

30 September 2022

Committee Secretary
Joint Standing Committee on Electoral Matters
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Dear members of the Joint Standing Committee on Electoral Matters,

Re: Inquiry into the 2022 federal election

I would be delighted to answer questions from the Committee, in person, on all aspects of its terms of reference, in my capacity as a constitutional law professor and citizenship expert, as well as from my experience as a candidate seeking to represent the ACT in the Senate in the 2022 federal election.

My comments below can be expanded upon in person.

(a) reforms to political donation laws, particularly the applicability of 'real-time' disclosure and a reduction of the disclosure threshold to a fixed \$1,000;

My response to this question is linked to my response to (b).

If there are caps on expenditure, I am supportive of the above to enhance transparency.

If there are no caps, then this reform will disadvantage smaller parties and independent candidates, without sufficient benefits for transparency and accountability.

(b) potential reforms to funding of elections, particularly regarding electoral expenditure caps and public funding of parties and candidates;

This needs serious attention and is urgent given its impact on representative democracy.

Without caps on electoral expenditure (including in-kind support) there will continue to be an unequal playing field, and a structural limitation on who has the capacity to nominate for election. I believe this to be constitutionally permissible and constitutionally important for safeguarding representative democracy.

(c) the potential for 'truth in political advertising' laws to enhance the integrity and transparency of the electoral system;

The Commonwealth should look at the ACT's Section 297 and 297A

<https://www.legislation.act.gov.au/View/a/1992-71/current/html/1992-71.html>

(d) encouraging increased electoral participation and lifting enfranchisement of First Nations People;

My Senate campaign was focused on activating people's citizenship, including electoral participation. From my experience, it is clear there is a need for increased public education.

As for electoral participation from the perspective of increasing the diversity of candidates, I would urge amendments to the Commonwealth Electoral Act to enable shared representation (two people running for one role) – as set out in my article https://press-files.anu.edu.au/downloads/press/n7864/pdf/02_rubenstein.pdf

I would also urge leadership around constitutional change for section 44(i) as already identified by this committee in - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution/Report_1

I believe a "Voice to Parliament" as proposed in the Uluru Statement will assist in lifting enfranchisement of First Nations People and I am supportive of constitutional change to achieve that end.

(e) the potential for the creation of a single national electoral roll capable of being used for all federal, state and territory elections in Australia;

A single national electoral should must enable a diversity in thresholds for the different states and territories – i.e. if a state lowered its age of voting to 16, for instance, those 16 year-olds would need to be eligible for enrolment on the national electoral roll as per section 41 of the Constitution.

(f) encouraging increased electoral participation and supporting enfranchisement generally, and specifically in relation to:

i. Accessibility of enrolment and voting for persons with a disability; -

This should be enhanced and every possible technological device/measure to enable voting should be supported.

ii. voting rights of Australians abroad; -

This should be expanded by amending the Electoral Act to allow Australian citizens based overseas their continued entitlement to vote without any restrictions. See my comments in this presentation - <https://www.asser.nl/nhrr/news/recording-available-covid-and-the-rights-of-citizens-a-conversation-with-prof-kim-rubenstein-on-the-australian-experience/>

iii. Australian permanent residents and new Australian citizens;

I believe permanent residents should be entitled to vote (which would also mean that new Australian citizens will have already been able to vote as permanent residents.).

I also believe this is constitutionally permissible.

iv. New Zealand citizens residing in Australia;

Yes, if they are permanent residents as in iii.

I expand on this point in the *attachment below*, which is a *short* Preface to a forthcoming ANU Press collection *Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand*, edited by Kate Bagnall and Peter Prince.

(g) proportional representation of the states and territories in the Parliament, in the context of the democratic principle of 'one vote, one value'.

This is an area in which I have already made many suggestions – including

Before my candidacy, as set out in August 2021

<https://www.canberratimes.com.au/story/7364596/mature-democratic-act-on-a-quest-for-electoral-justice/>

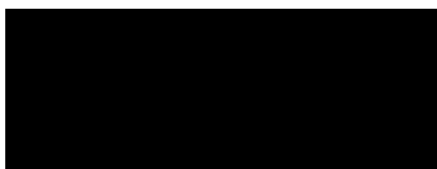
And during my candidacy to represent the ACT –

<https://www.canberratimes.com.au/story/7682904/double-act-rubensteins-first-order-of-business/>

And since the election. <https://www.canberratimes.com.au/story/7911695/the-grass-is-greener-in-ginninderra-nsw/>

I would be happy to address the Committee in person on all aspects of my submission.

Yours sincerely,



Professor Kim Rubenstein, FAAL, FASSA



Attachment:

Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand Edited by Kate Bagnall and Peter Prince (forthcoming)

Preface

Kim Rubenstein

What a delight to be asked to write the preface to this substantial collection, one that captures the energy and richness of a University of Wollongong 2017¹ workshop that I so well remember. This resulting book is a tribute to its editors and contributors. Their commitment and perseverance over five years has produced an excellent, ever-green analysis and makes important research accessible to citizenship and membership scholars in Australia, New Zealand and beyond — not to mention the greater community.

The collection highlights the prescience of bringing Australian and New Zealand scholars together to focus on citizenship scholarship and its central importance to community and political coherence. As this collection goes to press, Australian Prime Minister Albanese has flagged giving New Zealanders a faster pathway to citizenship and even aligning voting entitlements between the two countries. Australians who are permanent residents and who have lived in New Zealand for more than a year can vote in New Zealand elections.² The Australian Parliament's joint standing committee on electoral matters has been asked to consider the rights of New Zealand citizens in Australia — working here, being part of the community, paying taxes and otherwise contributing.

Already, some scholars have voiced publicly their scepticism about the constitutionality of such a move.³ They reference the democracy founding sections 7 and 24 of the Australian constitution, warning that the 'the people' referred to may not include New Zealanders. If so, then extending voting rights to them may be unconstitutional.

But when delivering the opening lecture at the 2017 symposium — and setting the scene for constitutional engagement around nationality, law and belonging — I explained that at the time of Federation, 'the people' were not Australian citizens, there was no such concept. Indeed, during the constitutional convention debates, the framers resisted any attempt to

¹ The symposium was organised through the Colonial and Settler Studies Network and was supported by the Feminist Research Network at the University of Wollongong.

² See <https://vote.nz/enrolling/get-ready-to-enrol/are-you-eligible-to-enrol-and-vote/> and section 74 Electoral Act 1993 (NZ) <https://legislation.govt.nz/act/public/1993/0087/latest/DLM308827.html>

³ Tom McIlroy, "Giving Kiwis voting rights in Australia constitutionally 'risky'", *Australian Financial Review*, October 27, 2022 <https://www.afr.com/politics/federal/giving-kiwis-voting-rights-in-australia-unsafe-20221027-p5btel>

define and delineate Australian citizenship as a key membership status; debates in which New Zealand representatives participated, although ultimately determining not to become part of the Commonwealth.

But New Zealanders, and all other dominion members of the Commonwealth, held the same membership status in 1901 as Australian residents did at that time – they were all British subjects. So, in 1901, when the Commonwealth was established, New Zealanders *residing* in Australia held identical rights of membership as other Commonwealth residents – for British subject status was the fullest form of membership. That said, those New Zealanders and other British subjects at the time, would have held stronger forms of membership than Indigenous Australians, who while formally British subjects, were not extended full British subject rights. This discussion is just one of many indicating the ongoing value of diving into the historical foundations of nationality, law and belonging in Australia and New Zealand and laying them bare in this monograph.

To their credit, the editors go further — explaining in their introduction, how *Subjects and Aliens* gathers scholarship investigating legal and social histories of nationality and citizenship in Australia and Aotearoa New Zealand, at the same time as highlighting the intersections of gender, race and ethnicity with nationality and citizenship.

Citizenship, and its equivalent term nationality⁴ — so central to political ideals and organisation since the days of the Athenian lawgiver Solon, embossed by the Enlightenment and modern democratic theory⁵ and enlarged by T.H. Marshall's broader socioeconomic gloss in the 1950s⁶ while further commodified in a globalised world⁷ — has, nonetheless, never been more nebulous, contested, ambulatory, fractured and abused than now. While citizenship 'has no definition that is fixed for all time...[i]t has always been at stake in struggles and the object of transformations.'⁸

It is therefore timely that this collection challenges ideas of who historically 'belonged' in Australia and New Zealand and highlights how citizenship rights in the two countries have been inconsistent and contested. By examining histories of law and policy surrounding nationality and citizenship rights in Australasia through the lived experience of individuals, families and communities negotiating their lives as British subjects or 'aliens' — those without British subject status, we can see that the ongoing contestation has remarkable foundations.

⁴ Both terms refer to the full legal status of membership of the nation-state; citizenship is more often used when discussed within a domestic legal context, and nationality in the international law context.

⁵ See Paul Barry Clarke, *Citizenship*, (Pluto Press, 1994)

⁶ T H Marshall, *Citizenship and Social Class: And Other Essays*. (Cambridge University Press, 1950)

⁷ Aiway Ong. *Flexible Citizenship: The Cultural Logic of Transnationality*. (Duke University Press, 1999).

⁸ Etienne Balibar, *Propositions on Citizenship*, 98 *ETHICS* 723 (1988)

With the focus of the collection directed to the first half of the twentieth century, up to the introduction of Australian and New Zealand citizenship in 1949,⁹ and to the earlier colonial period we gain valuable insights into the current pressing issues of our time – who belongs, what does belonging mean, and how secure is that membership when the democratic foundations to our system of government are so unclear and fragile?

⁹ The legal status of ‘Australian citizen’ was created by the *Nationality and Citizenship Act 1948* (Cth) (No. 83 of 1948) which commenced on 26 January 1949. The legal status of ‘New Zealand citizen’ was created by the *British Nationality and New Zealand Citizenship Act 1948* (NZ) (No. 15 of 1948) which came into effect on 1 January 1949.