26 August 2022

Committee Secretary
Joint Standing Committee on Electoral Matters

Dear Secretary

Inquiry into 2022 Federal Election

Thank you for the opportunity to make a submission.

There is much for Australians to be proud of in the conduct of the 2022 election. The nation is fortunate to have a well-respected electoral system run by an independent electoral commission. Key aspects of the system protect our democracy, including compulsory voting by encouraging politicians to appeal to the broader community. The nation's political culture is also supportive of honouring election results without rancour or complaint. It speaks well of that culture that outgoing governments accept the verdict of the people and support a smooth transition of power. Events overseas demonstrate why we should not take these for granted.

One of the strengths of our electoral system is its capacity for innovation. The system is never perfect or complete, and so these regular inquiries are an important opportunity to assess its operation and look for improvements. The following improvements ought to be made to improve the capacity of our electoral system to best serve the interests of the people and our democracy.

Better regulate electoral lies

Truth is fundamental to democracy. When citizens cannot tell fact from fiction, and leaders spread falsehoods for political advantage, society as a whole is damaged. The United States readily demonstrates this. Donald Trump's baseless claims about electoral fraud are sowing division and distrust throughout that nation and undermining good governance. This is a wake-up call for Australia. We need to act to limit the damage that can be caused by political lies.

The legal system has a role to play in holding people and organisations to account when they spread harmful lies to their advantage. For example, it is illegal for businesses to mislead or deceive consumers. They cannot make wrongful claims about their product, nor spread falsehoods to undermine a competitor. Another example is the law of defamation that enables people to sue for damages when their reputation has been sullied.

Where the Australian Parliament has fallen short is in regulating misinformation by our politicians. Parliament has regulated all sorts of falsehoods, but has failed to look to its own. The result is that politicians can lie with impunity in the hope of misleading voters to secure electoral advantage. There are many examples of this, including scare campaigns involving Medicare and death taxes.

UNSW SYDNEY NSW 2052 AUSTRALIA
T +61 (2) 9385 1000 | F +61 (2) 9385 0000 | ABN 57 195 873 179 | CRICOS Provider Code 00098G

Baseless scare campaigns are problematic enough without the risk this will turn into something more serious. We have the same potential as countries like the United States for false claims to grow to threaten the integrity of the electoral system as a whole. This concern is reflected in the fact that polls show over 80% of Australians support reform. The community wants greater accountability for politicians who deliberately mislead the public in search of votes.

An early priority for the new federal Parliament should be to enact new rules for truth in political advertising. It should approach the topic with caution and respect for freedom of speech, including because an overzealous law may be struck down by the High Court. Regulation must not overextend to regulate the broader political contest. There must always be space for robust debate and to question even the most accepted orthodoxy. It is also important that any new law cannot be weaponised during an election campaign by one party seeking court injunctions against its opponents.

The result should be a narrowly drawn law for truth in political advertising. Ths law should only target the spread of information that can be proven to be false. No attempt should be made to regulate opinion or ideas in contested areas.

There is a well tested model for achieving this. South Australia has prohibited electoral advertisements setting out statements of fact that are ‘inaccurate and misleading to a material extent’ since 1985. A person can be fined $5000 and corporations $25,000 for doing so. The South Australian Electoral Commission can request the withdrawal of advertisements that breach this standard and the publication of a retraction to correct the public record. Violations can also be taken to court.

The South Australia law is an important disincentive to politicians spreading falsehoods during state elections. It has been used to good effect. For example, Labor ran a 1993 television advertisement stating the Liberals would close hundreds of schools with less than 300 students. This was factually incorrect. The Liberals had actually stated that they would not close schools with 300 students, and that only ‘a small number of schools that have got a very small number of students might be affected’.

There is room for improvement in a national truth in political advertising law. Much damage, and political advantage, will occur before an advertisement is withdrawn. This may not be remedied by a public correction, and a small fine may be accommodated by political parties as a cost of campaigning. The Federal Parliament should account for this with greater penalties, including criminal sanctions in extreme cases of flouting the law. This will provide the law that Australia needs to take a stand against the deliberate spread of political lies.

Expand the franchise

There are a number of areas where the franchise might be expanded, including by removing the outdated disqualification of people of ‘unsound mind’ and extending the vote to Australians living overseas.

Consideration should also be given to extending the vote to 16 and 17-year-olds by way of a cautious, incremental path. Initially, the vote should extend to this age group on a voluntary basis.

Some nations have already made the shift, with voting in national or local elections occurring from age 16 in Austria, Germany, Norway, Switzerland, the Philippines, Argentina, Nicaragua, Brazil and Ecuador. Voting was extended to this age in the United Kingdom for the purposes of the recent referendum on Scottish independence. The *Scottish Elections (Reduction of Voting Age) Act 2015* now extends the vote to all persons aged 16 years and older for Scottish elections generally.

It is notoriously difficult to get 18-year-olds to enrol and vote, in part because this can be a time of great upheaval in their lives. Many are moving from school to university or into employment, often out of home, and are forming new relationships. Joining the electoral roll can be low on their list of priorities.

On the other hand, 16 and 17-year-olds tend to be in a more stable family environment, and still at school. One key advantage of allowing them to vote is that joining the electoral roll and voting for the first time can be combined with civics education. It is a better age for gaining the knowledge and forming the habits needed to be an engaged Australian citizen.

Voting at 16 would be consistent with other changes and opportunities at this age. People under 18 can leave school, get a job, drive a car and pay taxes. They can also enlist in the Australian defence forces, become a parent and, in exceptional circumstances, get permission to marry. If the law permits them to undertake these activities, it is hard to see why they cannot also vote.

It is often argued that 16-year-olds lack the knowledge about how government works to enable them to vote, and the political maturity needed to cast an informed vote. This can be true, but these problems are not limited to this age group. Australians of all ages typically have low levels of knowledge about government and can express disinterest about politics. Indeed, in my experience 16 and 17-year-olds tend to be more passionate about the future of our nation and their democratic rights than other sections of the community.

There should not be any rush to introduce the vote for 16-year-olds. At least initially, they should be given the option of voting, rather than it being made compulsory. The vote should only be extended to young people with the desire to take a direct part in our democracy.

Improve integrity in the electoral process

It is widely accepted among experts and others that Australia's system of political finance law is broken, and open to exploitation and undue influence. This can give rise to a form of 'soft corruption' in which money may be given in return for access and the potential to bring about undue influence on decision-making and policy development. Such a system is clearly not in the interests of the Australian community.

The many problems with the current system have given rise to a large number of reports and recommendations. My view is that it is time now to act by way of bringing about holistic reform to federal campaign finance law.

High Court decisions establish clear parameters for any such reform. In particular, the decision in *Unions NSW v New South Wales* suggests that any attempt to limit donations to individuals on the electoral roll has an unacceptable risk of being struck

down. On the other hand, the more recent decision in *McCloy* establishes that caps may be imposed generally upon donations, and that categories of donors may be banned where they give rise to an unacceptable risk to the political process.

Taking into account the legal constraints, I believe that federal law should be altered to bring about a system of campaign finance based upon the following features:

- all donations to candidates, political parties and third parties in respect of their political capped at say $5,000;
- real-time disclosure of donations over $1000;
- caps placed upon expenditure by candidates, political parties and third parties in respect of their electioneering activities;
- a modest increase in public funding to political parties, subject to those parties meeting minimum standards of accountability, including by way of incorporation and internal standards as to member participation and independent dispute resolution; and
- strict sanctions for the breach of campaign finance rules, combined with the necessary resources for enforcement.

Reform section 44 of the Constitution

Section 44 of the Constitution remains a prominent feature of Australian political life. Prior to the 2022 election, WA Liberal Senator Ben Small resigned after discovering New Zealand regarded him as a citizen. Others have pulled out of the 2022 election before nominating, including the Labor candidate for the New South Wales seat of Hughes and the Nationals candidate for the WA seat of O'Connor. Independent candidates have also been affected, such as Despi O'Connor in the seat of Flinders in Victoria.

This is only the tip of the iceberg. Many more of the 1624 candidates contesting the federal election were in breach of section 44. People can be disqualified because another nation regards them as its citizen. Others will be affected because they hold a position in the public service or are a small business owner with a contract to supply goods or services to the Commonwealth. Despite completing an Australian Electoral Commission declaration, many candidates will be oblivious to the fact that they are running in breach of the Constitution.

This mess has become a regular feature of our democracy since 15 members of Parliament resigned or were struck out by the High Court for breaching section 44 over 2017 and 2018. Even this number understates the impact, as it does not account for members who were disqualified but never caught out. At that time, the Constitution cut a swathe through our parliamentary ranks, with the most notable casualty being Deputy Prime Minister Barnaby Joyce. He lost his seat after discovering, much to his surprise, that he was a New Zealand citizen.

Section 44 affects a large percentage of the Australian population due to its open-ended language and the strict and uncompromising approach taken by the High Court. The Court has held that a person is struck out if they are completely unaware that another country has conferred them with citizenship. It is also irrelevant that the person has no intention to take up the entitlement. A person is even disqualified if they have taken reasonable steps to renounce their overseas citizenship, but the foreign nation has not got around to processing their application.

Delays in foreign processing led Katy Gallagher to lose her Senate seat in 2018, and it is why Peter Tsambalas has withdrawn as Labor's candidate for the seat of Hughes in 2022. He began the process to renounce his Greek citizenship late last year but failed to receive official notification from that country in time to nominate. Cases like this demonstrate how beholden our candidates can be to the bureaucratic processes of foreign countries.

The grounds of disqualification in section 44 were drafted in the 1890s and have not been updated since. They are technical, written in arcane language, and especially problematic when it comes to whether a person is a citizen of a foreign power. The High Court has said that this must be determined according to the law of the foreign nation, and not that of Australia. Unfortunately, foreign citizenship law is notoriously complex, and it can be expensive and time-consuming to receive advice from an overseas lawyer.

Foreign nations often confer citizenship rights on Australians due to ancestry or marriage. Norway for example regards a child born to a Norwegian citizen anywhere in the world as one of its own, while any person descended from someone who was a Hungarian citizen before 1920, or between 1941 and 1945 and speaks Hungarian, can be a Hungarian citizen. Similarly, everyone with a grandparent born in Ireland is eligible for Irish citizenship. Other countries, such as Germany, India and Italy, even permit citizenship due to a person's great grandparent.

Tracking down every possible ground of citizenship can prove an impossible task. It places a formidable barrier in the way of anyone standing for Parliament with foreign ancestry. This affects a vast number of Australians. In 2021, 7.5 million people, or 29% of the population, were born overseas. The number of Australians with a parent, grandparent or great grandparent born overseas is much higher again.

Navigating section 44 is made even more difficult because the High Court has set the point of nomination as the cut-off for compliance. A person must have their affairs in order before they know if they have won the seat. Public servants disqualified due to holding an office of profit under the Crown must resign their job when nominating and without knowing if they have been elected. Small business owners, such as the National's candidate for the seat of O'Connor, must also terminate federal government grants and contracts, including for the employment of apprentices.

None of these problems are new. We have grudgingly come to accept the difficulties posed by section 44 as an inescapable part of our political process. This is not something other nations would put up with. Neither should we. It is past time we reformed a clause that makes so many Australians ineligible for Parliament and subjects our electoral process to such uncertainty and instability.

The clause should be amended by inserting the words 'until the Parliament otherwise provides' at the start of s 44. This would provide a means for Parliament to modernise the grounds of disqualification, and to continue to update them is required in line with community standards.

Yours sincerely

Professor George Williams AO

UNSW SYDNEY NSW 2052 AUSTRALIA
T +61 (2) 9385 1000 | F +61 (2) 9385 0000 | ABN 57 195 873 179 | CRICOS Provider Code 00098G