Our Ref: 13/298

Ms Christine McDonald
Secretary
Senate Standing Committee on Finance and Public Administration
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

Re Inquiry into the Citizen Initiated Referendum Bill 2013

This submission is provided in response to the public invitation for submissions to the Senate Standing Committee on Finance and Public Administration's inquiry into the Citizen Initiated Referendum Bill 2013 (the Bill). The Bill proposes that eligible Australians be able to initiate legislation for introduction into the Parliament that provides for the holding of a referendum to alter the Constitution.

The Australian Electoral Commission (AEC) has decided to provide some comments to assist in the Committee's deliberation of the Bill. However, the AEC notes that there is an apparent absence of detail in a number of areas. Accordingly, the following comments set our below are largely limited to the functions outlined in the Bill that are proposed to be allocated to the AEC, the Electoral Commissioner and the Deputy Electoral Commissioner.

The Register

Reference is made in several sections of the Bill to a register of proposals for a referendum to amend the Constitution being maintained by the AEC. In section 6 of the Bill there is a reference to the register, applications being on an approved form and accompanied by a prescribed fee which in some (not yet specified) circumstances may be refunded.

It is not apparent as to exactly what the purpose of this register is and how it is to be accessed and maintained. For example, the AEC is currently required to maintain a register of registered political parties under section 125 of the *Commonwealth Electoral Act 1918* (Electoral Act). The register is required to include a list of all the political parties who have been registered. The register is required to be open for public inspection, without fee, during ordinary office hours at the principal

office of the AEC in Canberra (see section 139 of the Electoral Act). This register is maintained and accessed for a number of specific purposes under the Act. These purposes include such matters as ensuring that the claimed members are not used by more than one political party for registration, the details of relevant officer bearers, the names of the party, etc..

The Bill is silent as to the nature of the register and its purpose.

The Bill is also silent as to the nature of the proposed application fee and how its quantum is to be established. While stating that the quantum cannot amount to a tax, it fails to address whether the amount relates to the actual costs of processing a proposal for a referendum or involves some other basis for its calculation. It is also unclear how much revenue, if any, may be raised through the application fee. Subsection 6(3) of the Bill provides that the amount of the fee must not be such as to amount to taxation. Subsection 6(4) further provides for possibility that the application fee is refunded. It may be beneficial to provide greater clarity regarding these matters in the Bill. This would align with the approach taken in the Electoral Act, for example, where the application fee to register a political party, the fee to nominate a candidate, and the circumstances under which candidate nomination fees will be refunded are explicitly stated.

The role of the Electoral Commissioner and the Electoral Commission

Sections 7 and 8 of the Bill provide a role for the Electoral Commissioner in reviewing an application to register a proposal for a referendum to determine if it contains a proposal to amend the Constitution.

The AEC is of the view that these provisions require further consideration and possible revision before being progressed. While there may be merit in the assessment being conducted by an independent arbiter, it is not apparent as to why the assessment of a proposal should be made by the AEC, let alone the Electoral Commissioner.

Assessment of an "outline of a proposal" (required by paragraph 6(2)(b) of the Bill) to determine whether it is a proposal to amend the Constitution would inevitably involve matters of significant legal complexity and require expertise in constitutional law. Neither the Electoral Commissioner nor the AEC have such expertise and more notably, neither are responsible for advising the Government or the Parliament on constitutional matters. This position is made clear by the Administrative Arrangements Order made by the Governor-General which lists the Constitutional law as a matter which falls within the jurisdiction of the Attorney-General's Department.

In addition, the proposed decision-making responsibilities should also be considered in relation to whether or not circumstances or controversy could arise that influences the perception of the impartiality or neutrality of the Electoral Commissioner in subsequently discharging his or her responsibilities to conduct a referendum.

Accordingly, the AEC **recommends** that sections 7 and 8 of the Bill should be reviewed to establish whether or not it is appropriate to require the Electoral Commissioner, and indeed the AEC itself, to decide whether or not an application submitted contains a proposal to amend the Constitution.

Section 6 of the Bill states that the *Electoral Commission* is to receive applications to register a proposal for a referendum and section 11 requires the Electoral Commission to verify that

qualifying requirements in relation to a proposal have been satisfied. Elsewhere in the Bill, the *Electoral Commissioner* is responsible for certain functions.

This also gives rise to the need for consideration of the appropriateness of the Electoral Commission, or Electoral Commissioner in performing functions other than those which relate directly to the conduct of the referendum event itself. Independence from administration, assessment, and decision-making responsibilities for citizen initiated referendum proposals intended to be considered by Parliament, may better serve public trust and confidence in the AEC's administration of a subsequent referendum event on the proposal.

Costs

The Financial Impact Statement in the Explanatory Memorandum notes that the Bill will have a "limited financial impact" that is to be "met through existing Electoral Commission (EC) funds, and revenue raised through the application fee" that is required to accompany an application to register a proposal.

The AEC does not agree that implementation of the Bill would have a limited financial impact. In relation to the provisions of the Bill, AEC costs would be incurred in relation to:

- receiving, and reviewing applications lodged, including seeking access to appropriately skilled constitutional experts to provide advice in relation to sections 7 and 8 of the Bill;
- processing returned applications to verify that qualifying requirements have been met in accordance with requirements set out at sections 10 and 11, including that the applicant has obtained the signatures of at least 1% of all electors, and that signatures have been obtained correctly by verifying, by random sampling, that at least 3% of the signatures have been validly obtained; and
- development of relevant systems, forms, procedures, public information materials and staff training materials.

These processes are expected to be time consuming and costly. The AEC would not be able to offset or absorb these costs. Further there is nothing in the material that has been provided as to an estimate of the numbers of possible proposals that would be made to the AEC is the forward estimates period.

In relation to the ability of the AEC to meet costs through existing funds, it is worth noting that as referendums are infrequent events, funding for the conduct of a referendum is not specifically provided in annual appropriations. Instead, funding is provided, in consultation with the Department of Finance and Deregulation, when it is likely that a referendum will proceed. For example, the $44 million funding to enable to AEC to conduct a referendum in 2013 on financial recognition of local government was provided by the Government as part of the 2013-14 Budget.

This Bill contains elements which would require ongoing funding to be provided, in much the same way that ongoing funding is provided for the AEC in relation to political party registration processes. While the processes provided for in this Bill are not directly comparable to the political

party registration requirements, it may be worth noting that the budgeted cost for AEC party registration activities over the 2012-13 to 2016-17 period is $1.612 million.[1]

As outlined at page 2 of this submission, it is also unclear how much revenue, if any, may be raised through the application fee as the nature and quantum of the fee is to be established.

Impact of an election on proposed timeframes

The Bill proposes that a decision on an application for a proposal be determined within one month of receipt of the application; that written notice of the decision must be given to the applicant within seven days; that certain checks to verify that a lodged document meets the relevant "qualifying requirements" be undertaken within three months; and that proposed laws be introduced into Parliament within four months of a proposal being verified.

In relation to processes proposed to be conducted by the AEC, it is possible that relevant timeframes may not be met should they overlap with the conduct of an election. Should the AEC remain responsible for certain activities under this Bill, consideration should be given to inserting a provision which suspends the obligation of the AEC to meet these timeframes from the issue to the return of the writ for a Senate or House of Representatives election. Such a provision can be found in section 127 of the Electoral Act, which determines that no action is to be taken in relation to any application for the registration of a political party between the day of the issue of the writ and the day of the return of the writ for a Senate or House of Representatives election.

Technical considerations

Section 6: Application to register proposal for referendum

Section 6 of the Bill does not contain a requirement for an elector to demonstrate any form of popular support for his or her application to the Electoral Commission to register a proposal for a referendum to amend the Constitution. This contrasts with the approach provided for in the Electoral Act in relation to the registration of parties and nomination of candidates, where limited community support is required (in the form of a minimum number of members or signatures). Consideration should be given to implementing a requirement that community support be demonstrated at the initial application stage so as to balance the ability of electors to initiate an application with the need to ensure that the application is serious.

Section 7: Electoral Commissioner to examine proposal for referendum

Section 7 proposes that within one month of receiving an application, the Electoral Commissioner must examine the proposal outlined in the application and decide whether it is a proposal to amend the Constitution. As indicated previously, the AEC does not consider that the Electoral Commissioner is the appropriate authority to conduct this assessment; in any case, the period of time given to examine a proposal should be discussed with an appropriate legal authority to ascertain if it is sufficient.

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[1] As outlined in the Australian Electoral Commission *Budget Statement 2013-14*, page 91, which can be accessed at: http://www.finance.gov.au/publications/portfolio-budget-statements/13-14/index.html.

Section 8: Registration of proposal for referendum

Subsections 8(1) and 8(2) should be redrafted to ensure a clear basis for the acceptance or rejection of applications to register a proposal.

Subsection 8(1) states:

> "The Electoral Commissioner must, after the examination, register the proposal unless he or she is satisfied that *the proposal does not relate to a proposal to amend the Constitution*." (emphasis added)

Subsection 8(2) states:

> "If the Electoral Commissioner is not satisfied that *the proposal relates to a constitutional matter*, the Electoral Commissioner must reject the application to register the proposal."(emphasis added)

It is conceivable that a proposal *relates to constitutional matter*, while not *relating to a proposal to amend the Constitution.*

Subsection 8(3) provides that the Electoral Commissioner may not reject an application without giving the applicant an opportunity to be heard. It is unclear as to the nature of the prohibition contained in subsection 8(3) of the Bill and whether this is merely a reference to the obligation to afford natural justice in decision making processes or whether it is something more involving the obligation to have a hearing which is open to the public similar to what takes place in the redistribution processes under Part IV of the Electoral Act.

Section 8 does not require that the registered proposal be the proposal to amend the Constitution that is subsequently put to electors. The settled proposal to be put to electors is provided for under section 12. Section 12 provides that the proposed law to alter the Constitution be "in accordance with the proposal". It is not clear what discretion the Minister will have over the extent to which the proposed law reflects the proposal registered by the Electoral Commissioner. Whilst the AEC does not hold any particular view on this issue, an alternative model to the process proposed by the Bill could be for the proposed law to alter the Constitution to be settled prior to the collection of signatures. Should the latter be considered, the process provided for at sections 6 to 11 of New Zealand's Citizens Initiated Referenda Act 1993 may be a useful starting point.

Section 9: Notice of decision

Section 9 contains an obligation for statements of reasons to be provided within seven days of the making of a decision under section 8. It is unclear as to the basis for the inclusion of this time period. The AEC notes that for statements of reasons under the *Administrative Appeals Tribunal Act 1975* and under the *Administrative Decisions (Judicial Review) Act 1977* the obligation is to provide such a statement of reasons within 28 days of the making of the decision.

Section 10: Meaning of qualifying requirements and qualifying day

Subsection 10(1) provides that to meet the qualifying requirement, a document containing the signatures of at least 1% of all electors must be lodged with the AEC.

The number of electors on the Commonwealth electoral roll as at 30 April 2013 was 14 459 960. One per cent of electors is therefore equal to 144 600 electors.

It might be desirable that the document referred to in this section is an approved form so as to provide greater certainty that signatories are provided with consistent information concerning the proposal, the information they are required to provide, and notification of how that information may be used. On the other hand, the Committee may consider that section 11 provides for a sufficient process for establishing that signatures were validly obtained.

It would not seem practical that at the point of lodgement, the AEC could ascertain that the names and details of persons listed in the document were all electors, let alone unique electors. There would appear to be an obligation on the AEC to establish that the document contained a number of signatures that was at least equivalent to 1% of electors at the time of lodgement.

Determining the number of electors on the roll on a particular date may take a number of days. This is because enrolments lodged on or immediately before this date require processing; processing to remove ineligible persons from the roll will also require finalisation, for example, in cases where the AEC has been notified of an elector's death or permanent move overseas. Subsection 58(1) of the Electoral Act obliges the AEC to publish at the end of each month, the number of electors enrolled in each Division.[2] To provide all parties with a clear understanding of the minimum number of signatures required at the point of lodgement, it may be desirable that the 1% threshold be linked to the total number of electors enrolled in each Division, based on the determination by the Electoral Commissioner (under subsection 58(1) of the Electoral Act) at the end of the month prior to the month in which lodgement occurs.

This section states that to satisfy the qualifying requirement, the document is to contain the signatures, printed names and addresses of at least 1% of all electors. Read in conjunction with the requirement at subsection 11(3) that the AEC contact each person contained in a random sample to verify that their signature was validly obtained, it is not clear that collection of a signature serves a distinct purpose in verifying that the qualifying requirements have been met (whereas it would if the AEC was obliged to verify that signatories were electors, which would enable checking of signatures against enrolment records, where held).

Section 11: Electoral Commission to verify that qualifying requirements have been satisfied

This section outlines how the Electoral Commission must ensure that the application is valid and that the signatures have been obtained correctly. Subsections 11(2) and (3) outline the general framework for verifying within three months, through up to two random sampling processes, that at least 3% of signatures have been validly obtained. The process outlined includes a requirement that the Electoral Commission must contact each person selected in the random sampling process to verify that their signature was validly obtained.

The AEC view is that implementation of this arrangement would require a significant allocation or diversion of resources. The AEC would require further time to consider and provide advice concerning an appropriate time period and sample rate for this action to be accurately completed. Whilst it is not directly comparable, the process for political party registrations usually takes a

[2] Statistics are published in the *Commonwealth of Australia Gazette* and on the AEC website. The latter can be accessed at: http://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/gazetted/index.htm.

minimum of three months; in early April 2013 the AEC announced that any new political party wanting to ensure they are registered in time for a federal election held on 14 September 2013 needed to lodge a fully completed party registration application by close of business Monday 13 May 2013 with the AEC.[3] An application for the registration of a political party is required to be accompanied by an electronic copy of the membership list which contains each member's full name, residential address, date of birth, contact details (e.g. email and telephone). This is done to facilitate matching with the Commonwealth electoral roll. Without all of this information, the AEC would not be able to verify that a person is an elector. The mere provision of a signature would not enable the AEC to undertake any verification that a person is an elector.

As noted in comments on Section 10 of the Bill, 1% of the number of electors on the Commonwealth electoral roll as at 30 April 2013 is equal to 144 600 electors. Under the hypothetical scenario that the provisions of the Bill were law, and a document meeting the minimum qualifying requirements was lodged on 30 April 2013, the Electoral Commission would be obliged to select, through a random sampling process, at least 3%, or 4 338 signatories for verification.

The AEC is not aware of the statistical basis on which sampling at least 3% of signatories will result in a high probability that the persons purporting to support the proposal are both electors and actually do support the proposal. The AEC is not in a position to advise the Committee as to what proportion of signatures should be verified so that the results can be extrapolated as confirming the accuracy of the petition; the sampling methodology that is applied by the AEC to verify membership of a political party is based on an algorithm that has been prepared by the Australian Bureau of Statistics.[4] The latter reflects the fact that legislation concerning political party registration places an onus on the AEC to check that political party registration requirements are met, but does not specify how this is to be done.

It is assumed that it is intended each signatory must have been an elector in order to satisfy the "validly obtained" requirement. In the absence of a dated signature (which is not required by the Bill), this would be determined with reference to a signatory's enrolment at the time the document was lodged. Should the AEC check enrolment records and find a signatory was not an elector at the time of lodgement, the AEC nevertheless would be obliged to contact the elector to verify that his or her signature was validly obtained.

Whilst this section requires the AEC to contact each elector in the random sample, the only contact details required to be provided by an elector (under section 10 of the Bill) is his or her address. The Electoral Commission would need to contact an elector at the address provided to confirm their signature had been validly obtained. Further complications may occur if signatories have moved addressed since signing the petition. This would involve considerable time and expense.

It is likely that the process of verification and randomisation within tight timeframes would be aided by development of an electronic process for lodgement and/or entry of signatories' details. This would facilitate random sampling by enabling electronic randomisation of signatories prior to

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[3] AEC, "New political party registration applications for the federal election must be lodged by 13 May 2013", Media Release, 4 April 2013, available at: http://www.aec.gov.au/About_AEC/Media_releases/2013/04-04.htm.

[4] Further information concerning political party registration requirements and processes is provided in the AEC's *Party Registration Guide*, which can be accessed at http://www.aec.gov.au/Parties_and_Representatives/Party_Registration/guide/index.htm. Guidance provided in relation to testing of party membership lists submitted by a political party can be found at Appendix 3 to the guide.

selection of a sample; it would also facilitate electronic checking of the randomly selected sample for duplicate entries and electoral enrolment. The cost of developing such a system would need to be budgeted for; otherwise the ABS would need to be consulted on development of a practicable and appropriate process for ensuring that the selection of 3% of over 140 000 records provided in hard copy form could meet the requirements of a random sample.

Should the Electoral Commission determine that the signatures provided were not validly obtained subparagraph 12(2)(b)(ii) requires that the proposal is to be rejected. There does not appear to be any mechanism by which an applicant may vary or resubmit the document containing signatures. Provisions providing for such a process can be found in relation to an application to register political parties at section 131 of the Electoral Act, and in relation to New Zealand's arrangements for submission of an indicative referendum petition at section 20 of the Citizens Initiated Referenda Act 1993.

Section 12: Minister to arrange for introduction of proposed law

This section states that "the Minister" is to cause a proposed law that will alter the Constitution in accordance with the proposal to be introduced into Parliament. It is not clear which Minister this refers to: for example the Special Minister of State or the Attorney-General.

The Explanatory Memorandum for this section would read more correctly if the second sentence read as follows: "Both houses of Parliament may then have an opportunity to debate the proposal and to vote on the Bill". The proposed change reflects that the introduction of a constitutional alteration bill does not guarantee that it will be debated or put to a vote in one or more houses, and that the process for presenting a constitutional alteration bill to the Governor-General and the point at which Royal Assent is sought differ to the process described.

Section 14: Writ for referendum

Section 14 provides for the holding of a referendum on the first Saturday in October in a referendum year, which first occurs in 2016 and then every fourth year after that. The provisions further appear to provide that a citizen initiated referendum proposal could not be submitted to a vote earlier than one year from the day the proposal to change the Constitution passed Parliament, or any more than five years from the day the proposal to change the Constitution passed Parliament.

The Committee may wish to seek advice as to whether or not the relevant provisions could be validly enacted in light of the existing requirements in section 128 of the Constitution, that proposed laws to change the Constitution passed by each House of Parliament shall be submitted to the vote "not less than two nor more than six months after its passage through both Houses".

It may also be worth noting that:

- fixed timing requirements introduce the possibility that a proposal for constitutional change that has passed Parliament, is not to be put to the vote until after two or more general elections have occurred;
- fixed timing requirements would preclude a citizen-initiated referendum being conducted at the same time as a House of Representatives election and/or Senate election in scenarios

where it might be deemed to be desirable - for example, in the event that the latest possible date for a House of Representatives election or Senate election occurs in the same year as a citizen initiated referendum is to be held; and

- the required timing may be undesirable if it falls close to the likely date for a general election.

I trust this information assists the Committee in its deliberations.

Yours sincerely

Ed Killesteyn
Electoral Commissioner

31 May 2013