

Senator Helen Polley
Chair
Standing Committee on Finance and Public Administration
PO Box 6100
Parliament House
CANBERRA ACT 2600

Original by e-mail: fpa.sen@aph.gov.au

Dear Chair

Inquiry into the provisions of the Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010 and the Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010

I refer to the resolution of the Senate on 2 June 2010 that the Committee undertake an Inquiry into the provisions of the Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010 (the How-to-Vote Cards Bill) and the Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010 (the Modernisation Bill) and to report by 15 June 2010. I also refer to the letter from the Committee Secretary, Ms Christine McDonald, dated 3 June 2010 in which the Australian Electoral Commission (AEC) was invited to make a submission to the Inquiry by 9 June 2010.

2. In the limited time available, the AEC is able to assist the Committee with a broad outline of the measures in the two Bills and an explanation as to their genesis. I have addressed the contents of each Bill separately.

How-to-Vote Cards Bill

Schedule 1

3. The AEC notes that the following information is a shortened version of the information contained in the AEC's submission to the Joint Standing Committee on Electoral Matters (JSCEM) in relation to the Inquiry into the allegations of irregularities in the recent South Australia state election. Paragraph (d) of the terms of the Senate referral to the JSCEM on 13 May 2010 included:

“(d) what changes would be required to the *Commonwealth Electoral Act 1918* so as to prevent a political party (or others) engaging in such misleading and deceptive conduct at future federal elections;”

4. As mentioned by the Special Minister of State Minister in his evidence before the Finance & Public Administration Estimates Committee, the AEC was requested

by the Minister to prepare options for amendments to the *Commonwealth Electoral Act 1918* (Electoral Act) to remove any doubt that if similar conduct to that which is alleged to have occurred in South Australia took place in a federal election it would be in breach of the requirements of the Electoral Act. The proposed amendments contained in Schedule 1 to the How-to-Vote Cards Bill that was introduced into the House of Representatives on 2 June 2010 (House of Representative Hansard page 13) represent measures which would address the types of concerns about the contents of How-to-Vote cards that have previously been brought to the attention of the AEC and would also be able to be administered within the current available resources.

5. The AEC is of the view that How-to-Vote cards serve a useful purpose to inform voters, enable the franchise and to minimise informal votes (see the comments at paragraph 2.110 of the Joint Standing Committee on Electoral Matters “Report on the inquiry into the conduct of the 1998 federal election and matters related thereto” (the 1998 JSCEM Report)). The AEC is also of the view that an appropriate amendment to the Electoral Act would be one that ensures that voters are clearly informed of the registered political party or candidate on whose behalf a particular How-to-Vote card has been published.

6. The AEC notes that the publication of second preference How-to-Vote cards that have not been authorised by the candidate or registered political party who is listed as the first preference has been a vexed issue over a considerable period of time. Paragraphs 2.110 to 2.129 of the 1998 JSCEM Report summarise the history and some of the significant issues.

7. The 1998 JSCEM Report rejected the limited approach suggested by the AEC and instead recommended an approach similar to that which exists in Queensland. The 1998 JSCEM Report describes the Queensland approach as:

“The Queensland Committee felt that in applying the Court’s suggestion:

- (i) the more stringent authorisation requirements should apply only to How To Vote cards;*
- (ii) that the authorisation requirements should apply to all How To Vote cards and should not be restricted to second preference How To Vote cards;*
- (iii) that a How To Vote card be broadly defined to include those How To Vote cards that are narrative in nature;*
- (iv) that the authorisation must contain the name or abbreviation of the party of origin or the name of the independent candidate as well as the other authorisation details; and*
- (v) that the text of the authorisation appear on every printed face of the document and that the font size of the authorisation range from 10 point for an A6 size card to 20 point for an A3 size card.”*

8. At paragraph 2.128 of the 1998 JSCEM Report it states:

“The Committee therefore recommends that the AEC develop an authorisation regime for all How To Vote cards guided by the findings of the Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee.”

9. The then Government response to this JSCEM recommendation was:

“Supported in principle. The problem of second and later preference how-to-vote (HTV) cards, that could, in breach of section 329 of the Electoral Act, mislead voters, will not be resolved by an unenforceable authorisation regime, or administrative guidelines, given the recent history of litigation on this subject.

The Government does not support the first dot point of the recommendation, because HTV cards, including those of a narrative character, are already encompassed in the definitions of “electoral advertising” containing “electoral matter” set out in sections 328(5) and 4(1) of the Electoral and Referendum Acts respectively. A definition of HTV cards would only encourage disputes about interpretation, and in any case, the Government believes that the improved authorisation requirements should apply to all electoral advertisements governed by section 328(1) of the Electoral Act, not just HTV cards.

Further, the Government does not support the second and third dot points of the recommendation. They are too prescriptive and unnecessary.”

10. The AEC is aware that some of the State jurisdictions (Victoria, Queensland and NSW) have moved to a registration system for How-to-Vote cards. South Australia has a process (see section 66 of the SA *Electoral Act 1985*) that provides for How-to-Vote cards to be submitted to the SA Electoral Commission for inclusion in a poster that will appear at polling places. However, the SA system also allows for other How-to-Vote cards to be handed out to voters near polling places. Tasmania and the A.C.T. have different systems in place which have the effect that How-to-Vote cards are unable to be handed out on polling day itself (in Tasmania) or within 100 metres of a polling booth (in the A.C.T.).

11. The AEC is of the view that the How-to-Vote card pre-registration systems may be manageable in a single jurisdiction with comparatively small numbers of candidates and in a single time zone. However, for a general election in the federal jurisdiction involving nearly 1,500 candidates for both the Senate and the House of Representatives, such a system is likely to result in practical difficulties in having How-to-Vote cards submitted to the AEC, registered and approved for publication in the short time between the close of nominations for candidates and the commencement of pre-poll voting. In addition, the resources necessary to administer such a scheme are currently not available and this runs the risk of diverting the AEC from its primary election activities. Accordingly, the measures contained in Schedule 1 to the How-to-Vote Cards Bill do not include any prior registration requirements.

12. In Queensland, sections 161 to 163 of the Queensland *Electoral Act 1992* (the Queensland Act) deal with electoral advertisements. Section 3 of the Queensland Act contains the following definition of a How-to-Vote card:

“how-to-vote card” means a card, handbill or pamphlet that--

- (a) is or includes--
 - (i) a representation of a ballot paper or part of a ballot paper; or
 - (ii) something apparently intended to represent a ballot paper or part of a ballot paper; or
- (b) lists the names of any or all of the candidates for an election with a number indicating an order of voting preference against the names of any or all of the candidates; or
- (c) otherwise directs or encourages the casting of preference votes, other than first preference votes, in a particular way.”

13. Section 161A of the Queensland Act provides that:

“(1) During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card that does not comply with subsections (2) to (4).

Maximum penalty--

- (a) for an individual--20 penalty units; or*
- (b) for a corporation--85 penalty units.”*

14. The particulars in subsections 161A(2) of the Queensland Act that How-to-Vote cards are required to include are:

“(a) the name and address of the person who authorised the card;

(b) if the card is authorised--

- (i) for a registered political party or a candidate endorsed by a registered political party--the party's name; or*
- (ii) for a candidate who is not endorsed by a registered political party--the candidate's name and the word 'candidate'.”*

15. Subsection 161A(3) of the Queensland Act requires that the address must not be a postal box. Subsection 161A(4) of the Queensland Act adds the locations and font size for the authorisation details in subsection 161A(2) that are to appear on How-to-Vote cards:

“(a) at the end of each printed face of the how-to-vote card; and

(b) in prominent and legible characters in print no smaller than--

- (i) if the card is not larger than A6--10 point; or*
- (ii) if the card is larger than A6 but not larger than A3--14 point; or*
- (iii) if the card is larger than A3--20 point.”*

16. Subsection 161A(5) of the Queensland Act adds the following offence:

“(5) During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card if the person knows, or ought reasonably to know, that the particulars, or any of the particulars, mentioned in subsection (2) on the card are false.”

17. Section 161B of the Queensland Act also contains a registration process for How-to-Vote cards that must be lodged with the Electoral Commission of Queensland (ECQ) by 5pm on the Friday 7 days before polling day. The ECQ is

then required to examine the How-to-Vote cards and to determine whether or not they comply with section 161A. There is an offence in subsection 161B(7) for distributing How-to-Vote cards that have not been registered by the ECQ. However, as set out in paragraphs 10 to 11 above the AEC does not support the introduction of a registration process in the federal jurisdiction.

18. So the policy issue was to develop an amendment to the Electoral Act to address the concerns raised in SA case if they were to occur at a federal election and to address the previous issues raised in the 1998 JSCEM Report. The options including banning all How-to-Vote cards, banning just second preference How-to-Vote cards, banning all misleading or deceptive How-to-Vote cards or regulating all How-to-Vote cards.

19. The AEC had previously recommended that action should just be taken on second preference How-to-Vote cards. This was because the case law on deceptive information tends towards a narrow reading of the Electoral Act, making a more generalised approach difficult (see paragraph 2.127 of the JSCEM 1998 election Report). To be weighed up against this was the concern about defining what is a How-to-Vote card. However, the definition in section 3 of the Queensland Act appears to be sufficiently broad to at least capture all of the previous How-to-Vote cards that have been complained of to the AEC.

20. Section 328 of the Electoral Act covers all “electoral advertisements” of which a How-to-Vote card is merely a subset. Given the evolving political strategies of candidates, registered political parties and others involved in the political process, perhaps issues relating to false or misleading information in all forms of electoral advertisements that are used to formulate the basis for which a voter will be casting their vote should be examined rather than just How-to-Vote cards. However, this goes close to truth in electoral advertising which would be difficult for the AEC to administer (see also the similar conclusions reached by the Victorian Parliament’s Electoral Matters Committee in the February 2010 Report entitled “Inquiry into the provisions of the *Electoral Act 2002* (VIC) relating to misleading or deceptive political advertising”).

21. Many complaints were received by the AEC prior to the 2007 general election about electoral advertisements where the authorisation details were not clearly displayed (including on postal vote applications sent by registered political parties). The AEC is of the view that many of those complaints could have been circumvented if the particular electoral advertisements:

(a) contained the details of the registered political party or candidate on whose behalf the person who authorised the publication of the advertisement was acting; and

(b) the authorisation details were displayed in a prominent position (rather than “at the end thereof” which is the current requirements in subsection 328(1)); and

(c) the authorisation details were printed in a font size commensurate with the other printing in the advertisement so as to be readily drawn to the attention of voters.

22. The amendments contained in Schedule 1 to the How-to-Vote Cards Bill will introduce into the Electoral Act specific and expanded authorisation requirements for How-to-Vote cards. A contravention of these requirements will be an offence. The intention of the amendments is to make it clearer to voters who will benefit from the preference flow suggested on a How-to-Vote card. It is intended that these amendments will reduce the potential for voters to be misled and to give voters the means to make informed decisions by ensuring that the political source of How-to-Vote material is clearly stated.

23. The amendments follow the approach contained in the Queensland Act with:

- (a) a broad definition of a How-to-Vote card;
- (b) making it clear that a How-to-Vote card is a subset of an “electoral advertisement”;
- (c) adds a requirement for How-to-Vote cards to include the details of the candidate or registered political party on whose behalf it has been published; and
- (d) adds a requirement for How-to-Vote cards that the authorisation details must be prominently displayed at the top in appropriate specified font size.

24. The AEC submits that these amendments appear to be sufficient to ensure that voters are informed as to the source of the How-to-Vote card and, because they are subject to an objective test (e.g. the contents of the authorisation, the location of the authorisation and the font size), the new provisions should be able to be administered by the AEC with the need for few, if any, additional resources.

Schedule 2

25. The amendments contained in Schedule 2 to the How-to-Vote Cards Bill amend section 329 of the Electoral Act and section 122 of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) to add misleading or deceptive material that is published by both telephone or the internet to the existing categories in the term “publish”. The policy aim of these amendments is to address a concern that was raised by the Greens in relation to activity that is alleged to have taken place in the lead-up to the Tasmanian state election in 2010.

26. Generally these two sections prohibit a person from printing, publishing or distributing, or causing to be printed, published or distributed, anything that may mislead or deceive an elector in how to cast a vote. Subsection 329(6) of the Electoral Act currently defines the term “publish” to include “publish by radio or television”. The amendments in this Schedule to the Bill will add the terms “telephone” and “internet” to the definition of publish in section 329 of the Electoral Act and section 122 of the Referendum Act.

27. In addition, because the amendments to the offence in section 329 of the Electoral Act and section 122 of the Referendum Act are expanded to include the “internet”, to ensure that such material is not published offshore and accessed in Australia, the Bill amends the offence to have extended geographical jurisdiction.

Modernisation Bill

28. In general terms, the measures contained in this Bill are based on unanimously supported recommendations of the Joint Standing Committee on Electoral Matters "Report on the conduct of the 2007 federal election and matters related thereto" (the 2007 JSC EM Report). In addition there are some minor amendments that repeal redundant provisions.

29. Overall the measures in this Bill are aimed at providing efficiencies in some administrative processes (e.g. mobile polling) and decreasing the amount of prescription that prevents flexible and up-to-date processes from being used by the AEC in the conduct of polling. The measures also place more technological tools at the AEC's disposal so that the AEC can continue to deliver the best enrolment and election practices.

Schedule 1

30. The measures in this Schedule give effect to recommendation 41 of the 2007 JSC EM Report. The Electoral Act and the Referendum Act currently require information such as the location of polling places and the various enrolment forms to be published in the *Gazette*. The requirement to gazette this information is intended to provide transparency in the electoral process and ensure that members of the public have access to such information. In recognition of the trend for people to use technology and websites to interact with Government, Schedule 1 provides for the publication of electoral information on the AEC's website.

Schedule 2

31. The measures in this Schedule give effect to recommendation 7 of the 2007 JSC EM Report. The amendments require a person making an application for enrolment, or a person changing their name, to provide evidence of identity with their enrolment application. Such persons may provide any one of the following forms of evidence of identity:

- driver's licence number;
- passport number; or
- the signature of a person currently on the electoral roll who attests to the identity of the person.

32. If an elector is simply changing his or her address details then evidence of identity is not required as is currently the case in subsection 101(5) of the Electoral Act.

Schedule 3

33. The measures in this Schedule give effect to recommendation 12 of the 2007 JSC EM Report. Currently a person who is 17 years of age may provisionally enrol. These electors will automatically attain full enrolment on their eighteenth birthday. Provisional enrolment is voluntary. The AEC has found that provisional enrolment for such people allows the AEC to target enrolment of young people in schools,

educational institutions and youth events. Schedule 3 reduces the age of provisional enrolment from 17 years to 16 years of age.

Schedule 4

34. The measures in this Schedule make four sets of amendments relating to the use of technology in elections and election-related matters. First, the amendments provide for Senators and Members to receive electoral Roll information in electronic form. This amendment is based on the unanimously supported recommendation 50 of the 2007 JSCEM Report.

35. Second, the amendments provide for the use of electronic certified lists. An electronic certified list will be known as an 'approved list'. The approved list will be required to be approved by the Electoral Commissioner and will contain the same information as the certified list. Electronic approved lists and hard copy certified lists may be used at the same polling place. This amendment implements the unanimously supported recommendation 43 of the 2007 JSCEM Report.

36. Third, the amendments remove the technical requirement for ballot papers to be 'overprinted'. This requirement is replaced by the requirement for ballot papers to contain a feature approved by the Electoral Commissioner. This amendment gives effect to the unanimously supported recommendation 38 of the JSCEM Report

37. Finally, Schedule 4 amends the process of authenticating ballot papers by a Divisional Returning Officer. A Divisional Returning Officer will be required to mark a ballot paper that he or she believes is authentic with the words 'I am satisfied that this ballot paper is an authentic ballot paper on which a voter has marked a vote'. This amendment implements the unanimously supported recommendation 37 of the JSCEM Report.

Schedule 5

38. The measures in this Schedule are based on the unanimously supported recommendations 18, 20, 28, 29 and 30 of the JSCEM Report. The amendments differ slightly from the recommendations as they will provide for a single mobile polling provision that allows the delivery of mobile polling where and when it is needed.

39. Both the Electoral Act and the Referendum Act currently provide for mobile polling to be conducted at special hospitals, prisons and remote divisions, with specific provisions applicable to each type of mobile polling. To provide for consistent mobile polling arrangements these measures consolidate the various mobile polling provisions into a single mobile polling provision. In general, Schedule 5 provides for mobile polling to be conducted on polling day and the 12 days prior to polling day. The Electoral Commissioner is given the power to determine the places at which mobile polling can be conducted. The Electoral Commissioner will publish information about the availability of mobile polling on the AEC's website and by any other means deemed appropriate. The practical process of issuing ballot papers remains unchanged.

Schedule 6

40. The measures in this Schedule are based on the unanimously supported recommendations 5, 6 and 33 of the 2007 JSCEM Report. The amendments differ from recommendation 33 as they require the completed postal vote application to be returned directly to the AEC and prevent extraneous material being included on, or affixed to, a postal vote application. The intention is for Schedule 6 to commence at the default time of six months after Royal Assent.

41. Schedule 6 provides four reforms to postal voting. First, Schedule 6 removes the requirement that a postal vote application be signed by an applicant and a witness. This reform enables postal vote applications to be lodged online or electronically and reduces potential delays in the delivery of postal vote applications. The amendments require an elector making an application for a postal vote to make a declaration that he or she is entitled to make an application.

42. Second, Schedule 6 prohibits extraneous material being attached to, or incorporated into, a blank postal vote application form. It is currently common practice for political parties and candidates to undertake large-scale reproduction and distribution of their own version of the official AEC postal vote application. These amendments prohibit the inclusion of extraneous material, including political material, being attached to, or incorporated into, a postal vote application. However, extraneous material may be included in an envelope along with the postal vote application.

43. Third, the amendments require a completed postal vote application be returned directly to the AEC. To avoid delays in the issue and return of postal vote applications, these amendments provide that postal vote applications must be returned directly to the AEC. This is intended to ensure that the application is not returned via a third party, including a political party.

44. Finally, the amendments introduce a new requirement for both the elector and the witness to make a written declaration that the requirements for completing the ballot paper were completed before the close of the poll. The amendments also provide for the date of the witness signature on the postal vote to be the determining date for completion of the postal vote, rather than the post mark on the certificate.

Schedule 7

45. The measures in this Schedule amend enrolment practices and the provision of Roll information. The Electoral Act requires a version of the electoral Roll to be publicly available for viewing at AEC occupied premises. Schedule 7 clarifies that there is no right to copy or record by electronic means the publicly available Roll. This amendment is based on the unanimously supported recommendation 53 of the 2007 JSCEM Report.

46. The AEC maintains the electoral Roll for federal elections and also state and territory elections under 'joint roll arrangements'. The AEC collects information from every eligible elector and then forwards that information to the relevant state or territory. Schedule 7 provides for a regime under which the roll information provided

to the states and territories may be used for additional purposes. The regime provides for regulations to prescribe the purposes for which roll information may be used, for example, the compilation of jury lists. This amendment is based on the unanimously supported recommendation 44 of the 2007 JSC EM Report.

47. Finally, Schedule 7 introduces specific provisions to facilitate enrolment and continued enrolment for people who are experiencing homelessness. A person experiencing homelessness will not lose their itinerant elector enrolment because he or she has been living in crisis or transitional accommodation for one month or longer. In addition, a person experiencing homelessness will not automatically be removed from the electoral Roll if they do not vote at a general election. This amendment implements the unanimously supported recommendation 19 of the 2007 JSC EM Report.

Schedule 8

48. The measures in this Schedule deal with the eligibility for early voting. Pre-poll voting and postal voting are known as 'early voting'. An elector who wishes to cast an early vote must apply and make a declaration that they are eligible for such a vote. Once the elector has made such a declaration the elector is issued with ballot papers.

49. Schedule 8 implements the unanimously supported recommendations 25 and 26 of the 2007 JSC EM Report. The amendments provide two additional grounds upon which an elector may apply for an early vote. First, throughout the hours of polling on polling day, the elector will be absent from his or her Division. Second, the elector will be unable to attend a polling booth on polling day due to a fear for his or her personal safety or wellbeing.

Schedule 9

50. The measures in this Schedule are minor technical amendments to:

- remove gender specific language;
- amend incorrect cross references; and
- provide for consistent use of terminology.

51. The amendments in Schedule 9 do not affect the voting or enrolment rights and obligations of electors.

52. I trust that the above information is of assistance to the Committee's Inquiry. If you have any queries, the contact officer is Mr Paul Pirani, Chief Legal Officer, phone 6271 4474.

Yours sincerely

Ed Killesteyn
Electoral Commissioner
June 2010