



**Dissenting report – The Hon Bronwyn Bishop
MP, The Hon Alex Somlyay MP,
Senator Scott Ryan and Senator Simon
Birmingham**

Joint Standing Committee on Electoral Matters

Dissenting Report – Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012

Introduction

The Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 was introduced by the Government to implement recommendations 3, 9, 10, 11, 15, 29 and 30 of the *The Federal Election 2010: Report on the conduct of the election and other related matters*.

Recommendations 9, 15, 29 and 30 were supported unanimously by both Government and the Opposition members.

Recommendations 3, 10 and 11 were opposed by the Opposition members.

The Selection Committee referred this Bill to the Joint Standing Committee on Electoral Matters (JSCEM) for further scrutiny, following its introduction into the House of Representatives on the 29th of November 2012 by the Selection Committee.

This Bill moves to implement recommendations 3, 10 and 11. The Opposition remains opposed to these measures, as set out below:

Schedule 1, Part 1, Taxation Administration Act 1953

This measure is in response to recommendation 3 of the Government Members majority report of the *Federal Election 2010: Report on the conduct on the conduct of the election and other related matters*. It will enact legislative changes to the Taxation Administration Act, which governs the protection of personal data collected by the Australian Taxation Office (ATO). This change will allow the ATO to provide personal information and data to the Australian Electoral Commission (AEC) for the purposes of automatic enrolment.

The Opposition remains strongly opposed and previously voted against automatic enrolment by the AEC and have also raised objections in previous JSCEM inquiries. Furthermore we are opposed to the ATO being able to disclose tax-payers currently protected personal data.

This is consistent with our position in *The Federal Election 2010: Report on the conduct of the election and other related matters – Dissenting Report*.

The Coalition is concerned that this bill will allow the Commissioner of Taxation to provide personal information on individual tax-payers which will allow voters to be added to the electoral roll, with-out any due process.

The ATO have always claimed that it maintains the highest level of confidentiality when it comes to tax-payers personal information. This Bill intends to amend the Tax Act to allow personal data to be given to the AEC for the purposes of automatic enrolment and Coalition believes that this would constitute a breach of faith with the Australian people.

The Coalition has previously stated that Automatic Enrolment Legislation will severely damage and question the integrity of the Electoral Roll. It has always been an elector's individual responsibility to enrol to vote, notify the AEC of any change to address and then to vote at elections. These are not onerous responsibilities and the Opposition believes it should remain with the individual elector, not the Australian Electoral Commission. Coalition Members and Senators have consistently made this point since the JSCEM 2007 Federal Election Inquiry and highlighted this point more recently in the JSCEM inquiry into the Electoral Amendment (Protecting Elector Participation) Bill 2012.

The reliance on external data sources that have been collated and that are utilised for other purposes does not make them fit for use in forming the electoral roll.

As outlined in the previous report into these proposals, a 1999 report by the House of Representatives Standing Committee on Economics, Finance and Public Administration: *Numbers on the Run – Review of the ANAO Report No.37 1998-99 on the Management of Tax File Numbers*, found that:

- There were 3.2 million more Tax File Numbers than people in Australia at the relevant census;
- There were 185,000 potential duplicate tax records for individuals; 62 per cent of deceased clients were not recorded as deceased in a sample match.

Similarly, an ANAO Audit Report (No.24 2004–05 Integrity of Medicare Enrolment Data) stated that ‘ANAO found that up to half a million active Medicare enrolment records were probably for people who are deceased’.¹

In simple terms, where there are such examples of inconsistency in Commonwealth data, there cannot be sufficient faith in this data being used to automatically add people to the electoral roll.

The potential for error is even greater when using data from state or territory governments, as the Commonwealth cannot determine its accuracy and the relevant agencies are outside the scope of oversight by Commonwealth Parliament or Auditor-General.

The current ‘paper trail’ that sees electors initiate enrolment with a signed form provides a unique security feature to address any questions regarding roll integrity. The placement of people on the roll automatically will undermine this important element of roll integrity.

Given that there is neither consent nor a signature required for automatic enrolment, it is doubtful that someone could be pursued for false enrolment or other aspects of electoral fraud.

Furthermore, given the relatively light identification requirements present in the Australian electoral system, removing this security feature only weakens one of the few critical protections for the integrity of the roll and its policing.

Given that it is not uncommon for individual electorate results to be determined by less than 1000 votes, even a 1 per cent error in the information sourced from the various agencies could have significant ramifications for the outcome of a seat, or even an election.

This is not to suggest that current processes cannot be refined and updated, but a move away from an individual enrolling on his or her own initiative in compliance with electoral legislation to a situation where the state can enrol a person of its own accord represents a drastic and dramatic change in our enrolment processes.

The AEC has previously submitted that the declining enrolment rate is partly due to the out-dated and overly prescriptive enrolment procedures and requirements. If this concern is to be taken at face value, then this is a reason to reconsider some of these practices – it does not justify a movement away from individual registration to automatic enrolment.

¹ Australian National Audit Office, *Integrity of Medicare Enrolment Data No. 24 2004-05*, p. 12.

Despite the fact that the government majority report recommends that the power to declare data sources as ‘trusted’ be given to the AEC, Opposition Members and Senators do not believe this addresses this problem in its entirety.

We are concerned that the power to deem data sources ‘trusted’ in determining the use of such data in compiling the roll is a risk to the roll.

The inclusion of such data, if erroneous, would be extremely damaging to public faith in our electoral process. Furthermore, the inclusion of such data may well be controversial due to lack of faith in its inclusion or utilisation.

Placing the Electoral Commissioner at the heart of such a potentially politically charged dispute can only damage the standing of the office and the AEC.

The Opposition remains opposed to automatic enrolment and the provision within this Bill which provides for the Australian Taxation Office to release taxpayers personal data for the purpose of automatic enrolment.

Schedule 1, Part 1, Amendments – Negate requirement to have a signed certificate for a pre-poll ordinary vote

This measure aims to implement recommendation 10 of the JSCEM Report into the 2010 election and will remove the requirement under the Electoral Act and Referendum Act for an applicant for a pre-poll ordinary vote to complete and sign a certificate.

The Opposition recommends that electors continue to be required to sign a declaration when casting a pre poll vote. Previously the opposition has highlighted concerns about fraudulent and multiple voting in elections and strongly believes that that it is not an onerous task to provide a signature for a declaration pre-poll vote.

The Coalition strongly believes that there is one election day, that being polling day and that pre-poll only exists to assist those who are unable to vote on polling day due to work or travel commitments or health concerns. It is for that reason pre-poll votes should still require a signed certificate as is presently provided for.

Schedule 1, Part 1, Amendments – Opening of pre-polling before election day

The provision in this Bill will move to adopt recommendation 11 of the government majority JSCEM Report into the 2010 election, which provides that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations for any type of election or by-election.

The Opposition recommends that pre-poll voting be open 12 days before the election.

Opposition members believe that pre-poll voting should not open until the Monday 12 days before polling day, as opposed to the Monday 19 days before polling day as recommended by the Government members on the Committee in the Report on *The 2010 Federal Election: Report on the conduct of the election and related matter*. This would ensure that electors are still given ample time to cast a pre-poll vote prior to election day should they need to.

The Opposition members are concerned that allowing pre-poll voting for 19 days prior to Election Day takes the focus of polling day itself, which is where the overwhelming majority of votes should be cast. By having pre-poll 12 days before polling day this will also ensure that the AEC has sufficient time to accept nominations and check all details before printing ballot papers.

Opposition Committee members therefore oppose this measure.

Schedule 1, Part 1, Amendments - excluding of votes contained within a prematurely opened ballot box.

The Bill requires that when ballot boxes are opened prematurely that the box is removed from scrutiny. The Opposition is opposed to this measure as it currently stands. The Coalition does not believe that because a ballot box has been opened it should be automatically assumed that the ballots have been tampered with and therefore excluded from the scrutiny as this provision enacts.

Rather the Opposition recommends the proposal of the *Electoral Reform Australia, The New South Wales Branch of the Proportional Representation*

Society of Australia, who provided a written submission for and participated in the public hearing round table of February 4th 2013. Their submission states that instead of removing the votes from scrutiny that there should be a discretion given in the following terms

“To grant discretion to polling officials to accept or exclude ballots from incorrectly opened ballot-boxes.

...and

Having assessed the incident, the Returning Officer should make a decision but should start with the presumption that ballot papers should be included rather than excluded.”²

During the JSC EM inquiry the Shadow Special Minister of State did enquire as to whether or not the correct training process had taken place in ensuring that all Returning Officers had received appropriate training, the Electoral Commissioner did not have the information readily available and requested to take this question on notice and report back to the Committee.³ The Commissioner went on to further explain that the recommendations of the Gray Report on the opening of the ballot boxes had been implemented.

It is for that reason the Opposition questions the need for the provision in the Bill to automatically exclude any ballots particularly as the status of pre poll votes had changed in the lead up to the 2010 election, and given that the booth Returning Officers who had mistakenly opened the ballot boxes were experienced but not adequately advised by the AEC as to the change in status of pre poll votes from Declaration votes to Ordinary votes with the consequence that the ballot boxes cannot be opened until after the close of polling.

The Bill also neglects to deal with an instance where ballot boxes are deliberately tampered with, by way of deliberate sabotage, in order to have those votes within those ballot boxes excluded from scrutiny. In some

² Submission 2, JSC EM Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 *Electoral Reform Australia The New South Wales Branch of the Proportional Representation Society of Australia*.

³ Transcript JSC EM Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, Monday 4th February 2013

instances this may alter the outcome of the electorate result and therefore could affect the outcome of the election.

We note that Government members have recommended that there be a savings provision for ballots contained in a box which is prematurely opened but does not provide adequately for the counting of those ballots.

We believe all ballots must be counted at the preliminary scrutiny in the polling place, even if subsequently excluded from the scrutiny, so as to enable a proper judgement to be made as to whether an appeal to the Court of Disputed Returns is to be properly considered.

It will also allow a correct tally to be made on the night of ballot papers issued and ballot papers cast.

It would also enshrine the principle that citizens have the right to have their vote counted where the error is not theirs.

The AEC in the 2010 Election sought advice from the Australian Government Solicitor as to whether ballots contained in a box of pre poll votes which were opened prematurely should be excluded from the scrutiny. The AGS in its summary of advice stated:

“In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers (although for the reasons we discuss below, it is possible that a court might take a different view).”

The advice further stated that in the case of *Mitchell v Bailey (No2)* (2008) 169 FCR 529 the court had held “a ballot paper must be included in the count if it is a formal vote. For example, Tracey J said (at 537)

If a ballot paper is not informal the office conducting the scrutiny will have no legal basis for rejecting it. An implied obligation to admit such a ballot-paper to the count thereby arises. Once admitted it is to be counted”

They further said

“The validity of the ballot papers can be considered by the Court of Disputed Returns and Part XXII specially envisages that the Court of Disputed Returns will consider errors made by electoral officials in this process (s 365)”

It is to be noted that in the case of Boothby and indeed the seat of Flynn, where a similar incident occurred, that it was known that excluding these ballots would make no difference to the outcome the declaration of the poll.

The Coalition is pleased that agreement was reached with Government Members to express the need to insert into the Electoral Act savings provisions for ballot papers contained in a prematurely opened box. However disagreement remains as to when and how the ballot papers should be counted.

For the reasons set out above, the Coalition believes for the purposes of clarity, amendments should be moved to the Bill in the following terms:

Schedule 1, item 24, page 6 (lines 15 to 27), omit subsections 238B(2) to (4), substitute:

- (2) The most senior officer at the polling place must:
 - (a) separate the ballot-box, and keep it separate, from other ballot-boxes at the place; and
 - (b) as soon as practicable after the closing of the poll, cause a scrutiny of the ballot-papers contained in the ballot-box to be conducted in accordance with subsection (3); and
 - (c) as soon as practicable after that scrutiny:
 - (i) prepare a report setting out the circumstances of the premature opening of the ballot-box and any other matters the officer considers relevant; and
 - (ii) invite any scrutineers undertaking duties at the place to prepare reports about the circumstances of the premature opening and any other matters the scrutineer considers relevant; and
 - (d) as soon as practicable after the reports are prepared, forward the parcels made up in accordance with subsection (3), together with the officer’s report and any scrutineers’ reports, to the Divisional Returning Officer for the Division.
- (3) The scrutiny referred to in paragraph (2)(b) is to be conducted in accordance with subsection 273(2), 273A(2) or 274(2) (whichever applies), with the following modifications:
 - (a) the parcels of ballot-papers are to be labelled in way that clearly shows that this section applies to the ballot-papers in the parcel; and
 - (b) the parcels are to be kept separate from all other parcels at the polling place; and
 - (c) the parcels are to be transmitted to the Divisional Returning Officer only in accordance with subsection (2) of this section.
- (4) The Divisional Returning Officer must consider the reports and decide whether the ballot papers contained in the box are to be excluded from scrutiny under Part XVIII.

- (5) The Divisional Returning Officer is to decide that the ballot papers are not to be excluded unless there are strong reasons to decide otherwise.

Similar provisions should be inserted to amend the *Referendum (Machinery Provisions) Act 1984*.

The Hon. Alex Somlyay MP
Deputy Chair

The Hon. Bronwyn Bishop MP

Senator Scott Ryan

Senator Simon Birmingham