



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

24 May 2011

Committee Secretary
Joint Standing Committee on Electoral Matters
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

INQUIRY INTO THE CONDUCT OF THE 2010 FEDERAL ELECTION

We refer to the letter from The Honourable Daryl Melham MP to Mr Chris Craigie SC, the Commonwealth Director of Public Prosecutions, dated 4 May 2011 concerning multiple voting and impersonation offences under the *Commonwealth Electoral Act 1918* (the Electoral Act). We provide the following information to the Committee in response to the issues raised in that letter.

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of criminal offences against the laws of the Commonwealth. The CDPP can only prosecute when there has been an investigation by an investigation agency, such as the AFP. The CDPP does not have an investigative function. The CDPP is responsible for the prosecution of electoral offences under the Electoral Act which are referred to the CDPP by investigation agencies, such as the AFP.

All prosecutions conducted by the CDPP are conducted in accordance with the *Prosecution Policy of the Commonwealth* which provides that for a matter to be prosecuted there must be a prima facie case with reasonable prospects of conviction and that the prosecution is in the public interest.

Prosecutions for multiple voting or impersonation under the Electoral Act

The relevant provisions of section 339 of the Electoral Act are as follows:

- (1) A person shall not:
 - (a) impersonate any person with the intention of securing a ballot paper to which the impersonator is not entitled; or
 - (b) impersonate any person with the intention of voting in that other person's name;

(...)

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Penalty: Imprisonment for 6 months

- (1A) A person is guilty of an offence if the person votes more than once in the same election.

Penalty: 10 penalty units

- (1B) An offence against subsection (1A) is an offence of strict liability.

- (1C) A person is guilty of an offence if the person intentionally votes more than once in the same election.

Penalty: 60 penalty units or imprisonment for 12 months, or both.

The CDPP has prosecuted 17 matters for multiple voting or impersonation offences under either section 339(1)(a) or 339 (1A) of the Electoral Act. Of those 17 matters, 14 matters resulted in the offence being found proven. In four matters, the court was satisfied that the offence was proven but dismissed the charges without proceeding to conviction under section 19B of the *Crimes Act 1914*, in nine matters a fine was ordered and in one matter the court ordered a recognisance release order under section 20(1)(a) of the *Crimes Act 1914*. None of these prosecutions related to the 2004, 2007 or 2010 elections.

The CDPP's database indicates that the CDPP was referred briefs of evidence in five matters alleging multiple voting in relation to the 2004 election. None of these matters resulted in a prosecution. In three matters this was because there was insufficient evidence and in the two matters the time limit for bringing the charges had expired. The decision not to prosecute in each of these matters was not based on public interest factors.

The CDPP's database indicates that the CDPP was not referred briefs of evidence in any matters alleging multiple voting or impersonation offences in relation to the 2007 election. Nor, at the time of writing, has the CDPP been referred any briefs of evidence in relation to multiple voting or impersonation offences in relation to the 2010 election.

The above information on the number of referrals of matters involving multiple voting or impersonation to the CDPP from the 2004, 2007 and 2010 elections does not indicate that these matters are not getting priority by the CDPP, rather it indicates that only small numbers of matters or, in the case of the 2007 election, no matters, are being referred to the CDPP for consideration of prosecution.

Other issues raised

The letter to this Office also raised four further issues, in relation to which we provide the following information.

- Whether there are problems with prosecuting under the current law

We are unaware of any specific legal issues that have arisen in relation to the offences in sections 339(1)(a), 339(1)(b), 339(1A) and 339(1C) of the Electoral Act. A difficulty which may arise in multiple voting cases relates to the availability of evidence to prove that it was a particular person who voted on more than one occasion. Evidence that a person has been crossed off the electoral roll more than once on election day is not evidence of itself beyond reasonable doubt that a particular person voted on more than one occasion. There are a number of explanations of why a person may be crossed off the roll more than once, including a mistake by a polling officer, a mistake by the voter or a third party voting in another person's name. Evidence would therefore be needed from someone that it was a particular person who voted on more than one occasion. The two most likely places from which such evidence might be available could be polling officials or the person who is alleged to have voted more than once.

Turning first to polling officials, given the number of people that polling officers give ballots to on election day, a polling officer may not be able to identify a particular person as being a person who received a ballot paper from them on election day. To be able to prove the identity of a person who had voted twice in an election on the basis of evidence from polling officers, there would need to be at least two polling officers who could identify that they had given a ballot to the same person. Even if such evidence was available, that evidence might prove that a person collected more than one ballot paper on election day but might not necessarily prove that the person actually cast their vote more than once. That leaves admissions made by the person that they voted more than once as the most likely source of the required evidence. Accordingly, absent circumstantial evidence that proves beyond reasonable doubt that a person voted more than once, if a person does not admit that they voted more than once, there is unlikely to be sufficient evidence to prosecute the offence.

Similar issues may arise in relation to the impersonation offences, in that there will need to be evidence that a certain person impersonated another person. There may be evidence available from polling officials to identify the impersonator if the conduct is discovered at the time of voting. Otherwise, investigators may need to rely on admissions from the impersonator of their conduct for there to be sufficient evidence that it was that particular person who engaged in the conduct. It is also foreseeable that there could be circumstances where the investigation agency is unable to identify the impersonator at all.

- Whether the cost of instituting such proceedings is a barrier to prosecutions and whether the complexity of gathering evidence is a disincentive to prosecution

As discussed above, the investigation and the prosecution of a matter is a two step process, where the investigation agency is responsible for the gathering of evidence and the CDPP is responsible for the prosecution of the matter. The CDPP does not gather evidence, it prosecutes matters where the evidence has already been gathered by the investigation agency. Accordingly, whether the complexity of gathering evidence or the cost of gathering evidence is a disincentive to investigating these matters is a matter for the AFP to comment on rather than the CDPP.

- Does your office have any views on alternative methods for dealing with these matters and would an approach such as automatic fines, which could then be contested in court, be a viable option?

The possibility of an automatic fine scheme has been raised in the letter to this Office. We note that if a person opts not to pay the fine amount and the matter would be then referred for prosecution. There would need to be evidence beyond reasonable doubt that the person voted more than once in order for the matter to be prosecuted, which raises the evidential issues discussed above. There would also need to be consideration on whether such a scheme adequately reflects the criminality involved in committing these offences. In this regard, we note that the offences in section 339(1)(a), 339(1)(b) and 339(1C) of the Electoral Act are offences in relation to which the prosecution needs to prove fault elements and, therefore, may not be appropriate for such a scheme. This is a matter of criminal law policy which it may be appropriate for the Attorney General's Department and the Australian Electoral Commission to comment on.

We hope that this information is of assistance to the inquiry. Please feel to contact me on (02) 6206 5625 if you wish to discuss.

Yours sincerely


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Policy