Democratic Audit of Australia

Daryl Melham MP

Chair JSCEM

Parliament House

Canberra ACT

10 July 2012.

Dear Mr Melham,

Please find attached the Democratic Audit of Australia's submission to JSCEM's current inquiry into the *Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012.*

While Swinburne University hosts the Democratic Audit, the views expressed in this submission are not to be taken as those of the University.

As always, the Audit wishes the Committee well in its deliberations.

Yours sincerely,

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Democratic Audit of Australia: Submission to JSCEM July 2012

1. Postal Voting

1.1. Schedule 1 of the Bill proposes amendments to the postal voting regime, the most important of which is contained in Item 2 S28 whereby the Electoral Commissioner is made 'primarily responsible for the receipt and processing of postal vote applications'. The Audit supports the proposed amendment.

1.2. The Audit also recommends the repeal of S184 AA (1) & (2) of the *CEA* which permits the attachment to a postal vote application of 'written material by any person or organisation' and grants a copyright indemnity.

1.3. In effect this legitimates the practice whereby political parties harvest postal vote applications and provide as the return address not the AEC but the 'Returning Officer' at the post box of the political party.

1.4. The information so gathered is used to track voters apparently favourable to the party and to build the parties' databases *Feedback* and *Electrac.*

1.5. This is undesirable on a number of grounds.

1.6. One major, beneficial feature of Australia's electoral administration is that it is *bureaucratic* in nature and hence excludes partisans—unlike, say, the United States.[1] To permit political parties any role in the gathering of postal votes offends against this model.

1.7. The system as it stands unfairly favours incumbents who may use their funded printing and postal allowances in ways denied to challengers.

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[1] Colin A Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr et al eds, *Realising Democracy: Electoral Law in Australia,* Sydney, Federation, 2003, pp 205-15.

1.8. Partisans may be tempted to give preferential treatment to those whom they think are supporters when advising on and transmitting applications.[2]

1.9. In 2010 Andrew Robb MHR opposed changes to the postal voting regime on the grounds that 'the coalition consistently polls higher with postal votes' and questioned the motives of the ALP.[3]

1.10. The Audit contends that the postal voting regulations should favour no party or candidate over another and should legislatively exclude partisans from its operations.

1.11. Because the parties use envelopes containing the Commonwealth (or State) Coat of Arms, electors have complained that they have been misled into believing that the application form emanated from an Electoral Commission rather from a party.[4] This could undermine confidence in the impartiality of the electoral procedures.

1.12. These matters have appeared in the Federal Court of Australia on two occasions—*Baillieu v AEC (1996)* and *Peebles v Burke (2010).* Both judgments suggest that only legislative amendment will address the problem.

1. District Returning Offices

2.1 In his second reading speech Minister Gray observed that 'Directing the majority of postal vote applications to the electoral commissioner will enable the centralised processing by computers and the centralised dispatch of postal vote packages'.[5]

2.2 This raises again the structure of the AEC and especially the role and number of DROs.

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[2] G Orr, *The Law of Politics: Elections, Parties and Money in Australia,* Sydney, Federation, 2010, p 196.
[3] *Age,* 16 June 2010.
[4] Victorian Electoral Commission, *Report to Parliament on the 2006 State Election,* Melbourne, 17 July 2007, p 120.
[5] *Australian Parliamentary Debates, HR, 27 June 2012, p 11.*

2.3 As long ago as 1974 the *WD Scott Report* highlighted the disadvantages of the overly 'flat' structure of the then Australian Electoral Office and recommended reforms.[6]

2.4 The issue has been before this committee on many occasions and was the subject of a major inquiry in 1987.[7]

2.5 Developments in technology and the recent passage of the 'direct enrolment' bills by the parliament only increase the need for administrative reform.

2.6 To assist that process, the Audit recommends the amendment of S 38 of the CEA to remove the ministerial veto over the location of DROs

2. Candidate Nomination Requirements

3.1 The Audit is in general support of the amendments contained in Schedule 2 of the proposed bill.

3.2 As the Minister pointed out, the 2010 NSW Senate ballot paper has reached the maximum size possible using the current font size.

3.3 Over-large Senate ballot papers discourage the option of below-the-line voting.

3.4 Some Senate ballot papers are now so large that they cannot be laid flat in the polling booth and the necessary folding risks the casting of an accidental informal vote.

3.5 The problem is not confined to the Senate. The 21 July 2012 by-election for the Victorian state District of Melbourne has 16 candidates, only two of whom have a reasonable chance of success. One candidate estimates that he has

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[6] See Peter Brent, 'The Rise of the Returning Officer: How Colonial Australia Developed Advanced Electoral Institutions', PhD, ANU, 2008, pp 217-23.
[7] JSCEM, *Is This Where I Pay the Electricity Bill? Inquiry on the efficiency scrutiny into regionalisation within the Australian Electoral Commission, Canberra, 1988.*

unsuccessfully contested 20 elections since 1996.[8] It is difficult to see how this behaviour strengthens representative democracy.

3.6 The Audit recommends that the number of electors required to nominate unendorsed Senate candidates be set at 200 rather than the 100 proposed in the bill.

3. Unsound Mind

4.1 Schedule 3. 87 provides for an important amendment to s 93(8)(a) of the CEA.

4.2 Currently that section denies enrolment (and the vote) to a person who 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'

4.3 The amendment proposes to replace the words 'by reason of being of unsound mind' with 'in the opinion of a qualified person'.

4.4 The phrase 'unsound mind' was included in the *Commonwealth Franchise Act 1902* and has survived to date in the consolidated CEA 1918.

4.5 At the turn of the 20th century the phrase was commonplace—along with terms such as *idiot, lunatic, imbecile* and *non compos mentis* some of which survived into the 21st century in many US electoral instruments.[9]

4.6 Recently the term has come under criticism on a number of grounds[10] and is considered archaic in the light of developments in psychiatry and psychology.

4.7 Other Australian jurisdictions have addressed this matter. The Electoral Matters Committee of the Victorian Parliament received submissions in 2007 that the term was anachronistic and that it could be replaced by 'cognitive

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[8] *Melbourne Times,* 3 July 2012.
[9] Policy Research Brief. 11;1 "No Right is More Precious": Voting Rights and People with Intellectual and Developmental Disabilities', University of Michigan, May 2000, Table 1, p 2.
[10] Australian Government, *Electoral Reform Green Paper, Strengthening Australia's Democracy,* Canberra, September 2009, p 43.

impairment' or 'mental impairment'. Yet on advice from the Chief Parliamentary Counsel that the adoption of broader terms could disenfranchise more people, the Committee recommended the retention of 'unsound mind'.[11] (See Appendix A).

4.8 International jurisdictions have also addressed the issue. In the United Kingdom mental hospital patients, even if detained, are entitled to register as electors—the only exception being 'detained offenders'.[12] In New Zealand the only 'psychiatric patients' not entitled to enrolment are 'people who have been in a psychiatric hospital for more than three years after being charged with a criminal offence…'.[13]

4.9 The Audit does not claim specialist psychiatric/ psychological expertise, but would like to raise the following questions re the proposed amendments.

- Does the removal of the prefix phrase 'unsound mind' now make the exclusion clause too broad? Might people who don't understand the 'nature' of STV PR be de-enrolled?
- Is 'in the opinion of' too open a phrase?
- Must the opinion be in writing? Medical practitioners write medical certificates, but psychologists and social workers cannot.
- Some people are commonly called 'social workers' but are not eligible for membership of the Australian Association of Social Workers (AASW). Should this be specified?

4.10 There is probably a constitutional requirement to exclude some people from the franchise because they are incapable of choosing (Constitution Sections 7 & 24). When this has been before the High Court the two categories of persons commonly referred to are children and the mentally

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[11] Electoral Matters Committee, *Inquiry into the conduct of the 2006 Victorian state election and matters related thereto: Report to Parliament,* Melbourne, June 2008, pp 81-2.
[12] UK Electoral Commission, *Managing electoral registration in Great Britain: Guidance for Electoral Registration Officers,* London, October 2011, Part F, p 26.
[13] Elections New Zealand, *Enrolling – FAQ,* p 5 enrol@elections.org.nz

impaired. The question then becomes one of definition. The Audit contends that the principle to be employed here should be to do no harm.

4.11 In **Conclusion** it must be remembered that the regime surrounding the exclusion of those of 'unsound mind' is a 'benign' one.[14] Electoral management bodies do not aggressively seek out those to be deleted from the roll. Rather carers and/or family members apply to the Commissions, supported by a medical certificate, to have persons who are unable to comprehend the act of voting deleted. At the moment the numbers are small, but as the population ages those suffering forms of dementia will grow. Victoria's Law Reform Commission has recently drawn attention to the fact the 'Australia is now a state party to a number of international conventions concerned with protecting and promoting human rights, including the rights of people with disabilities'.[15] There also needs to be in place safeguards against ill-informed or partisan family members or carers who infringe against the legitimate voting rights of citizens.[16]

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[14] Orr, *The Law of Politics,* p 59.
[15] Victorian Law Reform Commission, *Guardianship: Final Report,* Melbourne, 2012, p xxi.
[16] There is currently a case pending in Victoria of a person who asserts that he was denied the right to vote at the 2010 state election by staff while an involuntary patient in a psychiatric ward. *Age,* 7 May 2012.

ATTACHMENT A

APPENDIX (A)

Inquiry into the conduct of the 2006 Victorian state election and matters related thereto

Report to Parliament

Electoral Matters Committee

June 2008

ORDERED TO BE PRINTED

Victorian Government Printer 2008

Parliamentary Paper
No. 117 Session 2006-2008

distribute their brochure about enrolment and voting for families and carers which was released in 2008.

Recommendation 4.16: The Victorian Electoral Commission considers conducting electoral education about enrolment, voting and voting rights with health professionals, residential care workers and carers of people with disabilities.

Unsound mind

In Victoria the term "unsound mind" disqualifies an individual to enrol to vote as an elector "by reason of being of unsound mind, [which is a person who] is incapable of understanding the nature and significance of enrolment and voting".[329] The VEC currently has 7,370 people who have been disqualified from voting because they were judged to be of "unsound mind".[330]

Gemma Varley, Chief Parliamentary Counsel at the Department of Premier and Cabinet informed the EMC that "unsound mind is not defined in the *Constitution Act 1975* and its meaning will [be] determined in the context of section 48. However, in the context of the criminal law, unsound mind has been held to be synonymous with insanity, mental illness and disease of the mind (R v Falconer (1990) 171 CLR 30)."[331]

The VEC received several complaints from the public and advocacy groups at the time of the 2006 Victorian state election about the use of the term "unsound mind".[332]

The EMC notes that the meaning of "unsound mind" is worthy of further discussion because nations such as Canada, Italy, Ireland, and Sweden do not disqualify electors on the basis of mental impairment and there has been very little research on voting rights for persons with cognitive impairments.[333]

In Australia the term "unsound mind" has currency in state and Commonwealth electoral law.[334] The Western Australian Electoral Commission is currently reviewing the meaning of the term "unsound mind" under the *Electoral Act 1907* and *Constitution Act 1889*.[335] In addition, the

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329 *Constitution Act 1975* s 48(2)(d).

330 L Williams (Deputy Electoral Commissioner of Victoria), Victorian Electoral Commission, *Personal communication*, 16 June 2008.

331 G Varley (Chief Parliamentary Counsel), Department of Premier and Cabinet, *Personal communication*, 23 May 2008.

332 Victorian Electoral Commission, *Submission No. 20*, p. 122.

333 A Blais, L Massicotte & A Yoshinaka, "Deciding who has the right to vote: a comparative analysis of election laws", *Electoral Studies*, vol. 20, no. 1, 2001, pp. 51-52; A Wislowski & N Cuellar, "Voting rights for older Americans with dementia: Implications for health care providers", *Nursing Outlook*, vol. 54, no. 2, 2006, p. 70.

334 *Constitution Act 1975* s 48(2)(d); *Parliamentary Elections and Electorates Act 1912* s 21(a); *Electoral Act 1985* s 29(1)(d); *Electoral Act 1907* s 18(a); *Commonwealth Electoral Act 1918* s 93(8)(a).

335 W Smith (Quality Assurance Co-ordinator), Western Australian Electoral Commission, *Personal communication*, 19 January 2008.

Law Reform Commission of Western Australia recently considered the appropriateness of the term "unsoundness of mind" in the *Criminal Procedure Act*. The Commission recommended that the term be replaced with "mental impairment" because:

> [T]he term "mental impairment", which encompasses both mental illness and intellectual disability, is a more accurate and more acceptable description.[336]

The EMC received advice from the Villamanta Disability Rights Legal Service and the Mental Health Legal Centre, which both indicated a preference for the term "cognitive impairment".[337]

The issue of disqualification was also raised as an issue in the inquiry. Villamanta Disability Rights Legal Service and the Mental Health Legal Centre suggested that the expression in the *Constitution Act 1975* section 2 which reads "is not entitled to be enrolled as an elector for the Council or Assembly" should be amended to read "is not obliged to be enrolled as an elector for the Council or Assembly". This signifies that the mark of exemption or exclusion would be abolished.[338]

The EMC is aware that the term "unsound mind" is an anachronistic term and is sympathetic to the concerns held by some members of the public and advocacy groups. Nevertheless, the advice the EMC has received from the Chief Parliamentary Counsel's Office states that using a broader term such as "cognitive impairment" or "mental impairment" may mean that more people may be excluded from voting:

> If the term "unsound mind" is replaced with the term "mental impairment" or "cognitive impairment" and the new term is not defined, it could be argued that the new term is broader than "unsound mind". It could also be argued that the normal meaning of cognitive impairment (which seems the more modern term) is broader than the normal meaning of mental impairment. Cognitive impairment may include things like short term memory loss.[339]

While the terminology "unsound mind" is considered anachronistic, the EMC considers it prudent to follow the legal advice provided by Parliamentary Counsel to ensure disenfranchisement is not widened.

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336 Western Australian Government, *Review of the law of homicide: Final report*, Law Reform Commission of Western Australia, Perth, 2007, p. 238.

337 V Topp (Lawyer and Policy Co-ordinator), Mental Health Legal Centre, *Personal communication*, 29 January 2008; T Jardine (Telephone Advice Worker), Villamanta Disability Rights Legal Service, *Personal communication*, 23 January 2008.

338 V Topp (Lawyer and Policy Co-ordinator), Mental Health Legal Centre, *Personal communication*, 29 January 2008; T Jardine (Telephone Advice Worker), Villamanta Disability Rights Legal Service, *Personal communication*, 23 January 2008.

339 G Varley (Chief Parliamentary Counsel), Department of Premier and Cabinet, *Personal communication*, 23 May 2008.