2

Issues in the Bill

2.1 During the inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (the Bill) the committee focused its attention on certain key issues in the Bill that it felt warranted closer attention: proposed changes to postal voting arrangements, nomination requirements, and provisions that prevent a person from being an elector if they are of 'unsound mind'. These issues are discussed in this chapter.

Postal voting

Background

2.2 The *Commonwealth Electoral Act 1918* (the Electoral Act) provides for various means by which Australians can vote for their federal representatives. In addition to attending a polling place on Election Day, electors can vote prior to Election Day in person at a pre-poll station or by post.

2.3 To vote by post, electors can register as General Postal Voters—if they meet certain criteria—and the Australian Electoral Commission (AEC) will automatically send them a postal vote package (PVP), which contains the relevant ballot papers.[1]

2.4 Section 184 of the Electoral Act provides that an elector (a person who is on the Commonwealth Electoral Roll) can also apply for a postal vote for a specific election. The application is to be made to a Divisional Returning Officer (DRO). A DRO is an AEC officer who is responsible for maintaining the roll and conducting the election in a particular division.

1 *Commonwealth Electoral Act 1918*, ss. 184A and 184.

2.5 The majority of postal vote applications (PVAs) are processed through the Automated Postal Vote Issuing System (APVIS). The AEC uses three production and delivery methods for PVPs: central print, local print or hybrid print. The AEC advised that central print, involving the centralised automated production and dispatch of PVPs on behalf of the AEC by a contracted provider, is the most common method for producing and distributing PVPs. The AEC also noted that for the next federal election, the changes in the *Electoral and Referendum Amendment (Modernisation and Other Measures) Act 2010* provide for online PVAs, which will also feed into APVIS.[2]

2.6 The Bill proposes to make certain changes to postal voting procedures. In particular, proposed amendments in Schedule 1 will give the Electoral Commissioner primary responsibility for postal voting, and provide a legislative basis for the centralised processing of applications and distribution of PVPs. It will also enable a 'person' rather than an 'elector' to apply for a postal vote and to receive a PVP. The AEC will not have to establish that the applicant is on the electoral roll before the PVP can be issued.

Analysis

2.7 The AEC stressed that the changes proposed to postal voting are 'not about changing fundamentally any of the current processes for dealing with postal vote applications'.[3] These changes are intended to have the current practices reflected in the Electoral Act. The AEC advised:

> This is primarily an amendment that is designed to reflect the fact that the application for postal vote information system is now highly centralised while the act reflects a postal vote processing system which was designed 100 years ago. All we are trying to do here is get an act that reflects the practice.[4]

Replacing references to 'elector' with 'person'

2.8 At the roundtable discussion on 16 July 2012, the AEC explained that the intention behind allowing a 'person' rather than an 'elector' to apply and receive PVPs, is to 'to give maximum opportunity for a person who is

2 Australian Electoral Commission (AEC), *Submission 2*, pp. 5-6.

3 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 7.

4 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 2.

applying for a postal vote to get the postal vote certificate material as quickly as we possibly can'.[5]

2.9 The AEC advised the committee that in practice, it already sends PVPs to 'all applications who have submitted a correctly completed postal vote application'.[6] Each applicant's enrolment status is reviewed prior to issuing the PVP. Applicants who are found on the electoral roll are classified as 'matched', and those who cannot be matched to an enrolment record or for PVAs outside Australia, are classified as 'unmatched'. For the 2010 federal election, of the 967 010 PVPs issued, 30 534 were unmatched. Following scrutiny of postal voter certificates (PVCs) returned, 24 437 were subsequently matched to an enrolment record and admitted to the count.[7]

2.10 Completed ballot papers received from postal voters will still be subject to further scrutiny. The AEC advised that the process is similar to that currently in place for other declaration votes:

> If a person goes to a polling place and cannot be found on the electoral roll, then they are given an opportunity to put in a provisional vote. Subsequent checking as to whether they are on the roll occurs at scrutiny stage. ... The checking of the enrolment status is done as part of APVIS, up-front. For those that cannot be matched, we do not remove the opportunity for them to cast a ballot—in the same way that a person casting a provisional vote at a polling place is given an opportunity to cast a ballot. When the postal vote certificate comes back we then seek further information to determine whether the person is validly on the roll. If they are—for some reason they were not on the certified list—then the vote will be admitted. If they are not, then the vote is not counted.[8]

Replacing references to DROs

2.11 In response to questioning on the substitution of 'Divisional Returning Officer' with 'Australian Electoral Commissioner' for the purposes of receiving PVAs, the AEC explained that:

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5 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 5.

6 AEC, *Submission 2.1*, p. 1.

7 AEC, *Submission 2.1*, pp. 1-2.

8 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 6.

> Under the legislation as it stands at the moment, the primary responsibility for dealing with postal vote applications is with divisional returning officers. All the amendments that are included in schedule 1 of the bill replace the DRO with the Electoral Commissioner and a delegate of the Electoral Commissioner.[9]

2.12 Evidence from the AEC indicated that postal vote applications are already being processed through a central system. For the 2010 federal election, the AEC issued 957 322 PVPs, with 891 125 (93 per cent) of these issued through the central print system.[10] The AEC advised:

> Over the last decade, the system has been that the data is entered through data processing operators right across Australia in every divisional office and indeed some of our state offices because of the large volumes. That data is then transmitted to a central system, APVIS, and the APVIS collects all of that data and makes decisions about whether the postal vote certificate will be sent to a central printer for printing and dispatch or whether it will be sent back to a divisional returning officer to dispatch the postal vote certificate.[11]

2.13 The AEC conceded that it had received advice in 1999 that the centralised processing of PVAs was acceptable under the Electoral Act. The AEC's current approach to the centralised processing of PVAs could continue if the amendments proposed in the Bill were not passed:

> **Mrs BRONWYN BISHOP:** It goes to the divisional office now. What happens under this proposal?
>
> **Mr Killesteyn:** Exactly the same; it will not change. ...
>
> **Mr Killesteyn:** That allows for that, but it is primarily a centralised process where the data is collected from all of our data entry points across Australia. The data is then centralised into our APVIS and the APVIS processes the data and makes the decision about how the postal vote certificate should be issued, whether it is issued by a major despatching house or whether it is issued by our divisional returning officers.
>
> **Mrs BRONWYN BISHOP:** Before I return to the second reading speech of the minister, which is now in some danger of being incorrect, is that process you have just described happening now?

9 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 3.

10 AEC, *Submission 2*, p. 6.

11 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 13.

> **Mr Killesteyn:** Yes.
>
> **Mrs BRONWYN BISHOP:** Right. So you did not need any change to the legislation for that to occur?
>
> **Mr Killesteyn:** We had some advice back in 1999 that the centralised processing was acceptable under the act.[12]

2.14 However, the AEC argued that it sees the changes proposed in Schedule 1 as an opportunity to reflect the current practice.[13] The AEC commented:

> We wanted to make sure all the processes were being correctly reflected in the act so that we had no issue with our administrative practices being at all argued to be different to what was in the act.[14]

2.15 The AEC contended that this change reflects 'the modern drafting approach where ultimate responsibility rests with the Chief Executive Officer and functions and powers are delegated as appropriate'.[15] The EM stated:

> The effect of these amendments is to enhance the flexibility to delegate processing tasks to a greater range of officers.[16]

2.16 The Electoral Commissioner confirmed that he would delegate powers in relation to postal voting to DROs and other AEC officers:

> **Mrs BRONWYN BISHOP:** So you are giving me an undertaking today that you will in fact delegate to DROs?
>
> **Mr Killesteyn:** Indeed.
>
> **Mrs BRONWYN BISHOP:** Good. So there will be no attempt to not delegate to them? I accept your word that you will delegate to DROs.
>
> **Mr Killesteyn:** The process that you see as a member of parliament or, rather, will see as a candidate, where you would take your postal vote applications to your local office, will still be there.

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12 *Committee Hansard*, 16 July 2012, Canberra, pp. 13-14.

13 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 14.

14 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 24.

15 AEC, *Submission 2*, p. 9.

16 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, p. 6.

> **Mrs BRONWYN BISHOP:** Good. As the chair has pointed out, this is evidence under oath, so I accept that that will continue to occur.[17]

Conclusion

2.17 The changes proposed in the Bill in relation to postal voting seem to largely reflect existing AEC practices.

2.18 In the case of issuing postal vote packages to a 'person' rather than specifically to an 'elector', the AEC has indicated that it already issues PVPs to (unmatched) applicants that are not found on the electoral roll at the time of application. The unmatched postal vote certificates returned are then subjected to further scrutiny and admitted to the count only if the person's electoral record can be matched. The committee agrees that this is in keeping with the approach taken with declaration voters who can make a declaration vote which is then subject to further scrutiny before their vote is admitted or rejected.

2.19 The other key change in Schedule 1 of the Bill is to provide that PVAs be returned to the 'Electoral Commissioner' rather than the 'Divisional Returning Officer'. The committee accepts the Electoral Commissioner's assurance that he will delegate his powers in relation to postal votes to DROs and other AEC officers. This change will not affect the way in which individuals and political parties interact with their DROs on postal voting matters.

Postal vote applications and political parties

Background

2.20 One of the issues not covered in the Bill, but raised in evidence to the committee, is the practice of political parties distributing postal vote applications.[18] It involves PVAs being mailed out with accompanying material about the party's candidates. The completed applications are returned to the political party, which make a record of the applicant's details in the party database before forwarding the application to the AEC.

17 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 7.

18 *Committee Hansard*, 16 July 2012, Canberra, pp. 1-3; Democratic Audit of Australia, *Submission 1*, p. 1.

2.21 In previous inquiries, submitters have expressed concern about this practice. In particular, that it is misleading as recipients may assume it is from the AEC, and that returning the application to the political party rather than directly to the AEC delays the issuing of the PVP to the applicant. Proponents of the practice argue that it provides a service to electors.[19] The matter was also discussed in the second Electoral Reform Green Paper.[20]

2.22 For many years this was accepted as standard practice by the political parties. Of the 967 010 PVAs received by the AEC, a significant number were forwarded by political parties, including the Australian Labor Party (254 678), Liberal Party (231 101), the Nationals (10 365) and other parties.[21]

2.23 However, during the committee's inquiry into the conduct of the 2010 federal election, the ALP and the Australian Greens expressed support for a change. In its report on that inquiry, the committee recommended legislative change 'to provide specifically that completed postal vote application forms must be returned directly to the Australian Electoral Commission for processing' (recommendation 13).[22]

2.24 The committee acknowledged the importance of candidates and political parties being able to communicate with electors, and supported candidates and political parties being able to distribute postal vote applications and campaign material to electors. To address the fact that if applications are returned directly to the AEC, the parties would no longer receive data on electors, the committee recommended enabling the AEC to provide prescribed information to the candidates and political parties for elections in the elector's division (recommendation 14).[23] The Liberal Party and the Nationals objected to changing the current practice.

19 For example, JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, pp. 55-62.

20 Commonwealth of Australia, *Electoral Reform Green Paper – Strengthening Australia's Democracy*, December 2008, p. 167.

21 AEC, *Submission 2.1*, p. 2.

22 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, Recommendation 13, p. 60.

23 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, Recommendation 14, p. 61.

Analysis

2.25 The Government has not addressed recommendations 13 and 14 in the Bill. As noted in the EM and the Special Minister of State's second reading speech, the proposed changes implement recommendation 12 for the automated distribution of PVPs.

2.26 At the roundtable on 16 July 2012, the committee discussed whether the changes to postal voting procedure proposed in the Bill could affect the practice of political parties issuing and receiving completed PVAs. The AEC clarified that this was not the intent of the changes in the Bill, stating 'this bill will not have any impact on the way in which political parties currently issue postal vote applications'.[24] The AEC confirmed that:

> It does not contemplate and nor does it seek to change the way in which political parties send out postal vote applications to whoever they see fit, along with whatever political advertising they wish. There is no attempt in this bill to change that at all.[25]

2.27 The AEC explained that a proposal to provide that postal vote applications be returned directly to the AEC was contained in the Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010. However, that amendment was withdrawn by the Government prior to that Bill's passage through the Senate.[26] The AEC stated:

> So as the act currently stands, with the amendments that are proposed here, it is not possible for the Electoral Commissioner to prevent the political parties sending out the PVAs, receiving them back and then forwarding them on to the AEC. There is no change.[27]

2.28 If the Bill is passed, the AEC anticipates that political parties will be able to provide PVAs to their DROs, as is currently the practice. The AEC stated:

> Political parties will be able to take those postal vote applications to the divisional office and it has already been arranged that the divisional office—in fact it happens every election and we are already planning for it to happen at the next election—will data enter all of those postal vote application details, both those that are

24 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 2.

25 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 3.

26 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 4.

27 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 4.

> submitted directly by the public to the divisional office and those by political parties.[28]

2.29 At the roundtable discussion the committee asked the Electoral Commissioner to put on record that the Bill would not affect political party processes in relation to PVAs:

> **CHAIR:** Let us just get it from Mr Killesteyn, who is the relevant officer. Might I say that it is relevant if he gives evidence on oath before a committee as to what his interpretation is if he subsequently does something different.
>
> **Mr Killesteyn:** You can see from attachment 3 to our submission, which details the postal vote application process that will be in place for the next election and certainly was in place for the elections prior to that, that there is no intention—
>
> **Mrs BRONWYN BISHOP:** I do not want an intention. You will not do it?
>
> **Mr GRIFFIN:** No, there is no legal capacity, is there? That is the point.
>
> **CHAIR:** Is it your view that there is no legal capacity at the moment?
>
> **Mr Killesteyn:** That is my view, but nor is there an intention. This is not an attempt to deal with this particular issue. This is simply an attempt to clarify the existing legislation to reflect current practice.
>
> **Mrs BRONWYN BISHOP:** So there would be no attempt to find anything under this current bill, and you would in no way attempt to prevent political parties having the postal vote applications come back to them and then go in to be processed by you.
>
> **Mr Killesteyn:** There will be no attempt to do that—absolutely.[29]

Conclusion

2.30 The committee notes the AEC's assurance that these changes will not impact on political parties' ability to: distribute postal vote applications with accompanying campaign material, receive completed applications,

28 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 7.

29 *Committee Hansard*, 16 July 2012, Canberra, p. 5.

and collect elector data from applications. Changes to this practice would require explicit legislative change.

Nomination requirements

Background

2.31 Part XIV of the Electoral Act sets out certain requirements for those seeking to nominate as a candidate for Senate and House of Representatives elections.

2.32 Schedule 2 of the Bill proposes to make changes to increase the amount of the nomination deposits required, the number of nominators needed by prospective candidates who are not endorsed by a political party, and the number of electors needed to support each unendorsed Senate candidate who request to be part of a Senate group.

2.33 Proponents of these changes argue that they will assist with addressing concerns about the growing size and complexity of ballot papers, by acting as a disincentive to potential candidates without serious electoral prospects. The Democratic Audit of Australia commented:

> 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.[30]

2.34 The Electoral Act prescribes the layout for House of Representatives and Senate ballot papers. As the number of candidates, in the Senate in particular, have increased it has led to expanding ballot papers. In the 2010 federal election, the NSW Senate ballot paper contained 84 candidates distributed across 33 columns. It was 1020 millimetres wide, which is the widest ballot paper that can be printed as a single sheet. This involved reducing the font size on the ballot paper to 8.5 point.

2.35 Any increases in candidates and columns on future ballot papers would see the AEC further reducing font sizes and hyphenating names, and voters casting their vote over more than a metre of paper.

2.36 During its inquiry into the 2010 federal election, the committee also noted concerns about the increasing number of House of Representatives candidates, and the potential for large numbers of candidates to impact on

30 Democratic Audit of Australia, *Submission 1*, p. 3.

electors being able to cast a valid vote as they must keep track of and correctly mark their preferences.[31]

Nomination deposits

2.37 Under the current arrangements, a candidate for the Senate and House of Representatives must pay the AEC a deposit sum of $1 000 and $500, respectively. The nomination deposits are returned to the candidate or their agent in certain circumstances, for example, if their nomination is rejected, the candidate dies before polling day, or if they receive at least four per cent of first preference votes.[32]

2.38 In its report on the conduct of the 2010 federal election, the committee considered the matter of nomination deposits. It noted that there have only been moderate rises in nomination deposits since 1918. The last change was in 2006, raising the Senate and House of Representatives nominated from $700 and $350, respectively.

2.39 During that inquiry, the committee considered whether nomination deposits could be used to address concerns about the challenges associated with increasing numbers of candidates and the resulting more complex ballot papers. The committee concluded that nomination deposits 'should be an amount that does not unduly hamper participation, but acts as a deterrent to frivolous candidacies'.[33] The committee recommended increasing the nomination deposits to $2 000 for the Senate and $1 000 for the House of Representatives. [34] Opposition members of the committee did not oppose the increase to nomination deposits in the report.[35]

2.40 The Special Minister of State indicated that the Bill seeks to implement the committee's recommendations 31 and 32 to increase the nomination deposits.[36]

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31 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 163.

32 *Commonwealth Electoral Act 1918*, ss. 167 and 170(3); and AEC, *Candidates Handbook federal election*, p. 31.

33 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 165.

34 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, pp. 165-166.

35 JSCEM, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, Dissenting report, p. 179.

36 The Hon Gary Gray AO MP, Special Minister of State, *House of Representatives Hansard*, 27 June 2012, p. 11.

Nominators for unendorsed candidates

2.41 Candidates endorsed by political parties are only required to be nominated by the registered officer of the political party.[37] To be registered as a political party, the party must have at least 500 members or have at least one member in Commonwealth Parliament.[38] Incumbent Independents seeking to run again in the new election only require the nomination of one elector.[39]

2.42 A candidate who is not endorsed by a political party (an unendorsed candidate) must be nominated by at least 50 electors.[40] Schedule 2 of the Bill proposes to amend subsection 166(1) to require a minimum of 100 electors to nominate an unendorsed candidate.[41]

Nominators for Senate groups

2.43 The Senate voting system provides voters with two options for casting a vote: above the line (group ticket voting) and below the line (indicating all preferences). If voting above the line, the elector must mark only one box of their preferred political party or group. The political party or group lodges up to three voting tickets with the AEC, which indicate the order in which preferences will be allocated.

2.44 Electors who choose to vote below the line must indicate all their preferences. In some cases, there may be a large number of candidates. If an elector's preferred candidate is not a part of a political party or Senate group, then they will have to vote below the line if they which to give a first or particular preference to that candidate.

2.45 The AEC tally room figures for the 2010 Senate federal election indicate that a significant majority of electors cast their vote above the line, particularly in states with a large number of Senate candidates. For example, in NSW (84 candidates) and Victoria (60 candidates), 97.76 per cent and 97.01 per cent, respectively, voted above the line. Even in the ACT, with only nine candidates, 75.93 per cent of electors voted above the line.[42]

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37 *Commonwealth Electoral Act 1918*, s. 166(1).

38 *Commonwealth Electoral Act 1918*, s. 123(1).

39 *Commonwealth Electoral Act 1918*, ss. 166(IC) and (ID).

40 *Commonwealth Electoral Act 1918*, s. 166(1).

41 Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Schedule 2, Part 1, clause 1.

42 AEC, *Submission 2*, p. 17, Table 3.3.

2.46 Given the high percentage of electors voting above the line in Senate elections, it can be seen as desirable for candidates to have a group box. The AEC noted that a 'significant dimension of Senate candidature has been the increase in the number of groups (endorsed and unendorsed) contesting Senate elections, which has risen from a total of 82 groups in 1993 to 136 in 2010'.[43]

2.47 In addition to political parties having group tickets, two or more unendorsed Senate candidates may apply to have their names grouped and appear above the line on the ballot paper. Currently at least 50 electors are needed to nominate the group.[44] Schedule 2 of the Bill proposes changing this requirement to at least 100 electors for each candidate in the group.[45]

2.48 The AEC advised that these changes would not affect endorsed candidates.[46]

Analysis

Concerns about the size of ballot papers

2.49 In evidence to the committee, the AEC confirmed that the expansion and complexity of ballot papers is a problem, stating that 'we are reaching a point where, if the candidates increase in New South Wales with the restrictions that we have on the size of the ballot paper, the type size will become so small that it will cause considerable difficulty'.[47] The size of the ballot papers also increases the complexity of the task of voting.

2.50 The Explanatory Memorandum stated:

> The Bill does impose deposit and nominator thresholds that must be met by candidates, but these are reasonable and are balanced against the need to provide a ballot paper that is easy to use and readable.[48]

43 AEC, *Submission 2*, p. 15.

44 *Commonwealth Electoral Act 1918*, Schedule 1, Form CB.

45 Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Schedule 2, Part 1, clause 1.

46 AEC, *Submission 2*, p. 14.

47 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 21.

48 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, p. 3.

Nomination deposits

2.51 The AEC noted that when introduced in 1905, the original nomination fee of £25 was a 'fairly significant amount of money', which reflected that nominating as a candidate represented a serious commitment.[49]

2.52 Electoral Reform Australia supported increasing nomination deposits and felt that the increases proposed in the Bill did not go far enough, and called for each candidate to deposit $10 000, with no distinction made between the Senate and House of Representatives.[50] FamilyVoice also supported the proposed increase, arguing that:

> ... the current amount of the deposit has proved ineffective in dissuading candidates with little prospect of electoral support, especially candidates for the Senate, from nominating.[51]

2.53 Some submitters opposed increasing nomination deposits, suggesting that it is 'exorbitant and unjust',[52] and that the increase discriminates against those with limited resources.[53] The Australian Democrats argued that the current arrangements 'appear to be realistic and workable', and expressed concern about the impact that the increase would have on minor parties. The cumulative deposit amount when nominating many candidates could be significant.[54]

Nominators for unendorsed candidates

2.54 The Democratic Audit of Australia supported the increase in nominators required for unendorsed candidates and suggested an increase to 200 nominators rather than to 100 as proposed in the Bill. The Democratic Audit of Australia stated:

> I think people who are going to run for parliament—whether it is the Senate or the House of Representatives or state parliament or whatever—should be able to show—and this is pretty commonplace around the world—that they have a degree of nominated support.[55]

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49 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 20.

50 Electoral Reform Australia, *Submission 3*, p. 1.

51 FamilyVoice, *Submission 6*, p. 3.

52 Democratic Labor Party, *Submission 7*, p. 1.

53 Proportional Representation Society of Australia, *Submission 8*, p. 3.

54 Australian Democrats, *Submission 4*, p. 3.

55 Professor Brian Costar, Democratic Audit of Australia, *Committee Hansard*, 16 July 2012, Canberra, p. 19.

2.55 Similarly, FamilyVoice agreed that an increase in the number of nominators for unendorsed candidates is justified, stating:

> The proposed changes would be useful in deterring candidates for election who do not have any significant measure of support in the community. If a candidate cannot find 100 electors to nominate him or her then there is little prospect of the candidate being elected.[56]

2.56 Other submitters opposed the doubling of the number of nominators required for unendorsed candidates, arguing that the increase is excessive and posed an unfair barrier to entry.[57] Further, Electoral Reform Australia stated that the increase 'would not achieve a reduction in the number of candidates standing for election'.[58]

Nominators for grouping unendorsed Senate candidates

2.57 In the case of six unendorsed candidates seeking to form a Senate Group the required nominators would be 600, which is more the 500 required for a registered political party. Some submitters argued that it was disproportionate to require a Senate Group to produce more supporters than a group of party endorsed candidates. FamilyVoice proposed that the nominators required for a Senate Group should be at least 500 electors.[59]

Conclusion

2.58 While having a variety of candidates is a feature of Australia's democracy, having a large number of candidates leads to an expanded ballot paper and increases the complexity of the voting task for electors. Setting appropriate nomination requirements is one way to help ensure that prospective candidates appreciate the seriousness of their participation in the electoral process, and that they can demonstrate community support for their candidacies.

2.59 At the core of discussions on changes to nomination arrangements must be the objective of striking the right balance between providing the opportunity for Australians to take part in elections and having reasonable requirements to reflect that political candidacy is a serious matter.

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56 FamilyVoice, *Submission 6*, p. 3.

57 Democratic Labor Party of Australia, *Submission 7*, p. 2; and Australian Democrats, *Submission 4*, p. 4.

58 Electoral Reform Australia, *Submission 3*, p. 2.

59 FamilyVoice, *Submission 6*, p. 4.

2.60 Increasing the nomination deposits from $1 000 to $2 000 for Senate candidates, and from $500 to $1 000 for House of Representatives candidates is reasonable and appropriate.

2.61 It is important that an unendorsed candidate be able to demonstrate community support for their candidacy. Endorsed candidates are able to establish this indirectly by the fact that they have been endorsed by a political party that has met the registration requirement of having at least 500 members. The committee supports increasing the nominators required for new unendorsed candidates from 50 to 100 electors. If these candidates wish to put themselves forward as prospective representatives, then it is reasonable that they should demonstrate some engagement with their electors and support for their candidacies.

2.62 The growing complexity of the Senate ballot paper in some states merits looking at ways to help ensure it is as user friendly as possible for electors. One important aspect of this is to keep above the line voting as a relatively straight forward option. It is therefore appropriate that each member of a Senate group be able to demonstrate community support for the grouping.

Changes to the 'unsound mind' exemption

Background

2.63 The phrase 'unsound mind' was included in the *Commonwealth Franchise Act 1902* and has survived in the current Electoral Act.[60] Subsection 93(8) of the Electoral Act provides:

> *(8) A person who:*
>
> *(a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or*
>
> *(b) has been convicted of treason or treachery and has not been pardoned;*
>
> *is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.*

2.64 The AEC may not object to a person's enrolment on the grounds of subsection 93(8)(a).[61] It is usually someone close to the individual who will raise an objection and seek to have that person recognised under

60 Democratic Audit of Australia, *Submission 1*, p. 4.

61 *Commonwealth Electoral Act 1918*, s. 114(3).

subsection 93(8)(a), and be 'excused from the obligation of compulsory enrolment and compulsory voting'.[62] A certificate from a medical practitioner is required before an elector can be removed from the roll.[63]

2.65 Sections 115-118 of the Electoral Act require that the following steps be taken before a person can be removed from the electoral roll based on 98(3)(a):

- a written objection must be lodged by an enrolled elector (often a family member, friend or medical practitioner);
- the objection must be accompanied by a medical certificate 'stating that in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting'; and
- the DRO must give notice of the objection to the person whose enrolment has been challenged, and provide them with a chance to respond.[64]

2.66 The AEC provided the committee with statistics on the number of electors removed from the electoral roll under subsection 93(8)(a) over the last four financial years. Totals of electors removed are outlined in Table 2.1.[65] A significant spike in removals is evident in the 2010-2011 financial year during which the 2010 federal election was held.

Table 2.1 Electors removed from the Commonwealth electoral roll under s. 93(8)(a)

Financial year	2008-2009	2009-2010	2010-2011	2011-2012
Electors removed	5 735	4 341	13 082	5 445

Source AEC, Submission 2.1, p. 5.

2.67 In recent years certain groups and individuals have criticised the use of the phrase 'unsound mind'.[66] This issue was considered in the Government's *Electoral Reform Green Paper: Strengthening Australia's Democracy*. It was stated in the paper:

> On its face, the exclusion from the franchise for persons of 'unsound mind' could be viewed as the removal of those persons' right to vote. Others might view this exclusion as a necessary way

62 AEC, *Submission 2.1*, p. 4.

63 *Commonwealth Electoral Act 1918*, s. 118(4).

64 Commonwealth of Australia, *Electoral Reform Green Paper – Strengthening Australia's Democracy*, December 2008, p. 43.

65 A further breakdown by age group is available in the AEC's *Submission 2.1*, p. 5.

66 Commonwealth of Australia, *Electoral Reform Green Paper – Strengthening Australia's Democracy*, December 2008, p. 43; AEC, *Submission 2.1*, p. 4.

> to protect the integrity of the electoral system from the harm that may be caused by votes cast by persons who are not able to understand the nature and significance of voting. In practice, however, no test for 'soundness of mind' is conducted when a person seeks to enrol or approaches a polling booth on election day. In practice the provision is 'used' when a person raises a concern with the AEC about another person, initiating a formal process which may result in the removal of the second person from the electoral roll. These concerns are generally raised by persons close to the elector in question, and motivated by what they see as the best interests of the person concerned, for example protecting them from having to respond to repeated penalty notices for failure to vote at successive elections.[67]

2.68 The *Roach v Electoral Commissioner* [2007] HCA 43, which focused on the restrictions on prisoners from casting a vote, also considered the issue of disqualification from enrolment and voting on the basis of an 'unsound mind'. Chief Justice Gleeson stated:

> The rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases. The rationale is related to the capacity to exercise choice.[68]

2.69 Justices Gummow, Kirby and Crennan also commented on the appropriateness of disqualification on the grounds of an elector being of 'unsound mind':

> Paragraph (a) of s 93(8) of the Electoral Act disentitles those who are incapable of understanding the nature and significance of enrolment and voting because they are of unsound mind. That provision plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.[69]

2.70 Schedule 3 (items 3, 4, 10 and 11) propose changes to the 'unsound mind' provision, which will provide for:

- removal of the term, 'unsound mind'; and

67 Commonwealth of Australia, *Electoral Reform Green Paper – Strengthening Australia's Democracy*, December 2008, p. 42.

68 R*oach v Electoral Commissioner* [2007] HCA 43.

69 R*oach v Electoral Commissioner* [2007] HCA 43.

- a broader range of appropriate qualified persons (including a medical practitioner, a psychiatrist, a psychologist and a social worker) to provide a statement (instead of a medical certificate) concerning an elector's capacity to understand the nature and significance of voting.[70]

Analysis

2.71 The AEC observed that in its dealings with disability groups, there has been 'very strong feeling about the use of the term' within that community.[71]

2.72 People with Disability Australia (PWD) agreed in general terms that the phrase is problematic and supports its removal from the Electoral Act. It submitted:

> In law, the term "unsound mind" is a label used to describe a person who has been judged to lack the functional capacity to make rational choices. In terms of the practical application of the legislation under review, this label is usually applied to people with an intellectual and/or psychosocial disability and/or a degenerative brain condition, and it is that specific group of people that the legislation is intended to target.[72]

2.73 While acknowledging that the proposed changes are intended to address concerns in the community about the term 'unsound mind', PWD suggested that the whole provision needed review.[73] PWD did not support the changes proposed in Schedule 3 of the Bill, and instead advocated repealing paragraph (a) in its entirety, on the basis that:

> ... it permits a restriction to the right of people with disability to political participation. This is direct discrimination and a human rights violation (Disability Discrimination Act 1992 (DDA), Convention on the Rights of Persons with Disabilities, International Covenant on Civil and Political Rights).[74]

2.74 The PWD argued that even if the phrase 'unsound mind' was removed and replaced with more neutral wording, as proposed, it would still

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70 AEC, *Submission 2*, p. 19.

71 Mr Thomas Rogers, Deputy Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 18. See also AEC, *Submission 2*, p. 19.

72 People with Disability Australia, *Submission 5.1*, p. 2.

73 Ms Ngila Bevan, People with Disability Inc, *Committee Hansard*, 16 July 2012, Canberra, p. 17.

74 People with Disability Australia, *Submission 5.1*, p. 2.

indirectly discriminate against people with intellectual and/or psychosocial disabilities, and potentially older people.[75]

2.75 In its submission, PWD referred to the *United Nations Thematic Study on Participation in Political and Public Life by Persons with Disabilities*, which found that:

> Article 29 of the CRPD [Convention of the Rights of Persons with Disabilities] "does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, any exclusion or restriction of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability would constitute "discrimination on the basis of disability" within the meaning of Article 2 of the Convention [CRPD]".[76]

2.76 Australia has ratified the Convention of the Rights of Persons with Disabilities. Article 29 seeks to ensure that people with a disability 'enjoy the right to vote, stand for election and hold office on an equal basis with others'.[77] The AEC noted that the Human Rights Branch of the Attorney-General's Department has raised the issue of the inclusion of the term 'unsound mind' in subsection 93(8)(a) when considering Australia's compliance with the CRPD.[78]

2.77 In relation to Australia's other international commitments, the AEC commented:

> As far as the AEC is aware there has not been any complaint or finding by the Australian Human Rights Commission or its predecessor that section 93(8)(a) of the Electoral Act is in any way in breach of the requirements of articles 25 and 2 of the International Covenant on Civil and Political Rights. ... [or] of the requirements in the Declaration on the Rights of Mentally Retarded Persons or the Declaration on the Rights of Disabled Persons.[79]

2.78 If paragraph (a) from subsection 93(8) was removed, there would still need to be some mechanism for dealing with someone who may be, in some way, mentally incapable of casting a vote, whether it is a temporary or ongoing issue for that individual.

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75 PWD Australia, *Submission 5.1*, p. 2.

76 PWD Australia, *Submission 5*, p. 3.

77 AEC, *Submission 2.1*, p. 3.

78 AEC, *Submission 2.1*, p. 3.

79 AEC, *Submission 2.1*, p. 4.

2.79 PWD expressed a preference for utilising subsection 245(4)(d) to deal with people who may not be in a position to cast a vote. It provides that a DRO is not required to send or deliver a penalty notice if he or she is satisfied that the elector 'had a valid and sufficient reason for failing to vote'. The PWD submitted:

> ... removing a person from the electoral roll is a disproportionate response to concerns that a person with a disability, their family or carer, may be inconvenienced by a failure to comply with compulsory voting requirements.[80]

2.80 The Democratic Audit of Australia expressed concern that the removal of the phrase 'unsound mind' could actually broaden the disqualification.[81]

2.81 At the state level, the Victorian Electoral Matters Committee (EMC), during its reviews of the 2006 and 2011 state elections, considered changing the reference to 'unsound mind' in its electoral legislation. In both reports, the EMC noted that the phrases caused distress to some electors, but decided not to recommend changes to the terminology.[82]

2.82 The EMC was guided by advice from the Victorian Chief Parliamentary Counsel, which cautioned that changes to the term could have unintended consequences:

> ... while the term "unsound mind" may not reflect contemporary views about disability, changing the term to "mental or cognitive impairment" may result in Victorians being disenfranchised as a result of another term replacing "unsound mind".[83]

Determinations by a 'qualified person'

2.83 PWD also expressed concerned about the introduction of the category of 'qualified person', who would be responsible for making a judgement as to whether a person is 'incapable of understanding the nature and significance of enrolment'.[84] PWD questioned whether there would be any

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80 PWD, *Submission 5.1*, p. 2.

81 Professor Brian Costar, Democratic Audit of Australia, *Committee Hansard*, 16 July 2012, Canberra, p. 16.

82 Electoral Matters Committee, *Inquiry into the conduct of the 2006 Victorian state election and matters related thereto: Report to Parliament*, June 2008, Parliament of Victoria, pp. 81-82; and *Inquiry into the conduct of the 2010 Victorian state election and matters related thereto: Report to Parliament*, May 2012, Parliament of Victoria, pp. 124-125.

83 Electoral Matters Committee, *Inquiry into the conduct of the 2010 Victorian state election and matters related thereto: Report to Parliament*, Parliament of Victoria, May 2012, pp. 124-125.

84 Ms Ngila Bevan, People with Disability Inc, *Committee Hansard*, 16 July 2012, Canberra, p. 16.

standards in place to guide the relevant professionals when making their determinations. PWD commented:

> Universal suffrage is an integral part of democracy and the power to remove the right of a person to participate in the political process is a significant one. Would the "opinion of a qualified person" simply be a conclusion they make based on their own degree of experience and professional judgement? Alternatively, what mechanisms would exist to ensure that any assessment tool was used consistently across jurisdictions and across the professions of the "qualified persons", especially as they represent different knowledge and skill sets? Which body would provide guidelines and/or training to the professions on how to use the assessment tool and monitor standards, compliance and complaints or appeals? What would be the financial implications of running this system? Would these costs be proportionate to the policy goal of disenfranchising people deemed "incapable", especially in light of the fact that the policy goal in itself is discriminatory?[85]

2.84 The Democratic Labor Party saw removing the reference to unsound mind as a 'timely change', but cautioned in relation to the person making a determination under subsection 93(8) that:

> ... the withdrawal of a citizen's right to vote ought be a last resort, with the greatest care taken in any assessment that results in the loss of so basic a right.
>
> Medical practitioners, psychiatrists and psychologists have detailed means and instruments with which to measure disability. It would be a tragedy if less rigorous means and instruments were invoked to deny someone the vote on the basis of their physical appearance or interaction with their assessor.[86]

2.85 The AEC observed that the list of qualified people:

> ... are selected based on the Freedom of Information Act but, as I understand the genesis of that, it is about nominating a group of individuals who have a particular relationship with the individual and can make that sort of judgment.[87]

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85 People with Disability, *Submission 5.1*, p. 3.

86 Democratic Labor Party, *Submission 7*, p. 2.

87 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 17.

2.86 The AEC conceded that the submitters and committee had raised valid concerns about the proposed process for determining disqualification from enrolment, and explained:

> The reason we were looking at other health professionals was that we did not want to put an impost on individuals or their families by requiring them to go to a medical practitioner, particularly if they had already a relationship with a psychologist, a psychiatrist or a social worker. We are talking about cognitive capacity, not necessarily diagnosis. So we are talking about something that can change over time ...
>
> We recognise that a person's cognitive capacity can change over time and therefore we wanted a process that was going to be relatively inexpensive, that was still going to have some security about it and in which the opinion was still going to be given by either a health professional or a paraprofessional who the person had a relationship with.[88]

2.87 When considering the issue of who may raise an objection in relation to the unsound mind provision, as part of the 1996 federal election review, the committee concluded that:

> The Committee believes that unsound mind objections are best left to relatives and medical practitioners, and agrees with the AEC that the previous committee's recommendations aside, the existing provisions should not be amended.[89]

Conclusion

2.88 The committee is sensitive to the concerns of those in the community who find the term 'unsound mind' outdated and offensive. In proposing the amendments in Schedule 3—to remove the references to 'unsound mind' and make provision for other professionals to be recognised as qualified people—the Government is attempting to address these concerns and to provide a means by which people who fall under the subsection 98(3)(a) disqualification can be determined.

2.89 However, rather than achieving these goals, the proposed amendments, in their current form, could serve to broaden the disqualification and potentially disenfranchise some electors.

88 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 18.

89 Joint Standing Committee on Electoral Matters, *The report of the inquiry into all aspects of the conduct of the 1996 federal elections and matters related thereto*, June 1997, Commonwealth Parliament of Australia, p. 21.

2.90 To support the changes proposed in Schedule 3 in relation to 'unsound mind' and the list of qualified people, the committee would need to be satisfied as to the extent of the problem necessitating change, and that the approach was not likely to have unintended consequences that may be detrimental to people with cognitive or mental health issues. Restraint should be exercised before making changes to this provision that could serve to disenfranchise potential electors.

2.91 Based on the evidence received, the committee is not satisfied that there is any pressing need to remove or substitute the phrase 'unsound mind', or that professions other than medical practitioners should be able to make determinations about a person's capacity to understand the nature and significance of enrolment and voting.

2.92 People with Disability Australia called for the removal of paragraph (a) of subsection 93(8) from the Electoral Act in its entirety, on the grounds that it discriminates against people with disabilities. It is important for Australia to ensure that it is meeting all its international obligations to ensure that people with disabilities have the opportunity to participate fully in political and civil life. The committee is not satisfied that subsection 93(8)(a) breaches any international obligations in relation to rights to electoral participation.

2.93 As outlined in Table 2.1, thousands of people are using the provision each year. There are some individuals who are 'incapable of understanding the nature and significance of enrolment and voting', whether it is due to temporary or ongoing challenges. Given Australia's system of compulsory enrolment and voting, it is useful to have a mechanism to address this, to protect the integrity of elections and assist those who might otherwise have to deal repeatedly with the AEC as to why they are not complying with their enrolment and voting obligations.

Recommendation 1

2.94 **The House of Representatives and the Senate pass the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, after deleting the changes proposed in Schedule 3 in relation to the 'unsound mind' provision and consequential amendments. The term 'unsound mind' and the current requirement for a certificate from a medical practitioner should be retained.**

Daryl Melham MP
Chair
15 August 2012