

Introduction

Referral of the Bill

- 1.1 On 16 February 2012 the House of Representatives Selection Committee referred the Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012 to the Joint Standing Committee on Electoral Matters (the committee) for inquiry and report.

Origins and purpose of the Bill

- 1.2 It is estimated that 1.5 million eligible electors are not on the Commonwealth electoral roll and will not be able to vote unless they initiate enrolment.¹ The number of eligible electors is growing faster than the rate of enrolled electors.² To abate this trend the Government has proposed significant changes to the *Commonwealth Electoral Act 1918* (Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act). The Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012 (the Bill) seeks to provide the Electoral Commissioner with the power to directly enrol previously unenrolled eligible electors.
- 1.3 At the 2010 federal election, Australian Electoral Commission (AEC) figures revealed that around 280 000 declaration votes (pre-poll, absent and provisional votes) were rejected due to the people casting the votes

1 The Hon Gary Gray AO MP, Special Minister of State, *House of Representatives Hansard*, 15 February 2012, p. 9.

2 Australian Electoral Commission, *Submission 4*, p. 3.

being incorrectly enrolled or not enrolled.³ Many of these electors were removed under the objection process, which requires the AEC to remove an elector from the roll if there is reason to believe that an elector no longer lives at their enrolled address.

- 1.4 The current arrangements provide that an elector who attends a polling place but is not found on the roll may make a declaration vote at an election, but cannot be reinstated to the roll if they were removed under the objection process. As a result their vote cannot be counted. This Bill will allow these votes to be admitted to further scrutiny if certain requirements are met.
- 1.5 The Bill is described in the Explanatory Memorandum (EM) as implementing recommendations one and 24 of the committee's report entitled *The 2010 Federal Election: Report on the conduct of the election and related matters*.⁴
- 1.6 The EM also incorporates a statement of compatibility with human rights. It concluded that the Bill 'is compatible with human rights because it advances the realisation of Article 25 of the ICCPR [International Covenant on Civil and Political Rights] by ensuring that all Australian citizens can vote in elections'.⁵

Direct changes to the roll

- 1.7 The proposal to introduce direct enrolment is based on recommendation one of the committee's review of the 2010 federal election, which supported amending the Electoral Act to allow the AEC to directly enrol eligible electors:

The Committee recommends that, wherever appropriate, the *Commonwealth Electoral Act 1918* should be amended to allow the Australian Electoral Commission (AEC) to directly enrol eligible electors on the basis of data or information provided by an elector or electors to an agency approved by the AEC, as an agency which performs adequate proof of identity checks, where that information is subsequently provided by that agency to the AEC

3 Australian Electoral Commission, *Submission 2* to the JSCEM inquiry into the Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 9.

4 Explanatory Memorandum, Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, p. 1.

5 Explanatory Memorandum, Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, p. 3.

for the purposes of updating the electoral roll. Approval of such agencies by the AEC should be made by disallowable instrument.⁶

- 1.8 The current Bill's substantive change – enrolling electors without claim – is dependent on the commencement of Schedule 2 of the Electoral and Referendum Amendment (Maintaining Address) Bill 2011. The latter Bill provides the Electoral Commissioner with the power to directly update an enrolled elector's address details 'following the receipt and analysis of reliable and current data sources from outside the Australian Electoral Commission that indicate an elector has moved residential address'.⁷ That Bill was also the subject of inquiry by the committee.⁸
- 1.9 The current proposals to allow the Electoral Commissioner to make amendments to the electoral roll based on sources of data from outside the AEC have developed over the last decade. It will be an extension of the Continuous Roll Update (CRU) process that is a key component of the AEC's roll maintenance activities.
- 1.10 The Australian National Audit Office (ANAO) in a 2001-2002 performance audit of the integrity of the electoral roll, found that:
- Greater efficiencies could be obtained and CRU could be further streamlined through automatic updating of the roll using information provided from reliable third party sources. Automatic updating of enrolment information is possible through cross matching the electoral roll to, and updating it from, reliable COA information provided by electors to other government agencies.⁹
- 1.11 In its 2002 review of the ANAO's report, the committee at the time noted the AEC's interest in the concept of 'automatic roll updating and direct address change' and acknowledged that 'automatic roll updating provides a means of streamlining CRU'.¹⁰ However, it also expressed reservations

6 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, Recommendation 1, p. 36.

7 Explanatory Memorandum, Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 1.

8 The House Selection Committee referred the Electoral and Referendum Amendment (Maintaining Address) Bill 2011 to the committee on 24 November 2011. The committee reported on 13 March 2012.

9 ANAO Audit Report No. 42 2001-02, *Integrity of the Electoral Roll*, p. 52.

10 Joint Standing Committee on Electoral Matters, *The Integrity of the Electoral Roll: Review of ANAO Report No. 42 2001-02, Integrity of the Electoral Roll*, October 2002, Commonwealth Parliament of Australia, p. 29.

about the 'potential for inaccurate outcomes if the elector is not directly involved in the process'.¹¹

- 1.12 The committee recommended, in its report on the 2004 federal election, that:

...the AEC consider and report on the implications of the Direct Address Change proposal (contained in Submission No. 136) and provide a detailed report to the Committee on its findings by the end of 2005.¹²

- 1.13 The review of the 2007 federal election contained a recommendation in relation to the update of address details of already enrolled electors (recommendation 10).¹³ This unanimous recommendation was the basis of the Electoral and Referendum Amendment (Maintaining Address) Bill 2011.

- 1.14 The committee again considered the issue of adding eligible electors to the roll based on third party data in its report entitled *Inquiry into the implications of the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW) for the conduct of Commonwealth elections*. The committee examined the adoption of this approach in New South Wales and recommended that the AEC be allowed to 'automatically enrol electors on the basis of data provided by trusted agencies'.¹⁴ A dissenting report opposed the recommendation.¹⁵

- 1.15 In the committee's review of the 2010 federal election, recommendations one and two supported amending the Electoral Act to enable the AEC to 'directly enrol eligible electors' and to 'directly update the enrolment details of electors' on the 'basis of data or information provided by an

11 Joint Standing Committee on Electoral Matters, *The Integrity of the Electoral Roll: Review of ANAO Report No. 42 2001-02, Integrity of the Electoral Roll*, October 2002, Commonwealth Parliament of Australia, p. 29.

12 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005, Commonwealth Parliament of Australia, Recommendation 6, p. 46.

13 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2007 federal election and matters related thereto*, June 2009, Commonwealth Parliament of Australia, p. 114.

14 Joint Standing Committee on Electoral Matters, *Inquiry into the implications of the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW) for the conduct of Commonwealth elections*, February 2010, Commonwealth Parliament of Australia, p. 22.

15 Joint Standing Committee on Electoral Matters, *Inquiry into the implications of the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW) for the conduct of Commonwealth elections*, February 2010, Commonwealth Parliament of Australia, Dissenting report, p. 26.

elector or electors to an agency approved by the AEC'.¹⁶ A dissenting report opposed these recommendations.¹⁷

Declaration votes and objection action

- 1.16 Significantly, the Bill also proposes to change the requirements for admitting declaration votes to further scrutiny and allowing the reinstatement of some eligible electors who have been removed from the roll.
- 1.17 It will affect electors who believe they are already on the roll, but cast a provisional vote because they could not be found on the roll at the time of voting. Some of these electors may have been removed under the AEC's objection process. However, under current arrangements they cannot be reinstated to the roll and their vote will not be admitted to further scrutiny.
- 1.18 The Special Minister of State, the Hon Gary Gray AO MP, stated in his second reading speech that the Bill will 'protect the participation of eligible Australian citizens in the electoral process by establishing a safety net for enrolment and voting'.¹⁸
- 1.19 Recommendation 24 – which is being implemented in Schedule 2 of the Bill – aimed to reinstate people onto the roll after they had been removed as the result of an objection by the AEC:

The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to provide that where an elector who had lodged a declaration vote at an election has been removed from the electoral roll by objection action on the ground of non residence; and

- the removal from the roll occurred after the election prior to the election to which the scrutiny relates, or
- where there has been a redistribution of the state or territory that includes the division since the last election but one before the election to which the scrutiny relates, the removal from the roll was made after the last such redistribution, then:

16 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 36.

17 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 179.

18 The Hon Gary Gray AO MP, Special Minister of State, *House of Representatives Hansard*, 15 February 2012, p. 9.

- ⇒ if the address at which the elector claims to be enrolled at the time of voting is within the electoral division for which he or she was previously enrolled, his or her House of Representatives and Senate votes will be counted; but
- ⇒ if the address at which the elector claims to be enrolled at the time of voting is in a different electoral division in the same state or territory, his or her Senate vote will be counted, but his or her House of Representatives vote will not be counted.¹⁹

- 1.20 Prior to and at the 2004 election, around 50 per cent of provisional voters were reinstated to the roll during the preliminary scrutiny of provisional votes. These electors were reinstated and their votes accepted for further scrutiny on the basis that the electors had, prior to their removal from the roll, previously been enrolled in the division in which they cast their vote. In the majority of cases, it was found that these electors had been removed from the roll as a result of the objection process. However, the percentage of provisional votes accepted dropped to less than 20 per cent for the 2007 and 2010 elections.²⁰
- 1.21 Amendments to the Electoral Act in 2004 – amending subsections 114(4) and 118(4)²¹ – and to Schedule 3²² in 2006, removed the AEC’s discretion in relation to removing an elector from the roll.
- 1.22 As outlined earlier, the Bill seeks to implement recommendation 24 of the committee’s report *The 2010 Federal Election: Report on the conduct of the election and related matters*. In that report, it was noted that traditionally the Electoral Act has contained safety nets designed to ensure that the voting franchise can be exercised by those who are entitled to do so.²³ The Bill aims to return safety net provisions for electors who have been removed from the roll, enabling them to be put back on the roll and their vote counted in certain circumstances.

19 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 95.

20 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. 90.

21 *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004*, items 51 and 55.

22 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, item 96.

23 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, June 2011, Commonwealth Parliament of Australia, p. iv.

Requirement to enrol

- 1.23 For the purposes of federal elections in Australia, an eligible elector is a person who is:
- 18 years of age or over;
 - an Australian citizen, or was a British subject on a Commonwealth electoral roll as at 25 January 1984; and
 - has lived at their current address for at least one month.
- 1.24 There is an inherent tension between eligible people's entitlement to vote and the compulsory nature of the act. One presupposes a right and the other an obligation. The Electoral Acts states that 'any person qualified for enrolment...shall be entitled...to have his or her named placed on the Roll'.²⁴
- 1.25 Under the Electoral Act, it is compulsory for eligible electors to enrol and vote in federal elections. Section 101 provides that eligible people who do not enrol are guilty of an offence and punishable by a fine of one penalty point, which is currently \$110.²⁵
- 1.26 The Bill aims to facilitate people to meet their enrolment obligation and exercise their right to vote.

CRU and objection processes

- 1.27 One of the main tools used by the AEC for roll update is the Continuous Roll Update process:

The process of CRU data matching operates as follows:

- data is matched against AEC enrolment records to establish whether or not a person is enrolled;
 - ⇒ data relating to specific categories of electors is excluded, e.g. silent electors, Members of Parliament, eligible overseas electors (and their kin), Antarctic electors, itinerant electors, and prisoners;
- date of enrolment is compared against the currency of the data record supplied by the third party to determine further action;

24 *Commonwealth Electoral Act 1918*, pt VIII – Enrolment, s 99 (1).

25 *Commonwealth Electoral Act 1918*, pt VIII – Enrolment, s 101.

- address data is matched against the AEC address register to establish whether or not an address is valid for enrolment purposes; and
 - ⇒ addresses with no mail service are excluded where no postal address is provided.²⁶
- 1.28 CRU activities are often based on data received from third party sources that indicate address details of enrolled people may have changed. It places the onus on the elector to confirm their current address details. The AEC advised that response rates were generally between 15 and 20 per cent for the monthly mail-outs during periods when there were no major electoral events.²⁷
- 1.29 Part IX of the Electoral Act sets out the objection process under which electors can be removed from the electoral roll. A person enrolled in a particular electoral division may object to the enrolment of another elector if they believe the person is not entitled to be enrolled in that division or is enrolled at an address at which they do not currently live and have not lived for at least one month.²⁸
- 1.30 Section 114 also requires the Electoral Commissioner to object to the enrolment of an elector in these circumstances. The AEC indicated that objection actions initiated by the Electoral Commissioner 'are most commonly triggered by CRU mailing based on third party data'.²⁹ The Electoral Commissioner writes to the elector notifying of the AEC's intention to remove them from the roll. If the elector does not respond to this notice within 21 days, they will be removed from the roll. The AEC will send a second notice to the same address advising the elector that they have been removed from the electoral roll.

26 Australian Electoral Commission, *Submission 2* to the JSCEM inquiry into the Electoral and Referendum Amendment (Maintaining Address) Bill 2011, pp. 7-8.

27 Australian Electoral Commission, *Submission 2* to the JSCEM inquiry into the Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 7.

28 *Commonwealth Electoral Act 1918*, pt IX – Objections, s 114.

29 Australian Electoral Commission, *Submission 2* to the JSCEM inquiry into the Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 8.

New South Wales and Victorian enrolment activities

- 1.31 In 2010 New South Wales and Victoria commenced with direct enrolment of eligible unenrolled people and the direct update of relevant enrolment details.³⁰
- 1.32 On 1 December 2009 the NSW Parliament passed the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW)*.³¹ The Act gave effect to the 'Smart Roll' system which introduced the direct enrolment of electors for state and local government elections in New South Wales.³² It also allowed eligible state electors to enrol and cast a provisional vote on polling day.
- 1.33 In Victoria, the *Electoral Amendment (Electoral Participation) Act 2010 (Vic)* was passed in July 2010. It provided the Victorian Electoral Commission with greater enrolment powers that included:
- enrolment procedures on election day for those electors not on the electoral roll;
 - abolition of the "three-month rule", which uses the elector's principal place of residence, three months prior to election day, as a measure of the elector's entitlement to vote;
 - streamlined enrolment procedures whereby the Victorian Electoral Commission (the Commission) will have the power to enrol people on its own initiative based on information obtained from sources under section 26(4) of the Act...³³
- 1.34 The AEC has suggested that this will lead to divergence between the Commonwealth electoral roll and the NSW and Victorian state rolls, as currently Commonwealth enrolments must be elector initiated.³⁴

30 Australian Electoral Commission, *Submission 2* to the JSCEM inquiry into the Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 11.

31 Joint Standing Committee on Electoral Matters, *Inquiry into the implications of the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW) for the conduct of Commonwealth elections*, February 2010, Commonwealth Parliament of Australia, p. 1.

32 Joint Standing Committee on Electoral Matters, *Inquiry into the implications of the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 (NSW) for the conduct of Commonwealth elections*, February 2010, Commonwealth Parliament of Australia, p. 2.

33 Explanatory Memorandum, Electoral Amendment (Electoral Participation) Bill 2010 [Vic], p. 1, see <<http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills-archive.html>>, accessed 24 February 2011.

34 Australian Electoral Commission, *Submission 87* to the JSCEM inquiry into the conduct of the 2010 federal election and matters related thereto, p. 53.

Overview of the Bill

- 1.35 The Bill contains two significant schedules: ‘enrolment without claim’ and ‘declaration votes and objection action’. The substantive change to the Electoral Act is the inclusion of section 103B which allows the Electoral Commissioner, or delegate, to enrol an unenrolled eligible person without claim or notice from the person. The majority of the other amendments to both the Electoral Act and the Referendum Act are to ensure the changes proposed by 103B are consistently represented through both Acts and allow for their implementation. Other amendments correct past errors and clarify existing subsections.
- 1.36 The commencement of Section 103B (enrolment without claim) is contingent on the commencement of Schedule 2 (updating enrolment without claim) of the Electoral and Referendum Amendment (Maintaining Address) Bill 2011.³⁵

Schedule 1—Enrolment without claim

- 1.37 Items 1 and 2 provide that directly enrolled voters will be placed on any new roll and that they are included on the roll even though they have not directly made a claim or given notice.
- 1.38 Item 3 reflects the change proposed by subsection 101(8) of the Electoral and Referendum Amendment (Maintaining Address) Bill 2011 and prohibits legal proceedings being commenced against a person for failing to enrol if the Electoral Commissioner enrolls them.³⁶
- 1.39 Item 4 is the key amendment of Schedule 1 to the Bill – ‘Enrolling unenrolled person without claim or notice from the person’:
- 103B(1): Before proceeding with a direct enrolment, the Electoral Commissioner must be satisfied that the person (a) is entitled to enrolment, (b) has lived at an address for one month, and (c) is not enrolled.
 - 103B(2): The Electoral Commissioner may give a person notice of the proposed action and inform them they have 28 days to respond. The proposed action is ‘that the Electoral Commissioner proposes to enter

35 Explanatory Memorandum, Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, p. 4.

36 Explanatory Memorandum, Electoral and Referendum Amendment (Maintaining Address) Bill 2011, p. 4.

the person's name and other particulars required by section 83 on the Roll for the relevant Subdivision'.³⁷

- 103B(3)-(4): The Electoral Commissioner can enrol a person after 28 days, or prior to the 28 days if the elector responds confirming address details and entitlement.
- 103B(5): The Electoral Commissioner cannot directly enrol a person in the period starting from the close of rolls to the close of polling for the election.
- 103B(6): If the Electoral Commissioner directly enrolls, or decides not to enrol a person, the affected person must be given notice in writing of the decision and the person's full name and address as entered on the roll, if applicable.
- 103B(7): If the Electoral Commissioner receives a claim for enrolment after giving notice of the proposed action, then a notice advising the person that they have been enrolled need not be sent under subsection 102(1)(b)(ii).
- 103B(8): A notice can be given by electronic means, regardless of whether or not the person has consented to this form of communication.

1.40 Item 6 sets out 'reviewable decisions' in a table format. The principle change is the addition of item 10 in the table which identifies the mechanisms for the dismissal of an objection and the subsequent notification. Changes to enrolments made under section 103A (update of address details) and section 103B (enrolment without claim) are also subject to review. A person has 28 days from the issue of a notice to apply for an internal review of the decision.

1.41 Items 10, 11, 12, 14 and 15 provide the standard protection afforded by the AEC against the disclosure of an elector's personal information.³⁸

37 Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, item 4, s 103B(2)(a).

38 Explanatory Memorandum, Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, p. 7.

Schedule 2—Declaration votes and objection action

- 1.42 The inclusion of subsection 105(4) provides ‘the Electoral Commissioner with the discretion to enrol a person who was not enrolled when casting a declaration vote’.³⁹
- 1.43 At present the Electoral Commissioner will enrol a person who casts a declaration vote if they are entitled to vote and their omission from the roll is the result of an error by an electoral officer or a mistake of fact. However, removal due to objection action is not currently regarded as an error or mistake of fact.
- 1.44 The new subsection 105(4) provides that a declaration vote may be admitted to further scrutiny if it meets with certain requirements under schedule 3, paragraph 12 of the Electoral Act.
- 1.45 Paragraph 12 of Schedule 3 currently reads:
- This paragraph applies to an envelope if the DRO is satisfied:
- (a) that the elector who signed a certificate or declaration on the envelope is not enrolled for the Division; and
 - (b) after making enquiry:
 - (i) that the elector was, at the time of voting, entitled to be enrolled for the Division; and
 - (ii) that the omission of the elector’s name from the Roll for the Division was due to an error made by an officer or to a mistake of fact; and
 - (iii) that the omission was not attributable to subsection 118(4A) [Determination of objection].
- 1.46 The Bill proposes to remove subparagraph 12(b)(iii). This will provide the AEC with the previous discretion it had to admit these declaration votes to further scrutiny and reinstate electors to the roll who were removed by objection action.
- 1.47 In its submission to the inquiry the AEC illustrated how ‘declaration votes cast by people who have been omitted from the electoral roll due to an “error or mistake of fact” would be treated under the proposed Bill’.⁴⁰

39 Explanatory Memorandum, Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012, p. 8.

40 Australian Electoral Commission, *Submission 4*, Attachment C, Table C1, p. 12.

Table 1.1 How changes to declaration votes and objection action will operate

Removed from the roll due to an 'error or mistake of fact' including based on objection action				
Address on envelope compared to address on Roll at the time of removal	Elector at same address	Same division but different address	Different division but same state	Different state
Include all votes	✓	✓	✗	✗
Include Senate and/or referendum ballot papers only	N/A	N/A	✓	✗
Reinstate to the roll and for which address (if any)	✓ Address prior to removal from the roll	✓ Latest known address in the division	✓ Latest known address in the state or territory	✗

Source Australian Electoral Commission, Submission 4, Attachment C, Table C1, p. 12.

1.48 Similar changes are also proposed to be made to the Referendum Act.

Date of effect

1.49 Clauses one to three will commence on the day the Act receives Royal Assent. The amendments in Schedule 2 (Declaration votes and objection action) of the Bill will take effect from the day following Royal Assent. However, the amendments in Schedule 1 (Enrolment without claim) are contingent on both this Act and the *Electoral and Referendum Amendment (Maintaining Address) Act 2012* receiving Royal Assent.

Objectives and scope of the inquiry

1.50 While the committee acknowledges that the Bill seeks to implement a policy on which there has been some difference of opinion in the past, the main objective of this inquiry is to investigate the adequacy of the Bill in achieving its policy objectives and, where possible, identify any unintended consequences.

- 1.51 On 17 February 2012, the committee Chair, Mr Daryl Melham MP, issued a media release announcing the inquiry and called for submissions to the inquiry.
- 1.52 The committee received seven submissions for this inquiry, which are listed in Appendix A. It held a roundtable discussion in Canberra on 29 February 2012. The participants are listed in Appendix B. The submissions and transcript of evidence are available on the committee's website at: www.aph.gov.au/em.