Time for the Commonwealth to show leadership to ensure that the most appropriate and efficient automatic enrolment procedures are implemented

Submission by the Proportional Representation Society of Australia to the Joint Standing Committee on Electoral Matters inquiry into the implications of the NSW automatic enrolment legislation for the conduct of Commonwealth elections

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Implementation of new procedures authorised by the *Parliamentary Electorates And Elections Amendment (Automatic Enrolment) Act 2009* leaves it possible that, in the absence of changes to Commonwealth legislation in the near future, there will be extensive confusion among voters should the next federal elections follow shortly after those in New South Wales on 26 March 2011.

In the view of the Proportional Representation Society of Australia, the Commonwealth should enact minimum standards that would need to be met if the consequences of unilateral state or territory automatic enrolment action are to be automatically extended to the Commonwealth roll.

Discussions with state and territory electoral authorities should proceed immediately with a view to quickly identifying a hierarchy of reliable data sources and set of co-ordinated and complementary operational procedures that minimise unproductive duplication of enrolment effort. The primary goal should unambiguously be to have uniform state/territory and federal rolls of the highest quality. Whether it becomes more difficult to fine or prosecute electors for not voting should not be a major concern.

Commonwealth resources freed up as a result of new automatic enrolment procedures should be redeployed in educating and empowering electors about the single transferable vote and how they can make the most of it.

What needs to be done now on enrolment with a sense of urgency could provide a template for harmonisation action in other areas of electoral administration. However, if early agreement cannot be reached, the Commonwealth must take interim protective action through early enactment of appropriate national standards.

Enrolment jousting more prominent in single-member electorates

The Proportional Representation Society of Australia and its constituent branches work to strengthen democracy in a voter-oriented non-partisan manner.

While our objective is to secure the adoption of the quota-preferential method of proportional representation for the election of representative bodies, some of our branches have a wider electoral reform ambit. We are all firm believers in open and transparent electoral administration that supports and empowers voters. However we remain vigilant and if there is a risk of freedoms or influence being withdrawn from voters in the name of harmonisation, we would come out in strong opposition to such retrograde developments.

Enrolment takes on far greater importance under winner-take-all arrangements as any two-party advantage from a legislative change may carry over to numerous seats.

It has not been a source of controversy under Tasmania's or the ACT's Hare-Clark systems as seats won there closely follow levels of voter support achieved and there is no prospect of achieving across-the-board advantage from any adjustments to enrolment-related procedures. Effective voting and the minimisation of wasted votes mean that neither enrolment nor redistributions lead to the same, usually self-interested, fervour that large parties tend to display in relation to single-member electorates.

Electoral arrangements a major factor in enrolment behaviour

A major part of the problem with people not enrolling or advising changes within the stipulated statutory period is that they live predominantly in safe seats and therefore many do not regard themselves as having a worthwhile voice. Even with the current impediments posed by cumbersome paper-based procedures for advising changes in enrolment particulars, more people would discharge their legislative obligations if they perceived themselves as having real polling-day influence.

Instead, the rush to change enrolment particulars immediately after the announcement of an election, or to fill out a form received on polling day, has become a feature of Australian politics. Increasing numbers of potential electors are deliberately steering away from being on the roll or simply not enrolling for the first time when they are young and mobile.

Allowing electoral authorities to take the initiative in these matters on the basis of administrative data to which they have access will not of itself result in greater voter satisfaction with our electoral system or current spirit of democracy.

The best way to achieve greater elector engagement is to have an electoral system that empowers rather than patronises or annoys voters. Being forced to mark further preferences makes no sense to voters for Labor or the Coalition in most single-member seats but it does in voting for the Senate because there is greater uncertainty about the order of exclusion and election at the end of the scrutiny. Forcing other voters to mark preferences for all candidates rather than encouraging them once they have grasped the principles of the single transferable vote will not make enrolment a priority in their experience.

NSW initiative requires an effective Commonwealth response

Though it has been long in the making following previous parliamentary committee examination of the conduct of state elections and unanimous recommendations, the unilateral move by New South Wales towards automatic enrolment procedures at the end of 2009 makes it possible for great confusion to ensue at elections within close proximity, unless the Commonwealth acts to change its legislation.

Even though the New South Wales Electoral Commission will be informing voters whose state enrolment particulars are altered through the new procedures that they need to take separate action to update their Commonwealth enrolment, past experience suggests that a large number of those electors will not do so. They are likely to find themselves off the Commonwealth roll at the next election if they have actually moved address.

As the current House of Representatives met for the first time in February 2008, it would be possible for the next federal election to occur after the 26 March 2011 date fixed for the NSW Parliament, even though little likelihood has been ascribed to that prospect by commentators. Were this to occur, numerous electors granted a vote for the state election could suddenly and unexpectedly find on polling day that they are not on the Commonwealth roll, a situation likely to lead to expressions of incredulity and annoyance often enough for exasperation to permeate lengthy queues of voters awaiting their turn to be marked off the roll.

Other jurisdictions may follow suit in implementing automatic enrolment procedures if they come to regard the current state of the rolls as unsatisfactory and do not expect any early movement on the part of the Commonwealth. Each time that occurs, the prospect increases of significant future elector confusion, especially at Commonwealth elections held shortly after those at state or territory level

Identifying the best data sources and setting standards

One choice that the Commonwealth could make would be to simply accept new enrolments or adjustments to particulars undertaken by any state or territory electoral administration as grounds for changing the Commonwealth roll. That blind trust however could turn out to be on the basis of flawed legislation enacted for partisan gain by another government (for instance, public servants could be arbitrarily assigned to a number of marginal electorates), or it could have other undesirable features that the Commonwealth would not wish to endorse.

Appropriate standards need to be in place to minimise voter dislodgement and annoyance as a result of states and territories going their own way and casting aside the previous joint roll maintenance arrangements.

Ideally efforts should be made to identify the best data sources for making inferences about apparent changes of address, and take steps to minimise any unproductive duplication in concerted efforts to keep the roll up to date.

The challenge comes down to having appropriate criteria for determining, as soon as prudence permits, that someone's real place of living may have changed, usually for the indefinite future, and seeking confirmation from the elector involved that such appearances aren't deceptive and that a particular new address now applies.

Apart from minimising error during the administrative activity whose scope has been considerably enhanced, there should be mechanisms for detecting and rejecting potential changes that are based on an element of fraud or misrepresentation.

It would make sense for national agreement to be reached about the best data sources on which to make such judgements, the hierarchy of reliability for such purposes, and the criteria to apply if there appears to be ambiguous evidence of change. This is an empirical matter about how quickly people who move usually have a new address entered for a particular service delivery or administrative purpose, and how often it is reasonable to ask for those updated data to be forwarded to electoral authorities.

In the same vein, it would also be worth investing considerable energy to seek national agreement on:

- what matters associated with enrolment would need to be settled at a particular point in time (for instance, eligibility to nominate is determined when the writs are issued and the rolls have closed); and
- where changes could still potentially be made in specified circumstances until polling day (for example, notifying a change of address after the rolls have closed and being issued with a declaration vote at the subsequent election).

Some of these agreements successfully concluded would be different from what currently occurs in practice: an elector who has changed address but not notified this fact in accordance with the provisions of the *Commonwealth Electoral Act 1918* usually casts a vote as though still living at the previous address, and a change-of-enrolment form is normally put through for the future.

Having the ability to alter enrolment particulars online could change voter behaviour to a noticeable degree from past patterns. For those with scanning facilities, electronic lodgement of a signed document would be as straightforward as mailing or faxing such particulars, and less prone to mishap resulting in amending action by electoral authorities not occurring.

Where electors are not initiating change in electoral enrolment, in an ideal world there would be minimal duplication of effort by electoral administrations without any detriment to roll quality. The most logical way to proceed would be to identify the best data sources, in terms of accuracy and customary early notification of changes in place of living, in each state or territory and among those available to the Australian Electoral Commission.

If these records are most easily accessed at state and territory level in a particular instance, the role of the Commonwealth would be limited to seeking agreement on national standards of evidence for making changes, and instituting further automatic checking processes from its most reliable sources only if there is strong evidence that such action will result in material improvements in the quality of the roll.

Identification of a hierarchy of reliable sources that usually show the earliest changes of address, of tests to establish the most likely new place of living if several appear in different data sources, and the point at which one can be confident of continuous residency at a new address for the period specified in legislation, would be necessary.

Whether or not the basis for fining or prosecuting electors for failing to vote should not be a major consideration as the primary goal of the automatic updating must unambiguously be to have the most accurate roll achievable with co-ordinated application of available resources.

There is no point in aggregating data just because different sources are available and carrying out work such as generating particular types of exception reports that has little prospect of materially improving the accuracy of the rolls. In fact, such indiscriminate action would constitute a significant additional privacy risk and arouse considerable avoidable suspicion among electors, as well as making the Australian Electoral Commission a potential target for criminal elements for whom the possibility of access to such information would be regarded as a boon.

The Commonwealth resources currently devoted to enrolment action but no longer required for that purpose could be far better deployed on other matters, particularly those to do with education and empowerment of voters in relation to their use of the single transferable vote.

What types of Commonwealth standards?

Before automatically accepting decisions made at the state or territory level, typically the Commonwealth would want to set a number of standards to provide assurances in relation to the following obvious questions of accuracy and integrity:

- is the evidence on which decisions are made of sufficient quality?
- would most reasonable people come to the same conclusions based on that evidence?
- where a change is made, has there been compelling evidence that the elector no longer lives at the previous address?
- are there adequate protections against the possibility of organised external fraud or internal malfeasance?
- are there adequate privacy protections in dealing with data provided for other administrative purposes?

What can go wrong when one has access to a range of administrative sources that include information about addresses?

- it may be difficult to identify particular people accurately where variants or nicknames are used, or there are many people with similar given names and no further information such as date of birth or the answers to elector-initiated verification questions is available to assist in identification;
- some apparent changes of address may involve business premises or investment properties normally available for rental, estates that are being finalised or a variety of essentially temporary purposes – it is therefore essential that there be strong evidence that an elector is no longer at the enrolled address and has no entitlement to remain on the roll there;
- not all the available data might point in the same direction – this is where a hierarchy of reliable sources that generally report changes of address quickly, criteria for believing that an elector is no longer at his or her previous address, and drawing appropriate inferences from an attempt to contact the elector within a stipulated time frame in relation to foreshadowed administrative action, are all important;
- phony identities or addresses could be submitted and other external or internal attempts made at fraud – there should be automated processes for checking that a given address actually exists and adequate protections in place to detect unauthorised access to data or any other suspicious internal behaviour should it arise;
- there could be an internal abuse of privacy that leads to such public indignation that compulsory enrolment and voting come into question in one or more jurisdictions – at the least there should be the prospect of imprisonment for offenders in such circumstances as well as the constant promotion of an ethical internal culture.

In line with administrative law principles, particularly as there is a statutory obligation to notify changes within a specified period and penalties apply for not having one's name marked off the roll (even if someone were unaware that enrolment information had been altered), there must be attempted contact with an elector whose particulars it is proposed to

change. Obviously any letter sent should go to the anticipated new enrolment address (and probably the previous one also unless there is compelling evidence that the elector is no longer at that address and is not entitled to remain enrolled there), and voters might also choose to provide electronic contact particulars that would suit them in the event that changes in enrolment particulars were proposed.

For the sake of transparency, changes that are made should normally be published except in relation to silent voters and other circumstances (for instance where there had previously been domestic or other violence) where there is an unacceptable risk of harm to an elector as a result. Because of the second possibility, it will be advisable for electoral authorities to liaise with various administrators or service providers so that processes are put in place for people to be able to indicate that their new particulars should not be released publicly. In addition, information on the procedures through which electors can apply to become a silent voter should become much more widely available.

The legislation passed in NSW

While the *Parliamentary Electorates And Elections Amendment (Automatic Enrolment) Bill 2009* had a speedy and uneventful passage through the New South Wales Parliament, as at 22 January 2010 its particulars were not outlined on the Web site of the NSW Electoral Commission: in a frequently-asked-questions section on enrolment, it was still being spoken of exclusively in terms of the joint roll maintenance agreement.

This should change in the near future and one can anticipate subordinate legislation and procedural manuals or chief executive directions or instructions to add further detail, for instance in relation to the contact that will be made with electors to advise them of the need to fill in and despatch another form to achieve the same change on the Commonwealth roll.

On a positive note, in the NSW legislation:

- there is an obligation upon electoral authorities to try to contact electors before changing their enrolment particulars; and
- changes made during the campaign period can only be on the basis of strong photographic evidence and an appropriate declaration must be made before voting on or before polling day.

The legislation has quite significant defects in relation to enrolment (as well as other matters) that were not dealt with during the speedy passage last year:

- there isn't a framework to deal with ambiguous situations (such as multiple administrative addresses suddenly appearing for someone) – it is assumed that the Electoral Commission can make a straightforward decision;
- there is not an adequate mechanism for automatically overturning foreshadowed Electoral Commission action – for instance, in addition to accepting objections from electors, if a letter comes back marked "return to sender" no change should be made along the lines proposed;
- the penalties for misuse of information by electoral officials are not nearly strong enough to provide public reassurance – there is just a modest fine as maximum penalty whereas gaol sentences are possible for offences such as displaying electoral matter without authorisation;

- the Electoral Commission wasn't required to upgrade its internal processes to guard against fraud or illegal dealing with the information collected – without extremely rigorous selection procedures and a strong culture of integrity to deter internal misuse, as well as systems for automatically detecting unauthorised, inappropriate or suspicious conduct, a corrupt or troubled official could do much damage to the reputation for electoral impartiality: in addition, criminal elements might find it attractive to try to suborn officials to obtain access to a multitude of sensitive data, or to get one of their number selected as the successful applicant when a suitable vacancy arises.

Where does this leave the Commonwealth? First it needs to decide whether it will accept holus-bolus changes made as a result of the operation of these flawed amendments. That would not be advisable as it would set an unfortunate precedent.

It would be preferable for the Commonwealth to make a stand and urgently initiate discussions with all the states and territories with a view to quickly arriving at agreement on when enrolment activity undertaken by a state or territory administration would be automatically accepted for Commonwealth purposes. If such agreement cannot be reached, the Commonwealth should not hesitate to impose standards for protecting the integrity of its roll. There is plenty of time for New South Wales to make amendments to its legislation to close the current loopholes and fall into line with agreed or imposed standards.

The successful completion of negotiations may prompt a more comprehensive search for a range of uniform criteria to apply nationally in other areas of electoral administration where there is currently a good deal of unnecessary variation. One fundamental inviolable principle should be that action in the name of harmonisation should not remove current freedoms and influence that voters have in some jurisdictions (for instance, in relation to what constitutes a formal vote), but rather set out minimum standards from a voter's viewpoint and not discourage higher ones from being adopted in some jurisdictions.

The Commonwealth resources freed up because, among other things, there is no longer a flood of changes to be processed when elections are announced, should result in more effort going into giving voters a greater understanding of the single transferable vote, what is required for a formal vote, and how they can best translate their wishes into effective preferential numbering. That could be both through electronic advertising and the despatch through the mail of a carefully-prepared information package likely to get at least the brief attention of even the most sceptical electors.