

Australian Privacy Foundation**Joint Select Committee on Electoral Matters (JSCEM)****Inquiry Into the
Electoral And Referendum Amendment (Protecting Elector Participation) Bill 2012**

24 February 2012

1. Background

The Joint Select Committee on Electoral Matters (JSCEM) published a report on the 2010 Election. Among the 37 Recommendations was Recommendation 1, which proposed a power for the Electoral Commissioner to 'directly' enrol people. This was supported by the 5 Labor members and 1 Green member, and opposed by the 4 Liberal members of the Committee.

A Bill that purports to implement the Recommendation was tabled in the House on 15 February, and referred to JSCEM for review. An informal request to submit evidence was communicated to APF by a member of the Committee at a Committee Hearing that day. A written invitation was received late on 17 February. This required a written submission by 24 February, and attendance at a Hearing on 29 February. The Chair declined a request by the APF for sufficient time to consider the Bill.

This document considers the original proposal, and its implementation in s.103B of the Bill.

2. Procedural Aspects

The APF notes that this Inquiry is characterised by the most unsatisfactory processes of any Committee Inquiry that the Foundation has ever been involved with during its 25-year history. Considerations include the following:

(1) It is not clear that any Risk Assessment has been performed

Risk assessment is normal business practice, and is expected by DoF and ANAO. None is apparent even from the perspective of the AEC and the integrity of the Rolls, let alone from the perspective of the people whose data is being expropriated, and for whom an entry is to be created by the AEC.

(2) It appears that no Privacy Impact Assessment (PIA) has been performed

A PIA is normal business practice, and is an expectation of both the Privacy Commissioner and the Government as a whole.

(3) No consultation appears to have been conducted with civil society

NGOs representing the public interest, such as APF and the Councils for Civil Liberties, seek to represent the public interest. The APF has found no evidence of any previous attempts by the JSCEM either to achieve consultation on this matter or to ensure that it has been undertaken by the AEC.

The APF received an informal approach by AEC shortly before Christmas 2011, but the information provided amounted to about six lines of text, and the approach did not in the least resemble an attempt at meaningful consultation.

(4) No consolidated legislation has been provided

Instead of longstanding technologies being applied, in order to provide both Committee-members and the interested public with the ability to understand the new provisions in their context, the Bill's proponents appear to prefer everyone to do the hard work of consolidating the legislation themselves.

(5) No research relating to the initiative has been made available

The AEC has failed to provide a report on a body of research relating to the initiative. It may be that this will be submitted in parallel with public submissions. This precludes the APF and others from gaining access to it and considering it while preparing Submissions. This grossly undermines the capacity of the public to analyse and submit, and the Committee to be informed.

(6) Insufficient time has been made available

The APF comprises busy professionals who make their time available *pro bono*.

The process of a responsible civil society organisation involves:

- Phase 1:
 - research into the proposal
 - research into prior policy positions that are relevant to the matter
 - considered analysis
 - drafting of a Submission
 - review of the draft
 - finalisation of the draft
 - submission of the draft
- Phase 2
 - review of other Submissions
 - preparation to provide verbal evidence
 - review of the outline verbal statement
 - attendance at the Committee Hearing

The timetable set down in this case comprised:

- no notice in advance – which makes no allowance for busy people's prior commitments
- 5 business days for Phase 1, which meant that the Board did not have time to complete its review prior to the Submission being sent
- 2 business days for Phase 2, immediately following the previous Phase, and hence probably without access to any other Submissions
- a pre-set date-and-time to give Evidence, with no flexibility offered.

(7) The outcome of the Inquiry appears to be predetermined:

- (1) The Inquiry into the Bill is being conducted by the same Committee that (by 6-4 majority) proposed the initiative in the first place.
- (2) The Chair has declared that the Committee's consideration would be focussed only on "the adequacy of the bill in achieving its policy objectives".

The hurly-burly of the floor of the House, and increasingly on the floor of the Senate, is based simply on party-numbers, with policy considerations a minor constraint. Committee Inquiries, on the other hand, are understood by the public to be the venue for thoughtful consideration. The procedure in this instance completely precludes calm deliberation.

The APF submits that **the procedural aspects of this matter are such that they bring the Committee process, and hence the Parliament, into disrepute**. The APF intends submitting to that effect to the President of the Senate and the Speaker of the House of Representatives.

3. The JSCEM's Proposal

The relevant parts of JSCEM (2010) appear to be as follows:

- the 6-person majority report in ss. 3.27-3.55 on pp. 29-35; and
- the 4-person minority report on pp. 182-186.

The majority report reached these conclusions:

- 3.54 ... the Commonwealth should adopt a model that allows direct enrolment of electors on the basis of accurate and reliable data provided to the AEC ...
- 3.55 ... a model adopted at the Commonwealth level requires transparency regarding the data sources it utilises

The discussion culminated in:

Recommendation 1

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 [1] on the basis of data or information provided by an elector or electors [2] to an agency [3] approved by the AEC, as an agency which performs [4] adequate proof of identity checks, where that information is subsequently [5] provided by that agency to the AEC for the purposes of updating the electoral roll. Approval of such agencies by the AEC should be made [6] by disallowable instrument (numbering and emphases added).

4. The Proposal in the Bill

The Minister's Second Reading Speech was highly misleading. It included the following:

"1-1/2 million Australian citizens ... cannot choose their representatives in parliament. ... 1-1/2 million Australians ... cannot have their say when proposals to change Australia's Constitution are put to the people. ... 1-1/2 million Australians [are] excluded from exercising one of the most important rights—and responsibilities—of their citizenship. This bill will protect the participation of eligible Australian citizens in the electoral process by establishing a safety net for enrolment and voting. It is just that—a safety net".

The Minister stooped to Orwellian 'newspeak', pretending that the measure is all about 'helping' or 'protecting' electors. The Minister should have been honest about this being a move, from an obligation to enrol, to imposed enrolment, with very broad and uncontrolled powers granted to a public servant.

The Explanatory Memorandum is guilty of two further misrepresentations, in that it stretches ICCPR Article 25 beyond its actual intent, and it fails to consider the directly-relevant Article 17 – "No one shall be subjected to arbitrary or unlawful interference with his privacy".

The proposal is in the new s.103B, but is expressed in a manner that is anything but transparent.

Extracting the key words, the APF understands s.103B to mean as follows:

IF the Electoral Commissioner is satisfied that a person:

- (a) is entitled to enrolment; and
- (b) has lived at an address ...for at least one month; and
- (c) the person is not enrolled.

THEN the Electoral Commissioner may enter the person's particulars on [the Electoral Roll], provided that:

- (a) the Electoral Commissioner [gives prior notice to the address where] the Commissioner is satisfied that the person lives: and

- (b) the Electoral Commissioner is [not] satisfied by [any] information given by the person to the Electoral Commissioner within 28 days after the notice [that the Commissioner should not do so]; and
- (c) the Electoral Commissioner [gives subsequent notice to the address where] the Commissioner is satisfied that the person lives that the Commissioner has done so.

[The Electoral Commissioner may give any notice by any means, and in particular may do so] by an electronic communication whether or not the person consents to the Commissioner doing so [or even if the person requests the Commissioner not to do so].

The remainder of this Submission has been prepared on the assumption that the above is an accurate representation of the meaning of s.103B.

5. Differences Between the Bill and the JSCEM's Proposal

The Bill does not implement the Committee's Recommendation 1 of 2010, and fails to satisfy the conclusions reached by 6 of the 10 members in paras. 3.54 and 3.55 of JSCEM (2010, p.35). More specifically, **the Bill omits all of the critical points [1] to [6] of the Recommendation.**

The majority of the Committee had purported to impose the following conditions on the authorisation:

- (a) the person must have provided the data [marked [1] in Recommendation 1]
- (b) the person must have provided the data to an agency [2]
- (c) the agency must have been approved by the AEC [3]
- (d) the AEC must have approved the agency on the basis of adequate proof of identity checks being performed [4]
- (e) the agency must have provided the data to the AEC for the purposes of updating the electoral roll [5]
- (f) the AEC must have declared its approval of agencies by disallowable instrument [6]

Instead, the Bill omits all of those conditions, and authorises the Commissioner to directly enrol electors subject only to the uncontrolled condition "[the Commissioner] is satisfied that ...".

The Bill is very different to the Recommendation. Further, the omission of the six controls is seriously harmful to data quality, and to individuals.

6. Contextual Factors

The APF's Submission regarding auto-update of entries on the basis of data matching, dated 15 February 2012, drew attention to key aspects of the context within which that proposal was brought forward. Those contextual matters are also relevant to the present matter. They are:

- (1) Mandatory enrolment and mandatory voting (as distinct from the right to vote) to are increasingly out of touch with the expectations of modern society.
- (2) The assumption that each person has precisely one address that is the reliable and unequivocal basis for allocating that person to an electorate is seriously flawed.
- (3) The electoral system has become highly untrustworthy, because it involves vast numbers of uses and disclosures of personal data with little relationship to the data's original purpose.
- (4) The Parliament and the AEC have failed to provide protection for people who are, or who feel themselves to be, at risk, because many individuals are unable to gain the Commissioner's "grant" in order to suppress sensitive personal data from widespread access and disclosure.
- (5) The Parliament has granted a public servant demand powers in relation to personal data that are both wildly excessive and uncontrolled, and the data that the Commissioner gains by these means is subject to many errors and uncertainties.

7. Deficiencies in the Proposal from a Privacy Perspective

In order to present the deficiencies, sections have been identified by emphasis and by identifiers.

IF [A] the Electoral Commissioner is satisfied that a person:

- (a) is entitled to enrolment; and
- (b) has lived at an address ...for at least one month; and
- (c) the person is not enrolled.

THEN

The Electoral Commissioner may enter the person's particulars on [the Electoral Roll], provided that:

- (a) the Electoral Commissioner [B] [gives prior notice to the address where] the Commissioner is satisfied that the person lives; and
- (b) the Electoral Commissioner is [not] satisfied by [any] [C] information given by the person to the Electoral Commissioner within 28 days after the notice [that the Commissioner should not do so]; and
- (c) the Electoral Commissioner [gives subsequent notice to [D] the address where] the Commissioner is satisfied that the person lives that the Commissioner has done so.

[The Electoral Commissioner may give any notice by any means, and in particular may do so] [E] by an electronic communication whether or not the person consents to the Commissioner doing so [or even if the person requests the Commissioner not to do so].

The APF submits that the following are serious deficiencies in the proposal:

- (1) In the text marked [A], **the Parliament would vest in a public servant the power to make judgements about a person's enrolment, and impose that decision on the person.** That is repugnant to the self-determination that is a hallmark of a free and democratically-governed nation.
- (2) Because the data depended on by the Commissioner was collected for purposes other than electoral enrolment, **in a considerable number of cases, the address that the Commissioner acquires will not be an appropriate address** at which to enrol the person in question, and a proportion of them will not even be an appropriate address at which to contact them.
- (3) In the text marked [B], the person's ability to prevent an inappropriate enrolment is undermined because **the notice is sent to an address that, in a proportion of cases, is inappropriate, thereby denying the individual the opportunity to correct the error.** If the person does not receive it (e.g. because the data that the Commissioner relied on was inaccurate or out-of-date, or arose from a faulty match), the person will not have the opportunity to be aware that the Commissioner is imposing on their right to self-determination.
- (4) In the text marked [C], **negating information has to be provided by the person themselves.** Hence it cannot be provided by, for example, a person in *loco parentis*, or who is aware that the person is no longer resident in Australia, or is dead.
- (5) In the text marked [D], the second notice goes to the same address. This provides no benefit in respect of precisely those instances where a problem exists. **If it was a wrong address the first time, and did not reach the relevant person, then the second notice is very probably also to the wrong address and very probably also will not reach the relevant person.**
- (6) In the text marked [E], the Commissioner is authorised to use an electronic address, which may not be an address that the person currently uses, in which case the notice will be ineffectual. Further, **the Parliament would be authorising a public servant to ignore a citizen's express request.**

These gross deficiencies in design are all the more serious because, as a result of the imposed enrolment, the person is likely to be guilty of an offence at the next election at which the amended Roll is used. The fact that there is (currently) a policy not to prosecute such offences means little. The individual may find themselves forced to prosecute their innocence of a charge that has been created by a faceless bureaucrat on the basis of data that was expropriated, at some time in the past, without the person themselves even being aware that the data was disclosed and used.

8. Conclusions

Recommendation 1 was already ill-advised, authoritarian, and an affront to civil freedoms.

The Bill fails to implement the Recommendation and fails to satisfy even the majority's requirements, because it rips out the 6 controls that the majority specified.

The Bill contains further features that undermine not only electors' privacy, but also the quality and integrity of the data in the Electoral Roll.

The Bill should be rejected.

References

JSCEM (2010) 'The 2010 Federal Election – Report on the conduct of the election and related matters' Joint Standing Committee on Electoral Matters, Canberra, June 2011

Second Reading Speech, at
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F60564cf1-8e98-4f07-8d0e-51f3e8dd47ca%2F0024%22>

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by a Patron (until recently, Sir Zelman Cowen), and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>