



Dissenting report – The Hon Bronwyn
Bishop MP, The Hon Alex Somlyay MP,
Senator Scott Ryan and Senator Simon
Birmingham

Joint Standing Committee on Electoral Matters

Dissenting Report - Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012

Introduction

Coalition Members and Senators strongly disagree with the Labor and Green members of the Joint Standing Committee on Electoral Matters that the *Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012* (i.e. automatic enrolment) be passed by the Parliament. The Coalition has long opposed moves by the Labor Party and the Greens to introduce automatic enrolment and notes that this Bill is being introduced solely to improve the electoral prospects of both Labor and the Greens. This follows similar moves by the former Labor Governments in NSW and Victoria prior to their last state elections.

This legislation will severely damage the integrity of the Electoral Roll by adding new electors who may not be entitled to vote without their knowledge and potentially without their consent, should the elector not receive the Australian Electoral Commission's notice of enrolment. The Coalition believes it is an elector's individual responsibility to enrol to vote, notify the AEC if they change address and then to vote at elections. These are not onerous responsibilities and should remain with the individual elector, not the Australian Electoral Commission. Coalition Members and Senators have consistently made this point since the JSCEM 2007 Federal Election Inquiry.

The Coalition also notes the extensive privacy implications that this legislation raises and has been virtually ignored by the Labor Party and Greens. As with the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011*, Dr Roger Clarke of the Australian Privacy Foundation provided the Committee with valuable information about the individual privacy concerns that this Bill raises. The Coalition has very real concerns about electors having their details published on the Electoral Roll without their knowledge and without the opportunity to apply for silent elector status.

Integrity of the Electoral Roll

It is imperative that the Roll which is used to elect our Parliamentarians is accurate and reliable, particularly in the wake of the 2010 Federal Election where no political party won a majority of seats in the House of Representatives and results in a number of individual electorates came down to only a few hundred votes. Where the responsibility for enrolling and updating individual elector details is taken from the individual and given to the AEC, as this Bill will do, the potential for errors to occur is significant. It also opens up the Roll to fraud.

Labor and Green Members of JSCEM as well as the Australian Electoral Commission seem to consistently downplay the issue of the integrity of the Electoral Roll. The Hon. Bronwyn Bishop MP, Shadow Special Minister of State, noted during the JSCEM roundtable hearing on 29 February 2012 that it was of critical importance from a legal point of view that the Electoral Roll be reliable and accurate, and drew attention to Professor Graeme Orr's book *The Law of Politics* and quoted from page 71:

*"Like other official public registers, such as land registers, a chief feature of electoral rolls is their finality. The purpose of a roll is to be a definitive statement of the entitlement to vote"—leaving aside the provisional provisions—"Thus there is a rule that the roll is conclusive evidence of the entitlement to vote. Reinforcing this is the secondary rule in almost all jurisdictions that a court of disputed returns is not to inquire into the correctness of the roll."*¹

Again Professor Orr in his chapter on "Enrolment and the Roll" cites *Perkins vs Cusack* (1930):

*"The Federal Court of Disputed Returns faced a petition claiming that many people on the roll for the seat of Eden-Monaro whose real place of living was outside of that electorate. Even though it was alleged that some enrolled electors lived at addresses that lay outside the divisional boundaries, Starke J refused to allow any evidence to be tendered that might contradict the face of the roll."*²

The Coalition notes that this Bill goes further than the Labor and Greens recommendation in the JSCEM report on the inquiry into the 2010 Federal Election. In this inquiry Labor and Greens members recommended that data sources used by the AEC to automatically enrol electors should be subject to disallowance by Parliament. This Bill and the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011* gives sole discretion to the AEC:

*"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 for the purposes of updating the electoral roll. Approval of such agencies by the AEC should be made by disallowable instrument."*³

¹ The Hon. Bronwyn Bishop MP, JSCEM Roundtable Hearing Hansard, 29 February 2012, p. 4 quoting Dr Graeme Orr, *The Law of Politics, Elections, Parties and Money in Australia*, Federation Press, 2010, p. 71

² Dr Graeme Orr, *The Law of Politics, Elections, Parties and Money in Australia*, Federation Press, 2010, p. 71

The Australian Electoral Commission has outlined their process to automatically enrol new electors, which clearly shows that if an individual they believe to be eligible does not respond to their contact, they will be put on the Electoral Roll automatically:

“the AEC would receive data from a third party data source, conduct a data matching process including a check of the eligibility of individuals to enrol, notify eligible individuals and, after a period of 28 days, make additions to the electoral roll and inform electors of the AEC’s action.”⁴

Essentially, individuals are put on the Roll if the AEC believes they are eligible after consulting various “data sources”. Neither this Bill nor the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011* specifies what data sources is required for the AEC to consider what constitutes reliable nor are there any restrictions on which data sources the AEC can use to enrol an elector. There is no provision specifying the standard of proof that the AEC needs to be able to enrol an elector. This Bill leaves all these decisions to the AEC, which Coalition Members and Senators believe is far beyond their jurisdiction.

The AEC states in its submission that it would use Centrelink and state government Roads and Traffic Authority information⁵ and has previously stated that information from Australia Post would also be used. The use of these agencies is not legislated, but are merely stated as the source the AEC considers reliable without providing any evidence to establish the reliability of this information. In reality, the AEC could use any data source it sees fit, including records from the Tax Office or Medicare. The Coalition has previously highlighted in its dissenting reports to the JSCEM inquiries into the 2010 Federal Election and the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011* about the extraordinary risk using these agencies given the high number of duplicate records:

*“The reliance on external data sources that have been collated and that are utilised for other purposes does not make them fit for use in forming the electoral roll. As outlined in the previous report into these proposals, a 1999 report by the House of Representatives Standing Committee on Economics, Finance and Public Administration: Numbers on the Run – Review of the ANAO Report No.37 1998-99 on the Management of Tax File Numbers, found that:
There were 3.2 million more Tax File Numbers than people in Australia at the last census;
There were 185,000 potential duplicate tax records for individuals; 62 per cent of deceased clients were not recorded as deceased in a sample match.*

³ JSCEM Report, *The 2010 Federal Election, Report on its conduct and related matters*. Recommendation 1

⁴ Australian Electoral Commission, Submission 4, Joint Standing Committee on Electoral Matters, *Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012*, p. 4

⁵ Australian Electoral Commission, Submission 4, Joint Standing Committee on Electoral Matters, *Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012*, p. 5

Similarly, an ANAO Audit Report (No.24 2004–05 Integrity of Medicare Enrolment Data) stated that ‘ANAO found that up to half a million active Medicare enrolment records were probably for people who are deceased’⁶

The Coalition has great concern that individuals not entitled to vote may be added to the Roll because of this Bill. It is clear that members of the community who are not Australian citizens or are under 18 or are not living at the address the AEC believes or are otherwise ineligible to vote may be incorrectly added to the Electoral Roll under this Bill. The AEC has stated they will use birth certificate and passport information to further ascertain a person’s eligibility to be on the Roll, however, this runs into difficulties if a person uses different spelling for their name, has changed their name or if there are other inconsistencies between their address details and other eligibility information. Coalition Members and Senators note that under this Bill, there is actually no legislative requirement for the AEC to check whether a person is over 18 or an Australian citizen before they are added to the Roll, meaning any process used to ascertain an individual’s eligibility could be changed without notice.

The first obligation of the AEC is to uphold the integrity of the Roll. The AEC has instead focused on maximising the number of people on the Electoral Roll at the expense of that obligation. Dr Roger Clarke of the Australian Privacy Foundation told JSCSEM on 29 February 2012 that the intention of the AEC should be to maximise the opportunity for people to enrol, not to do it on their behalf:

“I believe part of the problem is that the presumption is that there is a desire to maximise the number of people on the rolls. I do not believe that is an appropriate objective. The notion of the vote is a right—it is an entitlement—and turning it into an obligation, which is what that entails, I just do not believe is appropriate in a democratic process. The intention should be to maximise people’s opportunity to enrol and to vote, and this goes well beyond that.”⁷

The AEC has not advised how many errors they expect to occur as a result of automatic enrolment but have simply played down the prospect of errors occurring. Coalition Members and Senators are very concerned with this lax attitude to the integrity of the Electoral Roll and believes the AEC should focus on encouraging individual electors to be responsible for their own enrolment, rather than doing it for them.

⁶ <http://www.aph.gov.au/house/committee/em/elect10/report/Dissenting.pdf>, p. 183

⁷ Dr Roger Clarke, JSCSEM Roundtable Hearing Hansard, 29 February 2012, p. 6

Privacy Concerns

Coalition Members and Senators also note the risks relating to the privacy of individual electors raised during this inquiry and the previous inquiry into the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011*. Dr Roger Clarke from the Australian Privacy Foundation told the JSCEM Roundtable hearing on 29 February 2012 that he was particularly concerned about the lack of consultation about the Bill, was not aware of any privacy assessments taking place and believed that the outcome of the inquiry appeared to be predetermined:

*"We are not aware of any risk assessment having been performed. We were not aware of any privacy impact assessment having been performed. We were not aware of consultation processed which the Electoral Commissioner has just referred to. We are not aware of the APF or any of the civil liberties organisations being involved in any of those. We have checked back through our records and confined our evidence of that in our own records.....
....Finally, the outcome of the inquiry does appear to be predetermined. The inquiries being held by the same committee came forward with a related proposal, and when we sought further time to address this matter we were told that, 'The committee was merely focusing on the adequacy of the bill in achieving its policy objectives.' This sounds rather less than substantive consideration of the matter."*⁸

On top of the AEC not performing an adequate risk assessment relating to individual privacy, Dr Clarke expressed his concern about a number of aspects of the Bill. In particular, this Bill and the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011* enables electors to be placed on the Electoral Roll without their knowledge and for their address details to then be made available to members of the public who can view the Roll. This is of particular concern to those who are victims of domestic violence, those involved in custody disputes or for other reasons want their address suppressed because of safety fears. Coalition Members and Senators note when electors are added to the Roll without their knowledge or consent they are unable to apply for their address details to be suppressed. Dr Clarke spoke about this matter during the Roundtable hearing on 29 February 2012:

*"But there are a lot of other frustrations and fears amongst electors who are unable to suppress information which is sensitive, particularly their address. Those are additional concerns. There are people who are going to be moving address, who are going to be seeking to not have that address publicised, and it is going to turn up on the electoral roll against their wishes and, in some cases, against their knowledge. Those are things that have to be balanced against the preference of some people to impose a responsibility to vote and a responsibility to enrol. I believe there is a lot of balancing that needs to be done, and we do not believe that this is anything like the balanced approach."*⁹

⁸ Dr Roger Clarke, JSCEM Roundtable Hearing Hansard, 29 February 2012, p. 2

As such, the Coalition believes that electors should have the opportunity to apply for silent elector status before being added to the Electoral Roll. Coalition Members and Senators note that this arrangement is currently in place where electors have responsibility for their own enrolment and for updating their details.

Fraudulent Voting

Coalition Members and Senators are disappointed with the Australian Electoral Commission's attitude to fraudulent voting and have consistently noted the AEC's failure to prosecute any cases of fraudulent voting, despite their being over 20,633 multiple votes at the 2007 Election. At present an elector must fill out an enrolment form to be added to the Electoral Roll, however, if they are automatically enrolled there is no specific record to refer to of why they were enrolled in the first place.

On 29 February 2012, Senator Scott Ryan raised a valid point about how this legislation will make it harder for the Director of Public Prosecutions to prosecute cases of fraudulent voting. When electors are put on the roll automatically, potentially without their knowledge or consent, there will no longer be a signature available for the returning officer to compare if an elector is making a declaration vote. Senator Ryan noted that this will be one less piece of evidence that the DPP will have available if they were attempting to prosecute a case of fraudulent voting:

*"We currently have a signature on a form with an enrolment. We have had a number of discussions in this committee and the Senate committee the AEC comes before in estimates about the difficulty proving certain electoral offences and the burden of evidence required for the DPP to take action. I am concerned that, if we move to what I am going to continue to call automatic enrolment – simply because I think it is automatic in the sense that it does not require action from an elector – we are going to lack that signature from a voter. That worried me. If there are cases of potential electoral fraud, that is one less piece of evidence the commission will have in its armoury. You currently have a form that you can compare signatures to if, for example, people are using declaration votes and have to sign the envelope. That will not be available under these provisions."*¹⁰

⁹ Dr Roger Clarke, JSC EM Roundtable Hearing Hansard, 29 February 2012, p. 6

¹⁰ Dr Roger Clarke, JSC EM Roundtable Hearing Hansard, 29 February 2012, p. 7

Problems in NSW

The previous NSW Labor Government introduced automatic enrolment prior to the 2011 State Election and the result has been that a large number of electors automatically added to the state's Electoral Roll failed to turn up to vote at the 2011 Election. Mr Antony Green, who has previously appeared before JSCEM in a private capacity, noted that the turnout for first time new enrolments in NSW was only 64.3% out of a total of 18,996.¹¹ Mr Green noted in this article that *"Turnout is normally lower amongst 18 and 19 year olds than the rest of the electorate, but not as low as 64.3%"*. This suggests that a large number of automatic enrolments weren't properly notified about their enrolment or potentially never received any correspondence from the NSW Electoral Commissioner. That is a large number of errors occurred thereby diminishing the integrity of the Roll.

Coalition Members and Senators note that this would also do significant damage at a Federal level, where the response rate to correspondence from the AEC is abysmally low. Mr Ed Killesteyn, Chief Electoral Commissioner, noted on 8 February 2012 that there is a response rate of only 20 per cent for letters sent out by the AEC:

*"The evidence is already there in terms of the research that we have done, Senator, that people generally do not respond to the CRU letters. Our response rate at the moment is about 20 per cent."*¹²

This means there is an 80 per cent failure rate for state enrollees to comply with Federal law. This is a serious deterioration of the integrity of the Roll. Coalition Members and Senators are concerned that a number of electors who are added to the Electoral Roll without their knowledge would potentially receive a fine for not voting, which is particularly concerning because a number of electors enrolled automatically may not even be entitled to be on the Roll in the first place.

As noted by the Hon. Bronwyn Bishop MP, a court *"is not to inquire into the correctness of the roll"*, meaning those who have been enrolled automatically may have difficulty removing themselves from the Roll even if they do not have the right to vote. In *Re Berrill's Petition* in 1975 Mrs Berrill complained that there had been the wrongful removal or absence of many electors from their sub-divisional roll:

"A three-judge bench of the High Court sitting as the Court of Disputed Returns rejected the claim on jurisdictional grounds, citing the prohibition on going behind the roll. Stephen J noted that this did not mean errors in the roll were completely unreviewable. Rather, the prohibition assumes errors on the roll ought be put in order before an election"

¹¹ Mr Antony Green, 16 July 2011, *NSW Automatic Enrolment and its Challenge for the Commonwealth* <http://blogs.abc.net.au/antonygreen/2011/07/nsw-automatic-enrolment-and-its-challenge-for-the-commonwealth.html>

¹² Mr Ed Killesteyn, JSCEM Public Hearing Hansard, 8 February 2012, p. 4

rather than risking ‘dislocation of the democratic process’ through legal challenges to the roll during the campaign or after the election.”¹³

The AEC has admitted that it does not prosecute cases of people who have failed to put themselves on the Electoral Roll, as is the individual’s legal obligation, whilst under this legislation those not entitled to be on the Electoral Roll could potentially be fined for failing to vote. It must also be noted that the failure to comply with the Electoral Act and notify the AEC of a change in address is a strict liability offence and yet once again the AEC fails in its obligation to act to enforce the law. Instead it sees this legislation as relieving it of its obligations.

Conclusion

Coalition Members and Senators realise that this Bill is being introduced by Labor and the Greens solely to increase their electoral advantage, despite the severe risk it contains to the integrity of the Electoral Roll and significant concerns about individual privacy. The Coalition notes the complete disregard displayed by Labor, the Greens and the AEC to maintaining the integrity of the Electoral Roll and notes that the reliability of the Roll is paramount not only to ensuring valid elections take place but also in a legal capacity.

The Coalition disagrees with the blank cheque this legislation gives the Australian Electoral Commission to decide what information sources it uses to add people to the Electoral Roll. This legislation does not require the AEC to justify the use of a particular data source or the potential for Parliament to disallow the use of particular data sources. This is in contravention to the Labor and the Greens recommendations to the inquiry into the 2010 Federal Election. Furthermore, this legislation does not state the level of proof required for the AEC to add a person on the Electoral Roll, merely that the AEC write to the elector asking if they have an objection and then notifying them of their enrolment, a process which in NSW led to only 64.3% of those automatically enrolled showing up to vote, compared to an overall turnout of 92.3% for the 2011 NSW State Election¹⁴.

The Coalition notes that this legislation will make it even more difficult for the DPP to prosecute cases of electoral fraud, with there no longer being a requirement for an individual elector to provide a signature when enrolling. This poses a further risk to the integrity of the Electoral Roll and the potential for an increase in fraudulent voting.

¹³ Dr Graeme Orr, *The Law of Politics, Elections, Parties and Money in Australia*, Federation Press, 2010, p. 72

¹⁴ Mr Antony Green, 16 July 2011, *NSW Automatic Enrolment and its Challenge for the Commonwealth* <http://blogs.abc.net.au/antonygreen/2011/07/nsw-automatic-enrolment-and-its-challenge-for-the-commonwealth.html>

As such, Coalition Members and Senators believe that this legislation should be rejected by the Parliament and for the responsibility of enrolling to remain with individual Australian citizens and not be given to the bureaucracy.

The Hon Bronwyn Bishop MP
Shadow Special Minister of State

The Hon Alex Somlyay MP
Deputy Chair – JSCEM

Senator Scott Ryan

Senator Simon Birmingham