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Committee Secretary
Senate Finance and Public Administration Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005

Thank you for the opportunity to make a submission.

Increase in the disclosure threshold for political donations

The proposal to increase the threshold for disclosing gifts to parties and candidates from $1,500 to $10,000 is wrongheaded. Reform is required, but should instead be directed to increasing the transparency of the political process, including as to who is seeking to influence the behaviour of political parties through the donation of money. No increase in the threshold can be justified, let alone such a major increase. The change would have a harmful effect on our democracy. Reform should instead be aimed at the more effective and more frequent disclosure of political donations.

Early closure of the rolls

Changes to our electoral laws should be judged, among other things, according to how well they contribute to the greatest number of eligible Australians having their say at the ballot box. This measure clearly fails that test and should not be supported. It is difficult enough as it is to encourage some Australians to take part in our democratic processes without denying them their say at the very time they are most likely to be motivated to become involved.

Senator Abetz has justified the changes on the basis that: 'During the rush to enrol in the week following the announcement of a general election, incredible pressure is placed on the Australian Electoral Commission's ability to accurately check and assess the veracity of enrolment claims received.' This is a real issue, but is best dealt with by providing the

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Australian Electoral Commission with the resources its needs to do the job to a sufficient standard. It is not justification for disenfranchising people.

Prisoner disenfranchisement

As a matter of principle, all citizens, including prisoners, ought to be able to vote in federal elections. As a matter of law, the denial of the vote to prisoners may be constitutionally invalid. It is not possible to say with certainty what the outcome would be in the High Court, only that the change would be susceptible to challenge.

On the one hand, section 30 of the Constitution states:

> Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

On the other hand, section 7 states that 'The Senate shall be composed of senators for each State, *directly chosen by the people of the State*, voting, until the Parliament otherwise provides, as one electorate', while s 24 provides that 'The House of Representatives shall be composed of members *directly chosen by the people of the Commonwealth*' (emphasis added). If prisoners form part of 'the people' referred to in ss 7 and 24, their right to vote may be guaranteed by the Constitution.

Sections 7 and 24 have already given rise to an implied freedom of political communication.[1] An implication of a right to vote would seem even more strongly connected to the language and subject matter of the provisions. After all, these provisions require a 'choice' by 'the people', which, as s 7 makes clear, is to be made by electors 'voting' at the ballot box. High Court decisions on ss 7 and 24 have not yet determined whether each Australian citizen is vested with a constitutionally guaranteed right to vote.

Dicta from judges of the High Court has raised whether ss 7 and 24 limit the Commonwealth's power to restrict the federal franchise under the *Commonwealth Electoral Act*. In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*[2] McTiernan and Jacobs JJ said:

> the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people.[3]

In *McGinty v Western Australia*[4] Toohey J argued that 'according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy'. Gaudron[5] and Gummow JJ[6] also supported the idea that universal adult suffrage is now entrenched in the Australian Constitution. Gaudron J stated:

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[1] See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[2] (1975) 135 CLR 1.
[3] Ibid 36.
[4] (1996) 186 CLR 140, 201.
[5] Ibid 221-222.
[6] Ibid 287.

> Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as 'chosen by the people' within the meaning of those words in sections 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.'[7]

Only Dawson J rejected this.[8] In *Langer v Commonwealth*,[9] McHugh J supported entrenchment of the franchise by stating that 'it would not now be possible to find that the members of the House of Representatives were 'chosen by the people' if women were excluded from voting or if electors had to have property qualifications before they could vote'.

If this dicta is correct, as seems likely given its broad support and strong textual foundation in ss 7 and 24, it gives rise to the question of whether universal adult suffrage as entrenched in the Constitution extends to prisoners. This would likely be determined not according to the standards of 1901, but according to the notion of the Constitution as a evolving document that today embodies a very different notion of 'the people'. After all, the dicta above suggests that women could not now be denied the franchise, yet many women could not vote in the first federal election held in 1901 and, while the *Commonwealth Franchise Act 1902* (Cth) extended the vote to women, s 4 simultaneously denied it to any 'aboriginal native of Australia'. Indigenous Australians were not granted the vote until 1962.[10]

A challenge to the denial of voting rights of prisoners could involve the High Court determining who constitutes 'the people' under ss 7 and 24. It may be that this is decided by the Court by reference to a more legally precise concept such as citizenship, which is itself not referred to in the Constitution but has been used in constitutional interpretation elsewhere.[11] Of course, this would need to be qualified by other considerations, such as a person having reached a minimum age and other factors that may affect the capacity of a person to make the 'choice' referred to in ss 7 and 24.

The uncertain state of the law means that it is not possible to say whether prisoners possess a right to vote under the Constitution. The High Court has yet to affirm, except in the dicta of individual judges, that ss 7 and 24 even confer an implied right to vote. None of this dicta has analysed the nature of any such right, nor has attention been given to groups currently disenfranchised under the *Commonwealth Electoral Act*, such as certain prisoners and Australian living overseas.

Yours sincerely

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Professor George Williams

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[7] Ibid 221-222

[8] Ibid 183.

[9] (1996) 186 CLR 302 at 342.

[10] Even then, unlike other Australians, it was not compulsory for Aborigines to enrol to vote: *Commonwealth Electoral Act 1962* (Cth). Equality for Indigenous people at Commonwealth elections did not eventuate until 1983, when the *Commonwealth Electoral Amendment Act 1983* (Cth) made enrolment for and voting in Commonwealth elections compulsory for Aboriginal Australians.

[11] See *Street v Queensland Bar Association* (1989) 168 CLR 461 on the interpretation of the words 'a subject of the Queen' in s 117 of the Constitution.