Appendix 7

Extract of a Report from Senate Standing Committee for Scrutiny of Bills

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Senate Standing Committee for Scrutiny of Bills

Seventh Report of 1998

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Electoral and Referendum Amendment Bill (No. 2) 1998

This bill was introduced into the Senate on 14 May 1998 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984* to:

- require new electors to produce one original form of identification at time of enrolment;
- provide that a person witnessing an enrolment application must be an elector in a prescribed class of persons;
- provide that all electors must notify the Australian Electoral Commission of a change of address within one month of moving;
- allow for the provision of date of birth and salutation details of electors to Members, Senators and registered political parties;
- provide that any person sentenced to imprisonment is not entitled to enrol or to vote;
- provide that only the Presiding Officer at a polling place may assist electors in marking their ballot papers;
- provide that the preliminary scrutiny of declaration votes may commence on the Monday prior to polling day;
- raise from $500 to $1,500 the threshold for counting individual amounts received in regard to donations to political parties;
- provide that political parties are required to disclose a total amount of $5,000 or more (currently $1,500) received from a person or organisation during a financial year; and
- increase from $1,500 to $10,000 the amount above which a donor to a registered political party must furnish a return for a financial year.

The Committee dealt with this bill in Alert Digest No. 7 of 1998, in which it made various comments. The Special Minister of State has responded to those comments in a letter dated 11 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Commencement
Subclause 2(3)

In Alert Digest No. 7 of 1998, the Committee noted that, under subclause 2(3) of the bill, many of the items in Schedule 1 are to commence on Proclamation. No provision is made for automatic commencement or repeal at a particular time.

With respect to commencement provisions, the Committee places much importance on Drafting Instruction No 2 of 1989, prepared by the Office of Parliamentary Counsel. This Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been *made* by that time.

4. Preferably, if a *period* after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the *date* option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is *made* by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee noted that paragraph 6 of the Drafting Instruction suggested that clauses providing for commencement by Proclamation, with no other restrictions as to time of commencement, should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain. The Committee further noted that there was no indication in the Explanatory Memorandum of the reason for adopting a provision in this form.

Accordingly, the Committee sought the advice of the Minister on the reason for choosing the mechanism in subclause 2(3).

Pending the Minister's advice, the Committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

On this issue, the Special Minister of State responded as follows:

> In regard to the first point, the provisions listed in subclause 2(3) relate to the upgrading of witnessing requirements for electoral enrolment, the requirement for new electors to produce one original proof of identity document at the time of lodging an enrolment form, and the removal of the one month qualifying period for enrolment.
>
> The delay in commencement of these provisions will enable consultation and discussion with the State and Territory governments giving them the opportunity to enact complementary legislation.
>
> Without complementary legislation the joint roll arrangements could become irrelevant, requiring electors to complete separate enrolment applications to become enrolled on the Commonwealth and State/Territory rolls. This would be confusing to electors, and would create a duplication of the work involved in processing the claims. As a result, the Commonwealth and State/Territory rolls would soon become out of kilter, leading to accusations of a lack of integrity in the rolls – the very thing these amendments are aimed at improving.
>
> The Australian Electoral Commission (AEC) has advised that it will require a minimum of 6 months to make the necessary administrative arrangements to implement the amendments.

Under these circumstances, the amendments may not be able to be implemented before the next federal election.

The Committee thanks the Special Minister for this response.

The voting rights of prisoners
Schedule 1, Item 10

Section 93(8)(b) of the *Commonwealth Electoral Act 1918* governs the circumstances in which prisoners may have their names excluded from the Commonwealth Electoral Roll. It currently provides that those serving a sentence of imprisonment of 5 years or longer are not entitled to enrol or vote at a federal election.

Item 10 of Schedule 1 to the bill proposes to extend this limitation to all prisoners. The Minister's Second Reading speech observes that this proposed amendment is based on a recommendation of the Joint Standing Committee on Electoral Matters, which, in its report on *The 1996 Federal Election*, stated that those "who disregard the Commonwealth or State laws to a degree sufficient to warrant imprisonment should not expect to retain the franchise".

One Minority Report argued that the current provision represented "a reasonable balance between conflicting concepts" and suggested that the new provision "would be even harsher than those provided in 1902". Another Minority Report stated that this issue should be addressed when it took legislative form.

Consideration of the issue in 1994 and before

Section 93(8)(b) of the Act has been subject to considerable debate in recent years. Prior to 1983, the Act denied the franchise to all those serving sentences for offences punishable by imprisonment for 1 year or more. On the passage of the *Commonwealth Electoral Legislation Amendment Act 1983,* the franchise was extended to those serving sentences for offences punishable by imprisonment for less than 5 years – in effect, prisoners were then denied a vote where they were convicted of an offence having a potential maximum penalty of 5 years imprisonment.

In a submission to the Joint Standing Committee on Electoral Matters, the Australian Electoral Commission (AEC) noted that this provision had led to difficulties both in practice and in principle. In practice, it was difficult to establish, with certainty, every case in which the potential maximum sentence was imprisonment for 5 years or more. And in principle, such a provision was potentially inequitable – "a person serving an actual sentence of one month could be excluded from enrolment, while a person on a sentence of 59 months could be eligible, depending on the potential maximum sentence in each case".

Therefore, the AEC submitted that a person should be denied a vote only where they were actually serving a sentence of 5 years or more. This approach was ultimately included in the Act (see item 5 of Schedule 1 to the *Electoral and Referendum Amendment Act 1995*), and is currently the law.

However, the approach advocated by a majority of the Joint Standing Committee in 1994 went somewhat further than the AEC's proposal. In its Report on *The 1993 Federal Election*, the Committee noted that it had previously recommended that enrolment and voting rights be granted to all prisoners, regardless of their sentence (unless convicted of treason or treachery):

> an offender once punished under the law should not incur the additional penalty of loss of the franchise. We also note that a principal aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release. We consider that this process is assisted by a policy of encouraging offenders to observe their civil and political obligations.

In a dissenting report, then Opposition members stated:

> As our coalition colleagues on the committee in the 34th Parliament said when this proposal was last mooted, the concept of imprisonment – apart from any rehabilitation aspects – is one of deterrence, seeking by the denial of a wide range of freedoms to provide a disincentive to crime. A person having committed an offence against society is denied the privileges and freedoms of society of which one important one is the right to vote. The Committee's recommendation is therefore driven by a philosophical position with which we strongly disagree.

The Committee notes the continuing debate and draws the attention of Senators to the various views that have informed it.

The Committee also notes that it currently has before it an inquiry into the appropriate basis for including certain penalty provisions - particularly imprisonment - in legislation. It is possible that people may be imprisoned - perhaps on weekend detention - for relatively minor offences such as failing to provide information or traffic infringements or conscientiously objecting to certain matters. As a consequence, under the bill such people may be denied a vote. While conscious of the continuing debate on philosophical grounds, the Committee would nevertheless appreciate the Minister's advice as to whether consequences such as those noted above are inadvertent or intended.

On this issue, the Special Minister of State has advised as follows:

> Previous legal advice indicates that `sentence' connotes a judicial judgment or pronouncement fixing a term of imprisonment. A term of imprisonment is the term fixed by the judgment as the punishment for the offence.
>
> It should be noted that, as is currently the case, persons detained on remand or otherwise, or who are held at Her Majesty's pleasure, are not considered to be sentenced to imprisonment and, as such, the new provisions would not apply to them.
>
> In regard to persons sentenced to short term imprisonment, where the AEC receives timely notice that a person has been sentenced to a term of imprisonment, appropriate action will be taken to remove that person's name from the roll. However, while the AEC will be seeking to receive early notification from the Controller of Prisons in each State and Territory, where the AEC receives notice that a person has been sentenced to a term of imprisonment, but that term of imprisonment has expired, the AEC does not propose taking retrospective action. It should also be noted that there are inconsistencies in the notification procedures between the various States and Territories.
>
> Further, included in the amendments of the Bill are the repeal of facilities for mobile polling in prisons and the right to a postal vote due to imprisonment. Accordingly, there will be no facility for voting by persons in prison.
>
> The AEC sought details of the practical application of a similar provision in the Tasmanian State electoral legislation. The Tasmanian *Constitution Act 1934* provides that "no person under any conviction … is entitled to vote in any election…". The Tasmanian *Electoral Act 1985* provides that the Controller of Prisons shall forward to the Chief Electoral Officer each month

for appropriate action, a list of all persons sentenced to a term of imprisonment of 12 months or more.

Advice received is that, in a practical sense, it would be extremely difficult for a Tasmanian prisoner to vote in a State election. No provision is made for mobile polling facilities in prisons and prisoners do not qualify for a postal vote as there is a polling place within 8kms of the jail. The proposed amendments of the Bill would have a similar effect.

The AEC also sought advice on the application of prisoner voting provisions in Britain. The advice received was that convicted prisoners in the UK are legally prevented from voting while detained in penal institutions in pursuance of their sentences. However, convicted but unsentenced and remand prisoners may vote. Sentenced prisoners temporarily absent from prison, for example, while on `home leave' are still ineligible to vote. There is no equivalent of weekend detention in Britain.

The Committee thanks the Special Minister for this advice. The Committee notes that, under the Bill, it is possible that voters may be dealt with differently depending on the nature of their sentence and the effectiveness of notification procedures in the various States and Territories. Accordingly, the Committee continues to note the possible effect of this provision on personal rights and liberties.