



Premier
& Cabinet

23 NOV 2009

Mr Robert Furolo MP
Chairman
Joint Standing Committee on Electoral Matters
Parliament House
SYDNEY NSW 2000



Dear Mr Furolo

I refer to the report of the Joint Standing Committee on Electoral Matters on the administration of the 2007 NSW election and related matters dated May 2008.

I enclose a copy of the Government's response.

Yours sincerely

Leigh Sanderson
Deputy Director General (General Counsel)

NEW SOUTH WALES GOVERNMENT



RESPONSE TO THE REPORT OF THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

REPORT NO. 1/54 (MAY 2008)

The Government has considered the report 'Administration of the 2007 NSW Election and Related Matters' tabled in May 2008 by the Joint Standing Committee on Electoral Matters (the "Committee").

The Government welcomes the Committee's finding that the 2007 State election was administered competently and professionally by the NSW Electoral Commission (the "NSWEC"). The Government also notes the Committee's 14 recommendations for reform, many of which are aimed at improving access to electoral services for disadvantaged groups.

The Government's response to each of the recommendations made by the Committee is set out below.

Recommendation 1 - Development of a smart enrolment system

Recommendation 1 of the Committee's report recommends that the NSWEC continue to develop the smart electoral enrolment ("Smart Roll") system with a view to its implementation at the next New South Wales election.

The Smart Roll project has been established by the NSW Government to address concerns about the level of voter enrolment in New South Wales, including concerns that a number of groups such as young people, indigenous Australians, people with disabilities, and people from non-English speaking backgrounds are under-represented on the electoral roll.

Preliminary research undertaken to date indicates that:

- a) only 90.7 percent of the eligible voting population in New South Wales is actually enrolled, a decline of about 5 percent over the last two elections; and
- b) a Smart Roll system would restore overall enrolment levels to a minimum of 95 percent.

Consistent with the Committee's recommendations, the NSWEC has been conducting Smart Roll validation trials with a view to introducing Smart Roll technology for the 2011 State election and beyond. Additional funding of \$1.4 million was granted to the

NSWEC in January 2009 for further testing and development of Smart Roll technology.

On 12 November 2009, the Government introduced the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009 to facilitate the use of Smart Roll technology for the purposes of NSW elections.

The Bill amends the *Parliamentary Electorates and Elections Act 1912* (the "PE&E Act") to assign responsibility for the preparation of rolls for NSW elections to the NSW Electoral Commissioner (as opposed to the Commonwealth), and to allow the Electoral Commissioner to enrol eligible NSW voters, and to update the details of those who are already enrolled, based on reliable data held by other Government agencies.

Recommendation 2 – Exclusion zone for the display of posters

The Committee recommends that section 151B(1) of the PE&E Act be amended to prohibit the display of posters within six metres of the entrance to polling places and that from the six metre mark, up to and including the outer wall, fence or other boundary, no poster can exceed 8,000 square centimetres.

In the Committee's view, such amendments are necessary to minimise confusion arising from the operation of the current section 151B(1), which relates to the exhibition of posters, and section 151H(1), which places restrictions on canvassing for votes and other activities including "exhibiting any notice or sign".

At present, section 151B(1) of the PE&E Act provides that:

A person must not exhibit or post or cause to be exhibited or posted any poster of any size exceeding the prescribed size on the outer wall, fence or other boundary, or within 5 metres, of:

- (a) a polling place, or
- (b) the grounds of an enclosure in which a building used as polling place is situated,

at any time on the day of polling for an election.

This section also provides that "any electoral matter printed, drawn or depicted on any material whatsoever and where any electoral matter is printed, drawn or depicted in sections, such sections, both severally and collectively, shall be deemed to be a poster".

Electoral matter is also defined in section 151B to mean "any matter which is intended or calculated or likely to affect or is capable of affecting the result of any election held or to be held under this Act or of any referendum of the electors held or to be held in accordance with the provisions of any Act or which is intended or calculated or likely to influence or is capable of influencing an elector in relation to the casting of his or her vote at any such election or referendum". This includes "the name of a candidate

at any election, the name of the party of any such candidate, the name or address of the committee rooms of any such candidate or party, the photograph of any such candidate, and any drawing or printed matter which purports to depict any such candidate or to be a likeness or representation of any such candidate”.

Section 151B therefore prohibits the display of posters over the prescribed size limit within 5 metres of a polling place, or within 5 metres of the grounds of an enclosure in which a building used as polling place is situated. This provision was inserted into the Parliamentary Electorates and Elections Amendment Bill 2006 as the result of an amendment moved by the Greens.¹ The Government’s concerns with the proposed amendment were outlined by the Hon. John Della Bosca MLC during the course of debate:

[T]he amendment will stop people putting up large posters within five metres of the building being used as a polling place. It will also stop people putting up large posters on the boundary or the fence of the grounds of the polling place. It will stop people putting up a large poster within five metres of a boundary or a fence. This amendment will not, however, limit the size of posters that can be put up inside the remainder of the grounds. In this case the Government is extremely concerned about the chaos and confusion that would cause. Poster boys would be allowed to put up gigantic billboards in the middle of a school ground in which a polling place is located, but would have to put up a pint-size poster on the perimeter fence or fences, or once they stray into a five metre zone surrounding a polling place.²

Evidence presented to the Committee about the confusion caused by this amendment on polling day demonstrates that the Government’s concerns were well founded.

The Committee’s view is that amendments are necessary to avoid the significant confusion for electoral officials and party workers arising from the different exclusion zones that apply electoral posters and canvassing for votes on polling day.

The Government has recently introduced a Bill to make clear that the display of posters within six metres of the entrance to a polling place is prohibited, consistent with the restrictions that apply to canvassing for votes under section 151H(1)(a) of the PE&E Act.³

The Bill also ensures that the relevant size restrictions on posters will apply from the area starting from the six metre mark *up to and including* the outer wall, fence or other boundary of the polling place. This will ensure that the relevant size limits apply not only within the immediate vicinity of the polling place or fence, but within the remainder of the grounds in which a polling place is situated.

It is noted that the *Local Government (General) Regulation 2005* was amended recently to give effect to the Committee’s recommendation at local government elections.⁴

¹ New South Wales, *Parliamentary Debates*, Legislative Council, 26 September 2006, p 2208.

² New South Wales, *Parliamentary Debates*, Legislative Council, 26 September 2006, p 2208

³ See Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009.

⁴ See *Local Government (General) Amendment (Elections) Regulation 2008*.

Recommendation 3 –Electronic billboards and digital road signs

The Committee suggests that the PE&E Act be amended to prohibit the display of electoral material on electronic billboards and digital road signs.

The Committee's recommendation arises out of a concern that electronic billboards and digital road signs may be used to circumvent the legislative requirements for electoral material to be authorised and registered, and would therefore increase the scope for false or misleading information to be given to voters during elections.

Section 151E(1) of the PE&E Act currently provides that:

Any person who prints, publishes or distributes any matter, being an advertisement, "how to vote" card, handbill, pamphlet, poster, or notice, containing any electoral matter as defined in section 151B (other than the announcement in a newspaper of the holding of a meeting), without:

- (a) the name and address of the person on whose instructions the matter was printed, and
- (b) the name of the printer and address at which it was printed,

being printed in legible characters thereon, shall be guilty of an offence and liable to a penalty not exceeding 5 penalty units or to imprisonment for a term not exceeding six months.

In addition, section 151F(1) of the PE&E Act provides that:

A person shall not, in a public place, distribute any electoral material on the polling day for an election, and on all days to which the polling is adjourned, unless the material has been registered under section 151G for the election.

Section 151G sets out the process for applying for registration.

The Committee's concern about electronic billboards and digital road signs appears to stem from the fact that these mechanisms are not caught by section 151E (which requires printed material to be authorised) or section 151G (which prohibits the distribution of unregistered electoral material on polling day) of the PE&E Act. The Government is not convinced that imposing an absolute ban on the use of new technologies for the display of electoral material is an appropriate or proportionate response to this problem.

The Government has instead introduced a Bill which inserts a new section 151EA into the PE&E Act to prohibit a person from displaying any matter, being an advertisement or notice, containing any electoral matter (within the meaning of section 151B), on an electronic billboard, digital road sign or other similar device, unless the matter contains, in visible, legible characters, the name and address of the person on whose instructions the matter was displayed.⁵

⁵ See Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009.

Recommendations 4, 5 and 6 – Qualification for postal and pre-poll voting

The Committee recommends that sections 114A and 114P of the PE&E Act be amended so that qualification for a postal vote certificate, postal ballot paper, and a pre-poll vote includes electors with a disability and electors who fear for their personal safety (Recommendations 4 and 6). The Committee also recommends that section 114AA of PE&E Act be amended to provide that electors with a disability qualify for registration as general postal voters (Recommendation 5).

The Government agrees that the criteria for qualification as a postal and pre-poll voter under the PE&E Act should be extended to include people with a disability and people who fear for their personal safety.

Such amendments would enhance the voting options available to persons with a disability. In particular, enabling persons with a disability to cast a pre-poll vote would give such persons more scope to choose the most accessible means of casting their vote (eg, by postal or pre-poll voting, or by attending a suitable polling booth).

Enabling people to apply directly for a postal vote on the basis of a threat to their personal safety, without having to first be registered as a silent voter, would make voting easier for electors who have fled a domestic violence situation immediately before an election. As the Committee notes, making such persons eligible to apply for a pre-poll vote would also allow women escaping domestic violence to vote at a time and place of their choosing, safe from any risk of encountering the person from whom they have sought refuge.

The Government has therefore introduced a Bill to amend sections 114A, 114AA and 114P of the PE&E Act accordingly.⁶

Recommendation 7 – Mobile pre-poll voting

The Committee recommends that “the NSWEC trial mobile pre-poll voting for rural and remote communities and that the Commission seek legal advice as to whether such trials can occur under the current provisions of the PE&E Act, or whether amendments will be needed to the Act to enable such a trial”. The Committee further recommends that, “if the advice obtained by the NSWEC suggests that under the existing provisions mobile pre-poll voting cannot be trialled, then an appropriate amendment should be brought forward to enable a trial to proceed”.

The *Local Government (General) Regulation 2005* was amended in June 2008 to enable, among other things, pre-poll voting at mobile booths in remote local government areas.⁷ The amendments enabled pre-poll voting to be conducted using mobile booths at 12 remote areas for the purposes of the 2008 local government elections. The Electoral Commissioner advises that this initiative is being evaluated in anticipation of its being adopted for the 2011 State election.

⁶ See Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009.

⁷ *Local Government (General) Amendment (Elections) Regulation 2008*, clause 332A.

The Government has introduced a Bill to amend the PE&E Act to expressly permit mobile pre-poll voting in remote communities.⁸ Although there is an argument that the existing provisions of the PE&E Act are broad enough to allow mobile pre-poll voting to be trialled, the proposed amendments clarify the scope of the Electoral Commissioner's powers and ensure that this option is available for the 2011 State election.

Recommendation 8 – Form of election results

Recommendation 8 is directed at the NSWEC, and recommends that the election results posted on its website include:

- a) the percentage of the total formal vote received by registered political parties in the Legislative Assembly on a state-wide basis; and
- b) the progressive count for the Legislative Council expressed in terms of the percentage of the formal vote for registered political parties and candidates.

The Committee suggests that the NSWEC should consider seeking advice from electoral authorities in other Australian jurisdictions to assist it in implementing this recommendation.

The Electoral Commissioner advises that election results in the form referred to in paragraph (a) above will be published on the NSWEC's website for the 2011 State election.

As to paragraph (b) above, the Government has provided funds to the NSWEC for the redevelopment of the electronic Legislative Council vote counting system. The Electoral Commissioner advises that, as part of this process, reports will be redesigned so that the progressive post election day count can be expressed as a percentage of first preference votes.

The Electoral Commissioner advises, however, that there are practical difficulties with publishing the election night count for the Legislative Council expressed in terms of the percentage of the formal vote because informality cannot be determined at polling places due to the size and complexity of the ballot paper. The NSWEC will therefore consult with registered political parties about options for a notional informal percentage to be used for the purposes of election night counts.

Recommendation 9 – False and misleading statements

The Committee considers that any future review of the PE&E Act should examine ways to prohibit intentionally false or misleading statements being made about a candidate or party, whether those statements are made by an individual or a media outlet.

⁸ See Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009.

While the Government does not object to this issue being examined as part of any future review of the PE&E Act, it is noted that the regulation of truth in political advertising is fraught with practical difficulties.

Currently, the content of election advertising in New South Wales is regulated by defamation laws and by the PE&E Act, which prohibits untrue statements about how voters may mark their ballot papers. The broader regulation of election advertising has been the subject of a number of Parliamentary inquiries and considerable public debate in the past. While regulatory efforts to encourage truth in political advertising might be desirable, they have proved unworkable in practice.

For example, amendments were made to the *Commonwealth Electoral Act 1918* in 1983 which made it an offence to print, publish or distribute "untrue" political advertising. This provision was repealed as being unworkable just six months later based on the recommendations of the 1984 Joint Select Committee on Electoral Reform. The Committee found that legislation cannot sensibly regulate political advertising in pre-election periods for a number of reasons.

First, it is inherently difficult to distinguish policies, opinions, and assertions from statements of fact. Second, there is a real risk that any 'truth in advertising' legislation would be wilfully misused by political opponents, and that electoral authorities would be inundated with false and vexatious complaints during the pre-election period. Third, enforcement would be difficult, particularly given that any investigatory action taken by a regulator in a pre-election period may influence electors in a manner disproportionate to the matter being investigated.

It should also be noted that the constitutional validity of the 'truth in advertising' provisions of the *South Australian Electoral Act 1985* have not been authoritatively determined by the High Court of Australia, and some commentators continue to question the validity of such provisions.

Recommendation 10 - Accessibility of polling places

Recommendation 10 is directed at the NSWEC, and recommends that it consider developing a target of one fully wheelchair accessible polling booth for each electorate as part of its Equal Access to Democracy Plan, and that it endeavour to advertise fully accessible polling booths well in advance of each election.

The Electoral Commissioner advises that the NSWEC supports this recommendation and will incorporate the target suggested by the Committee into its selection criteria for polling places.

Recommendation 11 - Declared institutions

The Committee recommends an amendment to section 114ZR of the PE&E Act to allow electors in declared institutions to cast an ordinary vote, if they are enrolled in the district in which the declared institution is located.

At present, electors in declared institutions are required to complete a declaration on a declaration envelope or ballot paper envelope. In the Committee's view, allowing residents of institutions such as nursing homes to cast an ordinary vote would be of benefit to elderly and infirm electors who may have difficulty with writing. In addition, the Electoral Commissioner has advised that declared institution votes could be counted more quickly if they were classified as ordinary votes.

The Government has therefore introduced a Bill to amend the PE&E Act to enable electors in declared institutions to cast an ordinary vote, provided that they are enrolled in the district in which the institution is located.⁹

Recommendation 12 – Homeless electors

Recommendation 12 is directed at the NSWEC, and suggests that it provide further information for homeless electors on its website, including a link to the Australian Electoral Commission form entitled 'Electoral enrolment for persons with no fixed address in New South Wales'. Although many homeless electors may not have ready access to the internet, the Government notes that this recommendation is consistent with the views expressed by Homelessness NSW at the public hearing held on 19 March 2007.

The Electoral Commissioner advises that the NSWEC is currently investigating ways of addressing the Committee's concerns about the availability of information to homeless electors.

Recommendations 13 and 14 - Future options for voting

The Committee recommends that the NSWEC examine ways to allow vision impaired electors to cast a secret ballot, for example, through the use of e-voting and i-voting. The Committee also requests a reference to comprehensively review the PE&E Act, including future options for voting using new technologies (Recommendation 14).

The Electoral Commissioner advises that, while the principle behind Recommendation 13 is acknowledged, the implementation of e-voting and i-voting to enable vision impaired electors to cast a secret ballot would require substantial additional funding. This would need to be considered as part of the normal Budget process. The Electoral Commissioner will, however, be considering the outcomes of recent Victorian and Commonwealth online voting trials.

The Government believes that there would be some merit in making a reference to the Committee for a comprehensive review of the PE&E Act. It would, however, be preferable for any such review to await the outcomes of the Commonwealth Government's Electoral Reform Green Paper process to avoid unnecessary duplication. Part 2 of the Green Paper, which is scheduled for release later this year, will cover a broad range of issues relating to Australian electoral systems. This process is likely to highlight opportunities for co-ordinated reform of

⁹ See Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009.

Commonwealth, State and Territory electoral legislation in areas such as franchise and enrolment, registration, polling, and the administration of elections. Accordingly, the Government considers that it is appropriate to await the outcome of the Commonwealth Government's Green Paper process before making a further referral to the Committee.