Submission to Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy and Water for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election - Executive Summary

PIAC notes that the terms of reference for this inquiry include 'All aspects of the 2007 election'. In response to this general reference, this submission includes concerns about recent challenges to the right to vote, access to secret ballots and close of electoral rolls.

The majority of matters listed in the Terms of Reference focus on funding of campaigns such as donations and disclosure requirements. This focus is timely, given the recent inquiry into political donations in NSW. In preparing this submission PIAC has relied on heavily on research undertaken for its submission to the NSW inquiry into political donations earlier in 2008.

The principles of equal representation, and equal opportunity for citizens and parties to participate in political life must be central to the electoral process, along with the principle of ensuring that elected members are free to work in the public interest, unencumbered by undue influence, conflict of interest or corrupt practice. Any arrangements that compromise these principles must be regarded as serious threats to the public interest and representative democracy.

In summary PIAC believes that:

- only individual citizens should be able to make financial contributions that support political parties and candidates, and such donations should be capped;
- election spending of political parties and candidates should be capped;
- the financial and other privileges of incumbents and governments must be better regulated to minimise politically partisan use;

- citizens have a right to full information regarding the financial activities of governments, political parties and candidates and any other entities that have significant political influence;
- public funding should be provided to parties and candidates at local, state and federal levels in order to give greater financial equivalency, and that this funding should be tied to compliance with electoral law;
- Australian legislation and electoral support practices should give effect to the Article 25 of the *International Covenant on Civil and Political Rights*, which provides for universal suffrage, secret ballots 'without unreasonable restrictions'.

If the current arrangements are assessed against these principles it is clear that reform of both public and private political financing and electoral processes is necessary. Spiraling costs of political activity, reliance on large corporate donations by the major parties, the purchase of access to political representatives, relaxing of disclosure provisions, and inadequate independent scrutiny of political financial arrangements all make for an unequal and unaccountable political playing field threatening the fundamental representative role of parties. A lack of transparency and the perception of situations of conflict of interest and corrupt practice create distrust in the community and loss of confidence in our democratic system.

Some argue that civil liberties are impinged upon by the imposition of bans or limits on donations or expenditure. However PIAC is of the view that to create a healthy representative democracy, equity must be seen as the essential underpinning principle and believes that the implied right of freedom of political and governmental expression can properly be protected while limiting the impact of donations and expenditure on the integrity of the political and electoral process.

PIAC trusts that this Committee will lead the jurisdictions in best practice in political financing and create a precedent that can be followed by all other levels of government in Australia. PIAC presents comment and recommendations in the hope that the Government will be a strong advocate for electoral reform through the Council of Australian Governments (COAG) and other fora.

Summary of Recommendations

That there be a ban on all donations to political parties, candidates and associated entities from corporations, unions and organisations and that individual donations be capped.

That, in the absence of a ban on entity donations, there be a cap set on all donations to political parties, candidates and associated entities from corporations, unions and organisations and individuals.

That any entity that has contracts with state or federal governments and foreign citizens be prohibited from making donations to political parties, candidates, associated entities.

That there should be mandatory, detailed, regular and easily accessible public reporting of parliamentary entitlements and the use made of them by individual parliamentarians.

That the regulation of parliamentary entitlements be amended to ensure that such entitlements cannot be used for politically partisan purposes.

That tax and electoral laws be amended in order to permit tax deductibility on donations up to a maximum of $100 and to remove tax deductibility for corporate donations, if such donations continue to be permitted.

That political parties be required to provide full disclosure of their financial status, similar to the requirements for listed companies under the Corporations Act 2001 *(Cth).*

That all political parties, candidates and associated entities be required to publicly report on all donations in a timely manner and at least annually

That during election period, political parties be required to report more frequently on all donations

That the definition of 'gifts' be amended to include money raised at fund raisers and similar events.

That consideration be given to requiring that political parties have their returns independently audited.

That reporting requirements of political parties and candidates include that details of donors be disclosed.

That all reporting is informed by the objective of ensuring easy access and comprehension by citizens.

That all parties, candidates, third parties and influential associated entities be required to report on details of political expenditure.

That both federal and state electoral commissions are adequately resourced to enforce current reporting requirements.

That a review of the role Electoral Commissions be undertaken to determine whether consideration should be given to the establishment of a non-parliamentary body that would be given delegated authority to develop electoral law.

That those provisions of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 *(Cth) that reduced the disclosure requirements be repealed.*

The definition of 'associated entities' to be broadened to include activities not currently included but which qualify a 'threshold of influence' test.

That greater provision of free or fixed-(low) fee broadcast time be considered, including for new contestants.

That consideration be given to requiring commercial media, through licensing agreements, to provide free or subsidised air-time.

That an independent review be conducted into the current restrictions on campaign advertising and balanced and accurate delivery of political information and comment in the mass media.

That a proportion of direct election funding be spent on agreed broader social objectives.

That political parties be required to detail expenditure of direct election funding in a comprehensive and timely manner.

That public election funding be forfeited for non-compliance with requirements.

That limits on expenditure in election campaigns be introduced for political parties, candidates, third parties, influential associated entities.

That public funding be conditional on compliance with expenditure disclosure requirements and set expenditure limits.

That consideration be given to introducing a sliding scale of public election funding.

That greater provision of free or fixed- (low) fee broadcast time be considered, including for new contestants.

That strict guidelines for government advertising be developed and that Auditors General be given a role in reviewing advertisements before they are published or broadcast.

That governments be required to provide annual reports outlining expenditure on advertising, public relations and public opinion research.

That the recommendations of the Senate Finance and Public Administration References Committee on government advertising and transparency and accountability be given serious consideration by both State and Commonwealth Governments.

That both the State and the Commonwealth Governments reintroduce the inclusion of project and program funding detail in the budget papers and schedules of appropriation Acts.

That a review of electoral legislation in each jurisdiction be conducted with a view to identifying evidence for electoral reform in order to:

- *reduce the influence on the political process of large financial and in-kind donors;*
- *reduce spending on elections;*
- *regulate government expenditure on pre-election advertising and electoral activities;*
- *ensure citizens have access to full information about the financial activities of governments, political parties and candidates and other parties who have significant political influence;*
- *ensure public funding allocated to political parties and candidates at local, state and federal levels results in greater financial equivalency, and that this funding be tied to compliance with electoral law.*

That governments introduce measures to strengthen democratic processes and engagement of citizens by:

- *Establishing a civics education program about the right to vote and requirements to do so.*
- *Establishing as compulsory element of primary and secondary education and as a publicly available course, active citizenship training that enables partipants to learn about the various processes available for their engagement with the democratic processes of government and parliament and the skills to effectively utilise those processes.*
- *Maintaining compulsory voting.*
- *Implementing automatic enrolment to vote for all citizens over 18 years of age and the maintenance of that enrolment by the AEC.*
- *Enabling 16-18 year old Australian citizens to enrol and vote on a non-compulsory basis in Federal elections.*
- *Repealing the provisions in the* Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004 *(Cth) which allows for the close of rolls on the day of the Electoral Writs*
- *Improving postal and remote polling by implementing the recommendations made by The Honourable Bruce Scott MP, Submission No 1 to the Inquiry into the conduct of the 2004 Federal Election.*
- *Ensuring citizens with a right to vote are able to cast a secret ballot.*
- *Ensuring that citizens' right to vote is not removed because of their physical abilities, literacy standards, or because of the jurisdiction in which they reside or their place of residence (including prisons).*
- *Enabling above-the-line preferential voting in the Senate at the voter's discretion. Where a voter does not preference either above or below the line, the voter's vote should be exhausted at the last number the voter places.*
- *Implementing fixed four-year terms.*

Response to Terms of Reference

a. the level of donations, income and expenditure received by political parties, associated entities and third parties at recent local, state and federal elections

PIAC recognises that funds are required to actively engage in democratic processes, whether as an elected representative or as a political party. A key question in dealing with donations should be 'how can the risks to effective representative democracy of funding arrangements be minimised'.

Generally speaking, the current system of political financing has resulted in high and increasing costs of campaigns, political inequality, perception of and/or actual corruption, and voter disenchantment. The increased spending is particularly the result of private donations and public funding.

The influence of donations from corporations, unions and organisations to parties and candidates on politics and democracy cause several concerns:

- through large donations, donors purchase access that is not available to ordinary citizens or to smaller, particularly not-for-profit, organisations that have only limited resources and this access can result in actual or perceptions of undue influence;
- reliance on private donations creates a conflict of interest for parties and candidates and can cause them to make decisions that keep donors on side, rather than serve the public interest; and
- there is not a level playing field and the major parties that receive the majority of donations enjoy an unfair advantage over new entrants and minor parties, with incumbents more likely to attract funding.

The recommendations in this submission support increased transparency and accountability in the spending and receipt of both public and private political funding. However, greater reporting and transparency will not in itself remove the potential for the perception and/or reality of undue influence being purchased by large donors. It is only through limiting expenditure and donations that the objectives of probity and fairness can be met.

Limiting donations and expenditure on campaigns

Expenditure and donations can be limited through caps or through total bans. Many European countries have introduced regulation to control election spending in order to level the playing field and enhance representative democracy.

Introducing limits on expenditure in elections campaigns is potentially a way of addressing concerns about the spiraling costs of campaigns and political activity, and the unequal fund-raising capacity of minor parties and new entrants compared to the major parties. Limiting spending will not, however, completely address the concerns about the potential undue influence of large donors, or prevent conflict of interest situations arising. This is because, if for example there was a limit of $100,000 on a party's election spending, there is no reason the whole amount or large proportion of it could not come from one donor.

If, however, a cap on expenditure was accompanied by bans or limits on donations from corporations, organisations and individuals and there was greater regulation and monitoring of use of public funds by incumbents, then indeed there may be greater equality in the political environment as well as less potential for undue influence and corruption.

There were expenditure caps in place in Australia for many years at Federal level and in some states, although they were not well enforced. They were finally abolished at Federal level in 1980 after the Tasmanian

Supreme Court enforced the spending limits.[1] Tasmania is currently the only place in Australia where a limit on election spending exists: $10,000 (increasing each year) per candidate to the Tasmanian Legislative Council.

Limits on or banning of donations

The notion of limiting or banning all donations from corporations, unions and organisations to parties and candidates goes to the heart of current concerns about the influence of private money on politics and democracy.

Options for restricting donations include:

- Banning donations from particular groups or individuals who have a particularly strong interest in government decisions.
- Banning donations from individuals or companies that have contracts with government,
- Banning donations from foreign entities and individuals.
- Imposing limits on all donors, including individuals.
- Limiting donations by heavily taxing donations over a certain limit.[2]

Of these, PIAC prefers a model that prohibits any entity donations and caps individual donations.

In Canada in 2003, following progressive tightening of disclosure requirements, a law was passed that banned all but very small donations from corporations unions and organisations, and allowed only capped donations from individual citizens and permanent residents and prohibited cash donations of over $20.[3]

This change in the law was the result of a scandal involving government expenditure, which involved large contracts being granted to advertising companies that supported the Liberal Government at the time. An Inquiry found a clear link between the granting of the relevant contracts and the making of political donations and cash gifts to members of the Liberal government.[4] Then, in 2006, further changes to federal rules for financing of federal elections were made in the *Federal Accountability Act*[5], which introduced refinements to the political financing regime under the *Canada Elections Act*, including a complete ban on corporate and union contributions and limits on individual contributions to $1,000 per year. Limited tax credits for political contributions were made available as well. The *Federal Accountability Act* also prohibited candidates from accepting gifts that could be seen to influence them in the performance of their duties, if elected, and required reporting of gifts worth more than $500.[6]

An alternative approach to a system-wide ban on donations is to only limit or ban donations from particular groups or individuals who have a particularly strong interest in government decisions. Such a prohibition exists currently in Victoria where, under the *Electoral Act 2002* (Vic), there is a cap on donations of $50,000 each financial year to each political party for holders of gambling and casino licences. There have also been calls for the banning of donations from developers, such as through the Private Members Bill tabled by NSW MLC Lee Rhiannon.[7] While PIAC has sympathy with the intent of this proposal, limiting only particular interest

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1 Sally Young and Joo-Cheong Tham, *Political Finance in Australia: a skewed and secret system* (2006) 94.

2 Ibid, 122.

3 *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, SC 2003, c 19.

4 Andrew Geddis, 'The regulation of election campaign financing in Canada and New Zealand' (Paper presented to the Political Finance and Government Advertising Workshop, Canberra, 25 February 2006).

5 *Federal Accountability Act*, SC 2006, c 9.

6 Ibid.

7 In 2003, Greens MP Lee Rhiannon introduced the *Anti Corruption (Developer Donations) Bill* to the NSW Parliament, to amend the *Election Funding Act*.

groups does not provide a whole-of-system protection against possible influence and corruption. At different times there will be strong interest from various quarters: other industries, forestry, mining, religious groups and so on.

Other proposals include that there be a ban on donations from individuals or companies that have contracts with government, and a ban on foreign donors. PIAC is sympathetic to both these proposals.

Some argue that trade unions should be treated differently from commercial corporations because they are internally democratic, and therefore could have a derivative right to participate in the democracy.[8] However PIAC is of the view that organisations cannot have a direct claim to democratic representation as they are not citizens

Opposition to a complete ban on donations is based on the proposition that being able to donate to political parties is a form of political expression and therefore freedom of speech is denied through bans. It is also argued that being able to receive donations is related to the right to political association. However, the contrary argument is that such rights belong to individual citizens, not to corporations or organisations or political parties as such.[9]

Rather than imposing a ban on all donations from corporations, unions and organisiations some argue that limits should instead be imposed on all donors, including individuals, as occurred originally in Canada. Young and Tham also propose that donations could potentially be limited by heavily taxing over a certain limit.[10]

PIAC supports the adoption of the Canadian model because it is stronger and simpler. Any attempt to just limit particular interest groups, while understandable, is inequitable and rather *ad hoc*. Such an approach will result in ongoing and prolonged debates about which new interest groups may need to be included or removed on prohibited lists.

Limits on election expenditure

There are some key issues to be resolved if the capping of election expenditure is to be effective. Issues of enforceability have to be addressed. The AEC, in its submission to the Joint Standing Committee on Electoral Matters, made the point that no specific legislation could effectively close down all possible future disclosure loopholes, but that tax law provides an example of an approach that could be applied to electoral law. That is, that:

> … disclosure provisions in order to deal with future avoidance schemes as they arise need a general provision prohibiting arrangements contrived with a purpose of circumventing disclosure arrangements and that any such arrangements should be punishable by a fine that is sufficient to act as a deterrent…[11]

Another issue to be overcome is the lack of clarity regarding when election campaigns start; an issue particularly where there are not fixed dates for elections.

In Canada, candidates and registered parties are subject to indexed election expenses limits based on the number of electors registered in the applicable electorate.

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8 Young and Tham, above n 1, 26.

9 Ibid 34.

10 Ibid 122.

11 Australian Electoral Commission, *Submission to Joint Standing Committee on Electoral Matters Inquiry into Disclosure of Donations to Political Parties and Candidates* (2004) 17.

Election expenditure can also be restricted through imposing limits on political advertising. In New Zealand, Canada and the United Kingdom, regulation of political advertising is used to limit election spending. In Canada there are limits on advertising by third parties.

In the United Kingdom parties are given access to free broadcast time but not allowed to buy media air-time for political advertisements. In Australia there was an attempt to ban paid advertising in 1991, but this was struck down by a ruling of the full bench of the High Court when it was found to be constitutionally invalid due to implied freedom of political communication in relation to political matters inherent in the Constitution.[12]

In Canada, there is a limit on the amount spent as well as the time period during which advertisements can be broadcast. A candidate's election expenses limit will vary from one electoral district to another based on a formula set out in the *Canada Elections Act*. Under that Act, an election expense includes any cost incurred or in kind contribution received by a registered party or a candidate that is used ' to promote or oppose a registered party, its leader or a candidate during an election period'.[13]

While there are certainly challenges in implementing expenditure limits, the purpose of creating a fairer political environment is important enough to warrant taking on that challenge. While there may be an 'enforcement gap' in any political finance regulation system, other countries such as Canada and the United Kingdom have shown that a workable system is achievable. Public funding should be made dependent on compliance with expenditure reporting requirements and limits being met.

PIAC favors a whole-of-system approach because it is more equitable. A whole-of-system approach will more effectively control election spending and create greater financial equivalency among parties and candidates, which in turn will create a more level political playing field and an enhanced system of representative democracy. A simpler system arguably also results in simpler compliance requirements, which in turn could result in reduced possibility of loopholes being found.

Local government

PIAC believes that equitable funding arrangements for local government must be part of any reform of political financing. The fact that candidates for local council elections cannot attract any public election funding can result in a narrowing of the field of candidates, as only wealthy individuals or those who attract donations can run effective campaigns. The need to remove sources of potential conflict of interest or undue influence through donations and other means is very important at the local level.

Unlike state and federal spheres, councils are not made up of a government and a legislature. Basically everyone is the government and the opposition. At state and federal level the expectation is that Ministers do not usually make decisions on individual applications. Such decisions are delegated to the appointed officials, and if those decisions are set aside, it is usually of interest to the community, and the legislature. However, at local government level, there is greater involvement of councillors with individual constituent proposals. It is therefore particularly important that accountability and transparency is strongly mandated and enforced.[14]

PIAC believes that there is democratic merit in planning matters being dealt with at a local level. Local Councillors are able to better understand and represent local communities needs. However, having said that, the potential for corrupt practice is as much a threat to representative democracy at local level as it is at the

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12 *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992).

13 *Canada Elections Act*, SC 2000, c 9, s 407

14 A C Harris, NSW Auditor-General, 'Public accountability: Can there be professionalism without politics?' (Paper presented at the Institute of Municipal Management (NSW Division) 1997 Annual Conference, 30 July 1997).

state level and improvements in performance transparency and accountability are much needed at both levels.

The NSW Independent Commission Against Corruption (ICAC) comments, in a summary of its activities for 2006-07[15], that the most frequently represented government sector for all allegations from the public was local government. It was suggested by ICAC that this was an indication of the interest and 'high level of interaction' citizens have with local government. Development applications were the most frequently complained about public sector activities. While such high complaint levels are of concern and may be used to argue that the role of local government in planning should be removed, the comment from ICAC regarding the 'high level of interactions' supports the democracy argument that it is at the local level that people are able to engage in decision-making processes.

In its 2007 Position Paper, *Corruption risks in NSW development approval process*, ICAC outlines a number of options for reform of the development approval process. While ICAC does not see that the different roles of councilors necessarily create greater risk of corruption it does recommend that reasons should be given for all development decisions. PIAC supports this recommendation as sees it as particularly important where councilors set aside the recommendations of council officers.

Recommendations

That there be a ban on all donations to political parties, candidates and associated entities from corporations, unions and organisations and that individual donations be capped.

That, in the absence of a ban on entity donations, there be a cap set on all donations to political parties, candidates and associated entities from corporations, unions and organisations and individuals.

That any entity that has contracts with state or federal governments and foreign citizens be prohibited from making donations to political parties, candidates, associated entities.

b. the extent to which political fundraising and expenditure by third parties is conducted in concert with registered political parties

c. the take up, by whom and by what groups, of current provisions for tax deductibility for political donations as well as other groups with tax deductibility that involve themselves in the political process without disclosing that tax deductible funds are being used

The use of associated entities and third parties

At both state and Federal levels the inadequate disclosure requirements of private donations to political parties have resulted in perceptions of a culture of secrecy, undue influence and corruption. Critical to the effectiveness of any disclosure requirements is whether or not they result in the true source and total amounts of donations being disclosed. While strong disclosure and transparency requirements cannot stop the potential purchase of undue influence of donors, they at least ensure that citizens can see who is giving money to which parties, and when this occurs. Transparency is an essential tool in curbing corruption.

15 'How 2006-07 added up for the ICAC', *Corruption Matters* (Sydney) 30 November 2007, 4.

The use of fundraisers and 'associated entities' and 'third parties' to hide the identity of donors continues to be of concern. Disclosure requirements must cover all significant political actors. For example, if the use of trusts as conduits for political donations is permitted all other disclosure laws become somewhat irrelevant.

Parties and candidates can exploit loopholes to avoid current disclosure requirements and there is little interest from the major parties in closing those loopholes. An example is the practice of splitting big donations into smaller amounts below the threshold or donating amounts in every state and territory.

Associated entities are usually defined as an entity that is either controlled by one or more political parties or operates wholly or to a significant degree for the benefit of one or more political parties. PIAC is of the view that 'third parties' and influential 'associated entities' must be covered by disclosure and other electoral law and by any legislated limits on expenditure. The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) increased reporting requirements of third parties; including requiring detailed reporting of expenditure, even though this is not required of political parties.

Including third parties in political financing regulation raises particular issues that must be carefully considered. Issue-advocacy organisations play an important role in a democracy as they can raise issues that mainstream political parties may choose not to raise. Regulations must ensure as much as possible that election spending limits are not completely exhausted through the activities of third parties but equally that third parties are not prevented from genuine issue advocacy.[16]

Tax subsidies

Tax deductibility of donations to political parties was increased from $100 to $1,500 in 2006 and widened to include corporate donations. This has resulted in a significant increase in public subsidy to political parties, through revenue foregone.

PIAC does not believe that such an increase and widening of eligibility is in the public interest. While tax deductibility of small donations (up to $100) may stimulate involvement of citizens in political activity and therefore serve a good public purpose, this argument cannot be applied to donations made by corporations whose mission is to maximise profit, and which—quite properly—do not have the same rights as individual citizens in a democracy. Increasing the threshold to $1,500 also does not meet the requirements of good tax policy as it is regressive, unfairly advantaging those who are already well off.

Indirect funding of election campaigns

Individuals and corporations can avoid disclosing support of electoral campaigns by indirect funding. This occurs through:

- parliamentary entitlements of incumbents;
- the privileges of government;
- tax subsidies, through tax deductibility of private donations (increased in 2006 to $1,500, from $100);[17]
- generous tax concessions to elected representatives, not available to other Australian workers.

While some parliamentary entitlements such as superannuation only benefit the individual elected representative, many other entitlements such as salaries, allowances for staff, postage and print are of benefit to the parties more generally. The more members elected, the greater is this advantage.

Federally, under (then) Prime Minister The Hon John Howard MP, existing rules regarding entitlement to and the use of parliamentary allowances changed to further benefit incumbents. In 2006, the printing allowance was increased to $150,000 with almost half allowed to be carried over to the next year, and to be used for

16 Colin Feasby, 'Issue Advocacy and Third Parties in the United Kingdom and Canada', (2003) 48 *McGill LJ* 11.

17 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), Sch 4.

postal vote applications and how-to-vote cards.[18] This allowed members to use their Electorate Mailout Account more in the months preceding the election.

PIAC believes that parliamentary entitlements should be better regulated at Federal levels to ensure that they are not used for politically partisan purposes.

Recommendations

That there should be mandatory, detailed, regular and easily accessible public reporting of parliamentary entitlements and the use made of them by individual parliamentarians.

That the regulation of parliamentary entitlements be amended to ensure that such entitlements cannot be used for politically partisan purposes.

That tax and electoral laws be amended in order to permit tax deductibility on donations up to a maximum of $100 and to remove tax deductibility for corporate donations, if such donations continue to be permitted.

d. the provisions of the Act that relate to disclosure and the activities of associated entities, and third parties not covered by the disclosure provisions

Without transparency or access to information, accountability becomes an impossible goal. Access to information is an important democratic principle and a right of all citizens. This principle was confirmed as a priority for Australian citizens at the Australia 2020 Summit. The Future of Australian Governance stream, as described in the Initial Report, listed as desired outcomes: 'Open access to government information and strengthen protections of free press in order to facilitate a more open and publicly accountable government.'[19]

Current disclosure requirements are inconsistent and inadequate, in terms of what is required to be reported, when it is required to be reported and how it is to be reported. Disclosure laws should require detailed reporting of both donations and expenditure that is timely, frequent, accurate and easily comprehended. Such disclosure laws should also apply to all significant political actors.

In the case of fund-raisers the question of whether the amount paid, for example for a dinner, is 'market value' is made by the giver. The Australian Electoral Commission (AEC) has made several recommendations in this regard including that all payments at fundraising events be deemed to be donations.[20]

Countries such as the United Kingdom, the United States of America and Canada all require much more frequent reporting and some countries, such as New Zealand, require returns (at least from parties with significant income) to be checked for accuracy by an independent auditor.[21]

The AEC made recommendations in 2004 to the Joint Standing Committee on Electoral Matters, commenting that as a result of the poor record keeping of some parties the AEC had difficulty in determining the degree of compliance with electoral laws.[22] The 1996 post-election report suggested that annual returns be accompanied by a report from an accredited auditor attesting to the correctness of the return.[23]

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18 Young and Tham, above n2, 56.

19 Australian 2020 Summit, *Initial Report* (2008) 33.

20 Australian Electoral Commission, above n11, 24.

21 Young and Tham, above n2, 119.

22 More recently, media reporting in NSW indicates that there are serious inconsistencies between what is being reported by parliamentarians in terms of donations received and by donors in terms of amount and to whom they have made donations. See, for example, Debra Jopson, Edmund Tadros and Matthew Moore, '800 face

The *Electoral and Referendum Amendment Act*[24], which increased disclosure thresholds from $1,000 to more than $10,000 for anonymous donations and loans, and from $1,500 to $10,000 for other donations has seriously diminished transparency and accountability at a Federal level. PIAC believes it is in the public interest that these increases in thresholds be repealed and replaced with stringent regular pre-election reporting requirements using the previous lower thresholds. In the event that the Parliament bans entity donations and imposes a low cap on individual donations, further consideration will need to be given to the disclosure thresholds.

PIAC believes there is an urgent need for the introduction of stronger disclosure requirements for both receipts and expenditure of private donations to political parties, candidates and other significant political actors.

PIAC is of the view that the internal financial dealings of political parties should also be subject to full disclosure, as is the case for corporations. Any political financing regime that is based on the principles of fairness and accountability must recognise the advantage accrued wealth can give political parties and should therefore require full disclosure of financial circumstances of parties including capital assets.

There are concerns that if expenditure is regulated for political parties and associated entities, third parties will then become the focus of political activity. Regulatory frameworks therefore must capture such third parties.

In Canada there has been progressive tightening of disclosure requirements. In 1991, the Royal Commission on Electoral Reform and Party Financing recommended that:

- Election expenses incurred by any group or individual independently from registered parties and candidates not exceed $1,000.
- Sponsors be identified on all advertising or distributed promotional material.
- There be no pooling of funds.

As noted above, subsequently, in 2003, a law was passed that banned all but very small donations from corporations unions and organisations, and allowed only capped donations from individual citizens and permanent residents and prohibited cash donations of over $20.[25]

Compliance with the disclosure requirement

Accountably is dependent not only on disclosure requirements but the capacity to have them effectively enforced, including a penalty regime that can act as a deterrent. There have been concerns raised about the adequacy of the resources of both the NSW and federal electoral authorities to properly ensure compliance with electoral law. However, the AEC points out that while it is empowered to have fairly broad investigative powers, it is not able to go on 'fishing expeditions' and that the Commission must have 'reasonable grounds' before undertaking an investigation into a matter. It does not have powers on par with the Australian Competition and Consumer Commission as some appear to expect and amendments would need to be made to electoral laws if this were the will of the Parliament.[26]

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charges for donations', *The Sydney Morning Herald*, 3 May 2008 <http://www.smh.com.au/articles/2008/05/02/1209235155728.html> at 16 May 2008.

23 Australian Electoral Commission, above n11, 12.

24 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

25 *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, SC 2003, c 19.

26 Australian Electoral Commission, above n11, 13.

This raises interesting questions, which deserve further serious consideration. Brendan McCaffrie argues that consideration could be given to establishing a non-parliamentary body to which authority regarding electoral law is delegated. This would be one way of dealing with the tendency of political parties to prioritise partisan interests over democratic principles when creating, amending or neglecting electoral law. Emerging democracies such as Jamaica and Costa Rica have created such non-parliamentary bodies in order to protect the integrity of their democracies. Setting up such a body and delegating authority to it is not a threat to the supremacy of parliament as the parliament always retains the right to oversee and abolish such a body. While the authority to determine electoral boundaries is already delegated to the AEC, McCaffrie does not see the AEC as the appropriate body for further delegation of development of electoral law.[27]

The record shows that indeed partisan interests too often have resulted in changes to, or neglect, of electoral law, which in turn causes damage to our democracy. The federal reduction of disclosure requirements introduced in 2006 and the failure to take up AEC proposals to pre-empt exploitation of loopholes in legislation are recent examples.[28]

Recommendations

That political parties be required to provide full disclosure of their financial status, similar to the requirements for listed companies under the Corporations Act 2001 *(Cth).*

That all political parties, candidates and associated entities be required to publicly report on all donations in a timely manner and at least annually

That during election period, political parties be required to report more frequently on all donations

That the definition of 'gifts' be amended to include money raised at fund raisers and similar events.

That consideration be given to requiring that political parties have their returns independently audited.

That reporting requirements of political parties and candidates include that details of donors be disclosed.

That all reporting is informed by the objective of ensuring easy access and comprehension by citizens.

That all parties, candidates, third parties and influential associated entities be required to report on details of political expenditure.

That both federal and state electoral commissions are adequately resourced to enforce current reporting requirements.

That a review of the role Electoral Commissions be undertaken to determine whether consideration should be given to the establishment of a non-parliamentary body that would be given delegated authority to develop electoral law.

That those provisions of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 *(Cth) that reduced the disclosure requirements be repealed.*

The definition of 'associated entities' to be broadened to include activities not currently included but which qualify a 'threshold of influence' test.

e. the appropriateness of current levels of public funding provided for political parties and candidates contesting federal elections

Refer to part (g) for response to public funding of elections.

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27 Brendan McCaffrie, *Removing partisan bias from Australian electoral legislation: A proposal for an independent electoral law committee* (2008).

28 Australian Electoral Commission, above n11, 15.

f. the availability and efficacy of 'free time' provided to political parties in relation to federal elections in print and electronic media at local, state and national levels

In its 2003 report to the Commonwealth Heads of Government Meeting, *Open Sesame*, the Commonwealth Human Rights Initiative (CHRI) argued that the right to information underpins the realisation of all other rights, and this right is recognised through Article 19 of the *International Covenant on Civil and Political Rights*. At its inception, the United Nations called the right to freedom of information 'the touchstone for all freedoms to which the United Nations is consecrated'. And that while the duty to enable access to information rests with government, the duty to release information has widened to include other organisations, institutions and corporations where their activities affect the rights of citizens.[29]

While emphasising the importance of the public receiving information from candidates during an election period, it is not possible to provide a comprehensive response to this issue. The general issue of how communities access information raises other issues that should be investigated to ensure that that all members of the Australian community can access accurate information from many perspectives in appropriate formats.

The need for a review of political promotional material and current restrictions on campaign advertising was highlighted by concerns raised by the Reserve Bank of Australia about certain pamphlets circulated during the 2004 Federal Election. There are serious indications that the current restrictions are not as effective as is desirable in a democracy, which relies on the electorate to cast an informed vote.

Matters of concern in the delivery and access of campaign material and comment include:

- accessing other forms of media such pay television services;
- access to non-broadcasting services such as web-sites;
- using public space for posters and meetings;
- design, funding and access to information for people with disabilities, literacy problems or non-English speakers;
- responsibility of print and other news media to provide reporting or access to all candidates.

Recommendations

That greater provision of free or fixed-(low) fee broadcast time be considered, including for new contestants.

That consideration be given to requiring commercial media, through licensing agreements, to provide free or subsidised air-time.

That an independent review be conducted into the current restrictions on campaign advertising and balanced and accurate delivery of political information and comment in the mass media.

[29] Commonwealth Human Rights Initiative, *Open sesame: Looking for the right to information in the Commonwealth* (2003) Executive Summary.

e. the appropriateness of current levels of public funding provided for political parties and candidates contesting federal elections

g. the public funding of candidates whose eligibility is questionable before, during and after an election with the view to ensuring public confidence in the public funding system

h. the relationship between public funding and campaign expenditure

The following section responds to general concerns about the purpose and accountability of public funding for elections. The questions raised by part (e), (g) and (h) of the Terms of Reference are considered in this section.

Direct public funding

Direct public funding takes the form of election funding and through funds such as the NSW Political Education Fund and federally through annual funding of research centres.

In 1984, the Federal Government attempted to avoid the potentially corrupting influence of private money on politics through the introduction of public funding of elections. The Commonwealth Joint Select Committee on Electoral Reform 1983 said that public funding would:

- assist parties in financial difficulty;
- lessen corruption;
- avoid excessive reliance upon 'special interests' and institutional sources of finance;
- equalise opportunities between parties; and
- stimulate political education and research.[30]

Direct public funding has supplemented the continuing and increasing private contributions and has done little to reduce the influence of wealthy and powerful interest groups. It has not resulted in financial equivalency between parties or improved accountability and transparency. Neither does it appear to have stimulated research, policy evaluation or programs to support an informed electorate.

This broader issue about civic responsibility is something that the community continues to identify as an issue. The summary of the Australia 2020 Summit describes the participants in the Australian Governance theme as calling for the Government to 'strengthen the participation of Australians in their governance … through grassroots and non-traditional community engagement, as well as more formal electoral processes'.[31] Placing conditions on public funding for election campaigns is an opportunity to make this proposal a reality.

In 2004, the Australian Electoral Commission (AEC) commented that public funding does not appear to have achieved the goals of reducing party reliance on funds from sources other than public funding or equalising the opportunities between parties and it may be appropriate for the scheme to be reviewed. The comment included the suggestion that a degree of funding could be paid yearly to assist with administration costs.[32]

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30 Australian Electoral Commission, above n11, 10.

31 Australia 2020 Summit, above n19, 32.

32 Australian Electoral Commission, above n11, 11.

Eligibility for funding under the federal system is based on receiving 4% of the vote and it has no requirement for detailed reporting of expenditure. The amendments to the *Commonwealth Electoral Act 1918* in 1995, which decreased disclosure requirements, undermined the accountability improvements intended when public funding was introduced.[33]

The Federal election-funding model does not require that direct election funding be tied to anything other than very broad political outcomes. The original rationale for introducing public funding included the expectation that broader benefits would result from public funding.

PIAC supports the tying of at least a portion of direct election funds to particular social objectives, such as occurs in other countries. This could support a refocusing on grass-roots democracy and deliberative democracy including community consultation and campaigns, policy development, and party building; countering the current tendency in Australia for political parties to spend the majority of their funds on election advertising in the election period.[34]

To successfully introduce limits on election expenditure in an equitable manner, measures must be introduced to prevent or at least minimise the misuse of public funds by governments and incumbents.

Current public election funding is also inherently inequitable in two ways. Firstly, because it is a retrospective payment, therefore disadvantaging new entrants, and second because the payment is calculated in a way that favors the major parties. If the rationale for public funding is to assist political parties and candidates to participate in the democratic system then there is no justification for such a wide disparity in remuneration. A solution to this disparity in funding would be to create a sliding scale of payment per vote, with a higher payment for the first bracket of votes won and then progressively decreasing. Such a measure would contribute to financial equivalency between parties and candidates.

Recommendations

That a proportion of direct election funding be spent on agreed broader social objectives.

That political parties be required to detail expenditure of direct election funding in a comprehensive and timely manner.

That public election funding be forfeited for non-compliance with requirements.

That limits on expenditure in election campaigns be introduced for political parties, candidates, third parties, influential associated entities.

That public funding be conditional on compliance with expenditure disclosure requirements and set expenditure limits.

That consideration be given to introducing a sliding scale of public election funding.

That greater provision of free or fixed- (low) fee broadcast time be considered, including for new contestants.

Government sponsored advertising and election campaigns

There has been general criticism that governments have extended their campaign funds by using public funds for large public relations and media units with increased use of consultants. Governments are responsible for managing the public purse and have an ethical responsibility to ensure that it is the public interest that informs all decisions about expenditure of funds. Government advertising has become a serious concern at both NSW and Commonwealth levels.

The Federal Government's $14 million GST 'community information and education campaign' in 1998 was described by Tony Harris, former NSW Auditor-General, thus:

33 Young and Tham, above n2, 98.

34 Ibid.

> This was the awful precedent, which permitted government to advertise all of its election promises using public monies, as long as those policies had been approved (not necessarily introduced) by cabinet. Although the federal auditor-general approved the campaign, eight auditors-generals in the states and territories saw the advertisements as setting an unfortunate precedent.[35]

Similarly, in 2005 the Howard Government undertook an advertising campaign on its industrial relations policies before it had introduced the relevant legislation. This campaign was not in the context of a general election but was undertaken to offset non-government sector advertisements that criticised the intended legislation.

Harry Evans, Clerk of the Senate, pointed out in 2006 that the lack of transparency in such public spending was the result of the current financial system.

> … the financial system now in place makes it extremely easy for government to find large amounts of money for virtually any purpose, including new advertising campaigns for new projects…
>
> … illegalities and serious problems in the management of special appropriations and special accounts had been pointed out in reports of the Australian National Audit Office and that these problems were not the product of poor management alone, but of a financial system which by its nature leads to loose dealings with money. The Department of Finance and Administration has promised better management, but the Parliament is still not in the position properly belonging to a legislature, of actually approving the expenditure.[36]

While there are, of course, legitimate reasons for governments to advertise, the key issue of concern remains whether that advertising is party political and the level of transparency of the funding. In the same debate the point was made that there was insufficient detail available regarding the costs of research, development and production of advertisements.

PIAC is of the view that such weaknesses of accountability in the political financial system raise questions about probity, which go much wider than just government advertising. While PIAC does not dismiss all merit of accrual accounting and its associated outcome and output reporting, the move away from detailed program and project items in budgets has significantly reduced the capacity of the Parliament to scrutinise the expenditure of public funds by governments.

In March 2007, the Commonwealth Parliamentary Standing Committee on Finance and Public Administration made a number of recommendations that:

> … would go some way to restoring the Parliament's constitutional and historical prerogatives with regard to the control of the Executives' funding and expenditure.[37]

Recommendations included 'that expenditure should be reported at the levels of programs in budget documents, including in the schedules to the Appropriation Acts'.[38] PIAC is of the view that the current lack of transparency is a threat to Australia's system of parliamentary democracy.

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35 Tony Harris, 'The Auditor-General's Role in Politics' (Paper presented at the Political Finance and Government Advertising Workshop, Canberra, 25 February 2006) 6.

36 Harry Evans, 'Government advertising – funding and the financial system', *Parliament Matters,* February 2006, 8-9 <http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/key/library.html> at 18 February 2008.

37 Senate Standing Committee on Finance and Public Administration, Parliament of the Commonwealth of Australia, *Transparency and accountability of Commonwealth public funding and expenditure* (2007) ix.

38 Ibid, 52.

Government advertising is quite strictly regulated in several countries, such as the United States of America where the *Consolidated Appropriations Act 2004*, states that 'No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress'.[39] In Ontario, Canada, the *Government Advertising Act 2004*[40] requires that the Auditor General be provided with all proposed advertising and conduct are review of the material provided to ensure it complies with the requirements of the Act, which include that it 'must not be partisan' and 'must not be a primary objective of the item to foster a positive impression of the governing party or a negative impression of a person or entity who is critical of the government'.[41]

The Senate Finance and Public Administration References Committee published the report of its inquiry, *Government Advertising and Accountability* on 6 December 2005. The Committee found that '[e]xpenditure on Commonwealth government advertising has climbed steadily since 1991-92'.[42] Furthermore, the official figure of $126.75 million excludes significant areas of related expenditure and so is a serious underestimate of the total cost.[43] Amongst the Committee's recommendations were the strengthening of the disclosure requirements, and requiring the Auditor-General to provide independent scrutiny of compliance with regulations.

> Related to the concern about the political use of government advertising is the use of government resources for establishing large public relations and media units and the employment of consultants to undertake political work for government. This creates another problem for transparency and disclosure as consultants can claim that information is protected from disclosure on the basis that it is 'commercial in confidence' and thus create even more secrecy than if public servants were responsible. It is also important where consultants are employed that procurement guidelines are of a high standard and are complied with.[44]

There needs to be greater regulation, transparency and scrutiny of the use of government resources. There is a critical role for the parliament in this matter as well as for independent bodies such offices of the Auditor General.

Recommendations

That strict guidelines for government advertising be developed and that Auditors General be given a role in reviewing advertisements before they are published or broadcast.

That governments be required to provide annual reports outlining expenditure on advertising, public relations and public opinion research.

That the recommendations of the Senate Finance and Public Administration References Committee on government advertising and transparency and accountability be given serious consideration by both State and Commonwealth Governments.

That both the State and the Commonwealth Governments reintroduce the inclusion of project and program funding detail in the budget papers and schedules of appropriation Acts.

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39 *Consolidated Appropriations Act*, 2004, HR 2673, §601.

40 *Government Advertising Act*, SO 2004, c 20.

41 *Government Advertising Act,* SO 2004, c 20, ss 2(2), 3(2), 4(2) and 6(1).

42 Senate Standing Committee on Finance and Public Administration, Parliament of the Commonwealth of Australia, *Government advertising and accountability* (2005) xiii.

43 Ibid, 17.

44 Ibid, see recommendations 5-13.

i. the harmonisation of state and federal laws that relate to political donations, gifts and expenditure

PIAC supports the principle of consistent legislation between Australian jurisdictions in relation to political donations, gifts and expenditure. However, harmonisation should not be used as an excuse for inaction. In the process of achieving uniform requirements, the weakest form of legislation should not be adopted. For example, a jurisdiction that has the weakest form of disclosure requirements should not become the norm for all jurisdictions. Nor should it prevent jurisdictions implementing arrangements that improve and preserve democratic processes.

In preparing this submission, PIAC encountered a number of legislative differences between the jurisdictions. A more thorough review by the AEC or Committee would probably uncover many more.

The variations of concern which were identified in preparing for this submission include:

- NSW electoral law is particularly lax, requiring parties to report the donations they receive only every four years.

- Victoria places, under the *Electoral Act 2002* (Vic), a cap on donations of $50,000 each financial year to each political party for holders of gambling and casino licences.

- Tasmania is the only jurisdiction in Australia that limits election spending to $10,000 (increasing each year) per candidate to the Tasmanian Legislative Council.

Recommendation

That a review of electoral legislation in each jurisdiction be conducted with a view to identifying evidence for electoral reform in order to:

- *reduce the influence on the political process of large financial and in-kind donors;*
- *reduce spending on elections;*
- *regulate government expenditure on pre-election advertising and electoral activities;*
- *ensure citizens have access to full information about the financial activities of governments, political parties and candidates and other parties who have significant political influence;*
- *ensure public funding allocated to political parties and candidates at local, state and federal levels results in greater financial equivalency, and that this funding be tied to compliance with electoral law.*

Other Aspects of the 2007 Election

The Joint Standing Committee in its Terms of Reference is considering 'All aspects of the 2007 Federal Election'. This section of the submission refers to other matters of concern to PIAC, including:

- the need for ongoing civic education programs, which includes the right and responsibility to vote and active citizenship;
- closing of the electoral rolls;
- postal and remote polling;
- disenfranchisement of prisoners;
- preferential voting systems;
- electoral terms.

Civic Education

The discussion in the Australian community about civic responsibilities has become more active in recent months due to the Government Initiative of the Australia 2020 Summit. The participants in the Australian Governance theme took the opportunity to put forward a vision where there was greater involvement and strengthening of democratic structures, they called for the Government to 'Introduce innovative mechanisms to increase civic participation, collaborative governance to strengthen civic engagement and trust, facilitate "deliberative democracy" and strengthen citizen engagement'.[45]

PIAC is of the view that electoral law should support this vision, including the right and arrangements to vote in elections. In Australia, however, unusually for a system of parliamentary democracy, there is no constitutional right to vote.

It is useful to repeat the oft-made observation that the Australian people do not bear an obligation to cast a ballot. 'Compulsory voting' is something of a misnomer.

The *Commonwealth Electoral Act 1918* ('the Act') in section 245(1), headed 'Compulsory voting', provides that:

> It shall be the duty of every elector to vote at each election.

An 'elector' is defined in section 4 of the Act as a person whose name appears on the electoral roll. Section 101(1), headed 'Compulsory enrolment and transfer', further imposes an obligation of enrolment on those persons who are 'entitled' to be included on the relevant electoral roll. Section 93 details the entitlement to vote, and expressly excludes certain persons from this entitlement including those with a lack of capacity.

The Australian Parliament also has chosen to make provisions of the Act that prevent the casting of votes by certain categories of prisoners. The end result is that there is no general compulsion on all Australians—indeed not even on all adult Australians—to cast a vote.

There are both indirect and direct references to voting in the Australian *Constitution*. The references include:

> **CHAPTER I – THE PARLIAMENT**
>
> **PART II - THE SENATE**
>
> . . .
>
> **8 Qualification of electors**

[45] Australian 2020 Summit, above n19, 33.

> The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.
>
> **PART III - THE HOUSE OF REPRESENTATIVES**
>
> **24 Constitution of the House of Representatives**
> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth …
>
> **30 Qualification of electors**
> 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.
>
> …
> **PART IV - BOTH HOUSES OF PARLIAMENT**
>
> **41 Right of electors of States**
> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

It is clear that both sections 8 and 30 provide the Parliament has the power to make laws determining 'qualification of electors', subject in section 8 to the *Constitution*.

Section 24, through the words 'directly chosen by the people of the Commonwealth', seems to provide some basis for an argument that all citizens of the Commonwealth of Australia have a right to vote to choose the members of the House of Representatives. However, this section has been considered by the High Court of Australia and found to provide no such right contained in that section: *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1. In that case, the majority of the High Court held that this section, in light of the words of sections 8 and 30, does not provide a guarantee of universal adult suffrage.

The notion of a 'right to vote at elections' is somewhat confusing in section 41, which provides that the 'right to vote' in a federal election rests on the person being an 'adult' with a right to vote in their own state in the larger of that state's houses of parliament. However, that 'right' is determined by the relevant state parliament or constitution. So, for example, the entitlement or qualification to vote is set out in an ordinary Act of the NSW Parliament, the *Parliamentary Electorates and Elections Act 1912* (NSW) and is therefore subject to change through the normal parliamentary process.

Thus, section 41 does no more than prevent the Commonwealth from excluding a person from voting in a federal election if that person has a right to vote in a state election. The Commonwealth Parliament can, however, provide an entitlement to vote to an adult who is not entitled to vote in a state election.

Despite having ratified the *International Covenant on Civil and Political Rights* (ICCPR)[46], and despite the absence of any Constitutional right to vote, Australia has failed to legislate to give effect to Article 25, which provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: … (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors …

[46] Australia signed the ICCPR in December 1972 and it came into force for Australia in August 1980.

The current system of positive obligations around attendance at a polling place has been in place in for Federal elections since 1924 (though compulsory enrolment and attendance for Aboriginal people was introduced only in 1984). Governments should implement civic education programs that promote this character and custom of elections in Australia. Civics education should aim to:

- Reduce confusion about voting using different systems that operate in jurisdictions and for the three different tiers of government in Australia.

- Support recently arrived immigrant populations, many of whom have English as a second language and many of whom come from countries where voting is not compulsory.

Beyond civics education, PIAC urges the Federal Government to careful consider the idea of active citizenship training as proposed by the Future of Australian Governance stream at the Australia 2020 Summit. This proposal encompasses compulsory school education on the various mechanisms of government to develop policy and legislation and the opportunities for individuals in the community to participate in these processes. This would ideally include activities that directly engaged students in those processes, such as parliamentary and other government inquiries, representations to local and other parliamentarians, use of petitions and other parliamentary processes to raise issues or seek information from government. Such education should also be available more broadly to Australian citizens and non-citizens. It would enable participants to have a stronger sense of the representative nature of Australian government and the health of democracy in this country.

Closing of the electoral rolls

Amendments to the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004* (Cth) closed the electoral rolls on the day the Electoral Writs for the 2007 election. Previous elections allowed for rolls to be open seven days after the date of the writ ('close of rolls period'). The amendments prevented new enrolment, re-enrolment or transfer or enrolment, effectively freezing the electoral roll as it stood at the day the Election Writs were issued.

The impact of closing the electoral rolls immediately upon the announcement of an election is felt disproportionately by the young, people who have changed their address, the homeless, first-time voters and other newly enfranchised citizens (such as immigrants), who typically register to vote in great numbers in the grace period permitted by section 155 of the Act.

The last instance in which the electoral rolls were closed on the day the Electoral Writs were issued was under the Fraser Government in 1983. This effectively disenfranchised 90,000 voters.[47]

Today, the number of voters who risk being disenfranchised by repeating the 1983 decision to close the rolls early is far greater. Governments should be actively seeking to keep the rolls open for as long as is logistically possible prior to a Federal Election.

Whilst PIAC supports voter education programs and early registration, it is unnecessarily punitive for a Government to provide a hard incentive for voters to register early by amending the Act to close the electoral rolls upon the announcement of a Federal Election.

The Australia 2020 Summit stream on the Future of Australian Governance supported a recommendation for 'universal automatic enrolment and re-enrolment of eligible voters', raising this as a general issue for the community.[48] PIAC strongly supports this proposal.

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47 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29374-29375 (Michael Danby).

48 Australia 2020 Summit, above n19, 35

In addition, the Australian 2020 Summit Governance Stream favourably considered the Youth Summit proposal that Australian citizens between 16 and 18 years of age be permitted to enrol and vote (on a voluntary basis).

Postal and remote polling

PIAC has concerns about the adequacy of postal voting systems, particularly in remote and large electorates. PIAC supports the recommendations by the Honourable Bruce Scott MP, Member for Maranoa, to the inquiry in 2004:

> Base the posting out of ballot papers in each Divisional Returning Office of the AEC.
>
> Offer accessible technology for people to apply for postal votes, ie, have the form online and able to be submitted by fax.
>
> Conduct pre-polling in all major centres for two to three days prior to polling day.
>
> Provide universal mobile polling for all Aged Care facilities.
>
> Create more interstate polling booths, ie, at least one in each town, particularly in school holiday periods.
>
> Provide more pre-polling opportunities in areas renowned as being shift worker townships.
>
> Take into consideration remote mining/industry operations and perhaps provide additional postal services during the election period or provide mobile booths to visit these areas.
>
> Implement a tracking system for checking the progress of voters' postal vote applications and ballot papers.[49]

Disenfranchisement of prisoners

PIAC continues to be concerned about the disqualification of some prisoners from voting. The challenge to the recent federal legislative amendment to absolutely ban prisoners in the High Court in *Roach v Electoral Commissioner* (2007)[50] modified this amendment, finding that it should only apply to a prisoner who has a sentence of three years or longer, essentially reverting to the legislation that was in place prior to the 2006 amendments that created a blanket ban on prisoners right to vote.

It is PIAC's strongly held view that the disenfranchisement of prisoners is a breach of international law, including any disenfranchisement based on the length of sentence, and an inappropriate additional penalty imposed on prisoners imposed outside of the proper judicial process.

As noted above, Article 25 of the ICCPR requires States Party to the Convention—including Australia—to legislate to ensure equal and universal suffrage. Clearly, the removal of the right to vote from prisoners is inconsistent with this basic obligation.

It is a principle of the doctrine of the separation of powers that the penalty to be imposed on a person for the commission of a criminal act is to be determined by duly constituted court of law. PIAC submits that by legislating at the Commonwealth level to disenfranchise certain prisoners, regardless of the effect of State law upon them, the Commonwealth Parliament imposes a further punishment on that prisoner, in breach of

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49 The Honourable Bruce Scott MP, *Submission No 1, Inquiry into the conduct of the 2004 Federal Election and matters related thereto* (2004 Inquiry), 3.

50 *Roach v Electoral Commissioner* (2007) HCA 43

the doctrine of separation of powers. That is, the Parliament is unconstitutionally exercising judicial power to punish.[51] The imposition of this additional penalty on prisoners is also retrospective in effect and, as such, offends against the basic principle that punishments should not be imposed retrospectively.

Preferential voting systems

The preferential voting system that currently operates in Federal Elections lacks transparency. With the introduction of an 'above the line' system, Senate electors can choose either to indicate their preferred order for every Senate candidate by numbering the boxed below the line from 1 to whatever is the number of candidates, or to simply place a '1' in a single box above the line on the Senate ballot paper. Voters are encouraged to 'vote 1', 'above the line. By voting above the line, voters abrogate the direction of their preferences to the party for whom they vote '1'. Whilst it is possible to obtain the precise details of the preference deals struck between political parties, it is not immediately available to voters prior to the poll or at the polling place. They must approach the AEC or political party for that information. This information is sometimes difficult to understand even if a voter obtains it.

This is highly undesirable and compromises the value of the vote.

PIAC recommends that above the line voting be abolished and that voters be required to direct their own preferences. Where a voter does not preference the entirety of the available candidates, the voter's vote should be exhausted at the last number the voter places. This will benefit the democratic system by.

- Ensuring that every vote is earned by a candidate, in that a voter actively chose to preference him or her.

- Making voting more transparent by giving the voter complete control over how their preferences are directed. Even where a voter follows a party 'how to vote' card, they will be able to see to whom the party of their choice is directing their votes in that electorate.

PIAC acknowledges that this will require significant voter education, but to fail to implement this recommendation shows a level of contempt for voters by maintaining a system that keeps all but the most determined voters ignorant of what their vote really means.

An alternative would be to introduce an above-the-line preferential system whereby the elector indicates his or her preference in one or more of the boxes above the line. The elector's vote would be exhausted after the last number indicated. This is less preferable than abolishing above-the-line voting as it is likely to disadvantage independents as they are generally clustered under a single box above the line.

Electoral terms

A call for fixed terms were included in many of the submissions to the Australia 2020 Summit, and referred to in the Initial Report, clearly making this an issue for the general Australian community.[52] Previous Federal Governments have been unwilling to commit to four-year *fixed* terms as it would mean the loss of the right to call 'snap elections', subject to a Constitutional right of double dissolution.

PIAC supports fixed four-year terms to provide political certainty, to give the party or parties in power time to deliver on their election promises, and to remove the ability of incumbent Governments to call elections at politically opportune times.

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51 See *Chu Kheng Lim & Ors v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. In this case, the High Court held that the power to punish a person was an exclusively judicial power and that neither the Parliament nor the Executive could act in a punitive way.

52 Australia 2020 Summit, above n19, 35.

PIAC opposes the introduction of four-year terms that are not fixed, as this does not provide much in the way of greater certainty.

Electronic voting for vision-impaired voters

PIAC strongly commends the AEC on its pilot program of electronic voting for vision-impaired voters. This enabled, for the first time, many Australian citizens to cast a secret ballot. This is a fantastic step forward in the protection and promotion of the rights of people with disabilities.

PIAC urges the Committee to recommend the implementation of this facility at all polling booths in the next Federal election and its implementation in all other public elections conducted in Australia.

Recommendations

That governments introduce measures to strengthen democratic processes and engagement of citizens by:

- *Establishing a civics education program about the right to vote and requirements to do so.*
- *Establishing as compulsory element of primary and secondary education and as a publicly available course, active citizenship training that enables partipants to learn about the various processes available for their engagement with the democratic processes of government and parliament and the skills to effectively utilise those processes.*
- *Maintaining compulsory voting.*
- *Implementing automatic enrolment to vote for all citizens over 18 years of age and the maintenance of that enrolment by the AEC.*
- *Enabling 16-18 year old Australian citizens to enrol and vote on a non-compulsory basis in Federal elections.*
- *Repealing the provisions in the* Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004 *(Cth) which allows for the close of rolls on the day of the Electoral Writs*
- *Improving postal and remote polling by implementing the recommendations made by The Honourable Bruce Scott MP, Submission No 1 to the Inquiry into the conduct of the 2004 Federal Election.*
- *Ensuring citizens with a right to vote are able to cast a secret ballot.*
- *Ensuring that citizens' right to vote is not removed because of their physical abilities, literacy standards, or because of the jurisdiction in which they reside or their place of residence (including prisons).*
- *Enabling above-the-line preferential voting in the Senate at the voter's discretion. Where a voter does not preference either above or below the line, the voter's vote should be exhausted at the last number the voter places.*
- *Implementing fixed four-year terms.*