



public interest
ADVOCACY CENTRE LTD

Accessing democracy:

**Submission to the Australian Government in response
to the *Electoral Reform Green Paper - Strengthening Australia's
Democracy***

27 November 2009

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the (then) 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 Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, 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.

PIAC's work on electoral issues

PIAC has participated in state and federal election inquiries through submissions and appearances at public hearings since 2004. It has been advocating electoral reform more broadly since 1983.¹ Through this work, PIAC has focused on systemic changes aimed at improving the transparency of the democratic process and access to a secret ballot for all Australian citizens. Earlier in 2009, PIAC responded to the Federal Government's *Electoral Green Paper: Donations, Funding and Expenditure* (the Green Paper).² In its submission, PIAC set out the principles on which a strong democratic process should be based and provided a detailed analysis and recommendations about how electoral campaigns should be funded.

¹ In February 1983, PIAC represented unenrolled voters in an unsuccessful High Court challenge to establish a guaranteed right to vote: *R v Pearson; Ex parte Spika* (1983) 152 CLR 254.

² Kerrie Tucker and Deirdre Moor, *Deepening Democracy: Submission to the Australian Government in response to the Electoral Reform Green Paper* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009022_20090223.html> at 23 November 2009.

Issues for discussion and comment

Standards, qualities and expectations

PIAC supports the principles listed in the Green Paper:

- representation,
- responsiveness,
- universality,
- neutrality,
- transparency in electoral administration,
- integrity,
- the rule of law,
- civic culture,
- an open political environment,
- effectiveness, and
- efficiency and flexibility.

All these principles are required to create the foundations for a strong democratic process.

In addition, PIAC submits that citizens should have:

- a right to access to information;
- equal opportunity to participate in the electoral process regardless of disability or geographic location, parliamentary representatives who are free to work in the public interest without conflict of interest;
- privacy;
- a secret ballot;
- national consistency in electoral laws; and
- truth in campaigning.

The principles are inter-related, one principle should not be favoured over another, or be in competition for resources and attention. For example, transparency cannot be achieved without access to information.

Application of the principles will benefit democracy by encouraging diverse views in parliament, public debates and campaigns. Diverse views being engaged enables new ideas to be put forward, vested interests to be challenged and government to be held to account. Any arrangements that compromise these principles must be regarded as serious threats to the public interest and representative democracy. Weak electoral laws and low standards threaten the democratic process as citizens become disenfranchised and less inclined to engage in the process.

The application of these principles forms the basis of recommendations in this submission.

The legal framework for elections

PIAC submits that Australia should meet its obligations under the *International Covenant on Civil and Political Rights* (ICCPR)³ to which Australia is a state party. Australia has failed 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 ...

The term 'directly chosen by the people of the Commonwealth' in section 24 of the *Australian Constitution* seems to provide 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 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. Legislation that removes the right to vote for prisoners sentenced to custodial sentences of over three years is an example of how the Commonwealth Parliament can limit the franchise in Australia.⁴

Harmonisation

PIAC supports the principle of consistent rights and underlying principles in legislation in all Australian jurisdictions. In the process of achieving harmonisation, PIAC stresses that changes must not weaken existing law nor make it more difficult to implement arrangements that improve and preserve democratic processes. For example, the laws of the jurisdiction that has the weakest form of disclosure requirements should not become the norm for all jurisdictions.

PIAC sees the benefits in utilising the Application law model (ALM) in the formation of nationally harmonised electoral law, particularly the fact that it circumvents the need for states to assign their powers to the Commonwealth under placitum 51(xxxvii) of the *Australian Constitution*.

However, PIAC is concerned that the implementation of the ALM could have a negative effect by reducing the flexibility of a jurisdiction to respond to conditions peculiar to that jurisdiction that are adversely affecting electors or democratic processes.

The European Consumers' Organisation, the BEUC, articulated this concern during the European Union's process of harmonising consumer laws across the EU, arguing that:

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

⁴ *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth).

It is indeed important that a real balance is achieved between what should be fully harmonised, and what should better respect the subsidiarity principle ensuring that member states can swiftly react and address national particularities and new practices in evolving markets. Only then would the EU contribute to making the Internal Market work better both for consumers and businesses.⁵

PIAC believes that the same approach should be taken to harmonisation processes generally. As such, harmonisation of electoral law should take place without weakening the power of governments to swiftly react to new practices evolving in particular states.

There are a variety of models that could be used to facilitate this aim. For instance, through the ALM, in certain areas specific requirements or principles could be set that could not be altered by any single government, whilst in other areas minimum standards that allow jurisdictions to develop electoral practices over and above these standards would be more appropriate. This form of law making was utilised in part in the Australian Law Reform Commission's recommendations for national harmonisation of privacy laws.⁶

To avoid substantial differences developing between states regarding electoral laws, leading to different protections of voter rights and of representative democracy processes, any reforms could be reviewed on a regular basis, with a view to the further harmonisation of the laws.

PIAC considers that if aspects of electoral law are to be prioritised for harmonisation, then legislation to regulate political donations, gifts and campaign expenditure should be given the highest priority. PIAC provided an extensive analysis of the political donation legislation and effect on democratic process in its submission to the Federal Government's *Electoral Green Paper: Donations, Funding and Expenditure* early in 2009. The following recommendations relating to harmonisation are extracted from that report.⁷

Recommendations

1. *That the Australian Government initiate reforms of the electoral system that enable the rights set out in Article 25 of the International Covenant on Civil and Political Rights to be realised for all Australians.*
2. *That a review of electoral legislation in each state and territory be conducted with a view to harmonising laws to:*
 - *reduce the multiple voting systems by harmonising jurisdictions' methods of casting votes;*
 - *ensure the franchise is uniform and maximised across Australia;*
 - *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 politically partisan electoral activities;*
 - *ensure citizens have access to full information about the financial activities of governments, political parties and candidates and others 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 is tied to compliance with electoral law.*

⁵ BEUC, *BEUC Work programme for 2009* (2009) [27] <<http://www.verantwoordliche-kreditvergabe.net/media.php?t=media&f=file&id=3467>> at 26 November 2009.

⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC 108) (2008) <<http://www.austlii.edu.au/au/other/alc/publications/reports/108/>> at 26 November 2009.

⁷ Tucker and Moor, above n 2.

The franchise

PIAC welcomes the recommendation⁸ of the Joint Standing Committee on Electoral Matters in its *Report 2: Report on the conduct of the 2007 election and matters related thereto* to amend legislation to reflect the High Court of Australia's judgement in *Roach v Australian Electoral Commissioner*,⁹ to limit the disqualification to prisoners with custodial sentences over three years. However, while this correction moves towards universal suffrage it does not achieve fulfilment of Australia's obligations under Article 25 of the ICCPR as noted above. States that are Party to the ICCPR should legislate to ensure equal and universal suffrage. The disenfranchisement of prisoners is inconsistent with this basic obligation and is an inappropriate additional penalty imposed on prisoners outside of the proper judicial process.

Voting age

PIAC supports the Australian 2020 Summit Governance Stream's 'concrete proposal' that Australian citizens between 16 and 18 years of age be permitted to enrol and vote on a voluntary basis.¹⁰ PIAC notes the recommendation of the Joint Standing Committee on Electoral Matters to allow 16 to be the minimum age for provisional enrolment.¹¹ Accompanied with a civics education program in schools, this proposal is an encouraging step to increase interest and involvement among young people in the democratic process.

Recommendation

3. *That Australian governments adopt policies and amend legislation where appropriate to ensure universal suffrage for all Australian citizens aged 18 years and over, regardless of their status, abilities or geographic location.*
4. *That citizens between the ages of 16 and 18 be eligible to enrol and vote on a voluntary basis.*

Voting systems

Informal voting

PIAC notes there was a significant decline in informal votes in the 2007 Federal Election compared with 2004. However, the fact that 510,000 informal votes were cast in the House of Representatives ballot is still unacceptable and more could be done to reduce this count. The divisions with the highest rates of informal voting were all in Western Sydney, all of which have high rankings of 'poor English'. The Australian Electoral Commission (AEC) reported that informal voting is increased by:

- confusion about voting due to different electoral systems that operate in Australia;
- relatively high levels of recently arrived migrant populations, many of whom have English as a second language and many of whom come from countries where voting is either not possible or compulsory.¹²

The Joint Standing Committee on Electoral Matters, in its report on the conduct of the 2007 Federal Election, noted its concern about the high levels of informal votes in some geographic areas.¹³ The Committee referred to variations of voting systems in each jurisdiction as being a contributory factor, but did not go on to

⁸ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report 2: Report on the conduct of the 2007 federal election and matters related thereto* (2009) [11.12] <<http://www.aph.gov.au/house/committee/em/elect07/report2.htm>> at 23 November 2009.

⁹ *Roach v Electoral Commissioner* (2007) 239 ALR 1.

¹⁰ *Australia 2020 Summit - Final Report* (2009) [9.8.2] <http://www.australia2020.gov.au/final_report/index.cfm> at 25 November 2009.

¹¹ Joint Standing Committee on Electoral Matters, above n 8, [4.172].

¹² *Ibid* [8.4].

¹³ *Ibid* [8.12]

recommend harmonising voting systems, instead opting for public information and education.¹⁴ This approach is disappointing and not in keeping with the otherwise encouraging recommendations that are mostly responsive to problems experienced by voters.

Utilising technology could assist people in the polling both and target the issues identified by the AEC as causes of informal voting. The ACT Electoral Commission provides the option of electronic voting. The system allows the voter to select instructions in languages other than English and prompts people if they have placed an informal vote. The voter can make an informal vote, but they will not do so by mistake.¹⁵

Preferential voting

The preferential voting system that currently operates in federal elections lacks transparency. With the introduction of an 'above-the-line' ballot for the Senate, electors can choose either to indicate their preferred order for every Senate candidate by numbering all the boxes **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 currently abrogate the direction of their preferences to the party for which they vote '1'. Whilst it is possible to obtain the preference allocations nominated by political parties, it is not immediately available to voters prior to the poll or at the polling place. They must approach the AEC or the political party for that information. The information is sometimes difficult to understand even if a voter obtains it. This is highly undesirable and compromises the value of the vote.

Above-the-line voting should be abolished and voters be required to direct their own preferences but not have to number all candidate boxes. 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. The benefits of these changes include:

- ensuring that every vote is earned by a candidate, as a voter must actively chose to preference him or her;
- improving transparency 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;
- reducing the level of informal votes by accepting ballots up to where sequential numbering ends on a ballot.

PIAC acknowledges that this will require significant voter education, but failing 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 Senate 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.

Recommendations

5. *That the Australian governments act to reduce the level of informal voting by:*
 - *supporting an education campaign targeting communities with poor English literacy and experience of electoral processes;*
 - *introducing technology-assisted voting;*

¹⁴ Ibid [8.38].

¹⁵ *Electronic voting and counting* (2007) ACT Electoral Commission
<<http://www.elections.act.gov.au/elections/evacsprocess.html>> at 26 November 2009.

- *removing the above-the-line voting option for the Senate or, alternatively, introduce above-the-line preferential voting;*
- *providing a 'savings provision' allowing Senate ballots to be formal where they contain missed or duplicated numbers, that is, votes would be counted up to the end of sequential numbering on a ballot paper.*

Education for electoral participation

The participants in the Australian Governance stream at the Australia 2020 Summit took the opportunity to put forward a vision with 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.¹⁶

The 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 active 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.

Recommendations

6. *That a compulsory civics education program, based on the proposal of the Governance Stream at the Australia 2020 Summit, be implemented in primary and secondary schools.*
7. *That the Australian Electoral Commission have a budget allocation available to fund the establishment and delivery of an ongoing community-based civics education program.*

The campaign

PIAC has made detailed submissions on issues of funding campaigns, campaigning activities and access to media in its *Electoral Reform Green Paper: Donations, Funding and Expenditure*,¹⁷ and *Submission to Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election*.¹⁸ PIAC refers the Federal Government to these submissions. The following is a summary of the key recommendations from those submissions that impact on campaign management.

Recommendations: Funding of political party campaigns

8. *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.*
9. *That, in the absence of a ban on entity donations, there be a cap be set on all donations to political parties, candidates and associated entities from corporations, unions, organisations and individuals.*

¹⁶ Australia 2020 Summit, *Initial Report* (2008) 33.

¹⁷ Tucker and Moor, above n 2.

¹⁸ Public Interest Advocacy Centre, *Submission to Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election* (2008) <http://www.piac.asn.au/publications/pubs/sub2008051_20080516.html> at 27 November 2009.

10. *That any entity that has contracts with state or federal governments, and foreign citizens be prohibited from making donations to political parties, candidates, and associated entities.*
11. *That there be mandatory, detailed, regular and easily accessible public reporting of parliamentary entitlements and the use made of them by individual parliamentarians.*
12. *That taxation and electoral laws be amended 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.*
13. *That all 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).*
14. *That all political parties, candidates and associated entities be required to publicly report on all donations in a timely manner and at least annually.*
15. *That all political parties be required to report weekly during election periods on all donations.*
16. *That the definition of 'gifts' be amended to include money raised at fundraisers and similar events.*
17. *That all political parties be required to have their financial returns independently audited.*
18. *That the provisions of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) that reduced disclosure requirements be repealed.*
19. *That the definition of 'associated entities' be broadened to include activities not currently included but which qualify a 'threshold of influence' test.*
20. *That political parties forfeit public election funding for failure to comply with campaign funding and reporting requirements.*

Recommendations: Promotions

21. *That free or fixed low-fee broadcast time be provided for candidates recontesting and new candidates.*
22. *That commercial media, through licensing agreements, be required to provide free or subsidised airtime.*
23. *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.*
24. *That strict guidelines for government advertising be adopted in all jurisdictions and that the Auditors-General be appointed to review advertisements before they are published or broadcast.*
25. *That governments be required to provide annual reports outlining expenditure on advertising, public relations and public opinion research.*

Polling

Electronic voting

PIAC notes that improvements in access to polling booths were made during the 2007 election, addressing many of the concerns raised in the evaluation of the 2004 federal election.¹⁹ Recommendations in the 2007 review for ongoing improvements to access, particularly facilities for pre-polling, postal votes, and polling in aged-care facilities are all welcome.²⁰

¹⁹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 2004 Federal Election: Report of the Inquiry into the conduct of the 2004 Federal Election and Matters Related Thereto* (2005) <<http://www.aph.gov.au/house/committee/em/elect04/report.htm>> at 27 November 2009.

²⁰ Joint Standing Committee on Electoral Matters, above n 8, [7], [7.74]–[7.148].

The recommendation of the Joint Standing Committee on Electoral Matters to discontinue the electronically assisted voting trial that allowed blind and low-vision electors a secret ballot is extremely disappointing.²¹ Physical abilities, literacy standards or location of residence should not restrict the right to cast a secret ballot. The AEC should investigate means of making this option available at all polling booths.

Identification

There is no evidence of widespread fraud at Australian elections that would support a need to increase identity checks at polling booths.²² PIAC does not support any proposals that increase the burden of providing proof of identity at the polling booth.

PIAC notes the changes proposed to enrolment in NSW through the Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009, that will provide for automatic enrolment of electors and, potentially, data matching by the AEC. While PIAC is keen for the level of enrolment to be as high as possible, it is concerned about the privacy implications of this legislation and believes that more careful consideration needs to be given before such significant reforms are enacted.

Compulsory voting

PIAC supports continuation of compulsory voting and current penalties for failure to enrol and record attendance at a polling station. There is no evidence of widespread opposition to compulsory voting. In the 2007 Federal election, the number of informal ballots that were left blank was only 20 percent of 510,000 informal votes in the House of Representatives.²³ Most informal votes are incorrect numbering of the ballot. Calls for voluntary voting are represented as an attempt to extend the notion of individual choice beyond the casting of a ballot. In practice, it would create a move away from an obligation on governments in favour of an obligation on individual voters. This would be not only a change in the nature of elections, but also a major change in the practice of democratic politics in Australia. It has the potential to enable aspiring or incumbent governments to focus their election campaigning and promises on issues relevant to those who are demonstrably more likely to vote and ignore those who are less likely to do so.

Recommendations

26. *That accessible electronic voting should be introduced at all non-mobile polling booths.*
27. *That the Australian Electoral Commission should continue to implement improvements to access for people with disabilities and other special-needs groups.*
28. *That voters should not be required to provide proof of identity at the polling booth.*
29. *That compulsory voting in Australia be maintained.*

²¹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the 2007 Federal Election Electronic Voting Trials, Interim report of the inquiry into the conduct of the 2007 election and matters related thereto* (2009) [4.80].

²² Joint Standing Committee on Electoral Matters, above n 8, [2.35]–[2.52].

²³ *Ibid* [8.10].