

Submission

on the

Electoral Reform Amendment Bill 2013

to the

Legal Affairs and Community Safety Committee

Parliament House

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1. Introduction

On 21 November 2013 the Attorney-General and Minister for Justice, the Honourable Jarrod Bleijie MP, introduced the *Electoral Reform Amendment Bill 2013*. The Bill was referred to the Legal Affairs and Community Safety Committee for detailed consideration.

The Committee has called for submissions to be received by 17 January 2014. The Committee is required to report to the Parliament by 24 February 2014.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Democratic principles and electoral funding

The funding of political candidates and parties in elections is an integral element of a democratic system of government. The way in which elections are funded is of critical importance to the integrity of the electoral process and the strength of parliamentary democracy as a whole. Consequently, election funding law should facilitate the kind of representative democracy cherished by the Australian people.

2.1 Individual freedom

As Professor Lumb points out in his book *Australian Constitutionalism*, the roots of the modern Australian system of government lie in the debates and battles in earlier centuries over providing a system of effective constraints on government power.¹ The idea of the rule of law, or limited government, overturned the earlier doctrine of unlimited sovereignty under which people were subject to the arbitrary will of the ruler.

The core idea of the Australian system of government is recognition of the right of the citizen to freedom under the law. This fundamental freedom is expressed in many ways, including the right to stand for election and vote, and also through the right of a citizen to use his financial resources to further his political objectives. Any constraint on the freedom of a citizen to fund political candidates or parties needs to be fully justified.

Reasonable measures to encourage citizens who wish to fund political candidates or parties should be seen as a means to foster political freedom.

This recognition of individual freedom in Australia emerges from the Judaeo-Christian understanding of mankind being made in the image of God and therefore being entitled to respect and dignity.²

2.2 Freedom of association

Another central element of the dignity of mankind is the recognition that people are inherently relational and naturally join with others in groups of various kinds.

In a political context this involves “recognition of the fact that between the ruler and the mass of the citizenry there are a variety of groups to which the citizens belong. They may be occupational (guild, union, association), religious (church), educational (school, university), cultural and social. Certainly, in earlier periods, battles over authority and allegiance were often fought between an overweening

State (Monarch) and the Church anxious to preserve the rights of its members but also at times encroaching on such rights. The concept of limited sovereignty recognises that claims to allegiance or obedience may arise from a number of groups...”³

Political parties are among the kinds of association which citizens should have the freedom to form or to join. Furthermore, political parties should have the freedom to raise funds and use them in political campaigns, subject only to constraints which have strong justification.

2.3 Civil society

Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

*Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*⁴

The links between civil society and democracy were explored by Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.⁵ They argued that many civil society organisations facilitate better awareness and a more informed citizenry, who make better voting choices, participate in politics, and hold government more accountable as a result. Such organisations also accustom participants to the processes of democratic decision making.

Consequently, election funding arrangements should facilitate, not hinder, the organisations which constitute civil society, including political parties, trade unions, business associations and advocacy groups.

2.4 Representative democracy

Australia's system of representative democracy must be distinguished from direct democracy on the one hand and totalitarian democracy on the other.

Representative democracy is characterised by elected representatives who form a parliament charged with the responsibility of making decisions and acting in the public interest – without direct consultation with the electorate. This enables swift and resolute action in the face of changing circumstances.

Direct democracy involves decisions being made either by referendum or by delegates to a ruling body bound to vote in accordance with decisions made by a majority of their electors. Such a system is inherently slow and can be dominated by sectional interests.

In a totalitarian democracy, elected officials are bound to support an ideology independently of the views of the electorate. The ideology may be considered beyond the understanding of the electorate. The duty of the officials is to ensure that any inconsistent public or private activities are eliminated.⁶

Representative democracy works best when elected representatives maintain a close relationship with their constituents. While not being bound by their electorate, representatives are then able to take the views of the electorate into consideration when decisions are made in parliament.

Election funding arrangements should be designed to facilitate a close working relationship between representatives and their constituents.

2.5 Limitation of abuse

While civil society has a vitally important role in a healthy democracy, some elements of society nevertheless create the potential for corruption and abuse. Political donations may be used to purchase political favours, access to decision-makers, or consideration in policy formation. Such practices could distort the democratic process and undermine faith in government.

An important element of the Judaeo-Christian perspective on human society is an understanding of frailty or sinfulness of mankind. This notion is captured in Lord Acton's famous dictum: "Power tends to corrupt and absolute power corrupts absolutely."⁷

Consequently, some constraints on civil society and commercial institutions are necessary for the limitation of corruption and abuse.

3. Caps and bans on political donations and political expenditure

The democratic principles outlined above suggest that any restriction on private donations to political parties or candidates would need to be justified on the basis of verifiable concerns that could not be adequately addressed by other means such as disclosure requirements.

In the absence of any specific concerns about inappropriate sources of donations there is no justification for the current caps on political donations.

The right to freedom of association includes the right to form corporations or industrial organisations in accordance with the relevant laws. In the final analysis corporations and industrial organisations are the creatures of natural persons. In principle then the same kind of rules about donation should apply to both natural persons and corporations and industrial organisations. It may be that donations from corporations and industrial organisations may in general be larger than from those from natural persons. In this case an appropriate disclosure threshold will, as a matter of course, disclose a higher percentage of all donations from corporations and industrial organisations.

There is no justification for banning donations from particular sources such as corporations or industrial organisations.

Appropriate disclosure requirements should adequately meet the need for transparency.

The case for caps on election expenditure has not been made out. It is either merely a sentiment that "too much" is being spent on elections or, when coupled with proposals to increase public funding and limit private donations, an attempt to "socialise" election campaigning.

Recommendation 1:

In order to respect the fundamental freedoms of speech and association, donations to political parties or expenditure on election campaigns should not be capped. Current caps should be removed.

Clauses 27, 34, 50, 59 and 70 which would remove provisions imposing caps on political donations and on expenditure on election campaigns should be supported.

4. Disclosure of contributions and gifts

Mandatory public disclosure of financial contributions to political parties and candidates and their campaign expenditures is an important safeguard against inappropriate influence on the political system.

Disclosure thresholds should be set to achieve an appropriate balance between encouraging participation in the democratic process through financial support to political parties and candidates, and the public interest in knowing the source of political donations, especially larger donations.

The *Electoral Act 1992* currently requires the disclosure of any donation of \$1,000 or more.

This is too low as it is hard to imagine that a donation as low as \$1,000 gives rise to serious concerns about the possibility of undue influence.

Factors supporting a higher threshold for disclosure include:

- (a) preserving the privacy of citizens (and their businesses) who choose to make political donations, and
- (b) limiting the compliance costs of political parties in reporting the sources of donations over the threshold.

The disclosure threshold should be high enough to allow political parties to attract adequate private donations without an undue administrative burden of disclosure.

The major factor that should limit the threshold is the public interest of enabling the public to be aware of the major supporters of political parties. A robust democracy requires openness and accountability in the contributions to political parties, since those contributing large amounts could have significant influence over candidates who are elected to positions of responsibility and authority. The disclosure threshold should be set at a level that will allow the public knowledge of the source of the larger donations to political parties and candidates.

The three criteria for determining an appropriate threshold are: preserving donor privacy, limiting compliance costs, and safeguarding the public interest.

One approach to determining the threshold would be by reference to a fixed proportion of the total donation income raised. This would:

- (a) safeguard the public interest by ensuring that a fixed proportion of the donation income raised is subject to public disclosure; and
- (b) adjust the threshold to compensate for changes in donor generosity affected by changing salaries, living costs and other economic factors.

In order to balance all these factors it could be appropriate to use a fairly high percentage of total annual donations – somewhere between 90 and 95% - to determine the monetary threshold required to ensure disclosure of this percentage of donations.

The Bill proposes a threshold of \$12,400 to be indexed annually against the Consumer Price Index.

Recommendation 2:

The proposed threshold for disclosure of political donations of \$12,400 to be indexed annually against the Consumer Price Index is an appropriate disclosure threshold and should be supported.

5. Public funding

Proponents of public funding of electoral campaigns claim that this is the best means to provide a greater equality in the opportunity to present policies to the electorate and to reduce the risk of corruption and undue influence.

The latter goal is to be achieved indirectly by reducing the reliance of political parties on private donations to raise sufficient funds for an election campaign. However, it appears that public funding simply increases the amount available for election campaigning by all parties unless it is accompanied by severe restrictions on private donations. Proponents of public funding tend to support such restrictions.

This approach presumes that government, rather than civil society, is responsible for ensuring that parties and candidates are adequately funded. This well-intentioned presumption has the potential to undermine the strength of political parties by reducing their dependence on supporters as well as to alienate taxpayers who resent the use of taxes to fund election campaigns by parties whose values they oppose.

The notion that candidates should be entitled to public funding might be expected in a top-down totalitarian democracy but not in a bottom-up representative democracy.

Ideally all public funding should be abolished.

In particular the new proposal for public funding of political parties for policy development in addition to actual election expenditure is completely inappropriate. Allowing the level of such funding to be set by regulation opens the way for ever increasing allocations of public funding to the two major political parties.

Political parties should source their own funds for policy development from civil society and not become dependent on the public purse.

Recommendation 3:

All public funding of political parties should be abolished. In particular Clause 49 of the Bill which would introduce a new stream of funding for the two major political parties in the guise of “policy development payments” should be opposed.

However, if public funding is retained it should not be disproportionately allocated to major political parties as this would unfairly disadvantage minor political parties who nonetheless attract significant electoral support.

The current threshold of 4% is more appropriate than 10%. A threshold of 10% appears designed precisely to limit public funding to the Liberal National Party and the Australian Labor Party and to deprive parties such as the Greens, Family First and Katter's Australian Party from receiving funding even when they poll between 4% and 9.99% of the vote. In many cases the preferences of these minor parties determine the outcome of the election in a particular electorate.

Recommendation 4:

If public funding is retained then the existing threshold of 4% should be maintained and those clauses in the Bill that would raise this threshold to 10% should not be supported.

If the new policy development payments are introduced, they should be available to all political parties who stood a candidate at the previous election and who gained 4% or more of the first preference votes, regardless of whether the party has a sitting member or not.

6. Electronically assisted voting

Electronically assisted voting for those with particular disabilities that prevent them from exercising a secret and independent vote by writing on a ballot paper should be introduced on a trial basis using the best available technology. The right to vote, and to do so secretly, should not be limited by a person's physical disabilities.

Electronic voting has been used in Victoria for the State elections in 2006 and 2010. The system used is a modification of the voting system, "Pnyx", and was "provided by Sctyl (Spain) in partnership with Hewlett Packard (Australia)".⁸

In Victoria the system is used only at early voting centres. It was audited by BMM Compliance and found to be fit for use at the 2010 election.⁹ The Electoral Matters Committee stated that it was:

*satisfied with the security of the system as it was used at the 2010 Victorian state election, and the VEC [Victorian Electoral Commissions]'s management of the electronic voting option. The Committee would like to see the VEC continue to investigate ways to strengthen voter verification processes.*¹⁰

Voter verification refers to the system producing a printout of the vote as recorded. This is held by some experts to help ensure the integrity of an electronic voting system.¹¹

New South Wales used an electronic voting system, *iVote*, at the 2011 State election.

There has been some dispute about the flaws in this system, which unlike that used so far in Victoria allowed voting over the Internet as well as at voting centres. One bug, which only came to light after the election, resulted in 43 votes recording N instead of a number in the preference boxes making the votes invalid. This has subsequently been fixed. It was in part due to slow Internet connections.¹²

New South Wales is also enhancing their system to provide voter preference verification.¹³

The Bill would introduce provisions allowing for the flexible implementation of electronically assisted voting for the visually impaired and for other identified groups to be specified by regulation.

The approach taken by the Bill is measured and cautious but represents genuine development in ensuring technology is used to facilitate participation in democratic processes by all eligible Queensland voters.

The specific system or systems chosen and the procedures for their use need to be carefully audited both before implementation and after each election. New section 121C which would be introduced by the Bill would require such audits.

Recommendation 5:

The provisions in Clause 15 of the Bill that would introduce electronically assisted voting should be supported.

Any system used for electronically assisted voting and the associated procedures should be thoroughly audited before implementation and after each election.

7. Postal voting

The trend to broaden the grounds on which a postal vote can be requested is not healthy.

Postal votes can be lodged well before polling day and therefore before the conclusion of the election campaign. Election campaigns are an important feature of a robust democracy in which those seeking election present their case to the voters. Broadening eligibility for postal votes could result in a significant proportion of the electorate voting before the campaigning is finished and without the full benefit of all the information and arguments being put by candidates for election. Some critical fact or policy announcement may come to light only in the last few days of the campaign when it will be too late for early postal voters to be affected by it.

Recommendation 6:

The provision proposed in Clause 11 of the Bill to allow any eligible voter to lodge a postal vote should not be supported.

8. How-to-vote cards

The familiar scene of several volunteers offering how-to-vote cards, each recommending a vote for a particular candidate or party, to electors as they approach the polling booth is a vibrant part of a robust democracy in action.

For many of these volunteers, this may be their only engagement in overt political activity. The ability of parties and candidates to recruit volunteers for this purpose is a sign of a healthy democracy with a pleasing level of civic engagement.

Those who have engaged in this activity almost universally remark on the mutual respect exhibited towards volunteers handing out the how-to-vote cards of rival candidates and parties.

How-to-vote cards play a significant role in assisting voters complete their ballot papers in such a way as to ensure a formal vote by the numbering of all squares as well as by advising voters on the recommendations for preferences by the candidate or party who attracts their first preference vote.

Any proposal to curtail this process by banning the handing out of how-to-vote cards at polling booths is ill-conceived and unworthy of support.

It could be useful to have how-to-vote cards available on the Electoral Commission of Queensland (ECQ) website prior to the election, but there is no need to make submission of a how-to-vote card compulsory.

Recommendation 7:

The current provisions for handing out how-to-vote cards at polling booths should be maintained and no steps should be taken to curtail this democratic activity. The proposed provision in Clause 21 (3) requiring the Electoral Commission of Queensland to publish any how-to-vote cards received on its website should be supported.

Clause 21 (1) and (2), which would give the Electoral Commission power to ban unilaterally the publication and distribution of any how-to-vote card it was satisfied on reasonable grounds would mislead or deceive an elector, is not appropriate. This is an unwarranted interference in the right to free speech on political matters. As the how-to-vote cards are to be published on the website several days before the election, any party or candidate who feels that a how-to-vote card is misleading has plenty of scope to comment in the media and counteract any perceived disadvantage.

Clause 21 (1) and (2) should not be supported.

9. Proof of identity: Integrity of the voting process

The process of voting can be considered to have integrity if two conditions are satisfied. Firstly, the identity of each voter should be correct, i.e. the person voting should be the elector whose name is marked as having voted. Secondly, each voter should vote only once.

Many electorates have 20 or more polling booths. Suppose John knows the full name and address of Bill who lives in his electorate and the polling booth at which Bill intends to vote.

Currently, John can go to the same polling booth as Bill to cast his own vote, and then go to the other 19 or more polling booths and vote under Bill's name, thus voting 20 or more times in the election, let's say in a marginal electorate. If several people did this, the extra votes could have a significant effect on the outcome of the election.

The current ECQ processes will quickly identify that Bill has voted multiple times when the lists of voters at each polling booth are compared after voting closes. However that will only lead the ECQ and the police to Bill, who has done nothing wrong and is completely unaware of John's dishonest voting.

Although the number of extra votes could be identified, they could not be removed from the count because there is no way of knowing which candidate gained the invalid votes. If the number of extra votes were sufficient to change the result of the election, the best that the losing party could hope for is an appeal to the Court of Disputed Returns, which may or may not order another election. The process of having another election is time and resource consuming, and a hassle for everyone involved. The hassle may also affect the voting of the electorate, which may prejudice the party that sought another election.

In a close election such a disputed outcome could affect which party had the numbers to form a government. It is not prudent to wait until after this occurs to improve the integrity of the voting system.

The integrity of the voting system requires that a person vote only once, and as themselves. Having some personal identification, such as a driver's licence, rates notice, or electricity or gas account is a reasonable requirement. Banks routinely require some personal identification when making over-the-counter withdrawals. Election officials should be able to apply a similar system.

With such a requirement enforced, it would be very difficult for one person to claim to be someone else and vote as that person. With a requirement to show adequate personal identification in place, a person could only vote multiple times as themselves, and would be identified by existing ECQ processes.

Recommendation 8:

To prevent a person from voting either multiple times or under another name, each person should be required to provide adequate personal identification to the officials at polling booths prior to casting their vote. Clauses 9, 10 and 14 of the Bill, which would implement this requirement while providing for declaration votes for those who cannot establish their identity, should be supported.

10. Endnotes

1. Lumb, RD, *Australian Constitutionalism*, Butterworths, 1983, Ch 1.
2. Genesis 1:27.
3. Lumb, *op cit*, p 5.
4. *What is civil society?* Centre for Civil Society, London School of Economics, 1 January 2004.
5. Almond, G, & Verba, S; *The Civic Culture: Political Attitudes And Democracy In Five Nations*, Sage, 1989.
6. See the 1952 book *The Origins of Totalitarian Democracy* by Israeli historian J. L. Talmon.
7. "Letter to Mandell Creighton, 5 April 1887", in *The Life and Letters of Mandell Creighton*, 1904, p 372; also "Letter to Mandell Creighton", 5 April 1887, in *Essays on Freedom and Power*, Gertrude Himmelfarb (ed.) (World Publishing, 1948), pp 335-336.
8. Electoral Matters Committee, *Inquiry into the conduct of the 2010 Victorian state election and matters related thereto: Report to Parliament*, May 2012, p 106:
http://www.parliament.vic.gov.au/images/stories/committees/emc/2010_Election/20120523_emc.finrep-electoralconduct.pdf
9. *Ibid.*, p 108.
10. *Ibid.*, p 110.
11. Michael Clarkson et al., *Software Review and Security Analysis of Scytl Remote Voting Software*, 2008, p 41: <http://faculty.cs.gwu.edu/~clarkson/papers/scytl-odhp.pdf>
12. Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW election and related matters*, 2012 , p 46-47:
[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/129dfc87035dd10eca257ad10013144d/\\$FILE/Report%202-55%20\(Administration%20of%20the%202011%20NSW%20Election\).pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/129dfc87035dd10eca257ad10013144d/$FILE/Report%202-55%20(Administration%20of%20the%202011%20NSW%20Election).pdf)
13. *Ibid.*, p 52.