GRIFFITH UNIVERSITY

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Karen Struthers MP
Chair,
LCARC,
Legislative Assembly of Queensland

Dear Ms Struthers

Re: Electoral (Fraudulent Actions) Amendment Bill 2001

Please find enclosed a submission on this bill.

I research, comment and write specifically on electoral law, and would be pleased to be added permanently to your mailing list.

Yours

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Submission to Queensland Parliament
Legal, Constitutional and Administrative Review C'tee
Parliament House
George Street
BRISBANE QLD 4000

Electoral (Fraudulent Actions) Amendment Bill 2001

Summary

This Bill is flawed in several significant respects. It manages both to miss its mark in part, yet also to be significantly over-reaching. It is not well focused. It also distorts penalty relativities.

In ascending order of importance, the flaws are:

(1) **Under-Reach**. The Bill reads as if intended to create a broad and serious offence of acting with intent to fraudulently influence elections. However **the Bill probably shoots itself in the foot by limiting itself to acts done with the 'intent ... to influence the *outcome*** of an election'.
(2) **Over-Reach**. Conversely, on a literal reading, the Bill is seriously over-broad: **at face value it applies to deliberate misstatements during a campaign,** a matter Parliament has traditionally left to political discourse rather than legal regulation.
(3) **Mandatory Sentences**. In falsely treating all false enrolments as serious offences against 'election outcomes', the Bill repeats the **folly of mandatory imprisonment**.
(4) **Focus**. The motivation of the Bill seems to be to be seen to be toughening penalties in response to the enrolment fraud uncovered in the Shepherdson inquiry. If enrolment fraud is the catalyst, **amendments ought focus on fraud affecting electoral administration.** Such targeted amendments could strengthen the *Electoral Act* by ensuring there is an **extended limitation period and political penalties for all kinds of deception affecting electoral administration** (of which enrolment fraud is but a species).

In short, the Bill should not be proceeded with. Instead, there should be a targeted toughening of the limitation period and political consequences of offences involving deception against electoral administration (sections 153-154). If Parliament wishes to increase 'headline' penalties for electoral offences, it should do so only after a comprehensive and comparative review of all similar electoral offences under the *Electoral Act*, *Local Government Act* and the *Criminal Code*.

Specific recommendations can be found at the end of this submission.

The Bill's Flaws

1. **Under-Reach**. Queensland Parliamentary elections are conducted district by district. Sub-clause 160A(1) uses the phrase 'intent to ... influence *the outcome of an election*'. The outcome of the election in each district is the declaration of the successful candidate. That is, in technical and hence most likely in legal terms, the outcome of an election is the result in the sense of who wins, as reflected in the returned writ.

Someone may try to do something improper in the process of enrolment and balloting, that in reality is unlikely - and in any case is not intended - to affect the outcome of that process. This is especially the case when electorates of 20 to 30 thousand electors are involved. As the AEC has stated in submissions to the federal Joint Standing Committee on Electoral Matters, vote rigging would have to take place on a large and co-ordinated scale for it ever to be calculated to affect a constituency outcome.

Further, a traditional rule of statutory interpretation is to read any reasonable ambiguity in favour of the accused. Thus, someone who deliberately enrolled in the wrong electorate or under a false name, even assuming they voted in that electorate or name, could argue that they did so to support a candidate who was a friend, or to show allegiance to a particular party or district, without any intention (let alone likelihood) of affecting 'the outcome' of that election.'

If the drafter of this Bill wishes to provide a special penalty for acts intended to affect an election *in the sense of the total number of votes (including preferences) cast and counted in an electoral district*, then 'outcome' should be defined clearly and explicitly to capture that.

2. **Over-Reach**. Conversely, the notion of 'fraud' in sub-clause 160A(1) is vague and over-broad. How will a court interpret '*an act with intent to fraudulently influence* the outcome of an election'? Fraud at both common law and statutory criminal law is a broad concept. Generally speaking, it involves seeking benefit or gain through the use of deliberate misstatements or misrepresentations.

A politician who knowingly publicised factual misrepresentations on a topic central to an election campaign would prima facie be guilty of 'an act with intent to fraudulently influence the outcome of an election'. Allegations were raised at the 2001 federal election that government ministers may have knowingly and for political advantage made incorrect claims about asylum seekers throwing their children into the water. The Senate is likely to inquire into these matters. Under a literal reading of sub-clause 160A(1), this sort of allegation would be a matter for police consideration and not just political discourse. This can hardly be the Bill's intention: the question of 'truth' in political campaigning has deliberately been left unlegislated (see the repeated debates over a 'truth in politics' provision, such as LCARC's *Truth in Political Advertising* Report # 4, Dec 1996).

3. **Sentences** To *mandate* a 3 month imprisonment breaches a fundamental legislative principle and basic tenet of the rule of law, by restricting judicial sentencing

discretion. (These arguments are well worn following the debates over WA and NT property laws).

In this Bill, mandatory sentencing is not simply a theoretical matter about judicial versus parliamentary power. Sub-clause 160A(2) captures enrolment offences that involve no intent to corrupt elections at all. For instance, an improper enrolment might be made by a resident non-citizen who wishes to get on the roll to assist their assimilation. Or a fraudster wishing to establish a false identity might make a false enrolment. I do not wish to condone such apolitical wrongs (obviously, albeit in an isolated way, they affect the propriety of electoral administration). But they are clearly less serious electoral offences than politically motivated or concerted attempts at roll stacking. (Indeed the relatively benign case of the immigrant may not deserve a gaol sentence at all. And even in the case of the fraudster, the charge deserving a gaol sentence would be any head charge under the ordinary criminal law for the substantive deception of the public.)

At a minimum, any mandatory gaol sentences should be contingent on a judicial finding that the inaccurate enrolment was part of an intent to corrupt the *political* process (which includes the gaining of votes in *either* party or parliamentary ballots).

Further, a mandatory 3 month imprisonment with a maximum of 3 years is tough-talk, but it distorts the relativities between offences against Parliamentary elections. These sentences, currently contained in Part 9 of the *Electoral Act*, were carefully weighted. For example, section 150 provides for a maximum of 6 months for wilfully inserting a false or fictitious name or address on the roll. Similarly, personation is subject to a maximum of 6 months (under either section 153 or 170). It is unclear why the loose offence proposed in this Bill requires a maximum sentence five times larger than personation - personation is a more obvious and difficult to detect method of affecting marginal seat outcomes than anything in proposed clause 160A. Even the traditional blights of electoral bribery and intimidation are only subject to a 2 year maximum, with no minimum (sections 155 and 168). And the Commonwealth crime of violently or intimidatingly hindering the free exercise of political rights or duties carries only a 3 year maximum with no minimum (*Crimes Act 1914* (Cth) section 28). Note by way of comparison, that the *Criminal Code* provides maximum sentences of 1-2 years (but with short, 1 year time limitations) for certain offences involving non-Parliamentary and non-local government elections.

Finally, the Bill overlooks providing for disenfranchisement of anyone convicted under it. Nor does it provide for automatic disqualification from sitting in Parliament. A brief press report suggests that the general issue of such *political* penalties is currently being considered by the Government (*The Australian*, 14/12/01, p 2).

4. **Focus** Proposed sub-clause 160A(2), in deeming false enrolments to be the central example of a fraudulent intent to affect an election outcome, reinforces the impression that the Bill is motivated by Shepherdson inquiry revelations.

It is odd to attack enrolment fraud in a clause titled 'Fraudulently Influencing *Election Outcomes*'. The evidence at the Shepherdson inquiry showed that enrolment fraud was motivated by non-electoral considerations (eg rigging party pre-selections). Justice Shepherdson specifically found:

> No evidence ... indicating that the tactic [ie of making false enrolments to influence pre-selections] had been generally used to influence the outcome of public elections. Where it was found to have been used in public elections, the practice appeared to be opportunistic or related to family circumstances of particular candidates rather than systematic or widespread. (The Shepherdson Inquiry, Report, CJC, April 2001, p xiv.)

The little evidence that was exposed of enrolment fraud being aimed at casting votes at parliamentary elections, was limited to cases of family loyalty and not to attempts to influence election *outcomes*.

If the Bill is motivated to clamp down on enrolment fraud, it should do so by strengthening provisions relating to fraud against electoral administration *generally*. Recall the Pauline Hanson/One Nation de-registration case where Justice Atkinson found, on the balance of probabilities, that misleading and false party and registration documents were knowingly submitted to the Electoral Commission. In that case, police were hampered by the same problem of short time limitations that limited prosecutions post-Shepherdson.

In short, Parliament needs to comprehensively adapt and improve the existing framework, rather than 'parachuting' awkward, piecemeal amendments into the Act. Suggestions for tougher and better-tailored legislation are given below.

Recommendations

- **That this Bill not be passed.**

- **Instead, the offences in ss 153-154 of the Act should be attended to.** These offences cover all forms of knowingly deceptive electoral documents and statements, when such documents or statements are made for the purposes of the Act (ie in the process of electoral administration set up by the Act).

Of course, a new section 154A could be enacted specifically covering 'enrolment fraud'. 'Enrolment fraud' could be defined as any false statement or document (including witness) intended to achieve the enrolment of someone who is not entitled to such enrolment. I am not sure that a new s 154A is needed to deal specifically with enrolment fraud.

What is clear, however, as the One Nation de-registration case indicates, is that any reforms should not be limited to 'enrolment fraud', but encompass all forms of deception affecting electoral administration – ie ss 153-154. Such offences deserve an extended time limitation not because they are necessarily grave (that depends on the motive for each offence), but because they are offences involving *the truth*. In particular, they turn on questions of the veracity of matters contained in documents or statements, which are easy to cover up and therefore may take some years to detect.

So, in any reform Bill, three matters require attention:

(1) **Ensuring longer time limitations**. This can be done in either of two ways. One way, if tougher maximum penalties is desired, is by providing a maximum 1 year (or more) sentence for all offences against electoral administration (ie any offence under ss 153-154, and any new s 154A). This would signal the seriousness of deceiving electoral administration – including, for example, in the registration of a party.

Alternatively, a specific, extended time period could be provided in sections 153-154, for charges of knowingly making deceptive electoral statements and documents. A time period between 5-10 years would be suitable.

(2) **Providing a specific loss of political rights** for anyone found guilty of deceiving electoral administration (ie section 153-154 offences, and any new s 154A). Given the media report mentioned above, it is to be hoped that the government will do this by strengthening and expanding section 176 of the Act. Section 176 should cover a wider variety of offences (including deception against electoral administration under sections 153 and 154) and a longer term of political disqualification. The *added* prospect of a long period of political disqualification may provide extra deterrence to any politically ambitious person who is tempted to mislead electoral administration: certainly the mere threat of criminal sanctions has not proved sufficient.

(3) **Penalty tariffs**. Parliament may wish to increase criminal penalties for electoral offences. I cannot see a case for it, except as a symbolic gesture, since the limitation period can be addressed directly and additional political penalties are of greater practical and symbolic benefit. However, I am mindful of the oddity, of which Justice Shepherdson complained, that tougher penalties apply under the *Criminal Code* for offences against non-parliamentary/non-local government elections (such as industrial organisation elections) than for public elections. If Parliament is minded to toughen electoral penalties, it should only do so after a systematic review of the penalties for all comparable offences under the *Electoral Act*, the *Local Government Act* and the *Criminal Code*.

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