

SCHOOL OF LAW



BOND UNIVERSITY

A.C.N. 110 694 121

Gold Coast  
Queensland 4229  
Australia

Telephone 07 5595 1111  
Facsimile 07 5595 2246  
Facsimile 07 5595 2036  
International Facsimile +61 7 5595 2246  
International Facsimile +61 7 5595 2036  
Internet <http://www.bond.edu.au>

8 February 2002

Ms Karen Struthers MP  
The Chair  
Legal, Constitutional and Administrative  
Review Committee  
Legislative Assembly of Queensland  
Parliament House  
George Street  
Brisbane Qld 4000

**RECEIVED**

**11 FEB 2002**

**LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE**

Dear Ms Struthers,

Re: Electoral (Fraudulent Actions) Amendment Bill 2001

Thank you for the invitation to lodge a submission to the Committee on the above Bill.

Apart from certain general comments, this submission concentrates on the difficulties which might arise under s 109 of the Commonwealth Constitution.

First, the wording of the proposed s 160A, "fraudulently influence the outcome of an election", is in such wide and general terms that it may give rise to prosecutions in circumstances which would not normally be the subject of a criminal offence. In the absence of more specific prescribed conduct, it leaves individuals vulnerable to intimidation by threatened or instigated prosecutions. Although conviction depends on establishing fraud, the risk of intimidation, particularly in the political realm, remains a matter of concern.

Secondly, the mandatory term of imprisonment prescribed for conduct within subs (2) is an unacceptable erosion of the judicial discretion in sentencing offenders.

Concern has been expressed in parliamentary debate on the Bill that this proposed offence in s 160A might be inconsistent with Commonwealth electoral offences and hence be inoperative under s 109 of the Commonwealth Constitution.

The possibility of such a conflict arising stems from the joint Commonwealth and Queensland Electoral Roll which is administered by the Commonwealth under the *Commonwealth Electoral Act 1918* (Cth). Offences are prescribed by both that Act and the Commonwealth Criminal Code which are designed to protect the electoral roll from forgery and false statements. These offences are now

generally contained in Chapter 7 of the *Criminal Code Act 1995* (Cth), having been previously prescribed by the *Commonwealth Electoral Act*. Part 7.4 prescribes offences for false or misleading statements in applications (s 136)\* and for false or misleading information or documents (s 137). Part 7.5 prescribes offences for unwarranted demands. Part 7.6 prescribes bribery and related offences. Part 7.7 prescribes forgery and related offences. Note that these offences are not limited to electoral conduct but extend to all such activities in so far as they affect the Commonwealth.

Significantly, no issue of *indirect* inconsistency can arise between these Chapter 7 Commonwealth offences and the proposed s 160A since, by s 261.1 of the *Criminal Code Act 1995* (Cth), the Commonwealth has indicated its intention not to cover the field in respect of any of the offences in Chapter 7. Such a statutory declaration is effective to remove the possibility of indirect inconsistency: see *R v Credit Tribunal; Ex parte General Motors Acceptance Corp* (1977) 137 CLR 54.

Accordingly, the only difficulty which could arise is with a *direct* inconsistency between the proposed s 160A and any of the offences under those Parts of Chapter 7 and then, only in so far as the conduct in question involves the joint electoral roll. Given the breadth of s 160A(1), it is very likely that certain conduct caught by the offences under Chapter 7 of the Commonwealth's Criminal Code would also be caught by s 160A. However, this does not necessarily mean a direct inconsistency arises to oust a prosecution for the State offence.

A direct inconsistency can arise where the elements for each offence are the same but different penalties are prescribed: *Ex parte McLean* (1930) 43 CLR 472 at 483. But even in that situation, no direct inconsistency arises if each offence is seen to be concerned with a different subject-matter. For example, in *McWaters v Day* (1989) 168 CLR 289, where a soldier was charged under the Qld *Traffic Act* with driving under the influence of liquor, no inconsistency arose because the Commonwealth offence was a military offence under the *Defence Force Discipline Act 1982* whereas the State offence was a general criminal law offence.

Similarly, in *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 a witness was charged under State law for failing to answer questions before a royal commission which was authorised by both Commonwealth and State law. Although the corresponding Commonwealth offences imposed different penalties, no s 109 inconsistency arose because the offences dealt with different subjects: "The Commonwealth Act deals with inquiries conducted under Commonwealth authority and the State Act deals with inquiries conducted under State authority." (per Gibbs CJ at 219)

An analogy might be drawn from *Winneke's Case*, to argue that the proposed s 160A and the offences in Chapter 7 deal with different subject-matters: s 160A is specifically concerned with a State election, while Chapter 7 is concerned with any fraudulent activity against the Commonwealth. In any event, both are only going to apply to the same conduct when that involves fraudulent activity in relation to the joint electoral roll. In such cases, the more specific

Commonwealth offences ought to be applied. Apart from this possibility, each possess far wider fields of operation.

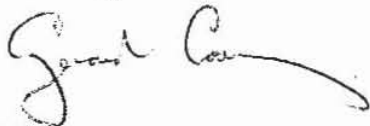
As for s 160A(2), this creates in effect a specific offence within the general offence of subs (1), namely, to do an act with intent to have a person enrolled for an electoral district knowing that the person is not entitled to be enrolled. Such conduct would also constitute an offence under Chapter 7 of the Commonwealth Criminal Code if it involved the making of a false statement (s 136) or forgery (s 144). The penalties differ: under s 160A(2) it is a minimum of three months and a maximum of three years imprisonment, whereas under the Commonwealth offences it is 12 months and 10 years respectively. It is certainly arguable on the basis of *McLeans Case* above, that s 160A(2) is rendered ineffective by s 109 for direct inconsistency in so far as the conduct concerned satisfies the elements of both s 160A(2) and one of the Commonwealth offences. There seems little basis for arguing, to avoid that conclusion, that they deal with different subject-matters since both are directed to protecting the joint electoral roll. There may still be conduct which falls within subs (2) but outside these more specific Commonwealth offences because no false statements or forgery occurred. To that extent, no inconsistency is likely.

In conclusion, while the general offence of s 160A(1) is not rendered wholly ineffective by s 109, a substantial part of the operation of subs (2) suffers that fate.

It should be noted that certain electoral offences remain in the *Commonwealth Electoral Act* (ss 336, 337, 339(1)(a)(b) and 342) which may raise both direct and indirect inconsistency. These offences cover false signatures, activities of witnesses, and impersonation.

If you require clarification of the matters above, please contact me on 07-5595-2003.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gerard Carney', with a long, sweeping horizontal stroke extending to the right.

Gerard Carney  
Associate Professor of Law

\*Query whether this covers electoral enrolment applications as s 136(1)(c)(ii) only refers to "application for registration". Compare with former s 339 of the Commonwealth Electoral Act which referred to any application under that Act.