SUBMISSION

In response to the Australian Government's September 2009

Electoral Reform Green Paper
STRENGTHENING AUSTRALIA'S DEMOCRACY

Andrew Murray November 2009

Note

The Green Paper discusses electoral reform from many perspectives. This submission does not seek to cover all items of interest therein.

This is a personal submission by Andrew Murray and does not represent the views of any other individual or entity. For most of his 12 years in the Senate Andrew Murray was a member of the Joint Standing Committee on Electoral Matters (JSCEM) and was the Australian Democrats Electoral Matters Spokesperson. This Submission draws directly on much of that work and experience.[1] See also Appendix A.

[1] For instance, see the Joint Standing Committee on Electoral Matters Committee Inquiry into the Conduct of the 2007 Federal Election, Submission by Senator Andrew Murray: Electoral Matters spokesperson for the Australian Democrats, April 2008.

1 Executive Summary

The Australian constitution

To make progress on constitutional reform, divide proposed reforms into two types: those that have all-party parliamentary support, which will include minor and technical matters needing to be attended to; and those that are contentious. The former category should be put to a referendum first and at lowest cost, that is, coincident with a general election, preferably the next one due later in 2010.

In any programme to modernise the constitution it would be expected that contentious issues should be presented for referendum singly, but widely-supported reforms could be presented as a package of reforms.

The Australian Constitution needs holistic review. A standing elected constitutional convention should review the Australian constitution, be in place for a number of years, be serviced by a permanent secretariat, and have sufficient resources to allow for full engagement and dialogue with the Australian people.

Fixed terms are more important than longer terms and can be implemented legislatively. Fixed terms would align Australia with dozens of other progressive democratic countries and states and territories in Australia.

Seven of our nine lower houses have four-year terms. The JSCEM has given all-party unanimous support to four-year terms for the House of Representatives through its reports on the 1996, 1998, 2001 and 2004 elections.

The will of the people is thwarted when a half-Senate election does not result in Senate personnel changing until the following 1 July, which can be many months after the election of a new House of Representatives.

If the Constitution were to be amended to have both houses dissolved, it should be amended so that the terms of members of *both* Houses end on the day before the day on which the terms of their successors begin, as is currently the case with senators, including the territory senators who go out whenever the House of Representatives is dissolved.

Referendum questions should be put to the people on a four-year term for the House of Representatives; retaining Senate terms at twice the length of House terms but with simultaneous Senate/House of Representatives commencement and termination dates; coupled with the ending of the prorogation power.

Simultaneous federal/state elections should not be banned outright – they should at least be at the discretion of the governments concerned. Subsection 394(1) of the *Commonwealth Electoral Act 1918* should be repealed.

For decades there has been constant cross-party parliamentary support for change to section 44 of the Constitution. The following should be put to the people as Referendum questions:

- That subsection 44 (i) of the Constitution be replaced by a requirement that all candidates be Australian citizens and meet any further requirements set by the Parliament.
- That subsection 44 (iv) of the Constitution be replaced by provisions preventing judicial officers from nominating without resigning their posts, and giving Parliament power to specify other offices to be declared vacant should an office-holder be elected.
- That the last paragraph of section 44 of the Constitution be deleted.

Harmonisation, a unitary system, or both?

A single system is better than a harmonised one but harmonisation is next best. It would be better to promote a single national system where relevant possible and applicable, and harmonisation where not.

Electoral matters, whether federal state territory or local divides fairly neatly into four main parts or categories:

- Electoral systems (federal, state, territory, local)
- The conduct of elections (federal, state, territory, local and organisational)
- The regulation of political participants (parties, associated entities, candidates, third parties), including the administration of constituencies and electoral matters
- Funding and expenditure

In a federal system electoral systems should remain separately legislated by the Commonwealth, the States and the Territories. For the other three main categories of electoral matters, there is no reason why the conduct of elections (federal, state, territory, local and organisational); the regulation of political participants (parties, associated entities, candidates, third parties); and funding and expenditure could not be under one electoral commission and one national set of laws.

From an accountability and reporting perspective a decision needs to be made on the desirable legal form for political parties. Strictly speaking, political party entity status is not a harmonisation issue, as the Commonwealth does not need COAG approval to proceed, but it would be sensible to get agreement.

Although full preferential voting is a better system than optional preferential voting, that is arguably less important than having the same preferential voting systems at federal state and territory elections. COAG should resolve this issue and agree on harmonisation.

The internet is insufficiently used as an official aid to elections and to voter information. COAG should agree standard items on official electoral commission websites.

Dispute resolution should be harmonised. There is no justification for different time periods in which an election petition can be lodged following the return of a writ, and COAG should agree a common period. The High Court could be made the Court of Disputed Returns for federal state and territory elections as a function of harmonisation.

The franchise

More than 10% of those eligible to vote (over one million adults) do not exercise their voting right. More efficient effective and automatic administrative systems are needed.

Experience has shown that harmonisation can mean agreement now but differences later; with respect to the franchise what is needed is a single national franchise law. A genuinely democratic right to vote requires free fair and regular elections under a universal and equal suffrage, with minimal limited but valid exclusions based on a qualifying age and citizenship.

There are enough non-Australian citizens voting in Australian elections to account for two House of Representatives constituencies. Foreigners should not have the right to vote in Australia.

The right to vote is an inalienable right attached to citizenship. Australian citizens living abroad should not lose their entitlement to vote, even if dual citizens and even if abroad for lengthy periods. Compulsory enrolment and compulsory attendance at the polls is impractical in the case of overseas voters, so voluntary enrolment and voluntary voting is the only sensible course.

If the numbers of overseas votes that could not be allocated or were over-concentrated in particular constituencies ever became an issue, an 'Australia-at-large' lower-house seat (and a similar device for state elections) would be a feasible alternative.

Whilst prisoners are deprived of their liberty while in detention, they are not deprived of their citizenship. Australia imposes an extra-judicial penalty on top of that judged appropriate by the court. A convicted person's right to vote should only be removed by the determination of a court, as part of the sentencing regime.

The Green Paper anticipates a growing problem with increased numbers of aged Australians. To avoid unnecessary and costly administrative procedures to remove the vote from persons with disability due to diminished capacity from ageing, it would be much simpler to make enrolment and attending the polls voluntary after a certain age (say 80 years of age). The age chosen for voluntary voting should be selected with professional medical advice.

Political governance

Unlike governance in the political sector much effort was put into better governance in the bureaucratic union and corporate sectors, with great improvements resulting. Greater regulation offers political parties protection from internal malpractice and corruption, and the public better protection from its consequences. It will reduce the opportunity for public and private funds being used for improper purposes.

Party constitutions should be required to specify the conditions and rules of party membership; how office bearers are preselected and selected; how pre-selection of candidates is conducted; the processes for the resolution of disputes and conflicts of interest; the processes for changing the constitution; and processes for administration and management.

Party constitutions should also provide for the rights of members in specified classes of membership to take part in the conduct of party affairs, either directly or through freely chosen representatives; to freely express choices about party matters, including the choice of candidates for elections; and to exercise a vote of equal value with the vote of any other members in the same class of membership.

Party constitutions should be open to public scrutiny and updated on the public register at least once every electoral cycle.

The Australian Electoral Commission (AEC) should be empowered to oversee all important ballots within political parties at the request of a registered political party, including American-style primaries.

The AEC should be empowered to investigate any allegations of a serious breach of a party constitution, and apply an administrative penalty.

Such reforms to Commonwealth law would inevitably flow onto the conduct of state political participants, since nearly all registered state participants are also registered federal parties.

'One vote one value' is an effective tool against 'gerrymanders'. 'One vote one value' in its guise of 'equal suffrage' is a fundamental democratic principle recognised by Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR).

Not only should this principle be embedded in our legislatures, but to achieve registration, political parties should be compelled to comply with this principle in their internal organisations.

Representative systems

For those parliaments too small to function fully as both houses of government and as houses of parliament (the Australian Capital Territory and the Northern Territory), they would

operate more effectively if there were a separation of powers between the executive and parliament. This would mean the direct election of the Chief Minister and Deputy Chief Minister and their appointment of a non parliamentary executive. A small proportionally representative unicameral parliament would then operate as a non-executive parliament.

If Queensland wants to remain unicameral it should either go to proportional representation or to having the Premier and Deputy Premier directly elected and letting them appoint Ministers outside of Parliament, so making the unicameral house a non-executive one. The alternative for Queensland is a bicameral system. An upper house adds real value in the cause of the public good and public interest through heightened accountability, a restraint on executive and legislative excess, a repository of parliamentary good governance and standards, and fearless open and extensive consultation inquiry and review.

While I am not opposed on principle to proportional representation in the House of Representatives, there is no real evidence that the House of Representatives is significantly unrepresentative, or that there is significant concern in Australia over its method of election.

Proportional representation in the lower house is not necessary in a bicameral system where preferential voting applies in the lower house, where lower house constituencies are broadly equal in voter numbers and where redistribution revisions are periodically conducted by a genuinely independent authority; and, where the upper house is elected on a proportional and preferential voting basis, where the constituencies are either state-wide or sufficiently large as to ensure a plural outcome under a meaningful quota.

The large number of Senate candidates has meant that voters have almost universally moved to voting [1] on a lodged party ticket 'above the line'. This overwhelming voter choice legitimises any move to preferential voting above the line.

Because Senate lodged tickets violate the essential democratic principle that there should be no deception and voters must know who they are voting for – (despite lodged tickets being public documents voters en masse do not know the preference flow the party has chosen for them) - preferential voting above the line should be introduced.

Dedicated electorates are a bad idea. There is a difference between a dedicated electorate for Australians (of any and every ethnicity, religion, or gender) that have no natural constituency, such as an Australia-at-large constituency for overseas Australians (which in any case is not necessary at present), and one which is exclusively for a specific demographic, defined for instance as property-based, ethnic or racial in type, language-based, based on religion, gender-based, sexuality-based or age-based.

Articles 2, 25 and 26 of the ICCPR quoted in the Green Paper all eschew this sort of discrimination, and rightly so.

Federal state and territory by-elections that do not result from the death of a member, or from ill-health, incapacity or other justifiable reason, are an annoyance to the community, as well as incurring a high and unnecessary cost. Resigning early without due cause is a breach of contract with the voters.

In 1995 the Western Australia Commission on Government recommended that legislation should be introduced to impose a financial penalty on members of parliament who resign without due cause. It might be best to have a reasonable personal penalty applying to both upper and lower house members for early resignation without due cause (say, $10 000 or $15 000, indexed to inflation), but a higher penalty for the member's political party concerned (say, no public funding entitlement for that political party [but others would still qualify] for the ensuing by-election).

Direct democracy

Direct democracy such as referenda and plebiscites can promote popular engagement with the political process on questions of public importance.

The *Commonwealth Electoral Amendment (Democratic Plebiscites) Act 2007* promoted direct democracy, and it made explicit inalienable civil and political rights in Australian law. The Act allowed for plebiscites – the direct vote of qualified electors to some important public question - to occur under the aegis of the AEC, and no state or territory law can gainsay it.

Canada, Italy, New Zealand, Switzerland, 27 states in the USA, Venezuela and Poland have versions of direct democracy to address feelings of citizen disconnection in those countries. Hence, there is sufficient experience from them to construct an effective form of direct democracy (often known as citizen initiated referenda [CIR]) for Australia.

A plebiscite resolution that passed should not automatically pass into law until approved by the Federal Parliament. This provides a check on any CIR backed by sectional interests, ensuring full legislative scrutiny and that the final decision lies with elected representatives.

Electoral management bodies

Electoral matters, whether federal state/territory or local divide fairly neatly into four main parts or categories, and the last three of these could easily be covered by one national law. This leads to the conclusion that only one electoral management body is needed, not nine.

The AEC does not have the characteristic independence markers of a statutory authority such as a body corporate with perpetual succession; an official seal; can acquire, hold and dispose of real and personal property, and may sue or be sued in its corporate name.

Two Australian precedents exist which could further enhance the independence of electoral commissioners: one is for the appointment of electoral commissioners to be confirmed by a majority of states as for the ACCC, so leading to a wider approval process; the other is for JSCEM to be consulted on both commissioner appointments and the AEC budget, as for the Audit Office. The Auditor-General is an independent officer of the Parliament appointed for a ten year term. The Minister's proposed recommendation for a new Auditor General must first be approved on behalf of the Parliament by the JCPAA. The JCPAA must also consider and make recommendations to the Parliament on the draft budget estimates of the ANAO.

There are dangers consequent to S44A (1) (a) of the *Financial Management and Accountability Act 1997* which should be addressed by making explicit the AEC's independence and its right to refuse to provide information that could afford the Minister or the Government of the day inappropriate political benefit.

Truth in political advertising

Legislation to impose penalties for failure to accurately represent the truth in political advertisements would advance political standards, promote fairness, improve accountability and help restore trust in politicians and the political system.

The private sector is already required by law not to engage in misleading or deceptive conduct by Section 52 of the *Trade Practices Act*. Why should politicians or political parties (whose 'product' on offer is political policies and personalities) be any different?

The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.

Political parties and postal votes

Having a particular party's political material accompany a postal vote application form affects the independent and non-partisan perception of the AEC and should be prohibited.

When voters are invited by the political party to return the form to them rather than the AEC, for onward transmission, it subverts and perverts the independent process of the AEC; it gives partisan advantage to large parties; it can fatally interfere with the speedier AEC processing so resulting in lost votes; and, it is a breach of privacy. The practice should be prohibited. All postal vote applications should be required to be returned to the AEC.

2 The Australian Constitution[2]

2.1 Do the easiest first

Strengthening Australia's democracy cannot be considered in isolation of constitutional change. The Green Paper is alert to this and has raised constitutional issues.

The Australian Constitution provides the basis on which the federal parliament is established, authorises the powers the parliament wields, and provides parliament with the authority under which electoral law is developed.

There are changes to the Australian constitution that would strengthen Australia's democracy. Without attempting a comprehensive review, and particularly without addressing the broader issue of strengthening Australia's democracy by legislating rights,[3] below are some selected areas worthy of comment.

On the face of it, the best way to make some progress on constitutional reform would be to divide proposed reforms into two types: those that have all-party parliamentary support, which will include minor and technical matters needing to be attended to; and those that are contentious. The former category should be put to referendum first and at lowest cost, that is, coincident with a general election, preferably the next one due later in 2010.

2.2 Modernising the constitution

Acting with political agreement

Although the Senate or the House of Representatives can in theory put matters before the people in their own right, in practice initiating change to the Constitution via referendum has been the sole prerogative of the Prime Minister.

Section 128 of the Constitution provides that where a constitutional amendment is supported by only one House of Parliament, the Governor-General 'may' submit it to a referendum once the procedures set out in the section are satisfied. The Governor-General acts on the Government's advice in exercising this power, so control of the process is in the hands of the Prime Minister.

Even where there is parliamentary unanimity on a case for reform over a long period (such as with section 44), for political, practical and financial reasons there is generally little enthusiasm for the referendum process.

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[2] This section draws substantially on the Submission by Senator Andrew Murray as Electoral Matters spokesperson for the Australian Democrats to the Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 2007 Federal Election, April 2008.

[3] See the Brennan *National Human Rights Consultation Report* Canberra, October 2009.

The value of double majorities has been illustrated many times. The requirement for constitutional changes to be supported by a popular majority as well as a geographic majority is the great example of federal structural checks and balances. It also ensures that governments and parliaments remain very conservative about attempting constitutional change because it is so hard to achieve.

On the face of it, it would be expected that contentious issues should be presented for referendum singly, but widely-supported reforms could be presented as a package of reforms.

Bi-partisanship of the Liberal and Labor parties is essential to progress any constitutional change, but cross-party plural support is even more helpful. Even so, cross-party parliamentary political unanimity increases but does not guarantee the chances of popular support.

Broader reform – a constitutional convention

There is no Commonwealth body that is responsible for reviewing the Constitution, but the parliamentary JSCEM has performed that function to a degree. Constitutional matters have also been addressed by other parliamentary committees.

The 2020 Summit included the following 'Top Ideas'[4]:

- Introduce an Australian Republic;
- Institute an overhaul of federalism, including a constitutional convention and a National Cooperation Commission; and
- Introduce innovative mechanisms to increase civic participation and strengthen civic engagement.

Our political compact, our social contract, is under strain in certain respects. Some of this strain comes from a constitution and institutions with roots in the 19th century that do not fully nourish the 21st century, and there is a consequent need to refresh and modernise Australia's governance.

The foundation of any nation is characterised by the political compact, the social contract. Australian federalism is a political system of checks and balances. No reform of the Australian system will be successful unless it accommodates revised checks and balances to ensure that the social contract is strengthened and refreshed.

A holistic approach is needed. It is difficult to improve the economic or the social entirely without also improving political governance. That means reassessing the constitution, the separation of powers, a republic, whether the federation should stay and if it

[4] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* p33.

should in what form, and the powers states and the commonwealth should each have. It means reassessing how power is acquired and restrained, who has power over what, how money is raised and spent, and by whom.

To achieve lasting reform, anticipate a ten year struggle as for the original Constitution, to allow time for dialogue with the people.

To ensure momentum what is needed is a standing elected constitutional convention, serviced by a permanent secretariat, and with a budget to allow for full engagement and dialogue. This could be supplemented by a university based institute for constitutional change, producing discussion papers and fostering public awareness and debate. This is serious business and needs a serious approach.

If we were to go back to basics on the Constitution, a useful early exercise would be to identify those aspects which facilitate a more balanced relationship between the centre and the states.

We need to identify those aspects of the Constitution which have fostered imbalances between the three tiers of government. Then there is the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

Power can only be controlled by countervailing power. Since the beginnings of government, citizens have learnt to fear their rulers, and democracies have tried to institute checks and balances. Executives continually find ways round those restraints.

A revised Australian social contract, a new political compact, is indeed necessary to address the real strains in our system. That means a refreshed and modernised Constitution and the political and other institutions that flow from it.

2.3 Length of terms and fixed terms for the House of Representatives

Fixed terms

Fixed terms are more important than longer terms.

Fixed terms would align Australia with dozens of other progressive democratic countries. Fixed terms are an accepted feature of a number of states and territories in Australia.

It is not just snap and early elections that are called for prime ministerial or party advantage; all elections are. In contrast elections held on a pre-determined date ensure stability and responsibility by both Government and Opposition. If introduced for the Federal parliament it would allow for sound party and independent preparation and for fairer political competition.

Fixed terms would end the power of the Prime Minister to call elections according to the dictates of political expediency, and would increase stability and continuity in the electoral cycle.

Fixed terms would save money too. Based on full-term expectations, Australia should not have held more than 32 elections last century, instead, they held 38, amounting to significant additional costs of between $800m and $1 billion in today's money.[5]

Fixed terms would not affect the double-dissolution process, nor would they affect the fall of a Government that lost the confidence of the House.

Support for four-year terms

Comparisons reveal disparities between the Australian federal jurisdiction with the states and with other bicameral systems throughout the world.

The three-year term consistency with the States and Territories has been lost with all (apart from Queensland's unicameral parliament) having now moved to four-year terms. The Australian political norm is for longer terms – seven of our nine lower houses have four-year terms.

A significant majority of democratic jurisdictions overseas employ either four or five-year parliamentary terms for their lower houses. The UK Parliament – the principal model for our federal electoral system – has a maximum term of five years. Australia is actually in the backward minority of four countries that have terms of three years.[6]

Fixed four-year terms would align Australia with 25 other progressive democratic countries.

Since 1900 there have been many calls for an increase in the House of Representatives term, including the issue being put to referendum in 1988. However, as it was put together with more contentious proposals and as voters were unable to vote 'Yes' for only one part of the package, defeat was essentially ensured.

In more recent times JSCEM has given all-party unanimous support to four-year terms for the House of Representatives through its reports on the 1996, 1998, 2001 and 2004 elections.

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[5] For further detail refer S. Bennett, 'Four-Year Terms for the House of Representatives', Research Paper No. 2, 2003-04, Department of the Parliamentary Library, September 2003.

[6] A long-standing constitutional policy of the Australian Democrats was to have four-year terms implemented for the House of Representatives. The *Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000* reflects this and provides a legislative vehicle to progress this reform. This bill is a reworking of the *Constitution Alteration (Fixed Term Parliaments) Bill* that was introduced by Senator Macklin in 1987.

Changing the House of Representatives term also entails making changes to the terms of the Senate. How the states have addressed this situation is relevant, and two states have 8-year terms for the upper house.

The JSCEM 2004 report[7] canvassed an interesting variant of a three year minimum House of Representatives term with an election to be called in the fourth year, so making the Senate term a minimum of six years, and a maximum of eight.

Advantages of four-year parliamentary terms:

- Improved policy making – the ability to reconcile careful and deliberate policy-making will be enhanced.
- Increased business confidence – the private sector will welcome more focus on long-term business planning and confidence that will benefit the economy.
- Reduced costs of elections.
- Improved debate – can facilitate more in-depth and genuine cross-party discussion on policy issues without the influence of a looming election and continuous campaigning in the third year of a term.
- Will address voter dislike at the frequency of elections.

Should there be simultaneous terms for the House and Senate?

The House of Representatives term is not fixed and the Senate's term is. In the normal parliamentary cycle the term length of the former (three years approximately) is half the latter's fixed six years.

If the House of Representatives term were to remain un-fixed, and the length of term of the Senate were to remain double that of the House, the question is whether simultaneous dates of commencement and termination should warrant consideration.

There is a reasonable argument that the will of the people is thwarted when a half-Senate election does not result in Senate personnel changing until the following 1 July, which can be many months after the election of a new House of Representatives.[8]

Making House and Senate terms coincident would mean that the Senate term would be measured as two House of Representatives' terms, and not six years. This would be a desirable outcome, and does not significantly alter the original constitutional intention of Senate terms being twice the length of House terms.

[7] Joint standing Committee of Electoral Matters report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, September 2005, Canberra, Chapter 7.

[8] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 5.7 page 47.

If the House of Representatives term were to be fixed and the length of term of the Senate was to remain double that of the House, the question of simultaneous dates of commencement and termination still arises.

Currently a general election comes about with dissolution of the House of Representatives but not the Senate, because the latter has a fixed term. In constitutional terms that makes the Senate a continuous chamber. The Senate continues functioning during a half-Senate general election. The Senate continues its Committee work (except by convention for the period of the election).

A continuous chamber does not apply with a double dissolution. A double dissolution under section 57 of the Constitution involves the dissolution of both Houses, and while those members and senators elected at the subsequent election share a common commencement date, they revert to different termination dates.

The Houses should meet when they decide to meet, and should not be able to be dismissed, either by prime ministerial decree through the Speaker, or by the power of prorogation. In circumstances of constitutional change we need to consider whether prorogation should be abolished.[9]

In a general election if the introduction of simultaneous House of Representatives/Senate commencement dates would involve dissolving the Senate at every election it would no longer be a continuous chamber.

Simultaneous House of Representatives/Senate terms' is a proposal which has been put to referendum and rejected before.

The main reason for opposing the simultaneous House of Representatives/Senate terms proposal was that it would increase prime ministerial power, and the scope for electoral manipulation, by allowing the Prime Minister to dissolve half of the Senate whenever he decided to dissolve the House of Representatives.

The Senate would no longer be a fixed-term, continuing body.

If this option is put again the same objection will certainly be raised again. Any lengthening of the House of Representatives term will only be successful if this objection is dealt with. The public have consistently fought measures which provide greater powers to the Prime Minister.

If the Constitution were to be amended to have both houses dissolved, it should be amended so that the terms of members of *both* Houses (including senators not subject to the half-election) end on the day before the day on which the terms of their successors begin, as is

[9] *Beware the monarchical gargoyle in our constitution* Harry Evans Canberra Times 25 February 2005.

currently the case with senators, including the territory senators who go out whenever the House of Representatives is dissolved.

There would be no parliamentary inter-regnum because the successor Parliament would follow the day after its predecessor ended.

This arrangement could apply regardless of whether the parliamentary term is fixed and regardless of the length of the term. At any time during an election the 'outgoing' Parliament could meet to deal with an emergency, and there would always be a Parliament to call upon. At any time after the election the new Parliament would be available.

Referendum questions should be put to the people on a four-year term for the House of Representatives; retaining Senate terms at twice the length of House terms but with simultaneous Senate/House of Representatives commencement and termination dates; coupled with the ending of the prorogation power.

2.4 Simultaneous federal/state elections

Simultaneous federal/state elections should not be banned outright – they should at least be at the discretion of the governments concerned.

Why shouldn't a federal by-election be able to be held simultaneously - with state or local elections; or a state by-election during a federal election; or a federal referendum during local government or state elections - at the discretion of a government or as agreed between governments?

Australians are in frequent election mode, with nine governments holding federal, state and territory elections, and local government elections, as well as occasional referenda and plebiscites at all three levels of government.

The issue is one of harmonisation cost and convenience. For instance, greater efficiency is achieved in the United States of America where simultaneous elections are a long-standing, regular and unexceptional feature of their election system.

In 1922 the *Commonwealth Electoral Act 1918* (CEA) was amended to prevent simultaneous federal and state elections. The 1988 Constitutional Commission recommended that this provision be repealed.

The next consideration might be whether already fixed dates for elections should be altered to become simultaneous as well (why shouldn't two different states have elections on the same day?), but as a first step at least, subsection 394(1) of the CEA should be repealed.

2.5 Section 44 problems[10]

Subsection 44 (i) of the Australian Constitution says *'that a person could not seek election to the parliament if that person was a citizen of another country or owed an allegiance of some kind to another nation'*. This should be replaced with the simple requirement that all candidates for political office be Australian citizens.

Subsection 44 (i) of the Constitution has provoked litigation in the past, the leading case being Sykes v Cleary (No.2) of 1992. For decades there has been constant cross-party parliamentary support for change. Widespread acceptance of dual citizenship almost certainly also indicates community support for allowing dual citizens to be candidates for parliamentary elections.

In any case it is a profound contradiction that a dual citizen can cast a vote, but not for a candidate who is a dual citizen.

As the Green Paper indicates, subsection 44 (1) was drawn up at a time when there was no concept of Australian citizenship, when Australian residents were either British subjects or aliens. It was designed to ensure the Parliament was free of aliens as so defined at that time. The Senate Standing Committee on Constitutional and Legal Affairs in its 1981 Report *The Constitutional Qualifications of Members of Parliament* recommended that Australian Citizenship be the constitutional qualification for parliamentary membership, with questions of the various grades of foreign allegiance relegated to the legislative sphere.

The Constitutional Commission, in its Final Report of 1988 recommended that subsection 44 (i) be deleted and that Australian citizenship instead be the requirement for candidacy, with the Parliament being empowered to make laws as to residency requirements.

The House of Representatives Standing Committee on Legal and Constitutional Affairs Report of July 1997 recommended that subsection 44 (i) be replaced by a provision requiring that all candidates be Australian citizens, and it went further to suggest the new provision empower the Parliament to enact legislation determining the grounds for disqualification of members in relation to foreign allegiance.

This Report also recommended that subsection 44(iv) be deleted and replaced by provisions preventing judicial officers from nominating without resigning their posts and other provisions empowering the parliament to specify other offices which would be declared vacant should the office holder be elected to parliament.[11]

[10] See also discussion in The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 8.47-8.60 pages 123-125.

[11] The Australian Democrats *The Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) 2000* was their fourth legislative attempt since 1985 to address this issue.

It would be absurd if public servants could retain their positions after having been elected to parliament. It is essential that a mechanism be put in place declaring vacant certain specified offices upon their holders being elected.

Subsection 44(iv) has its origins in the *Succession to the Crown Act 1707 (UK).* Its purpose there was essentially to do with the separation of powers, the idea being to prevent undue control of the House of Commons by members also being employed by the Crown.

Times have changed, even though the ancient struggle between executive and parliament continues to this day. Whilst this provision may have been appropriate centuries ago, the growth of the machinery of government has meant that its contemporary effect is to prevent citizens employed in the public sector from standing for election. Those that do stand often do so at substantial personal and family cost, because they resign their jobs

The last paragraph of section 44 (concerning the Queen's Ministers, half-pay and pensions) should also be deleted in its entirety. The Standing Committee on Legal and Constitutional Affairs Report of July 1997 noted that if its recommendations concerning subsections 44 (i) and 44 (iv) were accepted, the last paragraph of subsection 44 should be deleted.

That paragraph is redundant and irrelevant.

The following should be put to the people as Referendum questions:

- That subsection 44 (i) of the Constitution be replaced by a requirement that all candidates be Australian citizens and meet any further requirements set by the Parliament.
- That subsection 44 (iv) of the Constitution be replaced by provisions preventing judicial officers from nominating without resigning their posts, and giving Parliament power to specify other offices to be declared vacant should an office-holder be elected.
- That the last paragraph of section 44 of the Constitution be deleted.

3 Harmonisation, a unitary system or both?[12]

3.1 A single system is better than a harmonised one but harmonisation is next best

Harmonisation is a feature of the Green Paper, but a unitary system does not get equivalent treatment. That is odd, especially since there are clearly areas of electoral process that could be subsumed into a cost-efficient and administratively-efficient single national system.

It would be better to promote a single national system where relevant possible and applicable, and harmonisation where not.

In the first Green Paper Special Minister of State John Faulkner wrote that *Australia has overlapping electoral systems, regulating different levels of government, creating uncertainty and confusion.*

He could have added creating inefficiency, waste, opacity and complexity to his list of negatives. The regulatory burden is severe for all parties but more so for small but national political parties heavily dependent on volunteers who have to deal with nine different sets of electoral laws and with multiple regulators.

The second Green Paper returns to this diversity in electoral systems, and its consequent challenges.[13] It counts up eleven constitutional acts in Australia; sixteen primary electoral laws; and numerous other laws, guidelines and conventions.

Deserving of greater notice in the Green Paper and among the most impactful of new laws in the last decade is the Commonwealth's *Charter of Budget Honesty Act 1998.* The principles and practices that surround the legislated pre-election economic and fiscal outlook report (known as PEFO) are significant election accountability mechanisms, worthy of emulation in all states and territories.[14]

Later in the first Green Paper is expressed the hope that if electoral reform does not achieve harmonisation, at least it might result in greater consistency.[15] Such a minimalist hope is undoubtedly prompted by the difficulty facing any reformer of achieving significant change in the field of electoral matters, where vested interests hold such strong sway.

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[12] This section draws on arguments (*what is national, what is federal?)* made in the public submission by Andrew Murray to the Australian Government's December 2008 Electoral Reform Green Paper *Donations Funding and Expenditure,* February 2009.

[13] For instance the Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 1.15-1.22 pages 13-14; 1.31-1.35 pages 16-17; chapter 3.

[14] *Review of Operation Sunlight: Overhauling Budgetary Transparency* a Report for the Commonwealth Minister of Finance, Senator Andrew Murray, Canberra June 2008, pages 51-54.

[15] The Australian Government Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE, Canberra, December 2008, page 28, 3.62.

Such a view may be too pessimistic.

The best way to eliminate (or at least drastically reduce) the negatives outlined earlier is to have just one law, one administrator and one regulator.

Is that possible for a political sector operating in a federal system? Rationally speaking, it is, as only one facet of electoral matters need remain federal not national.

3.2 Only one facet of electoral matters need be federal not national

Dividing up electoral matters

Electoral matters, whether federal state territory or local divides fairly neatly into four main parts or categories:

- Electoral systems (federal, state, territory, local)
- The conduct of elections (federal, state, territory, local and organisational)
- The regulation of political participants (parties, associated entities, candidates, third parties), including the administration of constituencies and electoral matters
- Funding and expenditure

In a federal system electoral systems should remain separately legislated by the Commonwealth, the States and the Territories – constituencies, types of parliaments, length of terms, fixed or not, voting systems, all the variants of electoral systems.

For electoral systems nine sets of laws determined by the respective constitutions and parliaments are a normal consequence of a federation, although harmonisation and consistency should be sought after wherever possible, for obvious benefits of public understanding and political coherence.

For the other three main categories of electoral matters, there is no reason why the conduct of elections (federal, state, territory, local and organisational); the regulation of political participants (parties, associated entities, candidates, third parties); and funding and expenditure could not be under one electoral commission and one national set of laws.

Of course the principles and main policies need to be agreed by COAG and the states and territories parliaments before a national regime replaces the federal system for these three parts, but once that is done it becomes a question of priorities timing and implementation.

As important as it is to parliamentary democracy and the integrity of our electoral systems, in essence the conduct of elections is just an administrative, organisational and technical function. Savings and efficiencies would result from one rather than nine laws and nine electoral commissions. A similar argument applies for the regulation of political participants and for funding and expenditure.

Common legal entities

Strictly speaking, political party entity status is not a harmonisation issue, as the Commonwealth does not need COAG approval to proceed, but it would be sensible to get agreement.

The Commonwealth has not been averse to requiring common entity status.[16] Political parties could be forced into a federal regulatory regime by the simple device of requiring all parties desirous of public funding to be an incorporated entity subject to the federal Corporations law. Such a course of action would be unwise if there was a strong reaction and resistance from the states and territories. Permanent change is achieved when the transfer of powers is consensual and based on sound policy considerations.

The entity status of political parties needs to be confronted as a policy issue. The Green Paper picks up on this issue.[17]

Political parties lie within the not-for-profit or Third Sector. Nonprofits use a number of legal forms available for their formal entity status under both state and federal law – including unincorporated associations, incorporated associations, corporations, companies limited by guarantee, trusts, joint venture companies, and partnerships.

The legal form chosen may be determined by law;[18] by the members themselves; by historical circumstances; by the type of activity being undertaken; by needing to hold a license or permit; by the need to access tax concessions; or, by a perceived need to remain in or out of state or federal jurisdictions.

In the case of political parties, the need for parties to be registered constitutes a form of political licence. It would be a simple matter to require any political party seeking or holding registration as a political party to be incorporated under the *Corporations Act 2001* and so subject to the financial non-financial and accountability requirements of corporations law.

Most political parties are either unincorporated associations or incorporated associations under state law.

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[16] This tactic was used recently when the Commonwealth's *Private Health Insurance Act* was amended in 2009 to require all health insurers to become companies so that all will be subject to the same and higher standards of supervision and accountability under the *Corporations Act 2001*.

[17] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 8.26-8.28 page 118.

[18] There are for example non-government, community, voluntary, club, society, association, co-operative, friendly society, church, union, foundation, charity, party and other entities, some set up under specific sectoral legislation.

The Senate Not-for-Profits Disclosure report says of incorporated associations that they are *considered to be poorly regulated* and [due] *to different legislation in each state and territory, the reporting requirements of incorporated associations are not aligned*.[19]

They had this to say on unincorporated associations, a very common form of legal structure for many in the Not-for-Profit (Third Sector), including political parties:

> *7.5 Unincorporated not-for-profit associations are generally not required to be registered. They are not legal entities and therefore impose few legal obligations on members; however, unincorporated associations are considered to be both an entity and a company for income tax purposes.[Income Tax Assessment Act 1997, Division 995-1] Large political parties and their branches, and large religious organisations are often combinations of unincorporated associations of members and corporate property trusts subject to the direction of the unincorporated association members. These organisations have the resources to choose other legal forms but have decided that this arrangement best suits their purposes.*
>
> *7.6 In effect, an unincorporated association is a group of members that have come together for a common purpose. By number, unincorporated associations are the most common legal structure used by Not-For-Profit Organisations and are generally presumed to be small operators. The committee heard that, while it is the preferred legal structure of many organisations, 'an unincorporated association is a very dangerous creature. There are lots of cases that I could take you to that would fully illustrate that' [AD Lang, Law Council of Australia Proof Committee Hansard 29 October 2008 page 43].*
>
> *7.7 There are no reporting requirements for unincorporated associations, although these organisations are required to comply with any relevant legislation (i.e. an unincorporated association that undertakes a fundraising appeal is required to follow the directives laid out in the relevant state fundraising act).*[20]

3.3 A harmonisation priority

Chapter 5 of the Green Paper covers voting systems. In a federal system voting systems must remain federal not national. The Green Paper illustrates the effects of varied voting systems on informality. Informal votes arising from different federal/state preferential voting systems are a real problem.[21]

Although full preferential voting is a better system than optional preferential voting, that is arguably less important than having the same preferential voting systems at federal state and territory elections. COAG should resolve this issue and agree on harmonisation.

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[19] Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008 page 70 and 66.

[20] Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008 page 62.

[21] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 5.84 page 64.

3.4 The internet

The internet is insufficiently used as an official aid to elections and to voter information. COAG should agree standard items on official electoral commission websites.

Among those that might be considered is for all candidates to be offered the facility of a current photograph and (say) 250 word accompaniment; and, all how-to-vote cards must be placed on the website.

3.5 Dispute resolution

Dispute resolution should be harmonised.

There is no justification for different time periods in which an election petition can be lodged following the return of a writ, and COAG should agree a common period.[22]

The High Court could be made the Court of Disputed Returns for federal state and territory elections as a function of harmonisation.

The Green Paper canvasses dispute issues, but does not provide much discussion of the problem of 'lesser disputes'.[23] A reasonable outcome for petitions ruled inadmissible by the High Court but which otherwise raise substantive or significant matters is for them to be considered and reported on by JSCEM at the discretion of JSCEM.

[22] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 13.12 page 197.
[23] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 13.37-13.39 page 202.

4 The Franchise

4.1 Universal enrolment

The 2020 summit recommended universal automatic enrolment and re-enrolment of eligible voters as a 'top idea'.[24]

In Chapter 4 the Green Paper indicates that more than 10% of those eligible to vote (over one million adults) do not exercise their voting right.[25] Clearly, neither the present administrative systems nor the penalties for non-compliance are effective enough.

Some tax examples provide insights into motivation. One would think the penalties attached to not putting in a tax return would motivate tax compliance, yet a few years back a vast number in the legal profession, including the judiciary, were exposed as non-compliers.

Incentives apparently work better than penalties. Recently the prospect of a Taxation Office-administered $900 stimulus cheque reportedly saw hundreds of thousands of tax returns brought up to date, many for the first time.

I am a strong supporter of compulsory enrolment and compulsory attendance at the polls, for reasons I have previously expressed at some length in my Supplementary Remarks to JSCEM election reports. Compulsory enrolment and compulsory attendance at the polls does not affect an important freedom that is preserved in the secret ballot, in that citizens are not required to register a (formal) vote, and they may lodge a blank or spoiled (informal) vote.

The question is how far do you go with compulsory enrolment and attendance compliance? Refusing welfare benefits or tax rebates unless currently enrolled would probably see near-universal enrolment but such severe action would probably not be acceptable to the community.

The only alternative would appear to be more efficient effective and automatic administrative systems.

4.2 Citizenship

Universality

Australian citizenship, even where it is dual citizenship, should be the appropriate and primary basis for the franchise.

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[24] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* p33 point 4.

[25] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 4.20 page 34.

Citizenship is the basic underpinning of the nation-state, but as the Green Paper indicates, there are other differences in the franchise across Australian jurisdictions, such as on prisoner voting. This is unsatisfactory. Above all else in electoral matters, the franchise should be consistent and common in Australia, regardless of jurisdiction.

As the Green Paper emphasises[26] a genuinely democratic right to vote requires free fair and regular elections under a universal and equal suffrage, with minimal limited but valid exclusions based on a qualifying age and citizenship.

The principle of universality should override all other considerations. The franchise in Australia should not vary by jurisdiction.

Experience has shown that harmonisation can mean agreement now but differences later; with respect to the franchise what is needed is a single national franchise law.

British voters can decide key seats

There are enough non-Australian citizens voting in Australian elections to account for two House of Representatives constituencies. A government response to a question on notice[27] revealed that under sub section 93(1) (b) (ii)[28] of the CEA there are still some 163 887 voters on the electoral roll who are not Australian citizens (subsequently revised to 157 102[29]).

This figure may be overstated as it may include British subjects who have become Australian citizens but have not notified the AEC of their Australian citizenship status. It may also be understated, as this figure does not include British subjects who are on the roll but not coded as such if they have not changed their enrolment address since 25 January 1984.

British subjects who were on the roll in January 1984 were allowed to stay on it indefinitely, unlike the situation in Canada where Canadian citizenship was required from 1975.

Foreigners should not have the right to vote in Australia. British citizens who are not Australian citizens are undoubtedly foreigners. The Australian High Court determined in 1999[30] that the UK was a 'foreign power', making British citizens ineligible to sit in the Australian parliament because of their foreign allegiance. Despite this, British citizens on our electoral roll are there in sufficient numbers to decide elections in federal seats such as Brand and Canning in Western Australia and Kingston and Wakefield in South Australia.

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[26] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 4.4 pages 30-31.

[27] Senator Andrew Murray Question No 3027 23 February 2007.

[28] This section permits British subjects coded as being eligible to vote on 25 January 1984 to remain as non-citizens on the Australian voters roll.

[29] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 4.30 page 36.

[30] *Sue v Hill (1999)* 199CLR 462.

4.3 Australians living abroad

Australian citizens living abroad should not lose their entitlement to vote, even if dual citizens and even if abroad for lengthy periods. The right to vote is an inalienable right attached to citizenship.

Compulsory enrolment and compulsory attendance at the polls is impractical in the case of overseas voters, so voluntary enrolment and voluntary voting for overseas voters is the only sensible course. The present complex provisions governing Australian expatriates' entitlement to vote should be done away with. Let those citizens abroad who wish to vote do so, without restriction. The past record of voter registration of citizens abroad indicates little likelihood of a surge in overseas votes as a result.

That leaves the issue of which lower house constituency (the upper house presents less of a problem) should be the chosen voting 'home'. The present system for allocating overseas votes to a constituency seems to work well enough, although it might need to be supplemented by a 'deeming' provision for a small number of difficult-to-place voters.

If the numbers of overseas votes that could not be allocated or were over-concentrated in particular constituencies ever became an issue, an 'Australia-at-large' lower-house seat (and a similar device for state elections) would be a feasible alternative.

4.4 Early closure of the rolls

The early closure of electoral rolls as a result of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* ended decades of practice whereby Australians had sufficient time to either register to vote or to change their details after an election is called. The early closure of the rolls disenfranchised tens of thousands of Australians who were therefore denied one of their most fundamental human rights, the right to vote. The repeal of that legislation is essential.

4.5 Voting over the age of 16

Because there is support in some parts of the community for lowering the voting age, periodically there is public debate over the merits of lowering the voting age from 18 to 16.

Voting is universally regarded as an adult responsibility. Voting should be set at the age of adulthood, as determined by legal thresholds identifying the capacity to make choices independent of parents or guardians. In aggregate across the various federal and state laws, adult status appears to be mostly set in Australia at 18 years of age.

This issue of lowering the voting age should be guided by the Commonwealth Attorney General, who should be requested to provide an opinion on a voting age determined by adult criteria. Adult criteria vary by jurisdiction and matter.

A checklist for consideration as to adult responsibility could include: the cut-off age for children's courts; the age for compulsory school attendance; the age of sexual consent; the age for marriage without parental consent; youth wage ages; the age for military service and for combat; age-related superannuation taxation medical or welfare provisions; drivers licence ages; opening bank accounts, entering into binding contracts, buying shares or buying property without parental permission; the ages for gambling, smoking and alcohol purchase and consumption; age-related passport provisions; the ages for changing names by deed poll, making a will, creating a trust and other legal entities; the age for having a tattoo; and so on.

4.6 Voting rights of prisoners

Australia's system of government is founded on the sovereignty of its citizenry, whereby the people possess the ultimate power over the system of government. Any move that disenfranchises any group of citizens inevitably undermines that sovereignty.

Whilst prisoners are deprived of their liberty while in detention, they are not deprived of their citizenship. Prisoners should be accorded the right to vote because it is a fundamental right of citizenship.

Under Commonwealth law until 1983, persons sentenced or subject to be sentenced for an offence punishable by imprisonment for one year or longer could not vote. From 1983 to 1995 the period was five years. From 1995 to 2004 the period of disqualification was to apply to those actually serving five years or longer. From 2004 to 2006 the threshold was reduced to three years. Persons on remand could vote.

However, under the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* all persons serving a term of imprisonment were disenfranchised. This measure had the dubious distinction of moving closer to similar policy in the United States, the world leader in any democracy in both imprisonment and disenfranchisement.

These 2006 changes to prisoner voting rights were then overturned by the High Court in August 2007 in a 4-2 decision.[31]

The Court held that voting in elections lies at the heart of the system of representative government, and disenfranchisement of a group of adult citizens without a substantial reason would not be consistent with it. The High Court found that the net of disqualification was cast too wide and went beyond the rationale for justifying a suspension of a fundamental right of citizenship.

[31] *Roach v Electoral Commissioner (2007)* 233 CLR 162

To deny those imprisoned one of the most basic rights of citizenship is to impose an extra-judicial penalty on top of that judged appropriate by the court. It does not fit with Australia's tradition of leading the way in advancing the universal franchise. Nor does it fit with recent international court decisions that have declared prisoner voting bans invalid in Canada, the United Kingdom and South Africa.

There is no logical connection between the commission of an offence and the right to vote. Supporters of this measure inevitably argue that murderers and rapists should not be allowed to vote, but where a journalist is imprisoned for refusing to name a source on principled grounds, should he or she also be denied the vote?

To complicate this further, there is no uniformity amongst the states, or between the states and the Commonwealth, as to what constitutes an offence punishable by imprisonment.

It is better to return to principle. Denying prisoners the vote does not in any way act as a deterrent to committing crime.

Although Australia's Constitution does not explicitly guarantee citizens the right to vote, there is an implied right under the requirement of representative government or one that is "directly chosen by the people".

Australia is a signatory to the *International Covenant on Civil and Political Rights*, which compels the conclusion that every adult citizen shall have the right to vote without distinction and regardless of their circumstances.

A reasonable exception to the above arguments is when a person has been convicted of a crime against citizenship, namely treason or treachery, as described in the Criminal Code.

A convicted person's right to vote should only be removed by the determination of a court, as part of the sentencing regime.

4.7 Persons of 'unsound mind'

Being of unsound mind should as at present be sufficient grounds for removing the right to vote. It seems a provision that works well and it affects relatively few voters.

Over and above the usual considerations of the mentally ill, the Green Paper anticipates a growing demographic problem with increased numbers of aged Australians.

The Green Paper indicates that there could be very large numbers of citizens whose ageing results in diminished mental capacity,[32] and of course there would be just as many with mobility problems or disabilities resulting from ageing.

With regards to one aspect – compulsion – measures are needed to avoid unnecessary and costly administrative procedures to withdraw the vote from those affected by ageing, potentially affecting large numbers of Australians.

It would be much simpler to make enrolment and attending the polls voluntary after a certain age (say 80 years of age). Persons of unsound mind or disability due to diminished capacity from ageing or their families or carers would then not be subject to AEC letters and penalties for failing to vote.

The age chosen for voluntary voting should be selected with professional medical advice.

[32] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 4.52-4.59 pages 42-44.

5 Political Governance

5.1 Can better political governance give Australia an improved political class?[33]

Not much effort so far

Australians are demanding much more of their Governments. The push for higher standards and better performance is strong. Expectations have been created. The consequent economic social and environmental reform contemplated in Australia is very large.

Plans have been devised that embrace nearly every sector in Australia, yet the political sector has been left largely untouched, as if only the political class at the apex do not need to be more able, a higher calibre, more productive, more competitive, professionally more suited for the future.

The personal calibre quality and character of political and public service leaders matter greatly in delivering better performance.

Can better political governance give Australia an improved political class?[34]

This question has even more relevance in the context of markedly smaller membership of political parties than was once the case. That shrunken membership will inevitably have diminished the numbers, quality, and variety of potential candidates for public office.

Poor governance has significant negative effects. Governance through law, regulation and process makes power subject to performance and accountability and leads to better outcomes and conduct; which is why so much effort was put into better governance in the bureaucratic[35] union and corporate sectors, with great improvements resulting.

In contrast not much effort has been put into reforming governance in the political sector, although it must be said that at least the reporting of parliamentarians' interests and entitlements has significantly improved in recent years.

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[33] This section of the submission repeats arguments by Andrew Murray over many years, most recently expressed in this form in *Agenda: A Journal of Policy Analysis and Reform* vol 16, no 3 2009, which in turn drew on a section of the 17 February 2009 public lecture given by me in Brisbane for the Australia & New Zealand School of Government: *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda*; and has also been reproduced in *Critical Reflections on Australian Public Policy selected essays* edited by John Wanna ANU E Press Canberra 2009.

[34] Recent work by Andrew Murray on political governance includes two public submissions: February 2009 in response to the Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE; and to JSCEM's inquiry into the conduct of the 2007 federal election April 2008.

[35] For instance see the definition in page 13 of ANAO and PM&C 2006 *Implementation of Programme and Policy Initiatives: Making Implementation Matter,* Better Practice Guide Commonwealth of Australia, Canberra.

Political parties matter

Political governance matters because political parties are fundamental to the Australian democracy, society and economy. They wield enormous influence over the lives of all Australians. They decide the policies that determine our future, the programmes our taxes fund, the Ministers that government agencies respond to and the representatives in parliaments they are accountable to.

Political parties must be accountable in the public interest because of the public funding and resources they enjoy and because of their powerful public role.

Conflicts of interest and the self-interest of politicians have meant minimal statutory regulation of political parties. It is limited and relatively perfunctory, in marked contrast to the much better and stronger regulation for corporations or unions.

It is not as if the Commonwealth parliament has not been asked via debate reports recommendations and amendments to introduce better regulation along the lines discussed in this article – they have, but the resistance remains strong.

The successful functioning and integrity of any organisation rests on solid and honest constitutional foundations. The laws for corporations and unions provide models for organisational regulation. But political parties do not operate on the same foundational constructs.

We have law and governance in the public interest for corporations and unions because it makes a real difference to their integrity and functioning. The laws for the regulation of companies and industrial relations, the *Corporations Act* and the *Fair Work Act* currently number 2,400 and 650 pages respectively. In contrast to lengthy and detailed rules for the governance of corporations and unions in those Acts, there are almost no rules regulating the governance of political parties in the 440 page *Commonwealth Electoral Act.*[36]

At present there are two governance areas in politics that are regulated by statute to a degree – the registration of political parties, and funding and disclosure. The statutory registration of political parties is well managed by the AEC, as a necessary part of election mechanics, but the regulation of funding and disclosure is weak.

[36] As entities political parties sit within the Third Sector – see - Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008; ONE REGULATOR ONE SYSTEM ONE LAW, The Case for Introducing a New Regulatory System for the Not for Profit Sector, Senator Andrew Murray, Canberra, July 2006, available from the Parliamentary Library Canberra; and the public submission by Andrew Murray February 2009 in response to the Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE.

Although they are private organisations in terms of their legal form, political parties by their role, function, importance and access to public funding are of great public concern. The courts are catching up to that understanding.[37] Nevertheless, the common law has been of little assistance in providing necessary safeguards.

To date the Courts have been largely reluctant to apply common law principles (such as on membership or pre-selections) to political party constitutions, although they have determined that disputes within political parties are justiciable.

Increased regulation

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability.

Increased regulation of political parties is not inconsistent with protecting the essential freedoms of expression and from unjustified state interference, influence or control.

Greater regulation offers political parties protection from internal malpractice and corruption, and the public better protection from its consequences. It will reduce the opportunity for public and private funds being used for improper purposes.

JSCEM has previously agreed with many of these points, but nothing has been done.[38]

The CEA does not address the internal rules and procedures of political parties.

The AEC dealt with a number of these issues in Recommendations 13-16 in the *AEC Funding and Disclosure Report Election 98.* Recommendation 16 asks that the CEA provide the AEC with the power to set standard, minimum rules which would apply to registered political parties where the parties own constitution is silent or unclear. This was a significant accountability recommendation.

In their report into the 2004 election, in Recommendation 19[39] to its credit the JSCEM again recommended that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements.

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[37] For instance, *Baldwin v Everingham* (1993) 1 QLDR 10; *Thornley & Heffernan* CLS 1995 NSWSC EQ 150 and CLS 1995 NSWSC EQ 206; *Sullivan v Della Bosca* [1999] NSWSC 136; *Clarke v Australian Labor Party* (1999) 74 SASR 109 & *Clarke v Australian Labor Party (SA Branch), Hurley & Ors and Brown* [1999] SASC 365 and 415; *Tucker v Herron and others* (2001), Supreme Court QLD 6735 of 2001.

[38] See Chapter 4 Joint standing Committee of Electoral Matters report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, September 2005, Canberra.

[39] Joint standing Committee of Electoral Matters report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, September 2005, Canberra; pages 94-95.

5.2 Essential reforms

Improved political governance will over time lift the overall calibre of the political class by requiring greater professionalism, better pre-selection recruitment and training, a sustainable career path for professional parliamentarians as well as those that aspire to executive ministerial careers, and by reducing the opportunity for patronage, sinecures and dynastic factionalism.

Australia is fortunate in having many very able politicians, but the overall quality and ability of politicians and ministers – local, state, territory, and federal – needs to be lifted.

A trained professional experienced political class that is subject to the rigours of regulation, due process, and organisational integrity will always perform better than one that is not.

Most work environments or the trades are focussed on productivity and performance. In contrast formal training is curiously neglected in politics, and training is best characterised as 'on the job'. The training our elected representatives get before resuming full duties is perfunctory haphazard and limited.

It is true that some politicians are already trained in politics policy and government as former advisers or former public servants, but most are not. Many have no experience in managing an office a budget and staff.

Like all workforces, elected representatives would benefit from better training on entering their new profession.[40]

To bring political parties under the type of accountability regime that befits their role in our system of government, at the very least, the following reforms are needed.[41] It is perfectly proper to insist that these standards be met. The public deserve no less.

The question of what legal form political parties should hold is dealt with in Section 3 above. The choice of legal form affects reporting requirements, but the question of party constitutions needs also to be addressed.

[40] Intensive residential courses could be devised. As an example formal courses might include essential legal principles and legislation design; Australian political parliamentary electoral and constitutional law and systems; government and the bureaucracy in all its complexity; foreign affairs, treaties and diplomacy; accountability laws systems and practices; procurement and tendering; budgets finance and revenue, including cost-benefit analysis; managing a parliamentary office and staff; and so on.

[41] Schedule 1 of Senator Murray's *The Electoral (Greater Fairness of Electoral Processes) Bill 2007* encompasses all of these reform measures to ensure that all parties, irrespective of their ideologies, meet minimum standards of accountability, good governance and internal democracy.

The CEA should be amended to require standard items be set out in a political party's constitution to gain registration, similar to the requirements under Corporations Law for the constitution of companies.

Party constitutions should be required to specify the conditions and rules of party membership; how office bearers are preselected and selected; how pre-selection of candidates is conducted; the processes for the resolution of disputes and conflicts of interest; the processes for changing the constitution; and processes for administration and management.

Party constitutions should also provide for the rights of members in specified classes of membership to take part in the conduct of party affairs, either directly or through freely chosen representatives; to freely express choices about party matters, including the choice of candidates for elections; and to exercise a vote of equal value with the vote of any other members in the same class of membership.

Party constitutions should be open to public scrutiny and updated on the public register at least once every electoral cycle.

The AEC should be empowered to oversee all important ballots within political parties. At the very least, the law should permit them to do so at the request of a registered political party.

The decline in membership of political parties has led reformers to consider means of making pre-selections more competitive, along the lines of American primaries. The AEC should be empowered to conduct these at the request of a registered political party.

The AEC should also be empowered to investigate any allegations of a serious breach of a party constitution, and be able to apply an administrative penalty.

Changes to political governance such as these do not need COAG[42] coordination although their support would be welcome. Such reforms to Commonwealth law would inevitably flow onto the conduct of state political participants, since nearly all registered state participants are also registered federal parties.

Political parties are at least as significant to society as are corporations and trade unions, if not more so. Governance changes such as those outlined above have been tried tested and found effective in the governance of corporations, unions and other entities. They would undoubtedly improve the performance and governance of politics in Australia.

[42] The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

These are necessary reforms, but whether they would be sufficient on their own to produce a markedly more able and higher calibre political class overall is uncertain. Other reforms, including constitutional changes, will need to be kept in mind.

5.3 One vote one value

'One vote one value' has been a central theme in strengthening Australia's democracy. The long campaign has often been geographic concerning very large voter number differences favouring rural over urban constituencies in both lower and upper houses, but there have been political party concerns over internal voting power imbalances as well.

'One vote one value' is an effective tool against 'gerrymanders'.[43] 'One vote one value' in its guise of 'equal suffrage' is a fundamental democratic principle recognised by Article 25 of the *International Covenant on Civil and Political Rights*.[44]

The democratic principle of 'one vote one value' is well established, and widely but not universally supported. As far back as February 1964 the US Supreme Court gave specific support to the principle. In Australia 'one vote one value' legislation was first introduced in the Federal Parliament in 1972/3. During the 1970s, 1980s, and 1990s the principle of 'one vote one value', with a practical and limited permissible variation, was introduced to all federal, state and territory electoral law in Australia, except Western Australia. That state finally ended the lower house gerrymander in 2005.

Problems in parties

The decline in membership of political parties has increased concern at strong external influences on political party processes. Reformers have sought to reduce the influence of non-members of a political party on its members and processes; or to reduce the power of one set of party voters over another.

Not only should this 'one vote one value' principle be embedded in our legislatures, but to achieve registration, political parties should be compelled to comply with this principle in their internal organisations.

The JSCEM took this principle up as Recommendation 18 in its 2001 *User friendly, not abuser friendly* report.[45]

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[43] To '*manipulate the boundaries (of an electorate etc.) so as to give undue influence to some party or class*'; The Australian Concise Oxford Dictionary Oxford University Press.

[44] For instance see Senator Murray's *State Elections (One Vote, One Value) Bill 2001.*

[45] Joint Standing Committee on Electoral Matters: Report of the Inquiry into the Integrity of the Electoral Roll *User friendly, not abuser friendly* Canberra, May 2001.

If non-members or a class of affiliated members can affect internal political party voting systems for conventions pre-selections and various other ballots through exaggerated factional voting and bloc power votes, this can lead to legitimate concerns as to undue influence.

If more powerful votes are also directly linked to consequent political donations and power over party policies, then the dangers of corrupting influences are obvious.

If 'one vote one value' were translated into political party rules, no member's vote would count more than another's. It would also do away with undemocratic and manipulated pre-selections, delegate selections, or balloted matters.

It should be a precondition for the receipt of public funding that a registered political party comply with the 'one-vote one-value' principle in its internal rules.

Political parties, in addition to their overriding duty to the Australian public, must be responsible to their financial members and not to outside bodies, so that under 'one vote one value' the members are responsible for the party.

Affiliated organisations

There are two legislative avenues that were previously but unsuccessfully advocated as better governance in this regard - the CEA and the (now repealed) *Workplace Relations Act*. The JSCEM took the first step with its recommendation to introduce one vote one value in political parties in its aforementioned 2001 report.

Workplace law could

- Prohibit the affiliation, or maintenance of affiliation, of a federally or state registered employee or employer organisation with a political party unless a secret ballot of members authorising the affiliation has been held in the previous three (or four) years (or electoral cycle); and/or
- Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met.

This proposition is popular with some reformers who aim to make the process of trade union affiliation to political parties more transparent and democratic. The same principle should apply to corporations that affiliate to political parties.

Unions affiliate to political parties on the basis of how many of their union members (the great majority of whom are not party members) their committee of management chooses to affiliate for. The more members a union affiliates for, the greater the number of delegates that union is entitled to send to a political party's state or federal conference. Individual members of that union have no say as to whether they wish to be included in their union's

affiliation numbers or not. Affiliation fees paid by the union are derived from the union's consolidated revenue.

Reformers have considered various amendments that could make the system fairer, more transparent and more democratic.

- Any delegate sent to a governing body of a political party by an affiliated union has to be elected directly by those members of the union who have expressly requested their union to count them for the purpose of affiliation. As an added protection, the AEC could be asked to conduct such an election and the count would be by the proportional representation method;
- Definitions would need to comprehensively cover any way a union may seek to affiliate to a political party e.g. by affiliating on the basis of the numbers of union members or how much money they may donate to a political party;
- Any union delegates that attend any of the governing bodies of a political party that the union is affiliated to, must be elected in accordance with the CEA;
- Individual members of the union would need to give their permission in writing before the union can include them in their affiliation numbers to a political party; and
- No person should be permitted to be both a voting party member in his or her own right, and also be part of the affiliation numbers of a union. Such people effectively exercise two votes, in contravention of the 'one vote one value' principle.

The first Green Paper considered the issue of political donations resulting in undue influence and conflicts of interest and detrimentally affecting the integrity of Australia's political system. The same attention needs to be paid to undue influence and conflicts of interest arising from large voting blocs in political parties.

6 Representative systems

6.1 Unicameral systems

The greatest reform needed to representative systems in Australia is to unicameral parliaments.

For parliaments too small to function fully as both houses of government and as houses of parliament (the Australian Capital Territory and the Northern Territory), they would operate more effectively if there were a separation of powers between the executive and parliament.

This would mean the direct election of the Chief Minister and Deputy Chief Minister and their appointment of a non parliamentary executive. A small proportionally representative unicameral parliament would then operate as a non-executive parliament.

I have written more extensively on this elsewhere.[46]

The other unicameral Australian parliament is Queensland.

Parliament matters because it represents the sovereign people. Law which is the result of a parliamentary tyranny where a political party with half the popular vote gets all the say is not as democratically acceptable sustainable or durable as one where there is plural cross-party input and support for legislative and policy outcomes.

There is a saying that the ballot box is a cure for political illnesses, but the ballot box does not cure all, if all it results in is changing one parliamentary take-all majority for another.

In Queensland the unicameral system design is bad because it raises the Executive above all else, and diminishes the checks and balances explicit in the separation of powers.

If Queensland wants to remain unicameral it should either go to proportional representation or to having the Premier and Deputy Premier directly elected and letting them appoint Ministers outside of Parliament, so making the unicameral house a non-executive one.

The alternative is a bicameral system. An upper house adds value in the public good and for the public interest through heightened accountability, a restraint on executive and legislative excess, a repository of parliamentary good governance and standards, and fearless open and extensive consultation inquiry and review.[47]

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[46] Including in STATE OF THE TERRITORY (with Marilyn Rock) in Australian Quarterly, March-April, 1999, 47-48; and in THE NORTHERN TERRITORY: IN WHAT STATE NOW? (with Marilyn Rock) in Australian Quarterly, Nov - Dec, 1998, 43-47.

[47] These points on Queensland were made as part of the 17 February 2009 public lecture given by Andrew Murray in Brisbane for the Australia & New Zealand School of Government: *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda.*

6.2 Proportional representation

Chapter 5 of the Green Paper discusses proportional representation for the House of Representatives.

The arguments for proportional representation are often intertwined with a desire for greater plurality. Yet mature developed democracies are often plural even with single-member constituencies. Proportional representation resulting in plurality is said to produce weak government, but plural governments can be just as strong as single-party governments (Israel being an obvious example).

I am a supporter of proportional representation in unicameral houses of parliament and in upper houses. While I am not opposed on principle to proportional representation in the House of Representatives, as I the arguments against proportional representation can be overstated, the case has not been made that change is essential. There is also no real evidence that the House of Representatives is significantly unrepresentative, or that there is significant concern in Australia over its method of election.

Proportional representation in the lower house is not necessary in a bicameral system where preferential voting applies in the lower house, where lower house constituencies are broadly equal in voter numbers and where redistribution revisions are periodically conducted by a genuinely independent authority; and, where there is not only an upper house but the upper house is elected on a proportional and preferential voting basis, and the upper house constituencies are either state-wide or sufficiently large as to ensure a plural outcome under a meaningful quota.

6.3 The Senate

Without diminishing in importance the personal vote some Senators carry, the Senate is overall effectively a list system where (with exceptions like Senators Harradine and Xenophon) voters vote primarily for a political party rather than a person.

The second point is that the large number of Senate candidates has meant that voters have almost universally (nearly 97% in 2007) moved to voting [1] on a party basis on a lodged ticket ‘above the line’.

This overwhelming voter choice for voting by party ticket legitimises any move to preferential voting above the line.

Because Senate lodged tickets violate the essential democratic principle that there should be no deception and voters must know who they are voting for – (despite lodged tickets being public documents voters en masse do not know the preference flow the party has chosen for them) - preferential voting above the line should be introduced.

If it were introduced there would be no need to introduce voting thresholds to prevent Senators being elected even with very low primary votes as a result of 'preference harvesting', because 'preference harvesting' would no longer be feasible.

6.4 Dedicated electorates

There is a difference between a dedicated electorate for Australians (of any and every ethnicity, religion, or gender) that have no natural constituency, such as an Australia-at-large constituency for overseas Australians (which in any case is not necessary at present), and one which is exclusively for a specific demographic, defined for instance as property-based, ethnic or racial in type, language-based, based on religion, gender-based, sexuality-based or age-based.

Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights quoted in the Green Paper[48] all eschew this sort of discrimination, and rightly so.

I spent many years in Africa campaigning for the universal equal suffrage and against racism, 'separate development', 'homelands' and the like. For me to contemplate a race-based suffrage or constituency in Australia is just not possible.

In any case the democratic reality is that in any electorate where a particular demographic concentrates or even dominates, that will reflect itself in the candidates and parties representing that constituency. With respect to indigenous parliamentarians the Northern Territory parliament reflects that phenomena.

6.5 Elected representatives who resign early

Federal state and territory by-elections that do not result from the death of a member, or from ill-health, incapacity or other justifiable reason, are an annoyance to the community, as well as incurring a high and unnecessary cost.

In addition, resigning early without due cause is a breach of contract with the voters.

In 1995 the Western Australia Commission on Government (COG) recommended:

> *Legislation should be introduced to impose a financial penalty on members of parliament who resign without due cause. This penalty should be taken from a member's superannuation fund or other entitlements.*[49]

[48] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 2.4 page 19.
[49] Commission on Government Western Australia Report No. 1 August 1995 Perth, pages 321-322.

This remains a sound recommendation. However governments and legislatures have been reluctant to date to act on such a principle, possibly because resignation without due cause is not seen for the wrong it is, and possibly because the cost of by-elections (which can be many hundreds of thousands of dollars) is too high for most individuals to afford as a penalty.

The point is that most by-elections are as a result of death or resignation with due cause.[50]

Few by-elections are a result of resignation without due cause, and these should attract a penalty.

If the COG principle were to be accepted, which it should be, then it might be best to have a reasonable personal penalty applying to both upper and lower house members for early resignation without due cause (say, $10 000 or $15 000, indexed to inflation), but a higher penalty for the member's political party concerned (say, no public funding entitlement for that political party [but others would still qualify] for the ensuing by-election).

[50] Let me say that I consider a former Prime Minister or Premier who is no longer leader resigning *is* due cause.

7 Direct democracy[51]

The federal election is the expression of the will of the people with respect to who represents them, and who governs them. Between elections there is a question as to whether there are adequate opportunities for popular expression of views by the people.

Referenda are a well established if occasional feature (forty-eight in over a hundred years) of Australian democracy at both the federal and state level. The Australian Constitution can only be altered by binding referenda under section 128.

Plebiscites

Many Australians have been disenchanted with Australia's political system because they feel governments do not listen on many issues. The 2020 summit reflected that, and had much to say on greater civic participation.[52] Greater civic participation has long been a matter of interest to many Australians. This was also illustrated by a positive public reaction to the *Commonwealth Electoral Amendment (Democratic Plebiscites) Act 2007* (the Act).

That Act was remarkable in two respects – it promoted direct democracy, and it made explicit inalienable civil and political rights in Australian law.

The people of Australia regularly express their democratic will through elections, and on rarer occasions through constitutional referenda, but in the passage of that bill, for the first time in the federation's history the government and parliament was supporting direct democracy initiated by the people.

The Act allowed for plebiscites – the direct vote of qualified electors to some important public question[53] - to occur under the aegis of the AEC, and no state or territory law can gainsay it.

While the purpose of the Act was to allow the AEC "*to undertake any plebiscite on the amalgamation of any local government in any part of Australia*"[54], the Act appears to be open-ended in that it is for "*the purposes of conducting an activity (such as a plebiscite) under an arrangement*".[55]

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[51] The Australian Democrats always championed the concept of direct democracy, from Senator Mason's first bill in 1980 to the Democrats' Private Senator's Bill – the *Constitution Alteration (Electors Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000.*

[52] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* pp33-34.

[53] The Macquarie Concise Dictionary 2nd Edition.

[54] Explanatory Memorandum, *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007*.

[55] Schedule 1, Item 1, *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007*.

The second area of welcome democratic innovation in the Act is with respect to the International Covenant on Civil and Political Rights (ICCPR).[56] The ICCPR was ratified by Australia and came into force for Australia in 1980.[57]

It was gratifying that the Act itself referred to the inalienable rights enshrined in the ICCPR in respect of Article 19[58] and Article 25(a).[59]

Article 19 provides *"that people should have the right to hold opinions without interference and the right to freedom of expression"*; and paragraph (a) of Article 25 states *"that every citizen shall have the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives."*

Plebiscites – the direct vote of qualified electors to important public questions – are now permitted under federal electoral law. Importantly, they only allow for the expression of popular opinion and are not binding on parliaments or governments.

Canada, Italy, New Zealand, Switzerland, 27 states in the USA, Venezuela and Poland have versions of direct democracy to address feelings of citizen disconnection in those countries. Hence, there is sufficient experience from them to construct an effective form of direct democracy (often known as citizen initiated referenda [CIR]) for Australia, perhaps with these features:

- If 0.5% of the population petition on an issue, a parliamentary committee must report as to whether a national referendum or plebiscite should be held; but if over 2% of registered voters' petition, a popular vote must be conducted.
- Only if there is over 60% voter turnout and a clear majority of votes in favour would a proposition that passed have to be considered by parliament; below those percentages, the result would have advisory status only.
- A resolution that passed acts as a guide to parliament; it could not automatically pass into law until approved by the Federal Parliament. This provides a check on any CIR

[56] International Covenant on Civil and Political Rights (New York, 16 December 1966): Entry into force generally (except Article 41): 23 March 1976. Article 41 came into force generally on 28 March 1979.

[57] Entry into force for Australia (except Article 41): 13 November 1980. Article 41 came into force for Australia on 28 January 1993.

[58] Article 19 – 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[59] Article 25 – Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

backed by sectional interests, ensuring full legislative scrutiny and that the final decision lies with elected representatives.

- A strict limit to apply to the amount of funding of campaigns for or against a proposition to prevent powerful financial interests dominating.
- Accountability and transparency in relation to the funding of campaigns so that sectional interests are identified to the public.

Direct democratic advisory initiatives that leave the final decision with elected representatives are worth considering. Direct democracy can enhance our democracy. It can promote popular engagement with the political process on questions of public importance, particularly in matters that affect people immediately and specifically.

8 Electoral management bodies

8.1 One electoral management body not nine

Chapter 6 of the Green Paper discusses the structure functions and independence of electoral management bodies.

Australia has been well served by its federal state and territory electoral commissions. Both the first and second Green Papers propose consideration of ways to enhance or change their role. The greatest effect of the Green Papers' would be to increase their regulatory scope.

Section 3 'Harmonisation, a unitary system, or both?' above proposes considerable rationalisation to the structure and function of electoral commissions, arguing that electoral matters, whether federal state/territory or local divide fairly neatly into four main parts or categories, and that the last three of these could easily be covered by one national law:

- Electoral systems (federal, state, territory, local)
- The conduct of elections (federal, state, territory, local and organisational)
- The regulation of political participants (parties, associated entities, candidates, third parties),[60] including the administration of constituencies and electoral matters
- Funding and expenditure.

This leads to the obvious conclusion that only one electoral management body is needed, not nine. Variants on this theme are raised in the Green Paper.[61]

Section 5 'Political governance' above proposes an increase in regulatory scope that would affect electoral commissions.

8.2 Independence

The AEC does not have the characteristic independence markers of a statutory authority. For instance unlike the AEC the Australian Competition and Consumer Commission (ACCC) is a body corporate with perpetual succession; has an official seal; can acquire, hold and dispose of real and personal property, and may sue or be sued in its corporate name.[62]

Appointments

At present the Electoral Commissioner and the part-time Commissioners are appointed by the Governor-General for periods not exceeding seven years.

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[60] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 6.27-6.31 pages 80-81.

[61] See for instance discussion in The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 8.39-8.42 pages 121-12.

[62] See s6 (A) (2) of the *Trade Practices Act 1974*.

The involvement by the Governor-General in the appointment process is just a formality. The appointment is by the Minister, subject to the approval of the Prime Minister, whose decision is confirmed by the Cabinet and finally rubber-stamped by the Governor-General.

However, additional arms-length safeguards are built into the process of selecting the part-time Commissioners,[63] and these appear to work well.

While the appointment of electoral commissioners is more of a political decision, it is one that is subject to a formal government appointments process. Partisanship therefore does not appear to have been an issue. It is to the credit of the process of successive governments that particular electoral commissioner appointments have not attracted anything more than light grumbles in the political community, and the AEC has maintained its high reputation and widespread approval.

Independence is characterised by the exercise of objective and impartial judgement, unfettered by conflicts of interest or allegiances.

JCPAA Report 391[64] had some useful insights into independence:

> *The concept of independence is open to various definitions depending on the context in which it is used. In a very general sense, being independent refers to a person or group being self-governing and unwilling to be under obligation to others. More specifically, independence can be seen to have two complementary characteristics:*
>
> - *a state of mind that allows for opinions to be arrived at without being affected by external influences; and*
> - *a matter of appearance in that facts and circumstances are avoided that would lead a third party to conclude that a person's ability to arrive at an independent opinion has been compromised.*
>
> *.... Independence is important to ensure that a person or group of persons undertake their work professionally, with integrity and objectivity and free of bias and undue influence.....*
>
> *...[A] core set of mechanisms and criteria in each of the following areas, are common to enhancing the independence of each group:*
>
> - *appointment;*
> - *security of tenure;*
> - *termination; and*
> - *remuneration.*[65]

Full independence is only possible when:

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[63] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 6.9 pages 74-75.

[64] The Parliamentary Joint Committee of Public Accounts and Audit, Report 391, Review of Independent Auditing by Registered Company Auditors, August 2002.

[65] The Parliamentary Joint Committee of Public Accounts and Audit, Report 391, Review of Independent Auditing by Registered Company Auditors, August 2002, paragraphs 1.23-1.30, pp. 6-7.

- the method of appointment is objective, on merit, and not subject to patronage, favour, or inducements;
- remuneration is sufficient, profitable and secure for a reasonable period, and not hostage to other services or retainers;
- tenure is reasonable and secure; and
- objective fair and consistent separation or contract-ending mechanisms exist.

My proposals and those discussed in the Green Paper require a reconsideration of independence. The CEA has worked well in ensuring an independent authority that has enjoyed the confidence of the political class, the media, and the community.

There are precedents that can take independence further.

Two Australian precedents exist which could either individually or in combination further enhance the independence of electoral commissioners and the AEC itself. One is the appointment of the Commissioner of the ACCC which has to be confirmed by a majority of states, so leading to a wider approval process.[66]

The other is for JSCEM to be given a similar role to the JCPAA with the Auditor-General in being consulted on both AEC appointments and budget; and for the electoral commissioner to be made independent of the Executive. I have previously raised this prospect as a former member of JSCEM. The Green Paper remarks on these possibilities.[67]

Commonwealth Auditor-General and the JCPAA

The Commonwealth Auditor-General has significant powers, set out in the *Auditor-General Act 1997* (AGA):

- the Auditor-General has "complete discretion" in the exercise of his powers under the Act, and is not subject to direction from anyone (subsection 8(4));
- the Auditor-General is appointed for a non-renewable ten-year term, and can only be removed from office on limited grounds including misbehaviour, physical or mental incapacity or bankruptcy (Schedule 1, sections 1 and 6). A resolution of both houses of Parliament is necessary before the Auditor-General can be removed on the grounds of misbehaviour or physical/mental incapacity. Whenever a vacancy occurs in the office, a replacement must be appointed "as soon as is practicable" (section 7(2)).

The AGA also stipulates that the Auditor-General is an "independent officer of the Parliament" (subsection 8(1)), this terminology reflecting the fact that the Parliament is the Auditor-General's primary client, but (unlike other parliamentary officers) is not subject to direction by members of Parliament.

[66] See s7 (C) (3) and s8A (1A) of the *Trade Practices Act 1974*.

[67] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 6.37 page 83 and 6.45 page 84.

The Auditor-General's main client is the Parliament, not the Executive, as reflected in his or her status as an independent officer of the Parliament and appointment for a ten year term.

The AGA Schedule 1, section 2 provides that the Audit Minister (currently the Special Minister of State), when nominating a new Auditor-General, must not recommend an appointment to the Governor-General unless the proposed recommendation has first been approved on behalf of the Parliament by the JCPAA.

The *Public Accounts and Audit Committee Act 1951* (PAACA) (section 8A) in turn provides that within 14 days of receipt of the nomination, the JCPAA must either approve or reject the nomination by absolute majority (i.e. at least nine of the Committee's 16 members) or seek an extension of time of 30 days. Failure to reach a decision within that period shall be taken to be approval of the nomination.

The JCPAA went through the first approval process in 2005, unanimously endorsing the proposed appointment of the current Auditor-General Mr Ian McPhee. While the JCPAA has the power to hold a public hearing with the nominee, given Mr McPhee's strong claims to the position as a long-standing former Deputy Auditor General the Committee contented itself with a private briefing with Mr McPhee to discuss how he would approach the role.[68]

Scrutiny of the Auditor-General's budget and work programme

As with other public sector agencies, the ANAO is funded each year through the federal budget process. The PAACA (subsections 8 (j) and (l)) empowers the JCPAA to consider and make recommendations to the Parliament on the draft budget estimates of the ANAO.

However, over the second half of the financial year the Auditor General briefs the Committee on the funds he will be seeking in the budget and why, and the ANAO's informal understanding of which of its proposals are likely to be successful or unsuccessful.

In support of this process the AGA section 53 empowers the Auditor-General to disclose to the JCPAA, before the federal budget, the draft estimates for the Audit Office (effectively the ANAO's budget submission). The Committee then has the information it requires to make formal representations to Government on behalf of the ANAO if necessary, including extensive written submissions in recent years.

Immediately before the federal budget is delivered to the Parliament, the ANAO briefs the Committee on its funding allocation for that year. The Committee Chair then makes a statement to the Parliament, on budget day, on whether the Committee believes the ANAO has been given sufficient funding to carry out its functions. A corresponding statement is delivered to the other house by one of the Committee's members from that chamber.

[68] The author was a member of the Joint Committee of Public Accounts and Audit at the time.

This power is intended to discourage governments from trying to influence the Auditor-General by unduly restricting his funding, and is reinforced behind the scenes by the Committee having the information needed to lobby relevant Ministers on behalf of the ANAO if necessary.

While the Auditor-General is independent in determining his work program, the AGA section 9 states that he must "have regard" to the audit priorities of the Parliament, as determined by the JCPAA under paragraph 8(1) (m) of the PAACA.

8.3 Limits on the powers of the AEC

The Green Paper identifies dangers consequent to (the probably unintended electoral matters consequences of) S44A (1) (a) of the *Financial Management and Accountability Act 1997*.[69]

It is not clear whether the introduction of an 'independence provision' such as section 10 in the *Tasmanian Electoral Act 2004* on its own would fix this problem.

These dangers should be addressed by making explicit the AEC's independence and its right to refuse to provide information that could afford the Minister or the Government of the day inappropriate political benefit.

Such a change could result in 'grey areas' that could unnecessarily impact the proper relationship between the responsible Minister and the AEC, so there needs to be a safety valve in this respect, requiring the Commissioner to take independent advice and to provide that advice to the Minister when refusing any potentially contentious request from the Minister.

[69] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 6.25 page 80.

9 Truth in political advertising[70]

The principle

Legislation should be enacted to impose penalties for failure to accurately represent the truth in political advertisements because such legislation would advance political standards, promote fairness, improve accountability and help restore trust in politicians and the political system.

As elections are one of the key accountability mechanisms in our system of government, it is essential that advertisements purporting to state 'facts' are legally required to accurately represent the truth.

The private sector is already required by law not to engage in misleading or deceptive conduct by Section 52 of the *Trade Practices Act 1974*. Why should politicians or political parties (whose 'product' on offer is political policies and personalities) be any different?

As honesty is regarded as one of the fundamental bases of our society, the popular perception of politicians being dishonest is one of the most serious threats to the legitimacy and integrity of our democracy.

Suitable controls would go some way to addressing the already widespread cynicism towards politicians.

Controls that are or have been in place

In 1985 the South Australian Parliament enacted the *Electoral Act 1985 (SA*), of which Section 113 makes it an offence to authorise or publish an advertisement purporting to be a statement of fact, when the statement is inaccurate and misleading to a material extent.

Over 25 years later, this law still operates effectively, putting the lie to those who insist truth in political advertising legislation cannot work.

This legislation has been tested in the Supreme Court of South Australia, where it was held to be constitutionally valid. Further, it was found not to infringe the implied guarantee of free political communication found by the High Court to exist in the Commonwealth Constitution.

The Commonwealth had similar laws to the above for a short period in 1983-84. The Australian Democrats were the only party that fought for their retention, but the major parties ensured they were promptly repealed.

[70] See discussion in The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 10.53-10.66 pages 153-157.

Controls that should be in place

In March 2007 the Democrats tabled the *Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007*. Schedule 2 of this bill seeks to ensure that reasonable standards on truthfulness are made a matter of law.

To establish an effective system of trust in political advertising, the Bill proposes:

- amending the CEA to prohibit statements of fact that are inaccurate or misleading to a material extent;
- imposing fines for breaching the truth in political advertising for individuals and corporate bodies, including candidates and political parties; and
- providing for the 'reasonable person' defence and allowing for corrections and retractions.

Nothing in the Bill applies to infringe any doctrine of implied freedom of communication.

Such a provision should not just apply during the election period. All inaccurate or misleading statements of fact in political advertising, regardless of proximity to an election day, should be addressed. In recent times, the trend in electoral advertising is towards a 'continuous campaign'[71] that is carried out over the length of an election cycle to support party political goals.

[71] See Dr S Young, Submission No. 145 to 2004 Federal Election Inquiry.

10 Political parties and postal votes

A postal vote application form is an official invitation from the AEC to apply for a vote by post. At present political parties are allowed to send out postal vote application forms accompanied by party political material. This is highly improper.

It would be unthinkable to allow party political material not self-selected by voters (how-to-vote cards) to be taken into the ballot box.

Having a particular party's political material accompany a postal vote application form affects the independent and non-partisan perception of AEC material and should be prohibited. It was prohibited in the past.[72]

Even more worrying is when voters are then invited by the political party to return the form to them rather than the AEC, for onward transmission. Onward transmission is slower than direct post to the AEC, which can be fatal when election day is near, and there have been instances of onward transmission not taking place.

This is a deceptive and potentially corrupt process. It subverts and perverts the independent process of the AEC; it gives partisan advantage to large parties; it can fatally interfere with the speedier AEC processing so resulting in lost votes; and, it is a breach of privacy.

The practice should be prohibited. All postal vote applications should be required to be returned to the AEC.

[72] The Australian Government's September 2009 Electoral Reform Green Paper *STRENGTHENING AUSTRALIA'S DEMOCRACY* 11.24 and Footnote 852 page 167.

Appendix A About the Author

Andrew Murray was a Senator for Western Australia from July 1996 to June 2008. He is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children.

For most of his 12 years in the Senate Andrew Murray was a member of the Joint Standing Committee on Electoral Matters (JSCEM) and was the Australian Democrats Electoral Matters Spokesperson.

Aspects of his work on electoral matters can be found in the Committee and Senate Hansard record and on his website www.andrewmurray.org.au

Among his publications and reports relevant to Electoral Reform are:

- PUBLIC SUBMISSION by Andrew Murray to the Australian Government's December 2008 Electoral Reform Green Paper *Donations Funding and Expenditure,* February 2009.
- PUBLIC SUBMISSION by Senator Andrew Murray to JSCEM's inquiry into the conduct of the 2007 federal election April 2008.
- SUPPLEMENTARY REMARKS by Senator Andrew Murray to the report on the *Inquiry into the Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007,* Senate Standing Committee on Finance and Public Administration, Canberra, September 2007.
- ONE REGULATOR ONE SYSTEM ONE LAW The Case for Introducing a New Regulatory System for the Not For Profit Sector, Senator Andrew Murray, Canberra, July 2006, available from the Parliamentary Library Canberra.
- DISSENTING REPORT of Senator Andrew Murray to the report on the *Inquiry into the Electoral and Referendum (Electoral Integrity and Other Measures) Bill 2005,* Senate Standing Committee on Finance and Public Administration, Canberra, March 2006.
- DISSENTING REPORT of Senator Andrew Murray to the report *Funding and Disclosure: Inquiry into disclosure of donations to political parties and candidates,* JSCEM, Canberra, March 2006.
- SUPPLEMENTARY REMARKS by Senator Andrew Murray to *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto,* JSCEM Canberra, September 2005.
- TRUSTING THE PEOPLE: An Elected President For An Australian Republic, Introduced by Andrew Murray, Design by Design, Perth, 2001.
- THE DANGEROUS ART OF GIVING' [ARTICLE ON POLITICAL DONATIONS] (with Marilyn Rock) in Australian Quarterly, June-July, 2000, 29-33.
- STATE OF THE TERRITORY (with Marilyn Rock) in Australian Quarterly, March-April, 1999, 47-48.

- THE NORTHERN TERRITORY: IN WHAT STATE NOW? (with Marilyn Rock) in Australian Quarterly, Nov - Dec, 1998, 43-47.

Andrew Murray's Private Senator's Bills relevant to Electoral Reform are:

- Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007
- Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007: Second Reading
- Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007: Explanatory Memorandum
- Amendment to Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007
- Electoral Amendment (Political Honesty) Bill 2003: Second Reading
- Electoral Amendment (Political Honesty) Bill 2003
- State Elections (One Vote, One Value) Bill 2001: Second Reading
- State Elections (One Vote, One Value) Bill 2001
- Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members): Second Reading
- Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members)