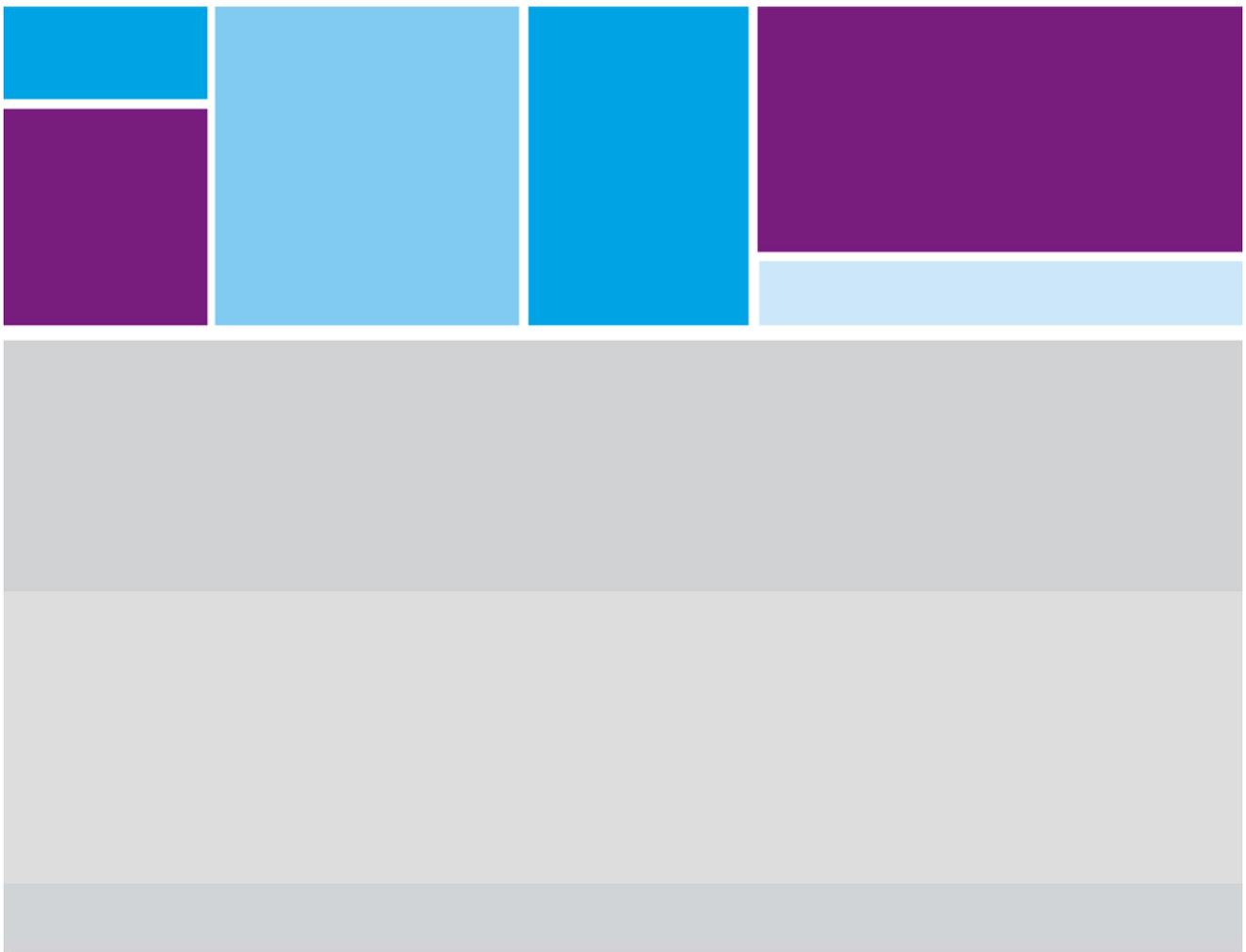


AEC Submission to the Joint Standing
Committee on Electoral Matters Inquiry
into the Conduct of the 2007 federal
election and matters related thereto –
Penalties in the *Commonwealth Electoral
Act 1918*

5 March 2010



AEC

Australian Electoral Commission

Background

1. During the hearing of the Committee on 17 November 2009 (see Hansard EM 8 and 9) the Chair to the Joint Standing Committee on Electoral Matters (JSCEM) requested that the Australian Electoral Commission (AEC) undertake an analysis of the levels of offences contained in the *Commonwealth Electoral Act 1918* (Electoral Act) and to provide the Committee with “a considered submission in terms of the gradation of offences within the Electoral Act”.

Commonwealth Policy

2. The policy responsibility for framing Commonwealth offences falls within the Attorney-General’s portfolio. The Minister for Home Affairs has approved a document entitled “A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers” (the Guide) which sets out that this Minister is required to approve provisions in a Bill that contain offences, civil penalties and enforcement powers (see Chapter 2 of the Guide). At this time the AEC has not obtained input from the Attorney-General’s Department or the relevant Minister on the matters contained in this Submission and any changes to the Electoral Act. Accordingly, any legislation to implement JSCEM recommendations on penalties could only be progressed with the approval of that Department and its Minister.

The Guide

3. The Guide refers to there being three different mechanisms for imposing liability on a person for contravening a statutory requirement – offences, infringement notices and civil penalties. The Guide notes that there are other mechanisms for imposing liability including civil liability, administrative sanctions (e.g. cancellation of political party registration) and enforceable undertakings. The AEC notes that in the Electoral Act the provisions dealing with breaches all involve a criminal offence. The apparent basis for this is that the offences relate to electoral matters and that the relevant conduct involves harm to society which can affect Australia’s national interests.

4. The Guide sets out the factors that should be considered in determining whether or not a provision should be criminal or civil in character. Some of these factors which appear to be relevant to the present matter include:

- How is similar conduct regulated in the proposed legislative scheme and other Commonwealth legislation?

- If the conduct has been regulated for some time, how effective have existing provisions been in deterring the undesired behaviour?
- What level and type of penalties will provide appropriate deterrence?

Constitutional bar and the CDR

5. An additional factor to be considered in the setting of penalties in the election context is the effect of section 44(ii) of the *Constitution* which provides that a person who “has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or a State by imprisonment for one year or longer ... shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives”.

6. A further issue of relevance to any discussion of penalties under the Electoral Act is the role of the Court of Disputed Returns (CDR). The CDR has the power to void the election of a candidate where there has been an “illegal practice” involving bribery or undue influence, or other action by which the result of the election was likely to have been affected (see subsections 362(1) and (3) of the Electoral Act). The term “illegal practice” includes any contravention of the Electoral Act or the regulations (see subsection 352(1) of the Electoral Act). However, paragraph 362(3)(a) limits this sanction being imposed where the illegal practice was committed by any person other than the candidate and without the knowledge or authority of the candidate. Subsection 362(2) of the Electoral Act makes it clear that any finding by the CDR that there has been an “illegal practice” does not bar or prejudice any criminal prosecution for the same practice that is in breach of the Electoral Act or regulations.

Misleading and deceptive applications

7. Many of the offences in the Electoral Act relate to the provision of information that is false or misleading in a material particular. The AEC notes that the Guide refers to an examination of how similar conduct is dealt with in other Commonwealth legislation. Part 7.4 of the *Criminal Code Act 1995* provides penalties of up to “imprisonment for 12 months” for deliberate false or misleading statements and “imprisonment for 6 months” for reckless false or misleading statements (see Divisions 136.1 and 137.1). The AEC submits that these provisions of the *Criminal Code Act 1995* sets the standard against which the relevant offence provisions contained in the Electoral Act would need to be examined. However, the AEC notes that in relation to the election funding and financial disclosure provisions contained in Part XX of the Electoral Act, the proposed increase in penalties reflects both the significance to the electoral system of full financial disclosure and the payment of millions of dollars in public monies in election funding entitlements to candidates, Senate groups and political parties. These proposed increased penalties

were contained in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 that is still before the Parliament.

Complaint Escalation Protocol

8. The effectiveness of the existing offence provisions in the Electoral Act is difficult to assess. One of the reasons for this is that the AEC does not have any systems in place to capture or record all alleged breaches of the requirements of the Electoral Act. This is particularly the case on polling day when the AEC staff (which includes both Public Service Act employees and temporary staff engaged under section 35 of the Electoral Act) are primarily engaged in the conduct of the election at polling places and then undertaking the count. These AEC staff complete incident reports forms which are forwarded to the Divisional offices of the AEC after the completion of the count. However, the AEC does not have any systemic approach to capturing all of the reported incidents.

9. The AEC does have a document entitled “A Protocol for Escalating Inquiries/ Issues/ Complaints” which is based on the AEC’s experience that most complaints involving the conduct at polling places are handled promptly and effectively by the Officers in Charge of the Polling Place and then the Divisional Returning Officers. If a complaint is not resolved at this level, it is then referred to the Australian Electoral Officer for the particular State or Territory. If the complaint cannot be resolved at this level, it is then referred to the AEC’s Chief Legal Officer and the Deputy Electoral Commissioner for action. The AEC has previously published information about the numbers of complaints that were escalated under this Protocol in the lead up to an election.

On-The-Spot fines etc

10. At the JSCEM hearings of 14 October 2009 (EM 7) and 17 November 2009 (EM 3), the possibility was raised by members of the Committee of giving polling place officials the power to issue on-the-spot fines and penalty notices. While the AEC would support the power being given to senior AEC officers to issue penalty notices, the AEC would not support this power being given to all AEC staff (including polling place officials) and DROs. The reasons for this include:

- On polling day DROs and other AEC staff are primarily focussed on the conduct the conduct of the poll and to add this additional task would be an have the potential to divert them from that primary task and to become embroiled in party political disputes;
- On polling day the AEC staff include over 60,000 polling place officials who have received limited training. To confer such a significant power on those AEC staff could result in a lack of consistent decision-making and would

undermine the existing Escalation Protocol which has proven to be successful in handling polling place disputes.

- While some polling place offences merely involve clear questions of fact (e.g. whether or not an “electoral advertisement” contains the necessary authorisation details as required by section 328 of the Electoral Act) some other offences involve more complex issues and the application of case law (e.g. matter that is likely to mislead or deceive an elector in relation to the casting of a vote in breach of section 329). To have such judgements made by DROs or temporary AEC staff would be of concern and would have the potential to create administrative difficulties (including additional costs for training and the creation of systems to record and recover any fines imposed); and
- The main task faced by the AEC is to ensure a breach of the Electoral Act is resolved quickly and effectively. If a person fails to take the appropriate action to remedy any action that is in breach of the Act, then the issuing of an on-the-spot fine or penalty notice does not ensure that the unlawful action ceases and resort would need to be had to the injunction power contained in section 383 of the Electoral Act. Decisions on section 383 matters are made by the Chief Legal Officer and the Deputy Electoral Commissioner as they involve the expenditure of significant amounts of public moneys on legal representation.

11. If the JSCEM were to recommend that the Electoral Act be amended to include a power to issue penalty notices, then the AEC would support such a proposal in the circumstances where this power to be exercised only by AEC staff acting under delegated power from the Electoral Commissioner (e.g. Senior Executive Officers or Australian Electoral Officers) as a reflection of the current processes used by the AEC where matters are escalated to the Australian Electoral Officers and then to the Chief Legal Officer and the Deputy Electoral Commissioner in Canberra.

Previous JSCEM recommendations

12. The AEC notes that many of the offence provisions and their associated level of penalties remain as they were with the enactment of the *Commonwealth Electoral Legislation Amendment Act 1983*. For example the penalties for a breach of section 328 of the Electoral Act (which generally makes the printing, publication and distribution of unauthorised electoral advertising an offence punishable on conviction with a fine not exceeding \$1,000 for a natural person or a fine not exceeding \$5,000 for a body corporate) are the same as those set by the Parliament in 1983.

13. The AEC notes that the JSCEM Report following the 1996 election included the following recommendation:

“Recommendation 51:

that a review of the level of penalties for offences under the Electoral Act and the Referendum Act be undertaken by the AEC with the assistance of the Attorney-General's Department, with a view to bringing the penalties into line with penalty rates for comparable offences under other Commonwealth statutes. (p90)”

14. The basis for the above recommendation was addressed in the JSCEM Report as follows:

“Penalty Levels

7.48 The AFP's prioritisation guidelines require it to focus on major crime, which may be identified according to the level of the penalty involved. Consequently the AEC has not always been able to obtain the AFP's services:

“Although the AEC appreciates the assistance of the AFP in investigating electoral offences, it is becoming increasingly difficult to obtain their agreement to the diversion of their resources to investigate many electoral offences, because the low level of penalties under the CEA suggest low prioritisation relative to other major crime referrals to the AFP...The AEC has recently had constructive discussions with the AFP in an effort to obtain a better mutual understanding of each agency's concerns.”

7.49 An indexed penalty unit system was incorporated into the Crimes Act in 1992. While the system applies to the Electoral Act and the Referendum Act as to most other Commonwealth statutes, the base level of penalties in the Electoral Act remains low.”

15. While the Government response supported the recommendation, the AEC has not been able to identify any record of any detailed work having been done on this matter.

JSCEM 2007 Report recommendation no. 46

16. The AEC notes that in the JSCEM Report on the 2007 election the Committee has already recommended (see Recommendation 46) that the penalty for a breach of section 328 of the Electoral Act should be increased.

17. The AEC has proposed an increase the penalty for a breach of section 328 to a maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate. This proposed action would appear to give effect to JSCEM Recommendation 46.

Strict liability

18. At the JSCEM hearing of 17 November 2009 (EM 5), there was a discussion about whether the offence contained in section 328 should be a strict liability offence and what would be the appropriate level of any penalty.

19. The application of either strict or absolute liability negates the requirement to prove fault (see sections 6.1 and 6.2 of the Criminal Code). The application of strict liability allows a defence of honest and reasonable mistake of fact to be raised. The application of absolute liability does not. The defence does not apply to circumstances where a mistake results from a lack of awareness of relevant facts. The AEC notes that the previous Governments and Parliaments have taken the view that these types of offences should not apply where the offence includes a term of imprisonment. This was also reflected in the evidence from the officers of the Attorney-General's Department at the JSCEM hearing of 17 November 2009 (EM 5 and 6).

20. The Guide states that different considerations apply to the use of strict and absolute liability depending on how it applies to an offence. Application of strict or absolute liability to *all* physical elements of an offence has generally only been considered appropriate where *each* of the following considerations is applicable.

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.
- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
- There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.

21. The AEC is principally concerned about being given the tools to ensure the speedy compliance with the provisions of the Electoral Act and to ensure that there is a practical deterrent to the publication of electoral advertising that is not authorised. The AEC acknowledges that the inclusion of strict liability elements in the offence in section 328 of the Electoral Act may provide some additional deterrent effect. The majority of the breaches examined by the AEC are technical breaches of section 328 with only part of the required authorisation details being provided. The main concern to the AEC remains the truly anonymous electoral advertisements where there is no person who is readily identifiable as the publisher and that criminal forensic investigation skills and resources would need to be obtained (e.g. the use of services from the Australian Federal Police (AFP)) in an attempt to locate the persons responsible for the publication of the anonymous advertisement. Changing the fault elements on their own would not appear to

provide a solution for the AEC to deal with these anonymous electoral advertisements. However increasing the penalty for a breach of section 328 (and also 328A) to include a term of imprisonment may well have an effect as any increase in the quantum of the penalty appears to increase the likelihood that the AFP may be in a position to accept a referral and to devote their scarce investigation resources to dealing with these types of offences.

Possible change?

22. Attached is a table of all of the provisions contained in the Electoral Act which contain a penalty offence. The final column contains suggested changes to the penalty offences in Parts XX and XXI of the Electoral Act which are aimed at providing internal consistency and to give operation to Commonwealth policy relating to penalties.

23. The AEC notes that the proposed penalties for the offences contained in Part XX of the Act reflects the revised disclosure regime that was contained in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009.

24. The AEC also notes that many of the penal offences in the Electoral Act are mirrored in the *Referendum (Machinery Provisions) Act 1984*. The AEC submits that if changes are recommended by the JSCEM to penal offences in the Electoral Act, similar changes should also be recommended to the *Referendum (Machinery Provisions) Act 1984*.

Section Number	Nature of the Offence	Current Penalty	Possible Change
78	Improper influence of a member of a Redistribution Committee	\$2,000 or imprisonment for 12 months, or both	
91A(1)	Prohibition on the improper use of information from the Roll	100 penalty units	
91B(2)	Prohibition on the disclosure of protected information from the Roll	1,000 penalty units	
91B(3)	Prohibition on the improper use of protected information from the Roll	1,000 penalty units	
101(6)	Failure to enrol to vote or to transfer enrolment when there is a change in the place of living	1 penalty unit and a strict liability/absolute liability offence depending on type of enrolment claim	
103	Penalty on an officer neglecting to enrol claimants	\$1,000	
187(1)	Breach of the duty of a witness to a postal vote application	\$500	
189B(2)	Prohibition on the improper disclosure of information from the electronic list of postal vote applicants	1,000 penalty units	

189B(3)	Prohibition on the commercial use of information from the electronic list of postal vote applicants	1,000 penalty units	
195	Interference with a postal vote ballot paper	\$1,000	
196	Prohibition on any person other than an AEC officer opening an envelope containing a postal vote ballot paper	\$500 and strict liability	
197	Failure to post or deliver postal vote application or a postal vote ballot paper	\$1,000	
200DB(1)	Offence for scrutineer interfering or influencing elector in pre-poll voting office	Imprisonment for 6 months	
200DB(2)	Offence for scrutineer communicating with some else at pre-poll voting office where that communication is not necessary for the discharge of the functions of a scrutineer	Imprisonment for 6 months	
200J	Prohibition on any person other than an AEC officer opening a pre-poll voting envelope	\$500 and strict liability	

200K	Breach of obligations on person present when an elector signs a pre-poll certificate or marks a ballot paper	\$1,000	
218	Prohibition on scrutineers interfering or influencing electors within a polling booth	\$1,000 or imprisonment for 6 months, or both	
245	Failure to vote without a valid and sufficient reason	245(5) administrative penalty \$20 245(15) \$50 penalty imposed by court and a strict liability offence 245(15C) \$50 penalty imposed by court for false or misleading information in response to a penalty notice for failure to vote	
271	Prohibition on officers marking ballot papers which would enable a voter to be identified	\$1,000	
315(1) and (1A)	Failure to lodge donor returns, election returns and annual returns relating to election funding and disclosure matters	\$5,000 for agent of a political party and \$1,000 for all others – strict liability offence	120 penalty units

315(2) and (2A)	Lodging an incomplete return or failing to retain relevant records	\$1,000 and strict liability offence	120 penalty units
315(3)	Lodging of a return by the agent of a political party that is false or misleading in a material particular.	A fine not exceeding \$10,000	Imprisonment for 2 years or 240 penalty units or both
315(4)	Lodging of a return by persons other than political party agent that is false or misleading in a material particular	A fine not exceeding \$5,000	Imprisonment for 12 months or 120 penalty units or both
315(6A)	Prohibition on persons providing false or misleading information in relation to a claim for election funding	\$1,000	Imprisonment for 2 years or 240 penalty units or both
315(7)	Prohibition on persons providing false or misleading information in a person who is required to lodge a return	\$1,000	Imprisonment for 12 months or 120 penalty units or both
315(8)	Additional daily penalty of \$100 for failing to lodge a return within the required period	\$100 per day	1 penalty unit per day
315(10)	Cap on the total penalty that may be imposed		

316(5), (5A) and (5B)	Refusing or failing to comply with a notice from an authorized officer to produce information relating to an investigation	\$1,000 and strict liability offence	Imprisonment for 12 months or 60 penalty units or both
316(6)	Prohibition on persons providing false or misleading information in response to a notice	\$1,000 or imprisonment for 6 months, or both	Imprisonment for 12 months or 60 penalty units or both
323	Officers and scrutineers to observe secrecy in relation to the identification of electors who have voted	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
324	Officers not to contravene a provision of the Act for which no other penalty applies or contravenes a direction given under the Act	\$1,000	Maximum penalty 50 penalty units
325(1) &(2)	Officers not to influence the vote of another person	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
325A	Proprietors and employees in hospitals and nursing homes not to influence the votes of patients and residents	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both

326 (1) & (2)	Bribery for votes and support	\$5,000 or imprisonment for 2 years, or both	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
327(1)	Interference with any political right or duty	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
327(2)	Discrimination against persons who have given donations to a political party or candidate	Offender is a natural person - \$5,000 or imprisonment for 2 years Offender is a body corporate - \$20,000	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
328	Failure to include authorization details on printed electoral advertisements	Offender is a natural person – a fine not exceeding \$1,000 Offender is a body corporate – a fine not exceeding \$5,000	Maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate
328A	Failure to include authorization details on paid for electoral advertisements published on the Internet	10 penalty units	Maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate

329	Prohibition on certain types of misleading or deceptive publications during the election period	Offender is a natural person – a fine not exceeding \$1,000 or imprisonment for a period not exceeding 6 months or both Offender is a body corporate – a fine not exceeding \$5,000	Maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate
330	Prohibition on making false or misleading statements about the enrolment of an elector on polling day	\$1,000 or imprisonment for a period not exceeding 6 months or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
331(1)	Failure to include the word “advertisement” as a headline for electoral advertisements in the print media	5 penalty units	Maximum penalty of 25 penalty units
331(2)	Failure to include the word “advertisement” as a headline for electoral advertisements that take up 2 opposing pages in the print media	\$500	Maximum penalty of 25 penalty units
334(1) and (2A)	Depiction of certain electoral matter directly on public property and locations	\$1,000 and a strict liability offence	Maximum penalty of 25 penalty units and a strict liability offence

335	Leaving How to Vote material in a polling booth	\$500	Maximum penalty of 25 penalty units
336	Prohibition on making the signature of another person on an electoral paper	\$1,000	Maximum penalty of 50 penalty units
337(1)	Falsely witnessing any electoral paper	Imprisonment for 12 months	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
338	Unlawfully marking ballot papers	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
339(1)	Other offences in relation to nomination papers and ballot papers	Imprisonment for 6 months	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
339(1A) and (1B)	Prohibition on a person voting more than once in an election	10 penalty units and a strict liability offence	Maximum penalty of 50 penalty units and a strict liability offence
339(1C)	Prohibition on a person intentionally voting more than once in an election	60 penalty units or imprisonment for 12 months, or both	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
339(2)	Prohibition on any act that results in the defacement or destruction of a notice list or other document affixed under the authority of a DRO	\$500	Maximum penalty of 25 penalty units

340(1) and (2)	Prohibition on canvassing within 6 metres of a polling booth	\$500	Maximum penalty of 25 penalty units
341(1) and (2)	Prohibition on officers and scrutineers wearing political badges or emblems in a polling booth	\$1,000 and a strict liability offence	Maximum penalty of 50 penalty units and a strict liability offence
342	Breach of the duty of a witness to enrolment claim	\$1,000	Maximum penalty of 240 penalty units or imprisonment for 4 years or both
343	Breach of duty to forward claims for enrolment to a DRO	\$1,000 and a strict liability offence	Maximum penalty of 50 penalty units and a strict liability offence
345(3)	Breach of duty on employers to allow an employee time off (of up to 2 hours) for the purpose of voting	Offender is a natural person – \$500 Offender is a body corporate – \$2,500	Maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate
346(1)	Prohibition on making or possessing any papers with the “official mark” that is used on ballot papers without lawful authority	\$1,000	Maximum penalty of 50 penalty units
347(1)	Disorderly behaviour at any lawful public political meetings held in relation to the election of MPs during the	\$500	Maximum penalty of 25 penalty units

	election period		
347(4)	Prohibition on a person who has been removed from a public political meeting for being disorderly returning to the meeting	\$1,000 or imprisonment for 6 months, or both	Maximum penalty of 50 penalty units or imprisonment for 10 months or both
348(1)	Prohibition on misconduct at a polling booth	\$500	Maximum penalty of 25 penalty units
351(1)	Prohibition on the publication of certain unauthorised statements purporting to be made on behalf of candidates	Offender is a natural person – \$1,000 Offender is a body corporate – \$5,000	Maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate
384	Offence under section 315(3) and 326 are indictable offences which may be dealt with by a court of summary jurisdiction with decreased penalties	315(3) – a fine not exceeding \$5,000 326 – a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months or both	