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Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Bill 2004

Jerome Davidson
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Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Bill 2004

Date Introduced: 5 August 2004

House: House of Representatives

Portfolio: Special Minister of State

Commencement: Schedule 1 commences 10 August 2004; the remaining provisions commence on the day the Act receives Royal Assent.

Purpose

The stated purpose of the Bill is to amend the *Commonwealth Electoral Act 1918* (the Electoral Act), the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) and the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* (the Enrolment Integrity Act) to address operational problems identified with the amendments made by the Senate during debate on 25 June 2004 of the Enrolment Integrity Act.¹ The amendments are timed to come into force immediately after commencement of the amendments made by the Enrolment Integrity Act so as to correct the perceived anomalies in that Act.

Background

Prisoner voting

Under the Electoral Act prisoners serving sentences of 5 years or longer are not entitled to vote in federal elections.² It was originally proposed, by the Enrolment Integrity Act, to remove the right to vote from all prisoners serving a sentence of imprisonment. That provision was, however, amended in the Senate, on the motion of Australian Labor Party Senator John Faulkner, to remove the right to vote from any person who:

(b) is serving a sentence of imprisonment which:

(i) commenced on or before the return of the writs for an election for the House of Representatives or Senate; and

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(ii) continues at the issuing of writs for any succeeding election for the House of Representatives or Senate.

According to the author of the Explanatory Memorandum, this amendment is unworkable because prisoners affected by it could only be removed from the roll by the existing objection process, and there would not be enough time available to conduct that process. Effectively, the Australian Electoral Commission (AEC) would need to ascertain at the time of the issue of the writs for an election, which prisoners come within the specified category, and then complete the objection process in the 7 day period between the issue of the writs and the close of the rolls. To rectify this, the Bill proposes to prevent from voting all prisoners serving a sentence of 3 years or longer.

Provisions of this nature are controversial. It is arguable that provisions purporting to disenfranchise prisoners are invalid by reason of an implied right to vote in the Australian Constitution.³ Similar provisions have been held to infringe constitutional provisions in Canada and in Europe.⁴

Significant technical flaws – ‘serving a sentence’

One question that arises in relation to the proposed provision is whether or not it applies to prisoners who have been released on parole or other community based early release schemes, such as home detention. The proposed provision, like the current one (pre-Enrolment Integrity Act), refers to ‘serving a sentence’. In some jurisdictions, however, persons released on parole are deemed to be ‘serving a sentence’.⁵ For that reason it seems that at least some prisoners released on parole would be caught by the proposed disenfranchisement provision, and indeed, by the current disenfranchisement provision.

The Enrolment Integrity Act addressed this issue by adding to the Electoral Act a definition of ‘serving a sentence of imprisonment’. The form of that definition is:

(8AA) For the purposes of paragraph (8)(b), a person is serving a sentence of imprisonment only if:

(a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and

(b) that detention is attributable to the sentence of imprisonment concerned.

The addition of that definition would have had the effect that prisoners released on parole did not come within the provision. According to the author of the Explanatory Memorandum, the proposed provision is not intended to apply to those on parole:

Prisoners released on parole will also be entitled to re-enrol. The provision will not apply to prisoners serving sentences of periodic detention or people serving a non-custodial sentence.⁶

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It is now proposed, however, by this Bill, to remove the definition of ‘sentence of imprisonment’. It is apparently thought by those responsible for the Bill that the definition is not necessary with the proposed provision that refers to ‘serving a sentence of three years or longer’.⁷ For the reasons expressed above, however, a definition of ‘serving a sentence’ is indeed required if it is to be clear that the section does not apply to those released on parole or those serving other forms of non-custodial sentence.

Close of the rolls

The Enrolment Integrity Bill contained provisions directed toward shortening the closure of the rolls period (the period between the issue of the writs for an election and the close of the rolls for new and altered enrolments). Those provisions were not supported in the Senate, but some provisions that would have changed the close of the rolls period in respect of referenda were inadvertently left in the Enrolment Integrity Act. This Bill proposes to repeal those provisions.

Proof of identity and address

The Enrolment Integrity Act introduces requirements relating to proof of identity and address for persons seeking to enrol to vote. Those provisions were agreed to with amendment by the Senate. The purpose of this Bill is to streamline the commencement provisions in relation to those provisions and to clarify the provisions relating to the review by the AEC of the operation of the new requirements for proof of identity.

Main Provisions

Schedule 1—Amendments relating to prisoner voting

Item 1 repeals paragraph 93(8)(b) of the Electoral Act and substitutes a **new paragraph 93(8)(b)** that renders ineligible to vote persons serving a sentence of 3 years or longer.

Item 2 proposes to repeal subsection 93(8AA) of the Act—the definition of ‘serving a sentence of imprisonment’—and insert a **new subsection 93(8AA)** that is an application provision ensuring that the Act applies whether the person started serving the sentence before or after the commencement of this schedule.

Items 3 to 5 make technical amendments to the Electoral Act associated with the new prisoner voting provision referred to in item 1.

Item 6 makes a technical amendment to the Referendum Act associated with the new prisoner voting provision referred to in item 1.

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Schedule 2—Amendments relating to close of the rolls

Items 1 and 2 repeal provisions inadvertently left in the Enrolment Integrity Act after the Senate rejected other similar provisions.

Schedule 3—Amendments relating to proof of identity and address on enrolment

Item 1 amends the commencement provisions of the Enrolment Integrity Act to streamline the commencement date of the provisions relating to proof of identity and address on enrolment.

Item 2 repeals item 132A of the Enrolment Integrity Act and inserts two new items—132A and 132B. These new items clarify the provisions relating to the AEC’s review of the evidentiary requirements for proof of identity and address. Under the proposed provisions the AEC must start a review two years after the commencement of the new provisions for identification contained in the Enrolment Integrity Act. The AEC must consider the effect of the provisions on enrolment and enrolment procedures and must report within 6 months of commencing the review.

Concluding Comments

The Bill is addressed essentially at clarifying and correcting provisions of the Enrolment Integrity Act. In large part the Bill achieves those ends but careful scrutiny should be given to the proposal to dispense with subsection 93(8AA) of the Electoral Act, which defines ‘serving a sentence’. The retention of the definition or substitution of a similar one would assist in ensuring that the effect of the Bill is consistent with the intention expressed in the Explanatory Memorandum—that prisoners released on parole and serving non-custodial sentences or periodic detention are to be allowed to vote.

Endnotes

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- 1 Explanatory Memorandum, Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Bill 2004, p. 2.
 - 2 *Commonwealth Electoral Act 1918*, s.93(8)(b).
 - 3 For an extensive discussion of the issue of prisoner voting rights see Jerome Davidson, ‘Inside Outcasts: Prisoners and the right to vote in Australia’, *Current Issues Brief*, no. 12, 2003-04: <http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib12.pdf>; and for a discussion of the Enrolment Integrity Bill see Jerome Davidson, ‘Electoral and Referendum Amendment

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(Enrolment Integrity and other Measures) Bill 2004', *Bills Digest*, no. 136, 2003-04:
<http://www.aph.gov.au/library/pubs/bd/2003-04/04bd136.pdf>

- 4 'Inside Outcasts: Prisoners and the right to vote in Australia', *ibid.*
- 5 See for example s. 14 of the *Parole of Prisoners Act* (NT).
- 6 Explanatory Memorandum, *op cit.*, p. 4.
- 7 *ibid.*

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