Public Policy Institute

SUBMISSION

to

Queensland Department of Justice and Attorney

General Discussion Paper

ELECTORAL REFORM

March 2013

SUBMISSION

Introduction: Key principles

The essential goals of any credible electoral law reform should be, first, the preservation of simplicity in voting requirements so that voters will understand their rights and responsibilities, and second, the protection of the integrity of the electoral system and election outcomes.

It is recognised that any electoral reform that achieves perfect simplicity might threaten the integrity of the system by its potential vulnerability to manipulation and corruption. Similarly, any reform that limits its focus to the integrity of election outcomes might contain a level of sophistication and detail that defies understanding by the average voter.

Thus, the best test of any proposed reform in this area is the extent to which it maintains a balance in pursuing the goals of both simplicity and integrity.

This submission by the **Public Policy Institute** of the Australian Catholic University is based on this test as it can be applied to some of the sections of the *Electoral Reform Discussion Paper* issued by the Queensland Department of Justice and Attorney-General in January 2013.

Specifically, this submission offers recommendations on the following parts of the *Discussion Paper*:

Part A-1 Political donations

Part A-2 Public funding for elections

Part B-5 Electronic voting

Part B-7 Compulsory voting

Part B-8 Voting system

The submission also offers brief observations, but without detailed analyses or specific recommendations, on the other parts of the *Discussion Paper*, namely:

Part A-3 Election campaign expenditure

Part B-1 Truth in political advertising

Part B-2 How-to-vote cards

Part B-3 Proof of identity

Part B-4 Enrolment on polling day

Part A-1 Political donations to political parties

The *Discussion Paper* identifies only two issues as "Issues for Consultation" in respect of political donations, specifically:

1. Are the existing laws in relation to political donations effective in protecting against the potential for undue influence and corruption?

2. How can the existing laws in relation to political donations be made more effective?

The *Discussion Paper* then invites comment on capped donations, limits on who can donate, conditions applied to donations, definition of what constitutes a donation, disclosure of donations, and opportunities for streamlining current administrative arrangements. All assume that the existing arrangements are to be maintained or expanded.

It is suggested that, before any decision is made on questions about caps on donations, restrictions of who can donate and requirements to disclose the names and particulars of donors to parties and candidates, further consideration should be given to a number of other important questions. These questions are:

- What were the real objectives of the laws in these areas?
- Are the relevant laws appropriate for these objectives?
- Have the objectives been met? Have the laws been found to be riddled with potential loopholes?
- Have these laws had unintended consequences (or perhaps consequences that were intended but were not announced publicly)?
- Do disclosure requirements intrude on freedom of speech, freedom of association, and privacy, thus discouraging donations and political participation (many people want to give with no strings attached but have personal reasons for not wanting to be publicly identified with a particular party or policy)?

There are good reasons for some scepticism about the consequences of the requirements for the disclosure of donations to political parties. It is usually argued (as the *Discussion Paper* does) that the treatment of political donations is "a key element in protecting against the risk of improper influence" and that an objective of this treatment is to maintain and extend confidence in the political system. There is no evidence that this has happened. Indeed, there is a possibility that public confidence has been undermined when politicians and interest groups, armed with disclosed information about the donors to their opponents, have used this information to discredit the motives behind their opponents' policy choices. Further, disclosure has made it impossible for leaders to insulate themselves from knowledge of their own party's sources, thus making them potentially more vulnerable to undue influence in their policy deliberations.

More seriously, rather than curbing corruption, disclosure and related measures have introduced the possibility of new increments of corruption with tactics akin to subtle forms of extortion, making it possible for parties to compile "enemies lists" of donors to their opponents. Party fundraisers or representatives of "affiliated

associations" have been able to target their appeals, armed with knowledge of past donations to their opponents, and to point out that it might be sound politics to make comparable donations to the other side.

> **Recommendation 1:** *It is not suggested that it would be politically feasible to rescind the arrangements in place to regulate political donations, but every effort should be made to ensure that these arrangements are reviewed to ensure that they meet legitimate democratic objectives and that they operate in ways that reinforce confidence in the system without discouraging participation or opening new increments of corruption.*

Part A-2 Public funding for elections

In respect of public funding for elections, the *Discussion Paper* presents only one issue for consultation: "Are the public funding arrangements in Queensland fair?" It then invites comment on whether parties and candidates should be subsidised on a per vote basis, whether subsidies should be limited according to "the winning party's entitlement" or "the number of votes received" and possible streamlining of administrative arrangements.

The *Discussion Paper* does make the observation that the question of the extent to which taxpayers should subsidise political parties and candidates is a "vexed issue." Aside from a very brief and incomplete listing of some of the arguments that have been used for and against such subsidies, however, there is no suggestion of any interest in reconsidering the merits or otherwise of public funding.

> **Recommendation 2**: *Although it would be unrealistic to expect Members of Parliament to give strong support to any proposal to end public funding of political parties and candidates, the current review of the Electoral Act 1992 does provide the opportunity for a careful examination of the successes and failures of subsidised politics. We recommend a more detailed consideration of this "vexed issue" prior to any decisions being made about the largely machinery questions on which comment has been invited in the discussion paper. Among the many questions that should be examined are:*
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> - *Have the objectives of public funding been met?*
> - *Have subsidies provided a level playing field?*
> - *Who benefits – parties or the media and the advertising industry?*
> - *Have subsidies had any effect on the incidence of corruption?*
> - *What have been the consequences for the political parties and for voluntarism and participation generally in the political process?*
> - *Have there been other unintended consequences?*
> - *Is there public support for subsidised politics? (Would any party be prepared to argue in its election manifesto for an increase in public funding of the parties?)*
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> *The threshold question, of course, would relate to the costs of public funding. Four parties (ALP, LNP, Greens and Australian Party) were funded to a total of*

$11,109,207.73 for campaign purposes at the 2012 elections. In view of the demands for funds in other policy areas, was this expenditure justified?

Part B-5 Electronic voting

The traditional method of voting with pencil stubs dates from the days before modern technology and is clearly anachronistic. There are many ways that the method of voting could be modernised, including the introduction of voting machines that can provide the result of an election count (even with the distribution of preferences) within seconds of the last vote being cast.

The case for the introduction of electronic voting is very strong. The advantages could be considerable but the costs could be great. It would not be prudent, however, to introduce it in a piecemeal way or to proceed without extensive research into all its implications.

> **Recommendation 3:** *It is recommended that a comprehensive research project be commissioned into the possible benefits, means and implications of introducing a regime of electronic voting for Queensland parliamentary elections. A non-partisan body such as the PPI (Public Policy Institute) could be commissioned to conduct such research.*

Part B-7 Compulsory voting

In most modern democracies, the right to vote implies a responsibility to enrol and to exercise that vote. In Australia, the right to vote imposes a legal obligation, enforced by the threat of a fine, to vote – or, more specifically, to enrol, to attend a voting place, and to participate in at least part of the voting process.

As noted in the *Discussion Paper*, compulsory voting was introduced for Australian state elections in Queensland in 1915 and for federal elections in 1924. Victoria followed in 1926, New South Wales and Tasmania in 1928, Western Australia in 1936 and South Australia in 1942. The idea of compulsion has not won widespread interest or support in other mature democracies, although it has been used for some elections in Belgium, Greece, Cyprus, Austria, Bolivia, Chile and some other Central and South American countries.

The *Discussion Paper* usefully summarises the cases for and against compulsory voting. The argument frequently given for the introduction of compulsion was that it would maximise the voter turnout. Compulsion has indeed brought the participation rate in Australia up to over ninety per cent in most major elections. This suggests that the threat of a relatively small fine can be an incentive to vote – which raises the possibility that a stiffer monetary penalty with more rigorous enforcement might be required to compel the remaining ten per cent to meet their voting obligation.

Support for the introduction of compulsion in Australia was largely bipartisan, with one side of politics fearing that unions were better placed to organise their members to transport them in bus or truckloads to the polls, and the other side fearing that their members were less likely to read the newspapers and, in the days before television, less likely to know that an election was to be held. Bipartisanship may have been encouraged by the fear in the major parties about the "plague on both your houses" implications of the turnout falling below fifty per cent (although the actual voluntary turnout was actually much higher). Compulsion also has support in the political parties because it "gets out the vote" and thus does the parties' job for them.

In spite of this historical bipartisanship, the debate about compulsory voting has persisted. The issue seems now to turn on questions of the quality of a vote. Does an election result secured with sixty to 70 per cent of the eligible voters participating have the same quality as an election with ninety-plus per cent participation? Does a vote cast simply because of compulsion and the threat of a fine have the same quality as a voluntary vote cast with informed consideration of the suitability of the candidates and their positions on the issues? Are voters likely to consider their vote more carefully when they see voting as a privilege or a right rather than as an obligation?

It has been argued, as the discussion paper points out, that the removal of the requirement for compulsory voting in state elections might cause some voter confusion when voting in federal elections remains compulsory. This problem could be minimised, however, by retaining the obligation to register while simply amending Section 186 of the Act to remove the offence for failing to vote.

> **Recommendation 4:** *While there is very little that is new that can be added to the debate about compulsory voting that has now been continuing for nearly a century, and while no single argument either way is fully persuasive, the weight of argument is tending to the side of voluntary voting, especially when simplicity and integrity are the tests*.

Part B-8 Voting system

The question of the voting system focuses on the choice among three options: first-past-the-post, true preferential, and "optional preferential."

The first-past-the-post system requires voters simply to indicate their single choice among the candidates for election. This has the benefits of speed in the count and simplicity for the voter, but it is flawed by the fact that, when there are more than two candidates, there is no certainty that the candidate elected will have majority support and thus be the one most acceptable to the voters.

The preferential system requires the voters to indicate in sequential order their preferences among the candidates offering for election. This has the benefit of

ensuring that the winner will have the support of a majority (that is, a minimum of 50 per cent plus one) of the formal votes cast, but it has the disadvantage of requiring more time and effort for the count of the votes. It has also been argued by opponents of preferential voting that it should not be assumed that many voters are capable of ordering their preferences beyond their first choice.

The “optional preferential” system (or “optional first-past-the-post” as it might be called) accepts any vote as formal if the voter has either indicated his choice of one candidate or opted to list an order of preference among some or all of the candidates. This is a compromise system containing few of the benefits but most of the flaws and disadvantages of the other systems.

Optional preferential voting was first introduced in Queensland in the 1940’s, apparently because it was seen to suit the electoral advantage of the government of the day by minimising the effects of the exchange of preferences between the Coalition parties. It was subsequently dropped because it was found to result in the election of too many Members of Parliament who did not enjoy the support of a majority of the formal votes of their electors, but it was later reintroduced by the Goss Government.

Subsequent advocates of optional preferential voting have urged people to treat elections as if they were being conducted on the first-past-the-post system (see Peter Beattie, “Just ‘Vote 1’ and the choice is clear cut,” in *The Australian*, 2-3 February 2013). The consequence of this strategy is that many votes exhaust in the count after their first and only choice is eliminated, with the result that candidates are frequently elected without the clear support of a majority of the formal votes cast in their electorate.

This might not always make a difference in determining which party forms a government, but in terms of democracy at the level of the individual electorate it is significant.

In the 2012 Queensland State election, for example, twenty-five Members were elected with only a plurality of the formal votes in their electorate. Examples include the electorates of:

- Thuringowa, for example, the Member was elected with only 10,857 (or less than 40 per cent) of the 27,221 formal votes;
- Maryborough was won with only 12,228 (or 40.67 per cent) of the 30,063 formal votes;
- Mulgrave with 10,514 (or 41.51 per cent) of the 25,328 formal votes; and another twenty-two Members were similarly elected without clear evidence of majority support.

The overall result in the 2009 election was much the same. The results were equally flawed and unsatisfactory in the 2011 State elections in New South Wales, where the optional preferential system is also used.

Perhaps the only case for optional preferential voting that stands some scrutiny is that, like the first-past-the-post system, it reduces the impact of the participation of minorities in the electoral process. Others of course would argue strongly that any voting system that discourages minorities in their pursuit of representation in the Parliament would have to be held to be discriminatory.

> **Recommendation 5:** *The Public Policy Institute is divided on the question of Optional Preferential (OPV) versus Preferential Voting (PV). There is no support for First-Past-the-Post. There is one view that OPV is desirable because it gives the voters a choice of voting methods. There is a strong view that PV is the only way to ensure that the winning candidate in an election is the one that has secured a majority of the formal votes.*

Part A-3 Election campaign expenditure

If the purpose of a limit on electoral expenditure is to ensure a level playing field, the cap must be capable of being applied with scrupulous fairness and must take account of all those factors that might advantage some parties over others. Similarly, it must be free from any susceptibility of exploitation or corruption through loopholes. Further, it should not intrude on freedom of speech or other important freedoms, such as freedom of the press, political association, or peaceable assembly.

It is doubtful that it is possible to meet such criteria, and it is therefore probable that any measure imposing a cap on expenditure will be imperfect and fail to meet its purpose. If the current arrangement is not to be abandoned, it should be amended in a number of ways, and notably in respect of its vulnerability to potential loopholes.

As an example, the definition of “election expenditure” should be expanded beyond “advertising advocating a vote for or against a candidate or for or against a registered political party.” It must include advocacy advertising by groups (often really “front” groups) promoting positions on specific issues when such positions are clearly identified, either positively or negatively, with a particular candidate or party. The implications for freedom of speech are considerable, of course, but the question of the marshalling or manipulation of advertising by advocacy groups must be confronted if the law is to be regarded as serious in terms of imposing spending limits to maintain a level playing field.

Similarly, the meaning of “affiliated organisation” and “associated entity” requires clarification. The definition should include any group that is entitled to be represented or to send delegates as participating members of a party’s decision-making assemblies or councils. The law should aggregate the electoral expenditure of any such group with the expenditure of the party.

Part B-1 Truth in political advertising

We make no recommendation on the issue of truth in political advertising. We note the reports in the discussion paper on the observations of the Senate Finance and Public Administration Committee, the South Australian Electoral Commissioner and the Electoral Matters Committee in Victoria the on the implementation difficulties, workability, implications and unintended consequences of the measures in South Australia and Victoria relating to misleading or deceptive advertising. These reports do not encourage confidence in the prospects of effective reform in this area.

Clearly, truth in political advertising is most important, but it is doubtful that it can be ensured by legislation or regulation. The difficulties of maintaining truth in traditional campaigning techniques are exacerbated by modern strategies, such as social networking and other electronic systems and by the trend towards televised public forums and manipulated crowd participation.

The development of some agreed form of voluntary code of conduct for electoral advertising might be worthy of consideration, but there is no certainty that any code could be respected by all parties, candidates and their vocal supporters, and it is doubtful that a voluntary code would be capable of being properly enforced. An ineffective code, like an ineffective law reform, would do nothing for the credibility of the electoral process.

Part B-2 How-to-vote cards

Traditionally, “how-to-vote” cards were simple, small and inexpensive papers provided by parties and/or candidates and printed with only their appropriate logos and their recommendations for the allocation of preferences. With the availability of more resources through public funding, the “how-to-vote” cards have evolved into glossy, expensive, wordy (and probably wasteful) advertising devices. It would probably be in the interests of the party organisations if they returned to the traditional form of “how-to-vote” card.

The danger of permitting the cards to carry political or policy messages (in addition to the how-to-vote recommendation) is that they provide the opportunity to publish last-minute misleading information. We make no comment on the four options proposed in the discussion paper for the regulation of “how-to-vote” cards, except to offer a caution about excessive regulation. We note the importance, however, of preventing the distribution of false information at a time when it cannot be effectively refuted and when it can undermine the integrity of an election.

We are attracted by the option set out at the bottom of page 26 of the *Discussion Paper*. The ECQ should follow the Victorian Electoral Commission and publish a copy of "how-to-vote" cards on its website. This would facilitate greater scrutiny of the cards before polling day and also provide postal voters with access to important information. It would also meet the community expectation that information that is available should be available electronically where possible.

Part B-3 Proof of identity

There appears to be an abundance of anecdotal evidence about the incidence of fraudulent voting, especially where it is possible for a person to cast his or her vote at any polling place in the electorate. Even the widespread suspicion of fraud undermines the credibility of an election outcome. If there is any chance that the fraud is real and as common as the anecdotal evidence suggests, then corrective action is clearly required. It is doubtful that fraud in elections can be eliminated, but measures such as proof of identity could at least discourage and minimise it. In a day when proof of identity is required for so many activities, the case against a requirement to show some such proof in an activity as important as voting is not especially persuasive. Because false identification can be so easily produced, moreover, requirements to show proof of identity should be supported by harsh monetary penalties against fraudulent voting and against those encouraging such fraud.

Part B-4 Enrolment on polling day

Consideration of the case for permitting enrolment on polling day should be balanced against the problems of verifying the identity and qualifications of the person seeking to enrol and to vote. It is sometimes argued that there are problems in persuading newly qualified young people to register and to vote and that the right to enrol on polling day might encourage them. The argument is not strong. A more effective advertising effort to encourage people to enrol prior to the election might be a better option.

Conclusion

It is acknowledged that very few, if any, electoral reforms are introduced if they are not consistent with the electoral interests of the political party proposing them. Fairness in electoral laws has always been a very subjective consideration and it is not difficult to make a credible case either for or against the fairness of any proposed electoral reform. Only rarely do oppositions give their support to government-proposed electoral reforms and governments rarely have any interest in opposition-backed amendments. It would be unrealistic to expect otherwise. Indeed, a healthy scepticism is needed whenever the word "reform" is used in the context of electoral law. Nevertheless, all parties should strive to focus on the principles of simplicity for the voter and on the integrity of the electoral outcome.