



ELECTORAL REGULATION RESEARCH  
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**ELECTORAL MANAGEMENT UNDER COVID-19**

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## **Executive summary**

The Covid-19 pandemic has presented election administrators world-wide with a challenge for which there are few parallels in living memory. The SARS-Cov-2 virus which causes it is mainly spread in droplets of respiratory secretions emitted through coughs, sneezes and even singing; and infected people can pass the virus on to others before they have developed symptoms themselves. The disease has a significant mortality rate, and there are as yet no vaccines to prevent it nor drug therapies proven to be effective to cure it. The main public health measure to mitigate it has been the introduction of strict “social distancing” rules; and yet elections as implemented hitherto in most democracies (including Australia) represent the antithesis of social distancing. Rather than keeping people apart, polling days have in the past brought them together in large numbers, in a process that typically encompasses most of the adult population.

In Australia the pandemic struck with frightening speed: in less than a month, the country went from normal life to being essentially locked down, with a consequent drop in economic activity on a scale unseen since the 1930s. Australia’s electoral laws are ill-suited to such a dynamic and dire environment: they tend to be highly prescriptive, making it difficult or impossible for electoral commissions to develop and implement effective responses to major new problems in a short time. There is a clear need for laws to be reviewed and modified so as to enable essential changes to be made to the electoral process to meet evolving challenges of a pandemic - even if the legislature has been dissolved. It should also be possible for electoral commissions to provide different voting mechanisms in different parts of the country, since some places might well be free of infection.

A further lesson already apparent from the Covid-19 experience is that knowledge of pandemics, of the identity and characteristics of the pathogens which cause them, and of the ways in which they are likely to unfold, will in the first instance be limited. Election administrators seeking to plan their activities against such a background will be confronted with uncertainty on a grand scale, making their task more akin to preparing for elections in insecure places such as Iraq or Afghanistan than getting ready for a normal election in Australia. They may be forced to develop parallel plans for several different scenarios, leaving the choice of which to pursue until the last possible moment.

Fortunately, Australia is as well-placed as any democracy to meet these challenges: electoral commissions are non-partisan and neutral, professional, well-resourced and, most importantly, enjoy the trust of the community. Many aspects of the electoral process (including in particular enrolment) have been largely automated in recent years, reducing the need for individual interactions. There is far more evidence of a bipartisan approach to electoral reform than is seen in, say, the USA; and options for electoral reform are largely unconstrained by constitutional requirements. At the same time, public faith in electoral processes, and the legitimacy of the legislatures and governments they produce, flows among other things from familiarity with how elections are run; and if major procedural changes need to be made (especially at the last minute), that source of trust will be absent. It is therefore essential that any new procedures clearly embody the key values of free and fair elections, especially universal access and a secret ballot.

A further unique aspect of the Covid-19 pandemic is the way in which it has stimulated electoral administrators all over the world to work at the same time on the same problem. There will be much to be learned from experience in other countries, and Australia’s electoral

commissions will also be able to learn from each other. That having been said, from the perspective of the voters it would be preferable for the avoidance of confusion that Australia's jurisdictions consult effectively with the view to harmonising their responses, rather than going off in different directions. The Electoral Council of Australia & New Zealand provides a useful focal point for such an interchange of ideas. The closest collaboration with public health authorities will also be essential. As part of that collaboration, public health regulations and electoral laws should be jointly reviewed to ensure that they are not in conflict.

In the face of a pandemic, the simplest response is to postpone elections, but the extent to which that is possible varies considerably across the country. Timing of Senate elections, and general elections for the House of Representatives, is constitutionally constrained, but by-elections for the House of Representatives can be deferred indefinitely. Postponement of elections is possible (though in some cases procedurally complex) in the states and territories.

From the point of view of operational policy, measures to deal with the pandemic in the electoral context are likely to involve mechanisms which have already become familiar: social distancing, speeding up processes, and physical hygiene and disinfection. The following specific measures should be considered.

- Prescribed timetables for elections should in general be extended, to provide electoral commissions with an enhanced capacity to respond to any disruptions which may occur.
- Electoral commissions need to put contingency plans in place to cover the possibility that key staff could fall ill at a critical time, possibly requiring everyone working in a particular office or team to be quarantined. If a vaccine become available, such plans could include the provision of subsidised vaccinations to all staff.
- Provision should be made for enrolment on election day (where that is not already available), to ensure that people whose opportunities to enrol may have been disrupted by the pandemic can still vote.
- If a candidate at a general election for the House of Representatives dies, giving rise to a need for a later supplementary election in the affected electoral division, the relevant laws should make it possible for the Senate polling in the division to be postponed until the date of the supplementary election.
- Rules governing campaigning near polling places should be reviewed and amended to enforce social distancing. Such amendments could encompass changed mechanisms for the provision of how-to-vote cards (where that is already permitted).
- Options for making polling safer include encouraging pre-poll and postal voting; improved processes for attendance voting; telephone or proxy voting for persons in isolation; the automatic despatch of postal ballots to all voters; and even internet voting.
- Electronic certified lists of voters should replace paper lists, not just because they speed up the polling process, but also because they can be configured to facilitate contact tracing by recording the time at which each person votes. At the federal level, the forthcoming Eden-Monaro by-election would particularly benefit from that.

- At the federal level, the electronically assisted voting method for which provision is made in Part XVB of the *Commonwealth Electoral Act 1918* should be made available to persons in quarantine or self-isolation.

One characteristic of Australian electoral processes is that they tend to provide a range of voting mechanisms - ordinary voting, postal voting, pre-poll voting and so on - which reflect the diversity of community needs. It is unlikely that these could be replaced by any single voting modality without causing considerable disadvantage to some voters.

Universal or near universal postal voting has been announced or foreshadowed as a possible model for voting in a time of pandemic, but it is inferior to the gold standard model of voting at polling places for several reasons. With postal voting, the state can no longer guarantee that all voters will have the opportunity to cast a secret ballot; the security of ballot papers is potentially more difficult to ensure; and the voting process lacks transparency, since it cannot be observed by scrutineers. Extended pre-poll voting is, from a purely electoral point of view, a much better option.

Remote internet voting gives rise to the same sorts of problems with secrecy and lack of transparency as postal voting, and is subject to many other practical and technical objections - which is why very few countries have adopted it.

Overseas voting as conducted up until now may not be possible, as it will be subject to foreign countries' own public health regulations, and could also be affected by any downgrading of international courier services.

Finally, it needs to be emphasised that electoral reforms can be path dependent; a change that has been put in place and has come to be accepted by society may be difficult to unwind.

# ELECTORAL MANAGEMENT UNDER COVID-19<sup>1</sup>

## Part 1 - Introduction and background

1.1 The objectives of this working paper are:

- to identify a range of challenges which an event such as the Covid-19 pandemic poses for the conduct of elections in Australia; and
- to explore various policy responses to such an event which decision-makers in governments, parliaments and electoral commissions might need, or wish, to consider.

1.2 Federal elections are the primary focus of the paper, though issues likely to arise at elections due later this year in the Northern Territory and the Australian Capital Territory are also noted. However, given the similarity of electoral processes across the different jurisdictions in Australia, the analysis of challenges and responses has broad applicability. Though federal, state and territory elections are administered by separate bodies, if an election somewhere in Australia were to be associated with an outbreak of infection, that would be likely to affect public perceptions of and confidence in *all* electoral processes.

1.3 The discussion below is set out under the following headings:

- Part 2 - The nature of the problems flowing from Covid-19;
- Part 3 - The broad electoral environment;
- Part 4 - The legal environment;
- Part 5 - Postponement of elections;
- Part 6 - Operational policy options; and
- Part 7 - Observations on policy choices.

## Part 2 - The nature of the problems flowing from Covid-19

2.1 Covid-19 is a multifaceted communicable disease caused by the SARS-CoV-2 virus, the first cases of which occurred in China in late 2019.<sup>2</sup> Initial reports which focused on transmission from animals to humans were soon supplemented by clear evidence of human to human transmission, and, subsequently, by evidence that the virus could be passed on by

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<sup>1</sup> I wish to thank Paul Kildea, Phil Green, Iain Loganathan, William Maley and Rod Medew for helpful comments on an earlier draft of this paper. That should not be taken as implying that they necessarily agree with any of the arguments or suggestions which follow; and I of course retain full responsibility for any errors or oversights.

<sup>2</sup> For a discussion of what at this point is known (and unknown) about ways in which Covid-19 infections can damage the human body, see Clifford Marks and Trevor Pour, "What We Don't Know About the Coronavirus", *The New Yorker*, 29 April 2020, at <https://www.newyorker.com/science/medical-dispatch/what-we-dont-know-about-covid-19>, viewed 22 May 2020.

infected but asymptomatic individuals. Intensive research efforts identified respiratory secretions as the key transmission vector, with viruses being ejected through coughs, sneezes and even singing, and being thereby passed on directly to others, conveyed to persons nearby via droplets in the air, or deposited on objects which could become a source of possible infection if touched.<sup>3</sup>

2.2 In early 2020 the virus spread rapidly around the world, leading the World Health Organisation to declare a global public health emergency on 30 January 2020; and in many countries, including Australia, the numbers of cases of infection initially grew exponentially, giving rise to fears of an uncontrolled epidemic marked by significant mortality and a potentially overwhelmed hospital system. Tragically, these fears came to be realised in several countries, with tens of thousands dying in the USA, the UK, Italy, France, Spain and Brazil. By the end of April 2020, more Americans had perished in the Covid-19 pandemic than in the Vietnam War.

### The public health response

2.3 In response, coordinated action by the federal, state and territory governments in Australia implemented shutdowns of social and economic activity, and rules for “social distancing”, on a scale unprecedented in living memory, with the primary aim of reducing person-to-person transmission of the virus. As at the time of writing (late May 2020) these appeared to have had significant success. Epidemiological modelling indicated, however, that an ill-timed loosening of those measures could lead to renewed outbreaks, and epidemiologists warned that a long-term solution would most likely depend on the widespread administration of an as-yet-undeveloped vaccine (which, because of timelines associated with testing, would be unlikely to be available until some time in 2021 at the earliest), or possibly the development of prophylactic drugs akin to those used against malaria and HIV.<sup>4</sup> Various drugs for the treatment of active cases of Covid-19 are presently being explored in clinical trials, and as at the time of writing at least one, the antiviral remdesivir, had been approved for emergency use by the US Food and Drug Administration.<sup>5</sup> Otherwise, treatment options for critically ill patients have involved intensive care, including in some cases mechanical ventilation.

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<sup>3</sup> A plain English explanation of the situations which appear to be most conducive to the spread of the SARS-CoV-2 virus is given in Erin Bromage, *The Risks - Know Them - Avoid Them*, at <https://www.erinbromage.com/post/the-risks-know-them-avoid-them/>, viewed 21 May 2020. Various studies have sought to identify the length of time for which the SARS-CoV-2 virus can remain viable or detectable if deposited on different surfaces. For an account of some of these, see Danielle Renwick, “How long does coronavirus live on different surfaces?”, *The Guardian*, 4 April 2020, at <https://www.theguardian.com/us-news/2020/apr/04/how-long-does-coronavirus-live-on-different-surfaces>, viewed 22 May 2020. An experiment under controlled conditions has found that on cardboard, “no viable SARS-CoV-2 was measured after 24 hours”; for details, see Neeltje van Doremalen et al., “Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1”, *New England Journal of Medicine*, 16 April 2020, at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>, viewed 22 May 2020.

<sup>4</sup> See John Elder, “Coronavirus vaccine: Professor Peter Doherty tells us how likely it is we’ll get one”, *The New Daily*, updated 26 April 2020, at <https://thenewdaily.com.au/life/wellbeing/2020/04/25/coronavirus-vaccine-peter-doherty/>, viewed 22 May 2020.

<sup>5</sup> See ABC News, *Remdesivir authorised as coronavirus treatment by US in ‘important first step’*, at <https://www.abc.net.au/news/2020-05-02/remdesivir-authorised-as-covid-19-treatment-by-us-fda/12208492>, 2 May 2020, viewed 22 May 2020.

## Economic effects

2.4 Beyond the medical effects of the virus, the potential economic implications of the measures taken to prevent its spread are massive, with comparisons being drawn to the Great Depression of the 1930s.<sup>6</sup> At the time of writing, it was by no means certain:

- when those measures would be fully relaxed;
- what state the Australian economy would be in when that had happened;
- how long thereafter it would take for the economy to recover fully; and
- what long-term implications changes in public behaviour would have for the structure of the recovered economy.

Also ill-defined at this point is the short-to-medium term fiscal environment: it remains to be seen whether governments will be seeking to cut spending, or to inject money into the economy.

## Major but uncertain implications for elections

2.5 All of these imponderables add to the uncertainty surrounding the context in which future elections may be taking place, and taken as a whole they have the potential to give rise to high levels of public anxiety. Significantly, and in contrast to the aftermath of most natural disasters, the impact of the Covid-19 pandemic has not been confined to a relatively small geographical area, but is touching the lives of people everywhere. From a public health perspective such anxiety may be helpful, as it may tend to fortify people's resolve to take social distancing seriously. But it poses a particular challenge for elections because, as implemented hitherto in most democracies (including Australia), they represent the antithesis of social distancing. Rather than keeping people apart, polling days have in the past brought them together in large numbers, in a process that typically encompasses most of the adult population of a country. One generic study of electoral processes has noted that "More than 40 points in the electoral process involve the assembly of people or transfer of objects and therefore pose risks of virus transmission if no preventive measures are taken".<sup>7</sup>

2.6 As has frequently been noted, elections are the largest and most complex logistical operations which a country faces in peacetime. That fact can easily be overlooked by people outside electoral commissions, since the better elections are run, the simpler the process can seem to those who engage with it only as voters, and then for just a few minutes every few years. Voters' positive experiences are, however, underpinned by a vast amount of planning and preparation which takes place throughout the election cycle, with most electoral commissions aiming to have everything in place well before the scheduled or likely election date.

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<sup>6</sup> See Gareth Hutchens, *Coronavirus to lead to biggest contraction of Australia's economy since Great Depression, Reserve Bank warns*, at <https://www.abc.net.au/news/2020-04-21/reserve-bank-warns-challenges-for-australian-economy-coronavirus/12169914>, 21 April 2020, viewed 22 May 2020.

<sup>7</sup> Fernanda Buriel, Staffan Darnolf, and Muluken Aseresa, *Safeguarding Health and Elections*, International Foundation for Electoral Systems (IFES), 11 May 2020, at [https://www.ifes.org/sites/default/files/ifes\\_covid19\\_briefing\\_series\\_safeguarding\\_health\\_and\\_elections\\_may\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_safeguarding_health_and_elections_may_2020.pdf), viewed 12 May 2020, p. 4.

2.7 In the past, the key planning parameters for Australia's electoral commissions have been the requirements set out in their laws, the distribution and demographic characteristics of their voter populations, and the availability of resources needed for the electoral process; all of which have tended to be relatively stable and predictable. It is already clear that events such as the Covid-19 outbreak can greatly disrupt such a stable planning environment. Pandemics in the modern world will typically involve a previously unknown pathogen, and knowledge of its features (and therefore the likely character and progress of the pandemic) will, at least in the initial stages, and possibly for much longer, be subject to great uncertainty. Electoral commissions' planning will have to be based on the best available estimates of what the world will look like at election time, but that will inevitably involve a considerable element of guesswork. Epidemiologists' mathematical modelling can assist up to a point, but such models are really only tools for deducing systematically the implications of the information and assumptions which underpin them, and if the information is incomplete and/or uncertain, and/or the assumptions prove to be incorrect, the predictions of the models could well turn out to be misleading.

2.8 Even now, there are many aspects of the Covid-19 pandemic which are still not well understood: in particular, it is not clear why some apparently comparable countries have been so differently afflicted by it. No two pandemics will be exactly the same, and the nature of infection will greatly influence policy options. For example, a pathogen easily spread through the air (such as the measles virus), but with a high mortality level would not only rule out any sort of voting process involving close contact between individuals, but could also in the worst case scenario lead to a collapse of key services such as the postal system, thereby also ruling out postal voting.

2.9 Against such a background, electoral commissions may well have to develop parallel plans for several different scenarios, leaving the choice of which to pursue until the last possible moment. In this respect, the planning environment will have more in common with elections conducted against the background of major security threats in places like Iraq and Afghanistan than with elections as run in Australia in the past. This will not only create a large amount of additional work, but will inevitably give rise to financial costs.

2.10 A particularly striking feature of the Covid-19 crisis is that it appeared almost out of the blue, and developed at frightening speed. While the possibility that such a crisis could at some time arise had been anticipated in general terms (though not in every detail) by public health professionals and some strategic thinkers,<sup>8</sup> that risk had not been generally appreciated in the broader community, and is unlikely to have figured prominently in the risk management plans which electoral commissions now routinely prepare.<sup>9</sup> Given the need to give priority attention to the most likely risks, they can hardly be blamed for that; but it does mean that they will be forced to find creative solutions to a range of problems in relatively tight timeframes.

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<sup>8</sup> Laurie Garrett, *The Coming Plague: Newly Emerging Diseases in a World out of Balance*, Virago, London, 1994; Alan Dupont, *East Asia Imperilled: Transnational Challenges to Security*, Cambridge University Press, Cambridge, 2001; and Adam Kamradt-Scott, *Managing Global Health Security: The World Health Organization and Disease Outbreak Control*, Palgrave Macmillan, Basingstoke, 2015.

<sup>9</sup> A number of the high level risks identified in the 2019-2023 *Corporate Plan* of the Australian Electoral Commission (AEC) can however be read as encompassing challenges of the type posed by the Covid-19 pandemic. See [https://www.aec.gov.au/About\\_AEC/Publications/corporate-plan/index.htm](https://www.aec.gov.au/About_AEC/Publications/corporate-plan/index.htm), viewed 3 May 2020.

2.11 The Covid-19 pandemic is unique in living memory in the way in which it has caused the attention of almost every electoral management body in the world to be directed simultaneously to essentially the same problem, giving rise to a rapidly growing literature on the topic.<sup>10</sup> Even after only a few months, it would be far beyond the scope of this paper to attempt to survey what has already been written. The staggered timing of federal, state and territory elections in Australia will create the opportunity for the various Australian electoral commissions to learn from the experiences of their peers. Plainly there will also be much to be learned from international experience, which may, in the coming months and years, help to clarify further the viability and risks of a range of different policy options. (Reports have already emerged of infections associated with in-person voting in the US state of Wisconsin.<sup>11</sup> On the other hand, national elections in the Republic of Korea appear not to have led to any recorded cases of local transmission.<sup>12</sup>) While it has been the tendency in Australian electoral reform to look first for inspiration to Australian jurisdictions, and then to seek to discover what has been done in countries such as Canada, New Zealand and the UK, in this case it would make eminent sense for Australian electoral commissions to inform themselves as much as possible about what is being done all over the world. The Department of Foreign Affairs and Trade could be requested through its diplomatic network to obtain such information.

2.12 Given all of these uncertainties, the balance of this paper has been drafted on the assumption that elections may have to be conducted in circumstances similar to those applying at the end of April 2020.

### **Part 3 - The broad electoral environment**

3.1 It is important to emphasise that an election is not just a product or service delivered by an electoral commission to the community, but is a societal undertaking in which everyone has a role to play. The ultimate evidence of the success of an election is to be found not in its mechanics, but in the extent to which its outcome is trusted and accepted by the people, and is seen as conferring legitimacy on the chosen legislature and government. Australian electoral processes have in the final analysis been successful because they have enjoyed deeply-rooted public support and respect.

3.2 The objective of any electoral policy responses to the pandemic should therefore be to ensure that risks of further spreading of infection are minimised, while preserving the critical aspects of the electoral process which underpin such trust and acceptance. In general, electoral reform in Australia has been marked by incremental rather than radical change, one consequence of which is that a basic public familiarity with the processes is preserved and reinforced: each election, mechanically, tends to look much like the one that preceded it, and so trust cascades. If, however, radical changes to processes have to be made, this ongoing trust

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<sup>10</sup> For an early contribution, see International Foundation for Electoral Systems (IFES), *Guidelines and Recommendations for Electoral Activities During the COVID-19 Pandemic*, 19 March 2020, at [https://www.ifes.org/sites/default/files/guidelines\\_and\\_recommendations\\_for\\_electoral\\_activities\\_during\\_the\\_covid-19\\_pandemic\\_march\\_2020.pdf](https://www.ifes.org/sites/default/files/guidelines_and_recommendations_for_electoral_activities_during_the_covid-19_pandemic_march_2020.pdf), viewed 24 May 2020.

<sup>11</sup> See Amanda Becker, “Coronavirus cases linked to Wisconsin’s April primary”, *The Sydney Morning Herald*, 23 April 2020, at <https://www.smh.com.au/world/north-america/coronavirus-cases-linked-to-wisconsin-s-april-primary-20200423-p54mee.html>, viewed 3 May 2020; and PBS NewsHour, *52 people who worked or voted in Wisconsin election have COVID-19*, at <https://www.pbs.org/newshour/health/52-people-who-worked-or-voted-in-wisconsin-election-have-covid-19>, viewed 3 May 2020.

<sup>12</sup> Asian Network for Free Elections (ANFREL), *COVID-19 and Elections: The Experience of Republic of Korea*, at <https://anfrel.org/covid-19-and-elections-the-experience-of-south-korea/>, viewed 22 May 2020.

can no longer necessarily be taken for granted. It is therefore important to be clear on the basic criteria for evaluating any new process. Broadly speaking, the following requirements, if satisfied, are likely to guarantee a free, fair and legitimate election.

- The election is administered impartially, and opportunities exist for complaints about the process to be lodged and dealt with in an even-handed and transparent way.
- People qualified to vote, and only people so qualified, are able to do so.
- They can vote in an open and neutral political environment where contending views can be safely expressed in an election campaign.
- Votes are not bought and sold.
- Voters can cast a secret ballot, without fear of any adverse consequences.
- Everyone votes only once.
- They know the nature and significance of the act of voting.
- Their votes are counted and tabulated accurately, without any fraudulent interference.

3.3 Societal support for electoral processes is also supported by their ritualistic elements. One US commentator has elegantly summarised this aspect of elections as follows.

“Voting is more than the simple act of indicating one’s political preference. It’s a vital public ritual that increases social solidarity and binds citizens together. ... Even with the secret ballot, the mechanics of voting are still explicitly designed to remind us that, in principle, we are all equal members of a political community. On Election Day, we must leave our homes and offices, travel to a polling place, and physically mingle with people who are plainly our equals that day, no matter what other differences we have.”<sup>13</sup>

In Australia, even the humble “sausage sizzles” outside polling places, organised by community groups to raise funds, have become part of the positive tradition and ritual of polling day, providing a stark contrast with the situation in countries where election days are feared because of the risk of intimidation or inter-party violence. While the unique challenges of the Covid-19 pandemic may make it necessary for some of the ritualistic elements of elections to be abandoned temporarily, it would be wrong to think that nothing will thereby be lost.

3.4 It is also important to note that while Australian society on the whole is likely to continue to view electoral processes positively even against the background of the pandemic, that view may not be shared across the board: some who see themselves as particularly at risk - for example, elderly people in aged care, or people living in remote communities which have avoided outbreaks of infection by limiting outsiders’ access - may be resistant to any activities

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<sup>13</sup> Rick Valelly, “Voting Alone: The case against virtual ballot boxes”, *The New Republic*, vol. 221, issue 11/12, September 13 & 20, 1999, pp. 20-22. The importance of the ritualistic aspects of elections is explored in detail in Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account*, Ashgate, Farnham, 2015.

which could increase the danger to them, even if only slightly. More generally, owners of premises used in the past for polling might be less keen on their being used for that purpose during a pandemic. All these sorts of fears and concerns are eminently understandable, and would have to be handled by electoral commissions with the greatest of sensitivity.

3.5 On a positive note, Australia is arguably as well-placed as any democracy to meet the challenge posed by Covid-19. The following strengths are especially worth noting:

- Electoral administration has a long history of non-partisanship and political neutrality. In this respect, Australia's situation stands in contrast to that of the USA, where electoral administration is state-based and often partisan.
- Australia's electoral commissions are also professional and permanent, and well-resourced by international standards, with considerable technical skill and experience in their ranks.
- Electoral reform in Australia has since 1983 been marked by a relatively high degree of bipartisanship and compromise, with comparatively little evidence of the inclination towards blatant manipulation of the basic electoral framework which has been increasingly on display in the USA. It seems unlikely that any of the major parties would approach reforms in response to the pandemic with the primary aim of advancing their own interests to the broader detriment of the process, especially given the degree of cross-party cooperation which has marked the response to the crisis to date (which, it might be noted, appears to have been much appreciated by the public).
- In the administration of elections, there has been a long-term trend towards more automation and the provision of online access to services. While polling and election night counting at federal elections are still paper-based, the federal Senate count now uses optical character recognition to capture the data from ballot papers, a process pioneered at Australian Capital Territory elections. The Territory also makes electronic voting available at pre-poll voting centres, while New South Wales gives certain voters the option of using the iVote internet voting system as an alternative to postal voting. Automated systems for the distribution of preferences in single transferable vote proportional representation elections are also widely used. Activities such as enrolling or applying for a postal vote typically no longer depend essentially on voters completing a hardcopy form or interacting with other people, and updating the rolls through large scale door-to-door reviews has been abandoned. In addition, a number of Australia's electoral commissions have made major progress in the implementation of online recruitment and training mechanisms for polling place staff.

3.6 On the negative side, however, there will inevitably be some risk that the disruption caused by the Covid-19 pandemic and its economic consequences could accentuate pre-existing divisions in society, which might then be exploited by political forces for their own ends, leading to elections being held in a more fractious atmosphere than has tended to be the case to date. Such a state of affairs can be seen to be evolving in the USA.

## Part 4 - The legal environment

### Constitutional limits

4.1 At the federal level, there exist few constraints on the Parliament's choice of electoral processes. The main restrictions flowing from the Constitution are as follows.

- There are constraints on the timing of House of Representatives and Senate elections, as discussed in Part 5 below.
- Both the House of Representatives and the Senate must be “directly chosen”: this rules out the use of an indirect electoral mechanism along the lines of the USA's electoral college.
- The numbers of members of the House chosen in the several states must be proportional to the numbers of their people. That requirement was elaborated by the High Court in *Mackellar's* case.<sup>14</sup>
- The extent to which the Parliament can disenfranchise prisoners as a class is limited by the doctrine set out in *Roach's* case.<sup>15</sup>
- Limitations on roll close timetables flow from the doctrine set out in *Rowe's* case.<sup>16</sup> More broadly, the doctrine set out in *Rowe* has the potential to be invoked in respect of other changes which could have the effect of limiting the exercise of the franchise.<sup>17</sup>
- There is an implied constitutional limitation on the Commonwealth's and the states' and territories' power to legislate in a way which restricts free political communication, as elaborated in a series of cases since the early 1990s.

The Constitution imposes no requirement for a secret ballot, or for any particular choice of electoral system.

### Prescriptiveness

4.2 Australia's electoral laws, federal, state and territory, are marked by a relatively high degree of prescriptiveness, though some jurisdictions have made efforts to move away from that.<sup>18</sup> The speed with which the Covid-19 pandemic reached crisis level highlights, however,

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<sup>14</sup> *Attorney-General (NSW); Ex Rel McKellar v Commonwealth* [1977] HCA 1, at <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1977/1.html>, viewed 3 May 2020.

<sup>15</sup> *Roach v Electoral Commissioner* [2007] HCA 43, at <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/43.html>, viewed 3 May 2020.

<sup>16</sup> *Rowe v Electoral Commissioner* [2010] HCA 46, at <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2010/46.html>, viewed 3 May 2020.

<sup>17</sup> Graeme Orr, “The Voting Rights Ratchet: The Genesis of Voting Rights Jurisprudence: From One-Vote, One-Value to Prisoner Voting, *Public Law Review*, vol. 22, no. 2, 2011, pp 83-89, at [https://www.researchgate.net/publication/256011283\\_The\\_Voting\\_Rights\\_Ratchet\\_Rowe\\_v\\_Electoral\\_Commissioner](https://www.researchgate.net/publication/256011283_The_Voting_Rights_Ratchet_Rowe_v_Electoral_Commissioner), viewed 3 May 2020.

<sup>18</sup> See Michael Maley and Graeme Orr, *Developing a Legislative Framework for a Complex and Dynamic Electoral Environment - Discussion Paper*, Working Paper No. 64, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, November 2019, at [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0006/3237864/WP\\_64\\_Maley\\_Orr.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0006/3237864/WP_64_Maley_Orr.pdf), viewed 23 May 2020.

that in a time of pandemic, such prescriptiveness is untenable: Australia went from normal life to being essentially locked down in less than a month. Had the outbreak of disease come in the last month of the life of the federal Parliament (or even after its dissolution), rather than several years before, the difficulty/impossibility of enacting legislation to change electoral processes would have forced the election to be run using procedures which could be highly problematical from a public health perspective.

4.3 A further notable feature of Australia’s electoral laws is that even though they prescribe a wide range of voting modalities (e.g. ordinary, postal, pre-poll, mobile, telephone, overseas and Antarctic voting) in an attempt to satisfy the needs of a diverse electorate, they provide little scope for different voting processes to be put in place in specific geographical areas. This is particularly significant given the size of the country, and the possibility that some places could be facing severe outbreaks of disease, while others could be completely free of active cases. At the moment it would not be legally possible, for example, to determine that voters in some electoral divisions should only be able to vote pre-poll, while in other divisions ordinary voting would continue.

4.4 Most electoral laws in Australia make some provision for handling unexpected problems, including by extending the time within which tasks can be performed, but they vary in their details. Section 285 of the *Commonwealth Electoral Act 1918*<sup>19</sup> provides a mechanism for “correction of errors” by “proclamation” (made by the Governor-General), while section 286 states that:

“... the person causing the writ to be issued may, by notice published in the Gazette, provide for extending the time for holding the election, or for holding the election in a specified Division, or for returning the writ, or meeting any difficulty which might otherwise interfere with the due course of the election...”.

In addition, section 395 of the Act permits the Governor-General to:

“make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to this Act ...”.

4.5 The extent to which these provisions would enable significant and urgent changes to electoral procedures to be made in response to challenges posed by a rapidly evolving pandemic is limited, and arguably insufficient. The regulation-making power, in particular, has the disadvantage of being limited to prescriptions “not inconsistent” with the provisions of the Act.

4.6 By way of contrast, section 392J of Queensland’s *Electoral Act 1992*<sup>20</sup>, inserted shortly before state by-elections held in March 2020, provides as follows.

**“392J Regulation-making power**

(1) A regulation may make provision about a matter for which -

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<sup>19</sup> <https://www.legislation.gov.au/Details/C2019C00103>, viewed 24 May 2020.

<sup>20</sup> <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1992-028>, viewed 24 May 2020.

- (a) it is necessary to make provision to allow or facilitate the holding of a by-election in the way stated in section 392A; and
  - (b) this Act does not make provision or sufficient provision.
- (2) The regulation may -
- (a) have retrospective operation to a day not earlier than the commencement; and
  - (b) be inconsistent with this Act to the extent necessary to achieve the purpose of this part.
- (3) This section and the regulation expire 1 year after the commencement.”

4.7 In some cases, safety net provisions of this type confer powers on the election administration, rather than the executive government. An example of this approach can be found in section 17 of the *Canada Elections Act*:<sup>21</sup>

**“Power to adapt Act**

- 17(1) During an election period or within 30 days after it, if an emergency, an unusual or unforeseen circumstance or an error makes it necessary, the Chief Electoral Officer may, for the sole purpose of enabling electors to exercise their right to vote or enabling the counting of votes, adapt any provision of this Act and, in particular, may extend the time for doing any act, subject to subsection (2), or may increase the number of election officers or polling stations.

**Limitation — power to adapt**

- (2) The Chief Electoral Officer shall not extend the voting hours at an advance polling station or, subject to subsection (3), the voting hours on polling day.

**Emergency — extending voting hours**

- (3) If voting at a polling station is interrupted on polling day by an emergency and the Chief Electoral Officer is satisfied that, if the voting hours at the polling station are not extended, a substantial number of electors will not be able to vote, the Chief Electoral Officer shall extend the voting hours at the polling station for the period the Chief Electoral Officer considers necessary to give those electors a reasonable opportunity to vote, as long as the polling station does not in any case
- (a) close later than midnight on polling day; or

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<sup>21</sup> <https://laws.justice.gc.ca/eng/acts/e-2.01/index.html>, viewed 21 May 2020.

(b) remain open during polling day for a total of more than 12 hours.”.

An example of an even more comprehensive provision is section 50 of Uganda’s *Electoral Commission Act 1997*:<sup>22</sup>

**“50. Special powers of the commission.**

- (1) Where, during the course of an election, it appears to the commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than the Constitution, does not accord with the exigencies of the situation, the commission may, by particular or general instructions, extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of those provisions as may be required to achieve the purposes of this Act or that law to such extent as the commission considers necessary to meet the exigencies of the situation.
- (2) For the avoidance of doubt, this section applies to the whole electoral process, including all steps taken for the purposes of the election and includes nomination.”.

Provisions of this type could be given an enduring operation as in Canada and Uganda, or be subject to a sunset clause, as in Queensland.

4.8 Australia’s electoral laws should be amended to provide the fullest flexibility to enable essential changes to be made to the electoral process to meet evolving challenges of a pandemic even if the legislature has been dissolved, though that would certainly represent a major departure from the way in which the legal frameworks for elections have previously been specified in Australia. Some key questions to be considered include the following.<sup>23</sup>

- Is it preferable for the executive government (possibly in caretaker mode) to be the formal executor of changes of this type, or should the power to make such changes be conferred on the electoral commission?
- By what process will proposals for changing electoral procedures (especially where the law may have to be overridden) be developed? How transparent will it be, and how might stakeholders be involved?

Consistency of federal and state laws

4.9 The legal restrictions on a wide range of activities which were put in place in March 2020 in an attempt to limit the spread of infection were primarily enacted by the states and territories. That gives rise to the possibility that there could be an inconsistency between state and federal laws, which might need to be resolved by reference to section 109 of the

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<sup>22</sup> <https://ulii.org/ug/legislation/consolidated-act/140>, viewed 21 May 2020.

<sup>23</sup> For a broader discussion of some of these issues, see Toby James, *Adapting Elections to COVID-19: five key questions for decision makers*, International Institute for Democracy and Electoral Assistance (International IDEA), 19 May 2020, at <https://www.idea.int/news-media/news/adapting-elections-covid-19-five-key-questions-decision-makers>, viewed 23 May 2020.

Constitution. For example, subsections 90A(1) and 189(1) of the *Commonwealth Electoral Act 1918* provide respectively that the electoral roll, and postal vote applications, are to be made available for public inspection at the relevant AEC office; but it is not clear that a person would have been permitted by the NSW *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* as promulgated on 30 March 2020 and revoked on 14 May 2020 to leave his or her place of residence to undertake such inspection. Nor is it clear that if that Order's restrictions were in force at election time, leaving one's place of residence to lodge nomination papers would constitute a "reasonable excuse" for being away from home.<sup>24</sup> Clearly the relevant state and territory instruments were put together in circumstances of great urgency, making anomalies of this type unavoidable in the short run; but for avoidance of uncertainty, there is a clear need for liaison between the state and federal health and electoral authorities to ensure that people are not at election time confronted with apparently conflicting rights and/or obligations in federal and state laws, or have rights and/or obligations which vary across states and territories.

4.10 The issue of inconsistency discussed in the preceding paragraph arises when federal and state laws appear to impose different requirements in relation to a particular activity in a given jurisdiction. Inconsistency in a different sense arises when state and federal authorities, quite legally, adopt within their own jurisdictions different approaches to a particular issue, for example, what constitutes valid marking of a ballot paper. The victims of this type of inconsistency are the participants in the electoral processes, most particularly the voters, who may find the differences confusing, sometimes to the extent that they spoil their ballots inadvertently due to uncertainty in their minds about the relevant requirements. The risk of this is likely to be greater if new processes are being introduced at federal, state and territory elections, with slightly different approaches taken in each jurisdiction. Significant benefits could arise if Australia's various electoral commissions were to seek to approach the problems of Covid-19 with a high level of cooperation, and with a clear objective of minimising unnecessary differences in approach. The Electoral Council of Australia & New Zealand could provide a good framework within which such a collaborative approach could be pursued.

#### Consistency of laws within jurisdictions

4.11 Finally, it is worth noting that at least some of the public health directives relating to Covid-19 will have been developed by states and territories without attention having had to be paid at the time to their implications for elections. A process of harmonising public health and electoral requirements will therefore have to be undertaken in those jurisdictions prior to any future elections, to ensure that stakeholders are not faced with contradictory provisions.

### **Part 5 - Postponement of elections**

5.1 From a purely practical point of view, the simplest policy response to the challenge of a pandemic is to postpone elections until it is under better control.<sup>25</sup> That has already been done in relation to the Tasmanian Legislative Council, where the periodic elections for two

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<sup>24</sup> [https://www.legislation.nsw.gov.au/\\_emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020.pdf](https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf), viewed 21 May 2020. Significantly, the Order in question explicitly stated that "undertaking any legal obligations" was to be a reasonable excuse for leaving one's place of residence, but did not so specify "exercising a legal right".

<sup>25</sup> For a discussion of this issue from a cross-national perspective, see Katherine Ellena, *The Legal Quagmire of Postponing or Modifying Elections*, International Foundation for Electoral Systems (IFES), 14 April 2020, at <https://www.ifes.org/news/legal-quagmire-postponing-or-modifying-elections>, viewed 24 May 2020.

seats due on 2 May 2020 were deferred until a yet-to-be-determined date later in 2020 (if the state Director of Public Health “has notified the Minister that he or she is of the opinion that there is no longer a significant risk to public health that would make it undesirable to hold the 2020 election”) or, failing that, until the date of the periodic Legislative Council elections to be held in 2021.<sup>26</sup> In New South Wales, state-wide local government elections have been postponed until 2021. In Queensland, on the other hand, a decision was made to proceed on 28 March 2020 with two state by-elections mentioned earlier, as well as state-wide local government elections. The polls took place in accordance with requirements set out in a detailed legal direction given by the state’s Chief Health Officer under the *Public Health Act 2005* (Qld).<sup>27</sup> To date there do not appear to have been any reports that the gathering of people at the polls gave rise to further transmission of infection. It was, however, reported in the media that some staff had walked out of a call centre supporting the election, due to fears that social distancing was not possible there.<sup>28</sup> More generally, deferral of elections internationally has been widespread.<sup>29</sup>

### Temporary suspension or adjournment of polling

5.2 Sections 240A, 241, 242 and 243 of the *Commonwealth Electoral Act 1918* make provision for the temporary suspension or adjournment of polling at a federal election. None of them, however, appears sufficiently broad to provide authority for a lengthy deferral of polling nationwide. In each case, the power to suspend or adjourn is conferred on the presiding officer at the polling place, rather than on the AEC. Sections 240A and 241 refer respectively to the “suspension” of polling or a case in which polling is “interrupted”, the implication being that polling must at least have started for those provisions to come into play. Section 242 refers to a case in which a polling place has not opened, but limits the length of time for which polling can thereafter be adjourned to 21 days.

### General elections for the House of Representatives

5.3 At the federal level, the scope for postponing general elections is constitutionally constrained. In accordance with section 28 of the Constitution, the current House of Representatives will expire on 1 July 2022, and writs for the election of a new House must, as specified in section 32 of the Constitution, be issued within ten days from the date of the House’s expiry (or earlier dissolution). Under the *Commonwealth Electoral Act 1918* as it currently stands, polling day could be no more than 58 days after the date of issue of the writs. (That 58 day period could, however, be extended by an amendment to the Act.) A further constraint, however, arises from section 64 of the Constitution, which provides that “... No Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives”. That would not necessarily prevent government from continuing in the event that it took more than three months for the new House

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<sup>26</sup> Kevin Bonham, *Legislative Council 2020: Rosevears And Huon Not Live*, 2 May 2020, at <http://kevinbonham.blogspot.com/2020/05/legislative-council-2020-rosevears-and.html>, viewed 21 May 2020.

<sup>27</sup> Queensland Health, *Local Government election and State by-elections Direction (No. 2)*, at <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/local-government-election-and-state-by-elections>, viewed 23 May 2020.

<sup>28</sup> Michael Doyle and Tracey Ferrier, “Staff walk out of Qld voting call centre”, *The Chronicle*, 27 March 2020 <https://www.thechronicle.com.au/news/staff-walk-out-of-qld-voting-call-centre/3982925/>, viewed 21 May 2020.

<sup>29</sup> For a regularly updated record of countries which have postponed or proceeded with elections in the face of the pandemic, see International Institute for Democracy and Electoral Assistance (International IDEA), *Global overview of COVID-19 impact on elections*, at <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>, viewed 3 May 2020.

to be elected; it could, however, mean that after the three months, the ministry would have to be drawn from the Senate. In normal circumstances that would be close to unthinkable, but the circumstances arising from the current pandemic are clearly far from normal.

### By-elections

5.4 Much more flexibility exists in relation to possible by-elections for the House of Representatives, writs for which are (pursuant to section 33 of the Constitution) issued by the Speaker of the House (or, in certain circumstances by the Governor-General in Council). Section 33 specifies no deadline for the issue of such writs, and there are precedents for seats to be left unfilled when vacancies have arisen close to a general election. In normal circumstances it would seem highly undesirable on democratic grounds to leave a particular constituency unrepresented in the House for a lengthy period, and up until now the longest period between the date on which a vacancy arose and polling day for the resulting by-election has been 82 days.<sup>30</sup> In the specific circumstances of a pandemic, however, it is reasonable to speculate that voters might rather see a postponement of polling than be forced to face possible health risks associated with having to breach social isolation to vote. Deferral of by-elections would be facilitated if done with bipartisan support, the prospect of which would seem quite reasonable: as noted earlier, such bipartisanship has been a feature of the response to the pandemic to date, and in any case there has been a general reluctance on the part of the parties in the Parliament to exploit short-term changes in numbers for short-term gain.<sup>31</sup>

5.5 This issue has been brought into focus by the announcement on 30 April 2020 of the resignation from the Parliament on health grounds of the federal member for Eden-Monaro, Dr Mike Kelly. Eden-Monaro would appear to constitute a special case even within the broader category of possible by-elections, coming relatively early in the history of the Covid-19 pandemic, when there has been limited opportunity for the government, the Parliament, the AEC and the health authorities to focus in detail on how electoral processes might have to be reconfigured in response to Covid-19. Furthermore, because of the detailed and prescriptive character of the *Commonwealth Electoral Act 1918*, it is likely that any major reconfiguration (such as the conduct of the by-election using only postal voting) would have to be underpinned by legislation; and the Parliament is currently scheduled to sit for only two weeks (in June) between 14 May 2020 and 4 August 2020. With the writ for the by-election to be issued on 28 May 2020 for polling on 4 July 2020, it now seems relatively unlikely that any legislated changes to procedures will be attempted.<sup>32</sup>

### Senate elections

5.6 Periodic Senate elections are required by section 13 of the Constitution to be held within one year before the places of Senators are to become vacant. In relation to the current Senate, that one year period will commence on 1 July 2021. Section 11 of the Constitution provides that “the Senate may proceed to the despatch of business, notwithstanding the failure of any

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<sup>30</sup> Damon Muller, *The Eden-Monaro by-election and COVID-19*, at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2020/May/The\\_Eden-Monaro\\_by-election\\_and\\_COVID-19](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/May/The_Eden-Monaro_by-election_and_COVID-19), viewed 3 May 2020.

<sup>31</sup> In the Senate, for example, votes have occasionally been recommitted by agreement if a Senator by accident or misadventure has failed to attend a division.

<sup>32</sup> For a discussion of some of the issues associated with the conduct of the Eden-Monaro by-election, see Antony Green, *How to Manage the Eden-Monaro By-election in a time of Covid-19*, at <https://antonygreen.com.au/managing-the-eden-monaro-by-election-in-a-time-of-covid-19/>, viewed 3 May 2020.

State to provide for its representation in the Senate”. As is pointed out by Quick and Garran, that is subject to there being a quorum in the Senate: the current Senate quorum is 19 members.<sup>33</sup> While this might suggest that in theory the Senate could continue to function with 36 members from 1 July 2022, that would be a *truly* radical and unprecedented scenario, with considerable potential for litigation to enforce the apparently mandatory wording of section 13.<sup>34</sup>

### State and territory elections

5.7 The scope for state and territory elections to be postponed has been analysed by Graeme Orr, and his analysis need not be reiterated in detail here.<sup>35</sup> In most cases postponement could be effected by ordinary legislation (though in the case of the Northern Territory that would have to be Commonwealth legislation); but in Queensland there would be a need for a referendum to authorise any delay beyond five weeks (which, absent specific changes to polling practice, would defeat the public health purpose of seeking to defer the election).

### Standards for timing of elections

5.8 It should be noted that there are no internationally accepted standards for the prescribed lives of parliaments, beyond the general requirement for “genuine periodic elections” set out in article 25 of the *International Covenant on Civil and Political Rights*.<sup>36</sup> Australian senators already have six year terms, and members of the NSW Legislative Council have eight year terms (and, for much of the 20<sup>th</sup> century, had twelve year terms). It might also be recalled that as a result of the Second World War, the UK House of Commons elected in 1935 remained in place for nine-and-a-half years. While a postponement of an election for a few weeks or even months might be relatively uncontroversial given the extraordinary circumstances of a pandemic, it would, of course, be a matter of considerable concern from a democratic perspective if a government sought to postpone an election and extend the life of a parliament for a lengthy period simply to enable it to remain in power, rather than as a good faith response to a pandemic crisis.<sup>37</sup> One possible way of mitigating that would be to require governments,

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<sup>33</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1901 (reprinted 1976), p. 429; *Senate (Quorum) Act 1991*, at <https://www.legislation.gov.au/Details/C2004A04213>, viewed 3 May 2020.

<sup>34</sup> Note that under section 42 of the *Commonwealth Electoral Act 1918*, terms of territory senators are contemporaneous with terms of the House of Representatives. That, again, is something that could be changed by legislation.

<sup>35</sup> See Graeme Orr, *The Demos in a Pandemic – Staging Elections during a Health Emergency*, 6 April 2020, at <https://auspublaw.org/2020/04/the-demos-in-a-pandemic-staging-elections-during-a-health-emergency/>, viewed 3 May 2020. For further information on the laws governing election dates at the federal, state and territory level, see Rob Lundie, Laura Schatz and Damon Muller, ‘So when is the next election?’: *Australian elections timetable as at January 2020*, 13 January 2020, Parliament of Australia, Parliamentary Library, Research Paper Series 2019-20, at [https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/7127233/upload\\_binary/7127233.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/7127233/upload_binary/7127233.pdf), viewed 3 May 2020.

<sup>36</sup> <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, viewed 3 May 2020.

<sup>37</sup> Such concerns are especially relevant in countries where democratic practices are still to be well consolidated. For a discussion of this in the context of the conduct of elections in Liberia during the 2014 Ebola outbreak, see Anthony Banbury, *Opinion: Elections and COVID-19 - what we learned from Ebola*, 8 April 2020, at <https://www.devex.com/news/opinion-elections-and-covid-19-what-we-learned-from-ebola-96903>, viewed 21 May 2020. For a discussion of recent legislation in Hungary granting the Prime Minister sweeping powers to “suspend existing laws and rule by decree”, see R. Daniel Kelemen, “Hungary just became a coronavirus

during a period of extension of a parliament, to operate under appropriately modified caretaker conventions (unless a “national government”, of the kind that existed in the UK from 1940 to 1945, had been put in place).

## Part 6 - Operational policy options

6.1 If postponement of elections is impractical from a legal perspective, or undesirable from a democratic or political perspective, the next question to be addressed is how processes might be reconfigured to make them as safe as possible for all participants. Here, the steps that have already been taken to mitigate the Covid-19 pandemic provide pointers for what might be done. Basically, three main categories of action can be identified.

- **Social distancing.** Processes may be redesigned so as to ensure as much as possible that people are kept at a safe distance from each other, to minimise the likelihood of direct person-to-person transmission. For example, standards for maintaining distance between people in queues, akin to those which have become familiar through their use in supermarkets, could be identified. An even stronger approach to this could involve excluding symptomatic individuals from polling places, and/or temperature testing of voters prior to their being permitted to enter premises.
- **Speed of process.** As a supplement to social distancing, opportunities could be sought to introduce more time-efficient processes, again with the aim of reducing the likelihood of direct person-to-person transmission. An example of such a step would be the use of electronic certified lists of voters at polling places, rather than paper lists.
- **Hygiene and disinfection.** Processes may be changed so as to reduce the likelihood that pathogens will be transferred through contact with inanimate objects. An example of this could be the comprehensive disinfection of polling place premises, the provision of hand sanitiser at the entrances to polling booths, or a requirement that all polling staff and voters wear appropriate protective gloves and masks.<sup>38</sup>

6.2 Steps to enhance social distancing would essentially involve implementing in polling booths the sorts of measures with which many voters have already become familiar: managing queues, limiting numbers within the premises at any one time, spreading out voting screens so that they are not immediately adjacent to each other, and so on. Similarly, changes to speed up the process would be well within the experience of electoral commissions. The enhancement of hygiene and disinfection, however, falls into a different category. Electoral commission staff are rarely experts on the latest knowledge of ways in which disease transmission could potentially take place, or could potentially be prevented, and therefore all planning for hygiene and disinfection needs to be informed by the most thorough analysis by public health professionals. In recent years, electoral officials have increasingly had to integrate security (including cyber security) and anti-terrorism planning into their operational plans, typically relying on the advice of police and security agencies. In a time of pandemic, reliance on public health expertise is just as vital. It is also important to emphasise that measures to ensure hygiene and disinfection need to be viewed as a system rather than just a product: for example, to be effective, face masks, gloves, infrared thermometers or hand

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autocracy”, *The Washington Post*, 2 April 2020, at <https://www.msn.com/en-ca/news/world/hungary-just-became-a-coronavirus-autocracy/ar-BB124MOU>, viewed 21 May 2020.

<sup>38</sup> For a further discussion of such measures, see Buriel et al, *Safeguarding Health and Elections*, pp. 14-15.

sanitiser must not only be procured and made available, but must also be used correctly; and that will require the development of procedures, the training of staff, and appropriate public information campaigns and materials.

6.3 The discussion which follows is arranged under the following headings.

- Recent examples - Queensland and the Republic of Korea;
- Administration;
- Representation and redistribution;
- Enrolment;
- Candidates;
- Campaigning and other activities in the vicinity of polling places;
- Polling;
- Overseas voting; and
- Counting.

#### Recent examples - Queensland and the Republic of Korea

6.4 The 28 March 2020 local government elections and state by-elections in Queensland, and the 15 April 2020 national elections in the Republic of Korea (which, like those in Queensland, proceeded without, on current evidence, giving rise to additional Covid-19 infections), provide examples of things that can be done to make an electoral process as safe as possible.<sup>39</sup> The Electoral Commission of Queensland (ECQ) has described some of the steps it took as follows.<sup>40</sup>

“In conducting the elections, the ECQ consulted closely with Queensland’s Chief Health Officer who advised that the risk of COVID-19 transmission at a polling place was very low. To provide a safe environment for electors and other political participants at polling places, the ECQ implemented a range of measures at very short notice to protect public health and safety. These included:

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<sup>39</sup> For a summary of the measures implemented in Korea, see Antonio Spinelli, *Managing Elections under the COVID-19 Pandemic: The Republic of Korea’s Crucial Test*, International Institute for Democracy and Electoral Assistance (International IDEA), 18 April 2020, at <https://www.idea.int/publications/catalogue/managing-elections-under-covid-19-pandemic-republic-korea-crucial-test>, viewed 24 May 2020. For a video showing the processes used at the April 2020 elections in the Republic of Korea, produced by the country’s National Election Commission, see *21st National Assembly Elections Summary Video*, [https://www.nec.go.kr/engvote\\_2013/07\\_inact/07\\_05.jsp](https://www.nec.go.kr/engvote_2013/07_inact/07_05.jsp), viewed 21 May 2020.

<sup>40</sup> Electoral Commission of Queensland (ECQ), *Submission to Legal Affairs and Community Safety Committee, Inquiry into the Electoral Commission of Queensland’s online publication of preliminary and formal counts of the votes cast in the local government elections and state by-elections held 28 March 2020*, 8 May 2020, at <https://www.parliament.qld.gov.au/documents/committees/LACSC/2020/ECQInquiry2020/cor-8May2020.pdf>, viewed 21 May 2020.

- extending operating hours at early voting centres including opening until 9pm on both Wednesdays and Thursdays and on Saturday, 21 March
- implementing COVID-19 related personal hygiene measures including providing additional supplies of hand sanitiser to all polling places and encouraging voters to bring their own pens or pencils
- employing approximately 4000 additional staff to assist with security, queue control and social distancing measures
- expanding capacity of the telephone voting service tenfold and increasing postal voting capacity to cater to an unprecedented demand for telephone and postal voting
- making adjustments to the layout of early voting centres and election day polling booths, including floor markings to ensure social distancing measures, limiting the number of people inside a venue and closing every second voting screen
- ensuring health assessments were undertaken for election staff entering remote Indigenous communities, and
- issuing Directions to prohibit the distribution of how-to-vote cards at or near polling booths and limit attendance of scrutineers during counting in line with social distancing requirements.

All measures were implemented in accordance with the Chief Health Officer’s Local Government Election and State By-elections Direction issued on 22 March 2020 that outlined the hygiene measures and social distancing requirements that ECQ staff, political parties, candidates and their representatives and members of the public needed to adhere to during the elections.”

Antony Green has also drawn attention to the following features of the Queensland approach.<sup>41</sup>

“Measures included –

- Health concerns for elderly residents meant that Electoral Commission Queensland (ECQ) mobile polling teams were prevented from entering nursing homes and hospitals.
- The ECQ encouraged the use of postal voting and pre-poll voting.
- ...
- ... There was more on the day cleaning in polling places.
- Some polling places were abandoned and voting concentrated in venues with more space for voters to spread out.

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<sup>41</sup> Antony Green, *How to Manage the Eden-Monaro By-election in a time of Covid-19*.

...

- Social distancing interfered with all face-to-face aspects of campaigning including door-knocking, public canvassing and campaign rallies.”

6.5 The Asian Network for Free Elections (ANFREL) has summarised the steps taken in Korea as follows.<sup>42</sup>

#### **“Before Election Day**

**Campaign gatherings were limited.** Instead, political parties and candidates turned to online campaigning.

**Advance voting was encouraged** to reduce the number of voters in polling stations on election day.

**Postal voting was extended and additional polling stations were arranged** for COVID-19 patients, medical staff and those quarantined.

**A Code of Conduct for Voters** was published and disseminated to inform and prepare them.

#### **On election day**

**Hand sanitizer and disposable gloves were provided** to voters before issuing ballot papers.

**Face masks were mandatory** in polling stations and queues, except during voter identification.

**Social distancing:** voters were asked to maintain a minimum distance of 1 m between them at all times.

**Temperature checks:** voters displaying 37.5°C or more were directed to separate polling booths.

**Polling stations were regularly sanitized and ventilated.**

**A special hour to vote was arranged for those in self isolation,** if they showed no symptoms, at the end of the day.

**Polling and counting activities were live streamed** to ensure transparency.”

6.6 This brief summary does not, however, fully convey the scale of the steps taken to ensure the safe conduct of the April 2020 Korean elections. Purely for infection control, the

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<sup>42</sup> ANFREL, *COVID-19 and Elections: The Experience of Republic of Korea*. For a detailed explanation of the Republic of Korea election, see National Election Commission (NEC) of the Republic of Korea, *Election Management in Response to COVID-19: 21st National Assembly Elections in the Republic of Korea (April 15, 2020)*, at <https://drive.google.com/open?id=1CTjx9sezUqrWmhNtebgpX8crCeaYPizE>, pp. 23-27, viewed 21 May 2020.

National Election Commission had to obtain 3 million masks; 286,725 units of hand sanitiser; 20,730 thermometers; 315,381 packs of sanitising tissues (with each pack containing 75 sheets); 26,350 packs of medical gloves (50 per pack); 1,256,300 packs of single-use vinyl gloves (50 per pack); 182,840 face shields, and 14,330 sets of “Type 4 protective clothing” for staff of temporary polling stations serving quarantined voters.<sup>43</sup> Even allowing for the fact that Korea has just over two-and-a-half times as many registered voters as Australia, the scale of these figures is striking.

### Administration

6.7 It should first be emphasised that electoral commissions, even outside the immediate context of elections, are employers with occupational health and safety obligations to their staff, of a moral, legal and pragmatic character. The extent to which these are effectively met could ultimately feed back into the conduct of elections: if a significant, preventable outbreak of disease were to be sourced back to an ill-planned and managed commission activity, the commission in question might well find it difficult or even impossible to persuade people to work for it thereafter in the large numbers required at election time. There could also be the potential for a very substantial damages claim if lives had been lost by voters who had attended a polling place pursuant to a legal obligation to vote. The situation of polling staff needs particular attention, since their work by its very nature can require them to interact with hundreds of voters.

6.8 Modern elections depend for their success on a complex web of administrative structures, systems and arrangements. Detailed prior planning throughout the election cycle helps to ensure the professional conduct of operations, but elections still do not run on “automatic pilot”. On the contrary, election periods involve concentrated work on the part of all electoral commission staff. This is so not just because many aspects of the process still require human management, but also because unforeseen issues invariably arise.

6.9 As noted at paragraph 3.5 above, many election-critical systems are now automated. Insofar as that may enable contact between members of the public and electoral commission staff to be minimised, it could be a strength in the time of a pandemic. But it also creates a significant vulnerability. Major automated systems, typically being used nationwide, still have to be operated and maintained by IT support teams, and the systems are often complex, specialised ones of which scant knowledge may exist outside the commissions themselves, supporting time-critical activities. If a key member of the support team were to fall ill at the wrong time (giving rise to a possible need for other team members to be hospitalised or quarantined), the successful operation of the systems could be seriously threatened. (This is just one reason why “hi tech” solutions to problems can sometimes be less robust than “low tech” approaches.)

6.10 While it might be thought that this risk could be minimised by enabling staff to work from home, that would represent a tremendous change from the way in which commissions have functioned at election time in the past. While the AEC, for example, instituted certain working from home arrangements in early 2020, that by itself would not suffice to test the viability of such a scheme at election time, when back-to-back meetings have typically been

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<sup>43</sup> National Election Commission (NEC) of the Republic of Korea, *Election Management in Response to COVID-19*, pp. 23-27.

the order of the day, drafts of critical documents may have to pass through multiple hands, and prompt decisions often have to be made.

6.11 While these problems with systems management would typically arise at headquarters, analogous difficulties could also be encountered in the field. The AEC has for some years now had a consolidated field structure, with offices for a number of different electoral divisions often co-located. While this has many advantages when compared with the older arrangement of having a discrete office for each division, it again gives rise to risks at the time of pandemic: one person falling ill could potentially lead to everyone in the office being sidelined at a critical time. The risk of infection of key staff, and possible cross-infection of colleagues, is potentially even more significant for state and territory electoral commissions, which tend to have small and highly specialised staff all located in the same office.

6.12 Beyond permanent staff, electoral commissions typically require the services at election time of large numbers of temporary or outsourced staff (other than polling staff), who form the backbone of the workforce for specialised activities such as the provision of information to voters through call centres, the provision of telephone voting facilities for the visually impaired, the conduct of fresh scrutines after polling day, the preliminary scrutiny of declaration votes, and the counting of pre-poll votes. Many such staff have previous experience with the work, and therefore do not need to be trained from scratch. It is by no means clear whether such a temporary workforce could be readily recruited in the midst of a pandemic, especially if school closures were in place, or people in high risk groups were being strongly advised to stay home. Even if a full contingent of workers could be recruited, the need to give more extensive training to those who had not worked on elections before would place an additional burden on the electoral commissions' permanent staff.

6.13 A range of different responses to these challenges can be contemplated. Commissions should review their work practices to ensure that understanding and management of a critical activity is never confined to just a single individual, and that contingency plans are in place to cover situations in which an entire team or office may have to be quarantined. While some work from home may still be possible, it may also be necessary for office spaces to be reconfigured so as to make social distancing feasible. Should safe or effective vaccines or prophylactics be developed, commissions might need to contemplate making them freely available to permanent staff (as has been done by the AEC in the past with flu vaccine) and to polling staff, or even making them compulsory for polling staff. Short of that, they might need to require polling staff to be tested for Covid-19. Most importantly, any such responses need to be developed in consultation with occupational health and safety experts, and tested as early in the election cycle as possible.

#### Representation and redistribution

6.14 The processes of apportioning seats in the House of Representatives between the several states and territories, and of redistributing electoral boundaries, are unlikely to be directly affected by the pandemic: apportionment is a formal mathematical process, while redistribution, though giving rise to significant public input, does not depend essentially on face-to-face contact. Meetings of redistribution committees, and public enquiries, could readily be done remotely.

6.15 It should be noted, however, that an uncontrolled outbreak of disease, giving rise to significant mortality on a scale not seen so far in Australia, could affect the calculated

representation of a state or territory which was teetering on the edge of either gaining or losing a seat. In relation to the states, there would be nothing that could be done about that, given the strictness of the rule laid down by the High Court in *McKellar's* case. More flexibility would exist in relation to the Territories: it would, for example, be open to the Parliament, under section 121 of the Constitution, to legislate to prevent a territory from losing a seat due to a fall in population caused by mass deaths in a pandemic.

6.16 Redistribution processes in Australia are now based on the principle of “one vote, one value”, and the drawing of boundaries is governed by numerical criteria relating to the numbers of voters in proposed electoral divisions, in some cases both current and projected. A pandemic giving rise to substantial mortality could have the potential to give rise to significant unanticipated inequality of voter populations across divisions. The impact of this would be most likely to be felt in the Northern Territory, where the Legislative Assembly’s single-member constituencies have far lower enrolments than those in any other Australian jurisdiction. As a redistribution in the Territory in advance of the planned 2020 election has recently been completed, that does not appear to be an immediate problem; but in a worst case scenario, boundaries might need to be revisited.

### Enrolment

6.17 The process for updating the electoral roll has changed fundamentally in the last decade. The need for all electors to fill out and lodge a hardcopy enrolment form on becoming qualified to enrol, and thereafter when changing address, has been largely eliminated, with online enrolment now possible, and with the AEC also empowered to implement a Federal Direct Enrolment and Update (FDEU) program, adding people to the roll or updating their details as necessary on the basis of reliable information received from other government bodies. These mechanisms have now become the dominant sources of changes to the roll: in February 2020, 50.6% of enrolment transactions involved direct enrolment or update, and another 33.9% were done online by electors.<sup>44</sup> These changed mechanisms served not only to reduce the burden on electors, but also led to a more complete roll. At the 2019 federal election, an estimated 96.8% of those eligible were enrolled; the AEC noted at the time that that represented “by far the most complete electoral roll in Australian history and a phenomenally high base to election participation unlikely to be matched anywhere in the world”.<sup>45</sup>

6.18 While the FDEU program has achieved remarkable results overall, its operation remains problematical for people to whom notices in writing cannot be sent, as sections 103A and 103B of the *Commonwealth Electoral Act 1918* make the giving of such notices a precondition for FDEU transactions. This especially affects people living in remote parts of the Northern Territory (where the postal services are unreliable), and in similar areas in South Australia; with a particular impact on indigenous potential voters. As at November 2019, the enrolment rate in the Territory was 84%, compared to 96% nationwide, with approximately 25,000 people missing from the roll, and one-third of indigenous people not enrolled.<sup>46</sup> In

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<sup>44</sup> Australian Electoral Commission, *Transactions by source and enrolment type for the month ending 29 February 2020*, at [https://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/type/2020/02.htm](https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/type/2020/02.htm), viewed 6 May 2020.

<sup>45</sup> Australian Electoral Commission, *The best electoral roll in history*, at [www.aec.gov.au/media/media-releases/2019/04-23.htm](http://www.aec.gov.au/media/media-releases/2019/04-23.htm), viewed 6 May 2020.

<sup>46</sup> Northern Territory Electoral Commission (NTEC), *Why is electoral participation declining in the Northern Territory?*, 14 November 2019, at [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0005/3254234/Iain-Loganathan.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0005/3254234/Iain-Loganathan.pdf), viewed 21 May 2020.

response, the electoral commissions in those jurisdictions have had to rely on a range of more traditional enrolment stimulation methods, usually involving face-to-face contact, or collaboration with other government agencies which are active on the ground.<sup>47</sup>

6.19 Such fieldwork, however, is problematical in a time of pandemic, with access to remote areas being either impossible or risky from a public health perspective. It is important to note, however, that enrolment is fundamentally not an end in itself, but an instrument to facilitate efficient polling by attempting as far as possible to ensure that the question of whether or not a person is entitled to vote is resolved in advance of the polling process. In circumstances where that is not possible, however, alternative approaches can be contemplated. It is already possible at elections in New South Wales, Victoria and the Northern Territory for a person to enrol on election day. In a time of pandemic, such a scheme should be implemented for all elections, either across the board, or in particular designated areas where it is known that standard enrolment processes have not been fully effective.<sup>48</sup>

### Candidates

6.20 The process through which federal election candidates are nominated has in some respects become more streamlined in recent years. While the nomination forms of non-party candidates (other than sitting independents) are still required to be signed by 100 electors, party candidates can instead be nominated in bulk by the registered officer of the relevant party, obviating the need for the interpersonal contact which the gathering of signatures may entail. The manner in which nominations are to be lodged can be determined in writing by the Electoral Commissioner, opening the way for the use of a process of online nomination which minimises human contact; and the AEC has stated that it is exploring the use of such a system. Section 176 of the *Commonwealth Electoral Act 1918* still contemplates the declaration of nominations at a public event, but that ritual involves few people and makes only a very minor contribution to the legitimacy of the process; little would be lost if the Act were amended to require the information which is currently read out to be simply published on the AEC website.

6.21 The declaration of nominations is immediately followed by a prescribed process for allocating ballot paper positions to candidates (and, where necessary, Senate groups) by a so-called “double randomisation” process which involves drawing numbered balls from a container. The provisions governing the draw are highly prescriptive, and at several points provide for numbered balls to be handed from one person to another, as well as permitting anyone present to rotate the container from which the balls are drawn. This process would appear to require review from a public health viewpoint. An alternative to the current provisions for a transparent but elaborate process would be the use of an electronic random number generator; this has been done at Australian Capital Territory elections since 1995, without giving rise to any disputes.

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<sup>47</sup> For information about initiatives in South Australia, see Electoral Commission of South Australia, *South Australian Experiments*, 14 November 2019, at [https://law.unimelb.edu.au/data/assets/pdf\\_file/0006/3254244/Mick-Sherry.pdf](https://law.unimelb.edu.au/data/assets/pdf_file/0006/3254244/Mick-Sherry.pdf), viewed 21 May 2020.

<sup>48</sup> In March 2019, the federal Joint Standing Committee on Electoral Matters rejected a proposal for election day enrolment which had been put forward in a Bill introduced by the Australian Greens. The Committee was of course not in a position at that time to anticipate the impact of the Covid-19 pandemic. See Joint Standing Committee on Electoral Matters, *Advisory report: Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018*, March 2019, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024195/toc\\_pdf/Advisoryreport.pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024195/toc_pdf/Advisoryreport.pdf), viewed 21 May 2020.

6.22 A risk which arises once nominations have been declared, and which could be a particular concern during a pandemic, is the death of a nominated House of Representatives candidate. When this happens, the election is deemed to have wholly failed, and a new writ must be issued for a supplementary election. In times past, it was sometimes possible for the new writ to set the same polling day as the original writ (as happened in the electoral division of Hume in 1972), but a consequence of the modern tendency to specify close to the minimum possible time periods for elections is that supplementary elections will generally have to be held on a later, sometimes much later, date. This may mean that the voters will have to go to the polls twice: first to vote for the Senate on the originally specified polling date, and then later to vote for the House. In a time of pandemic, that could increase the risk of transmission of disease. One partial solution to this which should be implemented would be to amend the relevant laws so that if a writ for a supplementary election has to be issued, the polling for the Senate in the division affected can be postponed until the polling day for the supplementary election. That would, however, give rise to some complexities which would need to be addressed. First, a long postponement could actually delay the finalisation of the Senate election results, and might therefore be deemed, on balance, undesirable. Second, complementary state legislation could be required, as each state parliament is empowered by section 9 of the Constitution to “make laws for determining the times and places of elections of senators for the State”. Finally, the timing of the postponed polling would depend on when the candidate had died: a death the day after nomination day would provide plenty of time for ballot papers to be printed in time for a poll postponed by only a week, and for the affected electors to be advised of the changed arrangements; but a death the day before polling day would likely require a longer postponement of the House voting, and would also make it almost impossible for voters to be informed of a postponement of Senate voting.

#### Campaigning and other activities in the vicinity of polling places

6.23 In relation to campaigning, it is useful to draw a distinction between activities undertaken prior to polling day, and on polling day itself.

6.24 In many countries, including three of Australia’s nearest neighbours (Papua New Guinea, Indonesia and Timor-Leste) campaigning is a mass activity involving large gatherings of people at rallies and in convoys of party supporters. In Australia, the traditional public meeting has long been superseded by forms of campaigning involving less personal contact, such as advertising on television, radio and social media, direct mail, calling from phone banks, “robo-calls”, text messages and the like. At a more personal level, doorknocking by candidates and volunteers, and by activist groups, is still undertaken, while party leaders tend to engage in television interviews, and stylised encounters with the public (generally pre-planned and tightly controlled rather than spontaneous, and designed in the main to provide footage which can be shown on the nightly news).

6.25 The more detached of these campaigning methods could potentially proceed largely unaffected by the pandemic (assuming, of course, that the private sector providers on whom parties and candidates might rely have not gone out of business). Forms of campaigning involving personal contact could, however, run foul of social distancing rules; and travel by senior political leaders throughout the country could be jeopardised by state and territory border closures and self-isolation requirements of the type which have recently been in place. That having been said, it is by no means clear that if the social distancing or border closure rules were challenged in court on the ground that they were beyond legislative power because they infringed on the implied constitutional freedom of political communication, they would be

upheld. The rules were put in place when immediate action was imperative, and it was clearly not feasible for policymakers at the time to specify prohibitions which took account of the diversity of possible human activity. This has been highlighted in numerous media reports of enforcement of the rules against individuals whose technical breaches were unlikely to have given rise to a public health risk.<sup>49</sup>

6.26 In *McCloy v New South Wales* [2015] HCA 34, the High Court elaborated as follows the test which is to be applied to determine whether the implied freedom has been breached.<sup>50</sup>

“The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively burden the freedom in its terms, operation or effect?

If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government ...? This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object ...? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

*suitable* - as having a rational connection to the purpose of the provision ...;

*necessary* - in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

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<sup>49</sup> For details of a highly publicised case of that type, see Ben Doherty, “NSW minister Don Harwin resigns over breach of coronavirus public health order”, *The Guardian*, 10 April 2020, at [www.theguardian.com/australia-news/2020/apr/10/nsw-minister-don-harwin-fined-1000-for-breaching-coronavirus-public-health-order](http://www.theguardian.com/australia-news/2020/apr/10/nsw-minister-don-harwin-fined-1000-for-breaching-coronavirus-public-health-order), viewed 21 May 2020.

<sup>50</sup> <http://classic.austlii.edu.au/au/cases/cth/HCA/2015/34.html>, viewed 30 April 2020.

*adequate in its balance* - a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power."

6.27 While certain prohibitions in social distancing rules, such as those on large gatherings, would seem likely to satisfy the proportionality test, a general prohibition on leaving home for other than specified reasons which did not include electoral campaigning might well be deemed neither necessary nor adequate in its balance: it is difficult to see how prohibited activities such as sitting alone by the side of a road with a billboard supporting a candidate or party, or driving around alone in a vehicle adorned with campaign messages, would pose a public health threat. While political parties or candidates might not wish to challenge the validity of social distancing rules, since that could give rise to a perception that they were insufficiently concerned about public health and welfare, a challenge could well be mounted by individuals or groups who had opposed the rules, or their broad-brush character, from the outset. To avoid this sort of uncertainty, it would be highly desirable that rules be reviewed jointly by health authorities and electoral policy makers before any election takes place under them, to ensure that such obstacles as they create to electoral campaigning are no broader than can be justified on infection control grounds.

6.28 Turning now to campaigning at polling places, that has typically had two main strands. First, it has been valued by candidates, parties and activists as the last critical opportunity to sway the minds of voters who may not have previously determined for whom they would vote. Key activities have been the display of posters and bunting, and brief person-to-person engagement. Second, it has involved the distribution of how-to-vote cards, intended to assist already committed voters to cast a formal vote, or to reinforce decisions made by parties or candidates concerning the direction of "their" second and later preferences.

6.29 It is worth noting that last minute campaigning at polling places is not a feature of all Australian elections. Tasmania, for example, bans all distribution of how-to-vote cards on polling day, and bans other campaigning within 100 metres of a polling place; and the Australian Capital Territory also bans campaigning within 100 metres of a polling place. Internationally, the sort of polling day campaigning permitted at federal elections in Australia is by no means universal; many countries, including in the immediate region New Zealand, Indonesia and Timor-Leste, permit no such campaigning.

6.30 The management of campaigning outside polling places had become a matter of controversy in its own right well before the Covid-19 pandemic struck. Two particular issues relating to the physical aspects of campaigning have stood out.

- First, competition between different campaigners for what are perceived to be tactically advantageous forms of access has in some places become less civil. With the growth in the use of bunting and large posters, a number of campaigners have been tempted to arrive early and cover as much of the available space as possible with their material (in at least one case - the 2014 Redcliffe state by-election in Queensland - employing

security guards to ensure that it wasn't later disturbed). In the worst-case scenarios, this has the potential to give rise to conflict, possibly somewhat violent.

- Second, anecdotal evidence has arisen that for some voters the experience of having to “run the gauntlet” of campaigners trying to gain their attention can be an unpleasant or annoying one.

6.31 These concerns have been examined by a number of inquiries, including one conducted by the Electoral Commission of Queensland into the Redcliffe by-election, and an inquiry by the federal Joint Standing Committee on Electoral Matters which was initiated in 2015 but lapsed at the 2016 federal election without a report having been produced.<sup>51</sup> More recently, the prospect of banning polling place campaigning and how-to-vote card distribution other than by campaigners representing parties or candidates has been raised. How such an apparently discriminatory limitation might be defended as “necessary” and “proportionate” in terms of the *McCloy* test is by no means clear.<sup>52</sup>

6.32 Several policy options for reinforcing social distancing so as to minimise the public health risk of campaigning outside polling places should be considered.

- The handing out of how-to-vote cards by campaigners could be banned, and instead, how-to-vote cards could be displayed in voting compartments (as is currently done in South Australia), made available on a single table near the entrance of the polling booth, under the control of the electoral officials, or provided in a downloadable form to voters, potentially using a link accessible via a QR code which could be scanned by voters using their own smart phones.
- Campaigners could be banned from coming closer than 1.5 metres (representing what has become the standard social distancing requirement in Australia) to voters, or to other campaigners.
- In line with recent amendments in Victoria, bunting could be banned, size limits on posters could be imposed, and the placement of such signs could be required to be no earlier than 6am on polling day. The purpose of such restrictions would be to limit the scope for conflict, including physical conflict, between campaigners.
- The radius of the area outside the entrance of a polling place within which campaigning is banned (currently 6 metres at federal elections) could be substantially increased.

6.33 Finally, it might well be necessary on public health grounds, though regrettable, to investigate banning the conduct of non-political fund-raising activities such as “sausage sizzles” in the immediate vicinity of polling places, since their presence could well have the effect of discouraging social distancing.

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<sup>51</sup> For further information about that inquiry, including links to submissions from the public, see Joint Standing Committee on Electoral Matters, *Inquiry into campaigning at polling places*, at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/Campaigning\\_polling\\_places](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Campaigning_polling_places), viewed 21 May 2020.

<sup>52</sup> That is not to say that a general ban such as that in Tasmania could not be defended. Such bans are typically justified on the ground that voters benefit from having at the end of the campaign a period of “clear air” in which to reflect on the choices they will make, which is also the main rationale for the TV and radio advertising “blackout” in the days preceding polling day.

## Polling

6.34 Among all the methods of voting used in Australia, from a purely electoral point of view the conduct of balloting at a location staffed and managed by the electoral commission remains the “gold standard”. At such places, the state itself takes responsibility for guaranteeing that voters can cast a secret ballot in circumstances free of intimidation.<sup>53</sup> The process moreover is “transparently secret”: scrutineers are able to witness the proceedings and satisfy themselves that the rules have been followed. This then reinforces public trust. It follows that if there is to be a shift away from the predominant use of this gold standard model, there will be a price to be paid in terms of the quality of the electoral process.

6.35 The discussion of polling which follows addresses the following topics.

- Encouraging pre-poll and postal voting;
- Improved processes for attendance voting;
- Voting by persons in isolation: proxy or telephone voting;
- Automatic despatch of postal votes to all electors in lieu of attendance voting; and
- Internet voting.

### Encouraging pre-poll and postal voting

6.36 The primary aim of steps to encourage more pre-poll and postal voting (collectively called “early voting”) would be to reduce the number of people voting on polling day, thereby cutting the lengths of queues, reducing queueing time, and generally streamlining the process. This, of course, would require that levels of resourcing of polling places be maintained or increased, notwithstanding that fewer people would be using them, and that would need to be clearly understood and articulated, not least because the AEC has at times come under pressure to reduce polling place resources as the scale of pre-poll voting has increased.<sup>54</sup> The greater use of postal voting would have a second significant effect: it would in many cases eliminate the need for voters to leave their residences to vote, or to have contact with people outside their immediate circle.

6.37 From the perspective of electoral commissions, the practical advantage of encouraging an increase in early voting is that the laws, processes and procedures required to underpin such a development are already largely in place: the change from current practice would be one of scale and emphasis, rather than the creation of an entirely new process. That having been said, it would be imperative for commissions to confirm that the resources needed to cope with such an increase would be readily available. For pre-poll voting, additional venues and trained staff would be needed. That would also be the case for postal voting; and much would also depend on the capacity of private-sector mail houses (in the aftermath of the economic disruptions caused by the pandemic) to generate postal voting packs (containing ballot papers and return

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<sup>53</sup> See Jørgen Elklit and Michael Maley, “Why Ballot Secrecy Still Matters”, *Journal of Democracy*, vol. 30, no. 3, July 2019, pp. 61-75 at p. 69, at <https://muse.jhu.edu/article/729169>, viewed 21 May 2020.

<sup>54</sup> See Peter Brent, “Revenge of the auditors”, *The Australian*, 17 November 2014, at <http://mumble.com.au/?p=2843>, viewed 13 May 2020.

envelopes) on the scale required, and on the capacity of Australia Post to deliver such packs and return voters' completed ballots to the AEC in a timely way. Given the changes in Australia Post's time standards for mail delivery in recent years, it might well turn out that an extension of the overall election timetable would be necessary.

6.38 At present, voters at federal elections who wish to cast a pre-poll or postal vote must apply to do so. The right so to apply is not conferred on all voters, but only on those who meet certain conditions specified in Schedule 2 to the *Commonwealth Electoral Act 1918*. Item 7A of that Schedule refers to a person who “will be unable to attend a polling booth on polling day because of a reasonable fear for, or a reasonable apprehension about, his or her personal wellbeing or safety”.<sup>55</sup> The wording of that condition, while probably intended originally to cover electors in danger of domestic or other violence, would appear sufficiently broad to confer a right to a pre-poll or postal vote on a person fearful of the risk of infection associated with attending a polling place. By law, and in practice, postal and pre-poll voters do not have to state the specific ground on which they are applying, but instead simply have to declare that they are qualified to apply. The significance of the existence of a relevant entitlement lies primarily in the fact that the AEC could legitimately advertise the availability of postal and pre-poll voting to persons concerned about infection. Applying for a federal election postal vote online is simple and straightforward.

6.39 In pursuing this policy option, electoral commissions would face a critical choice of whether to place greater emphasis on encouraging pre-poll or postal voting. From a purely electoral point of view, pre-poll voting is much the more robust process: in effect, it simply puts the gold standard operation of a polling place into practice before polling day, but at far fewer sites. With postal voting, by way of contrast, the state takes no direct responsibility for ensuring that voters can mark their ballots secretly, in an environment free of coercion or intimidation; and the voting process cannot be observed by scrutineers.<sup>56</sup> These shortcomings to date appear to have been tolerated by the Australian community, but up until now postal votes have never represented more than 8.6% of total votes cast at a federal election; whether such toleration would continue if postal voting were to increase greatly is difficult to know. On the other hand, postal voting might be thought preferable if a thorough public health assessment established that it would give rise to less chance of transmission of infection.

6.40 There has already in recent years been a dramatic increase in the proportion of people who have cast their votes before polling day at federal elections: at the 2019 poll, more than 40% of the votes were so cast. This trend was already apparent by 2008, with the AEC putting it to the federal Joint Standing Committee on Electoral Matters that:

“with close to 2 million votes being cast before polling day in 2007 (either at early voting centres, or through the post), it is now misleading to conceive of an election as taking place on a single polling day: there is, in fact, a polling period.”<sup>57</sup>

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<sup>55</sup> Voters who are likely to need to vote by post at most elections, and who fall into categories specified in section 184A of the *Commonwealth Electoral Act 1918*, can apply to be registered as “general postal voters”; they are then sent ballot papers automatically without having to make a separate application at each election. At present the listed categories include no equivalent to item 7A of Schedule 2 to the Act.

<sup>56</sup> For a more detailed discussion of problems with ballot secrecy to which postal voting can give rise, see Elklit and Maley, *Why Ballot Secrecy Still Matters*.

<sup>57</sup> Australian Electoral Commission, *Submission 169. Inquiry by the Joint Standing Committee on Electoral Matters (JSCEM) into the 2007 Federal Election*, 20 June 2008, at [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=em/elect07/subs/sub169.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/elect07/subs/sub169.pdf), viewed 21 May 2020.

The trend had been, and has continued to be, driven by a range of factors, including the despatch of postal vote applications by political parties to voters who might otherwise not have contemplated voting early. In the aftermath of the 2019 election, however, there has been something of a backlash against early voting from political parties concerned about the resources required to maintain a presence at pre-poll voting centres, and from commentators who decry the impact it may have on the deliberative character of a campaign process culminating in a single polling day.<sup>58</sup> Several other downsides of a deliberately stimulated increase in early voting can also be identified, and need to be taken into account when assessing the desirability of going down that path.

- It would give rise to additional costs, associated with the need to establish more pre-poll voting centres, and the higher costs per voter of postal voting. As noted at paragraph 6.36 above, any attempt to offset such increases by reducing resources allocated to polling day would largely defeat the purpose of the exercise.
- Under current legal arrangements, it would be likely to slow the finalisation of election results, as postal votes can be received up to 13 days after the close of polling.
- The counting of pre-poll votes in a timely way is already a growing challenge for electoral commissions, since it requires the mounting of large counting operations on election night, separate from those undertaken at polling places. Antony Green has suggested one solution, the commencement of the counts in embargoed conditions prior to the 6pm close of the polls.<sup>59</sup> A possible alternative could be to farm out ballot boxes from pre-poll voting centres to be counted at polling places. An even more effective (but also more radical and probably more expensive) approach would be to adopt from the Australian Capital Territory the practice of making electronic voting available for pre-poll voting. With votes being recorded electronically and therefore being counted automatically, an increase in pre-poll voting levels in the Territory in fact tends to make counting easier and faster.
- The seemingly inexorable trend towards more early voting in Australia (and indeed world-wide) suggests that a one-off large increase might prove difficult to reverse, potentially producing in the longer term a fundamental change in the nature of the polling process.

#### Modified processes for attendance voting

6.41 The measures adopted in Queensland and the Republic of Korea as outlined at paragraphs 6.4 to 6.6 above provide a useful starting point for considering how polling place processes could be improved. But they by no means exhaust the range of possibilities, and any or all of the following could also be considered.

- **Use of electronic certified lists** - These are widely used now at state and territory elections, but government funding for a full rollout at federal elections has not yet been forthcoming. In the context of a pandemic, they have two major and specific

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<sup>58</sup> See Stephen Mills and Martin Drum, “Three weeks of early voting has a significant effect on democracy. Here’s why”, *The Conversation*, 29 April 2019, at <http://theconversation.com/three-weeks-of-early-voting-has-a-significant-effect-on-democracy-heres-why-115909>, viewed 21 May 2020.

<sup>59</sup> Antony Green, *Should we Count Pre-poll votes before 6pm on Election Day?*, 16 April 2020, at <https://antonygreen.com.au/should-we-count-pre-poll-votes-before-6pm-on-election-day/>, viewed 13 May 2020.

advantages over paper lists beyond those typically cited, which taken together make it clear that electronic certified lists should replace paper lists.

- First, experience with their use, especially in the Australian Capital Territory, clearly demonstrates that they speed up the process of finding the voter's name on the list and recording that he or she has voted. This therefore tends to reduce the length of the voter's interaction with the relevant polling official. As long ago as 2013, the AEC noted that electronic certified lists "will mean a quicker process for voters and for AEC polling staff. An easier search and find of voters should reduce queuing and increase efficiency at the polling booth".<sup>60</sup> This reduction could potentially be made even greater by mailing to all voters a bar-coded voter identification card which could be swiped by the voter in much the way that customer loyalty cards are now being swiped by shoppers in major supermarket chains. (Provision would, of course, still be made for voters who for one reason or another were unable to bring such a card with them to the polling place.) Such a mailout would of course give rise to considerable postage costs. One possible alternative would be to augment the facility the AEC already provides to enable voters to check their enrolments online with a mechanism for downloading a bar code to a portable electronic device, in much the way that airlines now distribute electronic boarding passes. Even if there were a major publicity campaign encouraging voters to use that facility, it clearly would not cover the whole population; but if enough voters used it, it would at any rate have the potential to expedite movement through polling places significantly.
- Second, they have the potential to be used to assist with contact tracing in the event that it became apparent that an infected person had voted. Marked paper certified lists, while providing a complete record of who has voted at a polling place, give no indication of the time at which a person voted. Electronic certified lists can record that, thereby narrowing the class of potential contacts to be traced to people who had voted at around the same time, as well as polling staff. The Eden-Monaro by-election would appear likely to provide a good opportunity for technology to be used in that way.

For several decades up until now, every issuing officer at federal polling places has used a separate certified list, as well as issuing ballot papers. With electronic certified lists, especially if used in conjunction with bar code scanners, it is possible that only one or two units might be needed, which could be positioned near the entrance. The work of the issuing officer would then be reduced in most cases to handing over the ballot papers, and even that process could be expedited by removing the antiquated requirement in section 231 of the *Commonwealth Electoral Act 1918* that each ballot paper be initialled by the issuing officer.

- **Direction of voters to polling places** - Voters at Australian federal elections can cast an ordinary vote at any polling place in their electoral division. This is convenient for them, but also complicates the AEC's task of allocating resources so as to avoid undue queueing. In many countries, voters are rather permitted to vote at only one designated

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<sup>60</sup> Australian Electoral Commission (AEC), "Case study: Electronic lists - the roll of the future?", *Annual Report 2012-13*, at <https://annualreport.aec.gov.au/2013/case-studies/electronic-lists.html>, viewed 24 May 2020.

polling place, an arrangement sometimes described as “precinct voting”. This option could be considered: for it to work, however, a mailout of voter identification cards as described above, or some equally effective process for advising each voter where to vote, would be necessary. An alternative approach, but one potentially requiring much development work, would be to provide a facility for voters to see online which polling places had long queues, in much the way that Google Maps can flag traffic jams in real time.

- **Drive-through voting** - Section 234A of the *Commonwealth Electoral Act 1918* currently makes it possible for a voter at a polling place who is pregnant, ill or disabled to vote outside the polling place. In normal circumstances, the number of voters expected to make use of such a facility at any given polling place would be relatively small. If larger numbers required it, the functioning of the polling place could be significantly disrupted. An alternative which could be considered would be to set up dedicated “drive-through” voting venues in major centres, perhaps using parking lots, where the voting process could be managed by specialised teams.<sup>61</sup>
- **Questions to be put to voters** - At present, subsection 229(1) of the *Commonwealth Electoral Act 1918* requires each voter to be asked the questions “What is your full name?”, “Where do you live?” and “Have you voted before at this election?”. The first and second questions are currently needed to identify the person voting; the third is largely ritualistic in character. It would make sense to amend the Act to delete the third question. If bar-coded cards were issued to voters, the requirement for the posing of the questions to voters producing them could be eliminated completely, and perhaps replaced with a requirement for a multi-lingual notice to be placed adjacent to the bar-code reader informing the voter that by swiping the card, he or she confirms that it correctly records his or her name and address, and that he or she has not previously voted. (Vision-impaired and non-literate voters would need to be advised of this by a polling official.)
- **Establishment of additional polling places** - The aim of such a step would be to reduce the average number of people voting at each polling place, and thereby reduce queueing and delays. It could also be driven by the fact that the need for preserving social distancing within polling places might require voting screens to be separated by a distance of 1.5 metres, rather than being placed immediately adjacent to each other as has hitherto been the case. In some existing polling places there will be sufficient space for that to be done without reducing the total number of screens, but in others, fewer screens will be able to fit in the available space, giving rise to the potential for delays in the process as voters wait for a vacant screen.
- **Adding a second day of polling** - There is no reason in principle why polling has to be confined to a single day. Multi-day polling has frequently been used in transitional elections such as those in Namibia in 1989, Cambodia in 1993, and South Africa in 1994. Having polling running over a Saturday and Sunday rather than just on the Saturday could potentially effect a dramatic reduction in queues, especially if coupled with a public information campaign to encourage some people to vote on the first day

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<sup>61</sup> For a discussion of a trial of such a scheme in Queensland in 2017, see ABC News, *Queensland election: Drive-through polling booths open at Cleveland, Sunshine Coast*, at <https://www.abc.net.au/news/2017-11-20/qld-election-drive-through-voting-begins/9168182>, 20 Nov 2017, viewed 24 May 2020.

and others on the second, for example by using an “odds and evens” approach based on the voter’s birthday. Potential downsides of this would include the need to:

- obtain staff and premises for both days;
  - cover *very* substantial additional costs;
  - secure ballot boxes and sensitive materials overnight (which might require them to be moved to a safe storage site rather kept at the polling place); and
  - rewrite procedures and retrain staff.
- **Disinfection** - Various measures can be considered, including all of those used in the Republic of Korea. While the ECQ for the March 2020 elections in Queensland encouraged voters to bring their own pens to use, an alternative might be to issue every voter with a pencil, possibly in a sealed pack, along with his or her ballot paper(s). Disinfection poses a particular challenge in jurisdictions such as the Australian Capital Territory where electronic voting has been implemented based on keyboard use. Unless all of the voters using the system were required to wear sterile gloves and use them correctly, the keyboards would give rise to obvious concerns regarding cross-infection, which could well discourage voters from using them at all. Part of the problem arises from the fact that the cleaning of keyboards is notoriously difficult and time-consuming: the redevelopment of the system using touchscreens could potentially make it easier for the device in question to be sanitised between use by successive voters.
  - **Diversion of symptomatic voters** - Ensuring that voters displaying symptoms of a pandemic illness should not be permitted to enter a polling place and mingle with other voters is one of the most obvious steps which need to be taken. In the Republic of Korea, special separate voting facilities with enhanced protections against infection were provided, to which such voters were diverted. If that were not possible, there would be direct implications for the enforcement of compulsory voting, since it would be plain to all that having been symptomatic would constitute a valid and sufficient reason for failing to vote.<sup>62</sup> For obvious reasons, electoral commissions have not in the past published lists of “valid and sufficient” reasons: if they did so, it could be expected that electors who had simply not bothered to vote would explain that failure by asserting an excuse chosen from the list, which would ultimately defeat the purpose of enforcing compulsory voting. On the whole, it might make more sense in the circumstances of a pandemic simply to concede that compulsory voting would be unenforceable and abandon it, thereby avoiding the pointless and costly despatch of large numbers of non-voter notices.
  - **Assisted voting** - It is a general feature of electoral laws in Australia that voters who are vision impaired, physically challenged or non-literate may be assisted in the marking of their ballot papers, either by someone chosen by the voter, or by a polling official. In some such cases, scrutineers are also permitted to be present. A process of

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<sup>62</sup> On 26 May 2020, the AEC’s Evan Ekin-Smyth confirmed that for the Eden-Monaro by-election, “waking up on by-election day and feeling ill ... would be a valid excuse for not voting”. ABC Radio 666 Canberra, *Drive Program: Interview with Evan Ekin-Smyth (Australian Electoral Commission)*, 26 May 2020, at <https://www.abc.net.au/radio/canberra/programs/drive/drive/12267270>, viewed 26 May 2020, from 21 minutes 25 seconds to 22 minutes 3 seconds from the start of the recording.

that type would be difficult to undertake while maintaining social distancing, particularly in the open environment of a polling place. That could give rise to a need either for additional protective equipment (such as plastic face screens) to be worn by those present when assistance is being provided, or for a separate area to be set aside in the polling place in which the voter could instruct the person providing the assistance from a safe distance without being overheard by others present.

- **Voice recognition** - As a longer term undertaking, it could be useful to research further the possibility of using voice recognition technology to enable votes to be recorded without voters being required to touch any ballot or device.

#### Voting by persons in isolation: telephone or proxy voting

6.42 For people in quarantine or self-isolation, attendance voting is impossible, and postal voting is problematical, both because of the requirement for a witness to be present when a postal vote is marked, and because of the undesirability of having persons in quarantine touching objects which then make their way out into the broader community. A better alternative would be to amend the law to extend to quarantined or isolated voters the electronically assisted voting method specified in part XVB of the *Commonwealth Electoral Act 1918*, which is currently made available only to sight-impaired voters. Quarantined and isolated electors were able to vote at the March 2020 local government elections in Queensland using such a system.<sup>63</sup> It should be made available across the board.

6.43 A more radical departure from previous Australian electoral practice would be to enable proxy voting on behalf of the quarantined or isolated, such as is permitted in the United Kingdom.<sup>64</sup> From a policy point of view, proxy voting would be less desirable than telephone voting, as it would eliminate the direct and personal character of the vote. Overtones of proxy voting can however be discerned in the provision made during the 2017 same sex marriage survey for the survey form (in effect, the ballot paper) to be completed on behalf of a respondent by a “trusted person”. Proxy voting would not be an option at federal elections because of constitutional constraints.<sup>65</sup> It could, however, conceivably be considered for some state or territory elections.

#### Automatic despatch of postal votes to all electors in lieu of attendance voting

6.44 On 15 May 2020, the Victorian Minister for Local Government announced that the state-wide local government elections scheduled for 24 October 2020 would proceed using universal postal voting: further details of the process are to be elaborated in due course by the Victorian Electoral Commission. Queensland’s Premier has also speculated publicly on the possibility that the state election due in October 2020 could be conducted by post, making it

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<sup>63</sup> For a detailed explanation of its operation, see Electoral Commission Queensland (ECQ), *Fact Sheet 2020 - Local Government Elections: Telephone Voting*, at [https://www.ecq.qld.gov.au/\\_data/assets/pdf\\_file/0022/9562/Fact-sheet-Telephone-voting.pdf](https://www.ecq.qld.gov.au/_data/assets/pdf_file/0022/9562/Fact-sheet-Telephone-voting.pdf), viewed 21 May 2020.

<sup>64</sup> See United Kingdom Government, *How to vote - Voting by proxy*, at <https://www.gov.uk/voting-in-the-uk/voting-by-proxy>, viewed 21 May 2020.

<sup>65</sup> See Australian Government Solicitor, *Opinion Number. 1656* [of Sir George Knowles, Solicitor-General], at <https://legalopinions.agps.gov.au/legalopinion/opinion-1656>, viewed 21 May 2020.

the first legislative election so conducted in Australia.<sup>66</sup> At the federal level, there have been two similar events.

- The first was the 1997 vote for a Constitutional Convention. Involving voluntary voting, it was the largest postal voting operation ever mounted in Australia, requiring the despatch of 12 million postal voting packs to electors.<sup>67</sup> A key feature of the election was the length of time the process took: nominations closed on 8 October 1997, but the deadline for receipt of votes was 9 December 1997, 62 days later. By contrast, at a federal election, polling day can be no more than 31 days after the date of nominations, and the deadline for receipt of postal votes can be no more than 44 days after nominations.
- The second was the 2017 same sex marriage survey, at which “voting” was also voluntary.<sup>68</sup> Again, the process was time consuming: the electoral rolls closed for the survey on 24 August 2017, but the deadline for the receipt of completed forms was 7 November 2017.

In each case, the time needed to produce and mail out the ballot packs/survey forms significantly influenced the length of the process.

6.45 Amendments to the *Commonwealth Electoral Act 1918* to enable universal postal voting at a federal election would be relatively straightforward: the definition of a “general postal voter” could simply be broadened to include all electors, and provisions requiring the establishment of polling places could be put on hold. The deadline for the receipt of postal votes, and various other deadlines and time periods defined by reference to polling day, would also have to be redefined, as there would no longer be a polling day as such. The extent of pre-poll voting, and mobile polling in remote areas, hospitals, nursing homes and prisons, is already left to the discretion of the AEC. Separate Antarctic voting would still be required, but only a tiny number of voters would be involved. Provision could also continue to be made for individuals to apply for a postal vote, to cover people who might have been omitted or deleted from the roll by mistake. On the basis of the experience described in the preceding paragraph, an increase in the maximum period between nominations and the last day for the receipt of postal votes would almost undoubtedly be required: the extent of the increase needed would have to be explored in detail with Australia Post.

6.46 From a purely electoral point of view, universal postal voting has a number of serious shortcomings which might be thought to make it undesirable except as a near-to-last resort.

- **Loss of guaranteed secrecy** - First, and perhaps most importantly, it represents an abdication of the state’s responsibility to guarantee to the citizens the opportunity to

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<sup>66</sup> Matt Wordsworth, *Coronavirus may see full postal vote for Queensland October state election, Premier says*, at [www.abc.net.au/news/2020-04-10/coronavirus-may-change-queensland-state-election-to-postal-vote/12138788](http://www.abc.net.au/news/2020-04-10/coronavirus-may-change-queensland-state-election-to-postal-vote/12138788), viewed 21 May 2020.

<sup>67</sup> For a comprehensive account of the operation, see Australian Electoral Commission (AEC), *1997 Constitutional Convention Election Report and Statistics*, at [https://www.aec.gov.au/Elections/constitutional\\_convention/files/report.pdf](https://www.aec.gov.au/Elections/constitutional_convention/files/report.pdf), viewed 21 May 2020.

<sup>68</sup> For a detailed report on the process, see Australian Bureau of Statistics (ABS), *Report on the conduct of the Australian Marriage Law Postal Survey 2017*, at [https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/\\$FILE/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.002.pdf/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.pdf](https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/$FILE/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.002.pdf/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.pdf), viewed 21 May 2020.

cast a secret ballot.<sup>69</sup> The act of voting is shifted from polling places where the gold standard model applies, to whatever may be the environment in which the ballot paper is marked. Such a change would be particularly problematical for people in abusive or controlling relationships, but even more broadly than that, the significance of pressures which can arise in the family context has been noted by Sarah Birch:

“... people value their civic role, their civic duty. That is very important for people and they take it very seriously. When they are voting in a public place they will honour their civic duty and they will vote according to their true preference. However, the reality is that for a very large proportion of the population their civic duty comes second to their familial duty, their duty to their family. If they have to choose, they will put their duty as a spouse, a father, a son, a mother or a daughter above their civic duty. That is not something on which I particularly have a view. I see it as a reality. I think it is unrealistic to expect people to put their civic duty above their duty within the family.”<sup>70</sup>

Some might argue in response to these concerns that postal voting has a long and largely untroubled history in Australia. That is plainly so, but against that, under the universal model voters would have no choice but to vote in a potentially non-secret environment. Some might also point to the fact that a postal vote is required to be witnessed by an “authorised witness”. Again that is so, but since 1965, any enrolled voter has been able serve as an authorised witness at a federal election (with additional categories of people also permitted to witness a postal vote cast outside Australia), and as things stand now it is not even entirely clear to what an authorised witness is attesting. All of that having been said, it is important to note that just because postal votes are cast in an unsupervised environment, that does not necessarily mean that the secrecy of the ballot will be breached in the case of a particular individual: postal voters are still instructed to record their votes secretly, and most probably still will.

- **Loss of transparency** - Obviously, with voting taking place in widely diverse environments, the process can no longer be observed by scrutineers.
- **Loss of security of ballots** - The mailing out of postal ballots *en masse* gives rise to a risk, beyond that which currently applies, that they could be misdirected, or stolen from letterboxes and used for fraudulent voting. Under normal postal voting arrangements, a person applying for a postal vote has to nominate an answer to a “security question”, and that answer must also be stated on the voter’s completed postal vote certificate envelope, thereby providing a protection against the completion of a postal ballot by someone to whom it had not been issued. That would not, however, be possible under the universal postal voting model, as discrete applications for postal votes would not be

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<sup>69</sup> For a detailed discussion of the definition and ongoing importance of the secret ballot, see Elklit and Maley, *Why Ballot Secrecy Still Matters*. The right to cast a secret ballot is stated in the 1948 *Universal Declaration of Human Rights*, the 1966 *International Covenant on Civil and Political Rights* (to which Australia is a state party) and virtually every document ever developed for the purpose of defining criteria for free and fair elections.

<sup>70</sup> Quoted in Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options*, November 2014, at <https://www.aph.gov.au/~media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JSCEM/2013%20election%202nd%20interim/Full%20report.pdf?la=en>, viewed 30 June 2018, p. 60. For a more detailed exploration of this issue, see Sarah Birch and Bob Watt, “Remote Electronic Voting: Free, Fair and Secret?”, *The Political Quarterly*, vol. 75, issue 1, pp. 60-72, 2004, at pp. 67-69.

required. (While concerns on this front might be thought to be overstated in the context of a well-established democracy such as Australia, they are very much part of a bitter and heavily litigated partisan disagreement currently unfolding in the USA regarding the desirability of what is there typically called “absentee” voting.<sup>71</sup> In Australia, local government elections in particular might be thought to be fragile in this regard, not just because of the relatively small number of votes which might need to be manipulated to alter an outcome, but also because of the history of corrupt behaviour in local government which has been seen in some states.<sup>72</sup>)

- **Load on the postal system** - At the 2019 federal election, only 8.6% of votes were cast by post. A shift to 100% postal voting would therefore represent close to a twelve fold increase in the scale of the operation. Furthermore, the major political parties would also probably be wanting to make massive use of the postal system, for example to mail out how-to-vote cards to voters.
- **Impact on campaigning** - The concerns noted at paragraph 6.40 above regarding the impact of early voting on the deliberative character of the election process would arise to an even greater extent under universal postal voting. The scale of the mailout required would inevitably mean that some voters would receive their ballots, and therefore would be able to vote, far in advance of the deadline for ballots’ return. At the Constitutional Convention election of 1997, the mailout started on 3 November, 36 days before the deadline. For the 2017 same sex marriage survey, the mailout started on 12 September, 57 days before the deadline. On this issue, electoral commissions would be confronted with a difficult decision on how to proceed: the early return of postal ballots would enable their preliminary scrutiny to commence well before the deadline, thereby facilitating a prompt start to the further scrutiny of votes immediately after the deadline had been reached. In a best case scenario, almost all ballots could be ready for further scrutiny immediately after the deadline, enabling the election result to be finalised within a week or two, much as is the case at present. It was no doubt with such considerations in mind that the Australian Bureau of Statistics (ABS) actively encouraged participants in the 2017 survey to return their forms as promptly as possible. Such encouragement by electoral commissions could however be seen as a political act, disadvantaging, albeit unintentionally, whichever party was behind in the polls at the calling of the election, and was therefore most dependent on an effective campaign to close the gap.
- **Burden on parties and candidates** - The early commencement of preliminary scrutiny as just discussed, though essential if election results are to be able to be produced within a timeframe comparable to that currently achieved, would potentially impose a burden

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<sup>71</sup> For an indication of the scale of these disputes, see Rick Hasen, *Election Law Blog: Category Archives: absentee ballots*, at <https://electionlawblog.org/?cat=53>, viewed 21 May 2020. A particularly egregious case of fraudulent misappropriation of postal ballots occurred in the (overturned) election for North Carolina’s 9<sup>th</sup> congressional district in 2018: see Richard L. Hasen, *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy*, Yale University Press, New Haven and London, 2020, at pp. 96-101. The debate in the USA needs to be viewed against the background of a push for universal postal voting (which already applies in several US states) which pre-dated the Covid-19 crisis. Advocates of the change have, among other things, seen it as a way of preventing partisan electoral administrators from suppressing votes by cutting back on polling places in areas unsympathetic to their party. Such a concern is irrelevant in Australia.

<sup>72</sup> See Michaela Whitbourn, “Salim Mehajer jailed for electoral fraud”, *The Sydney Morning Herald*, 22 June 2018, at <https://www.smh.com.au/national/nsw/salim-mehajer-jailed-for-electoral-fraud-20180622-p4zn1x.html>, viewed 21 May 2020.

on parties and candidates wishing to deploy scrutineers to the process, as it would be unfolding at the same time as the parties were focusing on campaigning.

6.47 One advantage of universal postal voting, when compared with the mere encouragement of more early voting, would be the substantial cost savings associated with not having to establish and staff polling places on polling day.

#### Internet voting

6.48 The most radical polling option of all would be a shift to internet voting. Its advantage would be that, properly implemented, it would shift all activity into cyberspace, and eliminate human contact which could spread infection. Universal internet voting would not be possible without disenfranchising voters unable or unwilling to access the internet (who would be likely to be disproportionately older and more rural), but it could conceivably be made available to the great majority of voters. Australian experience with the use of the internet for voting by other than users with very specialised needs has been confined to the iVote system used at New South Wales state elections. Remote internet voting obviously gives rise to the same issues of loss of guaranteed secrecy and loss of transparency as universal postal voting, including the risk that a person in a family environment, or in a controlling relationship, could be unduly influenced to vote in a particular way.<sup>73</sup>

6.49 A decade ago, internet voting was a topic being pursued around the globe with some enthusiasm. But in the aftermath of the publication by the Electoral Council of Australia & New Zealand of a detailed 2013 study of internet voting,<sup>74</sup> and of a subsequent unanimous report from the Joint Standing Committee on Electoral Matters which expressed no support for any substantially increased use of internet voting (not least on the grounds of the risks to the secrecy of the ballot which could arise from that), such pressure as there might have once been for the use of unsupervised internet voting at the federal level had up until now largely abated.<sup>75</sup> Apart from the issues of secrecy and security addressed by the Joint Standing Committee, a number of other factors appear to have been influential.

- First, it continues to be obvious that throughout the world, the limited scale on which internet voting schemes have been adopted stands in stark contrast to the manner in which the internet has become a feature of virtually every other aspect of life. An IFES White Paper published in April 2020 has noted that:<sup>76</sup>

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<sup>73</sup> A former senior electoral official who has also been involved in the White Ribbon programme targeting domestic violence has recounted to me how women in shelters have described to him their experience of having their postal votes effectively taken over by abusive partners. That is one reason why, in some places where internet voting has been trialled, voters have retained the right to vote at a polling place even if they have previously cast an internet vote. If they do so, the internet vote is cancelled.

<sup>74</sup> Electoral Council of Australia & New Zealand (ECANZ), *Internet voting in Australian election systems*, 10 September 2013, at <https://www.ecanz.gov.au/sites/g/files/net4931/f/internet-voting-australian-election-systems.doc>, viewed 24 May 2020.

<sup>75</sup> Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options*.

<sup>76</sup> Meredith Applegate, Thomas Chanussot and Vladlen Basysty, *Considerations on Internet Voting: An Overview for Electoral Decision-Makers*, International Foundation for Electoral Systems, 7 April 2020, p. 4, at <https://www.ifes.org/publications/considerations-internet-voting-overview-electoral-decision-makers>, viewed 24 May 2020.

“Estonia is the only country that uses internet voting nationwide. A few others use internet voting in some parts of their country or for certain members of the electorate (Armenia, Australia, Canada, Panama, Switzerland and the U.S.). Some countries have done limited pilots of internet voting and decided not to continue its use (the United Kingdom and Norway). Others initially adopted internet voting but decided to discontinue it (India, France, the Netherlands and Spain).”.

- Second, the heightened salience of concerns about foreign interference in elections following the 2016 US presidential election has tended to encourage policymakers to retain “low-tech” decentralised systems which are harder to manipulate directly from afar.
- Third, in Australia in particular, the failure of the 2016 online census conducted by the ABS has had a chilling effect, especially in relation to electoral operations, which, even more than the census, must succeed at the first attempt. In addition, the relatively high turnout - 79.5% - at the 2017 same sex marriage survey may have cast some doubt, at least in the Australian context, on the occasionally stated theory that the use of more sophisticated technology for polling is desirable to encourage turnout. In fact, the IFES White Paper notes that there “is not a single instance to date in which internet voting has increased voter participation”.
- Finally, election management bodies are well aware that the establishment of mechanisms for large-scale internet voting would be a massive task, requiring skills quite different from those which have typically been found even within their information technology areas.

6.50 There is a large literature on the subject of internet voting, and a detailed consideration of the issues would be far beyond the scope of this working paper; they have, in any case, been explored in detail in the 2013 ECANZ paper. Two concluding observations can however be made.

- The introduction of internet voting on a large scale, with the aim of seeing it used by a substantial majority of voters, would represent an extreme example of taking on the risks associated with dependence on major centralised systems which are discussed at paragraphs 6.9 and 6.10 above. A major failure would have far graver consequences even than those which flowed from the census disaster in 2016. In the short term, the problems would be legal, political, operational and possibly constitutional, but the longer term damage to public trust in the electoral process could also be quite massive.
- As noted by Elklit and Maley:<sup>77</sup>

“... it has not escaped the attention of election administrators and policy makers that the security of votes cast over the internet has been the subject of fierce disagreement among technical specialists. While vendors have often enthusiastically supported the adoption of internet voting, many computer scientists have instead tended toward the perspective of Ronald L. Rivest, who

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<sup>77</sup> Elklit and Maley, *Why Ballot Secrecy Still Matters*, p. 74.

once observed, ‘best practices for Internet voting are like best practices for drunk driving.’”.

### Overseas voting

6.51 In recent years, the opportunity to vote in federal elections has been made available in a large number of foreign countries, through Australia’s diplomatic and consular network. The way in which such voting can proceed will, however, be influenced by the varying legal and public health situations in all the countries in question. The 1963 *Vienna Convention on Consular Relations* is worded quite broadly, such that the provision of voting facilities could plausibly be seen as a consular function.<sup>78</sup> That having been said, consular activities are undertaken within the broader framework of relations between sovereign states, and the maintenance of good relations would be a factor to consider in determining whether voting in a foreign country could proceed, if such voting could compromise that country’s own response to a pandemic. In any case, while Australia might be able to assert a right to provide voting facilities through an embassy or consulate, it is unlikely that a similar right could be asserted for Australian citizens to leave their places of residence to vote at those facilities if a lockdown were in place in the country. (This issue of the applicability of another jurisdiction’s laws would also arise in relation to state or territory electoral commissions seeking to provide voting facilities either in foreign countries, or in other states or territories within Australia.) An alternative approach could involve staff at Australian Embassies and Consulates issuing postal votes through the local postal service, but that would assume that such a service exists, is generally effective, and would not have had its own operations disrupted by the pandemic.

6.52 In a time of pandemic, the interaction of legal and practical problems has the potential to create significant difficulties for the conduct of overseas voting. To give but one example, under the *Commonwealth Electoral Act 1918* as it currently stands, votes cast overseas have to be returned to Australia for counting. That could be problematical if travel bans were in place, and/or international courier services had ceased to service certain destinations or were providing only limited services.

6.53 Faced with similar challenges, the Republic of Korea for its April 2020 election abandoned overseas voting at 91 diplomatic missions in 55 countries, and made special provision for vote counting to be undertaken at 18 missions which, because of the suspension or reduction of flights, were not going to be in a position to send back to Korea the votes which had been cast.

### Counting and scrutineering

6.54 A notable feature of the March 2020 elections in Queensland was the exclusion of scrutineers from the counting process. Antony Green has noted that this was “by the far the most contentious measure adopted by the ECQ”; it plainly represented a substantial departure from long-standing Australian electoral practice. It was likely motivated by a recognition that the normal counting process, which involves sorting ballot papers into stacks according to the first preference votes marked on them, can only be closely observed from a short distance. Given the circumstances of the election, the relevant authorities may have had no choice other than to prioritise public health concerns. In the longer run, however, the loss of transparency associated with the absence of scrutineers could not be regarded as satisfactory. Electoral

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<sup>78</sup> See [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf), viewed 21 May 2020.

commissions themselves tend to value the presence of scrutineers, as it reinforces public trust in the process, and can help to rebut baseless assertions of departures from correct practice.

6.55 One possible, though challenging, response to this issue would be to change the way in which ballots are counted. In some countries (including for example Indonesia and Timor-Leste), each ballot is individually displayed by a counting official to the scrutineers present, before being handed to another official to be placed in the appropriate stack. The counting official announces the party for which the vote has been cast, a tally of the votes is maintained on a whiteboard, and scrutineers can maintain their own tallies. The process is exceptionally transparent, and could be implemented while keeping scrutineers socially distant. It is, however, also extremely time-consuming when compared with sorting directly into stacks. Time could, however, be saved by running several parallel operations: for example, a polling place which had taken around 1,000 votes could split them into four lots of roughly 250, with each of those lots counted separately. That would, however, require more scrutineers to be available. (At polling places at which only a small number of votes had been cast, a possible alternative would be to sort the ballots first, with scrutineers observing from a distance, and then display the ballots in each stack one by one when conducting a two-candidate preferred vote count.)

6.56 After polling day, the *Commonwealth Electoral Act 1918* stipulates that there must be an entire fresh scrutiny conducted of the House of Representatives votes already counted at polling places. This feature was introduced only in the 1980s, with the aim of detecting even the smallest counting errors; prior to then, the election night count stood unless a formal recount was ordered. (Fresh scrutines of this type are distinctively Australian; in countries where the authorities are less trusted, such a mechanism tends to be viewed as giving rise to unacceptable opportunities for results to be manipulated.) If the circumstances of a pandemic made it imperative to minimise all non-essential handling of ballots, one possibility would be to eliminate this requirement for a fresh scrutiny except in cases where the count was particularly close, or where there was reason to believe that a counting error might have been made.<sup>79</sup> Taking that even further, the fresh scrutiny process could be eliminated entirely, with reliance being placed again on the recount mechanism to reinforce confidence in the correctness of tight results. (It would be reasonable, under that scenario, to specify a more generous criterion for recounts than has previously been applied: for example, any House of Representatives count with a two-candidate preferred margin of victory of less than 500 could be automatically subject to a recount.)

6.57 If, however, fresh scrutines are retained, consideration could be given to limiting the right of scrutineers to lodge objections to the formality of ballot papers during the election night counting, since there would be a further opportunity for such objections to be lodged during the fresh scrutiny.

6.58 The most radical way of redesigning fresh scrutines so as to enhance social distancing would be to adopt a modified version of the post-polling process used at Australian Capital Territory elections, where all ballots are optically scanned, and decisions on contentious ballots are made on-screen, with scrutineers having access to linked screens some distance from the counting staff.

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<sup>79</sup> Such reasons could include direct and credible complaints from scrutineers, or statistical anomalies such as a result in a particular polling place which diverged wildly from past voting patterns, or from results in adjacent polling places.

6.59 Finally, it is worth noting that one stage of the election at which social distancing can be particularly difficult to maintain is the return of materials from the polling places after counting has concluded. This process was extensively re-designed by the AEC in response to the issues which arose at the 2013 Senate election in Western Australia, but might need to be examined again to ensure that the need for social distancing is fully reflected in the relevant procedures.

## **Part 7 - Observations on policy choices**

7.1 A number of concluding observations can be made at this point.

- Most importantly, it must be emphasised that this paper has only been able to flag certain policy options, rather than to explore them in depth, especially from a public health point of view. While the benefits of certain simple steps, such as requiring people to keep socially distant in queues, can probably be inferred from practices which have been widely put in place since the start of the Covid-19 crisis, other options, especially more complex ones, will require much deeper analysis. An increase in the number of polling places, for example, while potentially having the benefit of reducing queueing, could also see more premises potentially requiring disinfection. To undertake such analysis properly, electoral commissions must work in partnership with public health authorities.
- The need for holistic analyses of processes and systems must again be emphasised: many have both a physical and a human element. To give but one example, while the supply to voters of disposable gloves (as was done at the Korean elections in April 2020) appears to have been a worthwhile initiative, that might not have been so had the gloves been incorrectly used or disposed of.
- Flowing from that point, it must again be emphasised that the insight that elections are a societal undertaking is more important than ever when reliance is to be placed on individual behaviour to prevent the spread of infection. Elections need to be administered in a spirit of partnership with the community rather than being seen just as delivery of service to a passive client; and this will require extensive, detailed and well-designed public information campaigns covering all relevant elements of the electoral process. In Korea, one tool used to that end was the development of a Code of Conduct for voters.
- One inevitable feature of a pandemic is that any understanding of how it will develop will be subject to considerable uncertainty, which will affect strategies for the conduct of elections. Even now, with much having been learnt about the structure of the SARS-Cov-2 virus, it remains quite unclear why the progress and impact of the pandemic has varied so greatly from country to country, and across different societal groups.
- The highly prescriptive character of Australian electoral law could become especially problematical in a time of pandemic, when (as has been recently seen) fast moving events on the ground may give rise to a need for radical changes to past processes. There is a strong argument for the incorporation in all Australian electoral laws of a provision akin to section 17 of the *Canada Elections Act* or section 50 of Uganda's *Electoral Commission Act 1997*.

- Electoral commissions should also be empowered to implement different voting modalities in different parts of the country, depending on the local public health situation.
- As noted at paragraph 4.3 above, Australia has historically provided a range of voting modalities, in recognition of the diversity of the needs of the electorate. It should be emphasised that the pandemic has not changed that diversity of needs. While a partisan and acrimonious debate has broken out in the USA over the desirability of introducing universal postal voting in response to the pandemic, it is unlikely that any model of that type, based on there being but one voting modality, could work for Australian federal elections. Taking again the example of postal voting, there will always be voters beyond the reach of the postal system: people living in remote areas, or based in Antarctica, or living overseas in places not reached by the local postal service. Optimising the process in the face of a pandemic is therefore likely to involve a shift of emphasis between different voting modalities, rather than a focus on just one “silver bullet” solution, with a continuing emphasis on the need to meet the requirement of universality by providing effective voting mechanisms to people in the community with special and diverse needs.
- The truism that in all projects there is a trade-off between cost, quality and time is especially true of elections conducted during a pandemic. In many scenarios, however, a problem will not be able to be solved by additional spending, and the trade-off will become one between quality and time. For that reason, laws should be amended to enable the overall election timetable to be lengthened, and to make greater provision for electoral commissions to be able to vary deadlines in response to events.
- “Hi tech” solutions to problems have many potential benefits, but they also give rise to risks, one being that a failure of a system could well have nationwide consequences, and a second being that they tend to require support from small expert teams the functioning of which could be seriously disrupted if a team member were to contract the pandemic infection.
- The comparative feasibility of many of the policy options raised in this paper, especially the more radical ones, is almost impossible to assess at this point. Almost all of the process changes which might be made would come at a financial cost, which would have to be borne by governments or electoral commissions. Much would depend on whether materials could be procured from the private sector come election time: world-wide difficulties in obtaining specialised personal protective equipment (and even face masks) in the quantities required by medical staff have constituted one of the sadder stories coming out of the Covid-19 crisis.
- The need to focus on the mechanical aspects of elections should not be allowed to obscure the fact that elections are fundamentally social and political undertakings. Graeme Orr has written persuasively and at length on the importance of elections as rituals. Respect for such rituals is not just sentimental: the positive experience of polling day as a time when the people of the nation come together to make a collective decision reinforces public trust in the electoral process and in democracy
- Finally, it should be borne in mind that electoral reforms can be path dependent: once a change has been put in place and has come to be accepted by society, it may be

difficult to unwind, even if that might later have come to seem desirable on electoral policy grounds.

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