

2022

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT RESPONSE TO REPORT 4 OF THE STANDING COMMITTEE ON JUSTICE AND
COMMUNITY SAFETY - INQUIRY INTO THE ELECTORAL AMENDMENT BILL 2021 - PRIVATE
MEMBERS BILL - LOWERING THE VOTING AGE**

**Presented by
Mr Chris Steel MLA
Special Minister of State
March 2022**



Chris Steel MLA

Minister for Transport and City Services

Minister for Skills

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Member for Murrumbidgee

Mr Peter Cain MLA

Chair

Standing Committee on Justice and Community Safety

ACT Legislative Assembly

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Dear Mr Cain

Thank you to the Standing Committee on Justice and Community Safety (the Standing Committee), for its Inquiry into the Electoral Amendment Bill 2021, and tabling of Report 4 on 18 February 2022.

The topic of lowering the voting age has been the subject of much discussion in the Territory, and other jurisdictions, over many years. I appreciate the close examination the Standing Committee gave to the Electoral Amendment Bill 2021, and to the concept of lowering the voting age more broadly.

The Government notes recommendation 1 and 2 of Report 4 of the Inquiry into the Electoral Amendment Bill 2021, as well as Mr Braddock's dissenting report to Report 4.

Noting the Electoral Amendment Bill 2021 is not a Government Bill, the Government offers the following comments in response to the Standing Committee's Report 4.

Failure to enrol penalty

Under the *Electoral Act 1992* (Electoral Act), it is compulsory for a person to *enrol* to vote if they are entitled to do so. If a person fails to enrol to vote, the maximum penalty for this offence – should the matter go before a court – is 0.5 penalty units, or an \$80 fine.

The Electoral Amendment Bill 2021 proposes to lower the age at which a person can enrol to vote to 16 years of age, and halves the maximum penalty for this offence for 16- and 17-year-olds to 0.25

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penalty units, or a \$40 fine. The Electoral Act does not offer a 'default notice' process for a person who fails to enrol, and it is at the discretion of the ACT Electoral Commission, or the Australian Electoral Commission, whether they pursue prosecutions for unenrolled persons under this failure to enrol offence.

If the Bill was passed, young people could be prosecuted under this offence provision in the Children's Court, as detailed below, and face the possibility of conviction and a criminal sanction for failing to enrol.

It should be noted that in the event a matter proceeds to court, the young person would be liable for court-related costs in addition to the above-mentioned fine. These costs are in the vicinity of \$228 for a matter of this nature.

Failure to vote penalty

As noted in the Government submission to the Inquiry, compulsory voting has been enforced in each Australian jurisdiction under offence provisions in legislation. Compulsory voting does not compel the performance of duty to vote, but rather provides penalties for non-performance of the duty. In the ACT, the penalty is created under section 129 of the Electoral Act.

Report 4 detailed the range of views presented through submissions and the public hearing on the Electoral Amendment Bill's approach to the failure to vote penalty. There would be benefit in the bill's proponents undertaking a further detailed assessment of the legislative framework that would apply to young people who fail to vote, and subsequently fail to provide a valid and sufficient reason or pay the fine. The ACT Government is concerned about the negative consequences or impacts on young people from being exposed to the criminal court system. Any future iteration of the bill should seek to minimise these.

Under the current legislative framework and the Electoral Commission's processes, a person who fails to vote is provided with three opportunities, through 'default notices', to either provide the particulars in writing detailing their voting, provide a valid and sufficient reason for the failure to vote, or to pay a \$20 fine.

If the person does not respond, if the Electoral Commissioner finds the person does not have a 'valid and sufficient reason' for failing to vote, or if the person fails to pay the fine, the person will be issued with a summons to attend court. The prosecution process is then managed by the Director of Public Prosecutions (DPP) on behalf of the Electoral Commissioner.

The person has the option to pay the fine or provide the DPP with a valid and sufficient reason for their failure to vote. In either case, the matter is dismissed and charges withdrawn. Otherwise, the matter follows through the usual criminal court procedure, in which the person either pleads not guilty and proceeds to hearing, pleads guilty and is sentenced, or the matter may be dealt with in the person's absence if the Magistrate is satisfied that service has been affected.

For an adult, if they plead guilty or are found guilty they will be sentenced for failing to vote and face a maximum penalty of 0.5 penalty units or \$80. They also face the possibility of a conviction being

recorded on their criminal history. As with the offence of failing to enrol to vote, the person may also be liable for up to \$288 in other court costs and administration fees if this matter proceeds through a full court process.

If the voting age was lowered in the ACT by the Electoral Amendment Bill 2021, young people aged 16 and 17 years of age would be subject to a similar process to that outlined above, noting the reduction in penalty units proposed by the Bill which would result in a reduced fine of \$10 and reduced maximum penalty of 0.25 penalty units or \$40.

Should the young person fail to respond to the notices (failing to provide the particulars of voting, failing to provide a valid and sufficient reason, or failing to pay the \$10 fine), the young person will be summoned and would be required to appear in the Children's Court to deal with the charge.

In the Children's Court, under section 74G of the *Courts Procedures Act 2004* (Court Procedures Act), a young person must have a lawyer, or the Magistrate must be satisfied that the young person has had the opportunity to secure legal representation and that the best interest of the young person will be adequately represented in the proceedings. While a parent or guardian is legally required to attend the proceedings under section 71 of the Court Procedures Act, the parent or guardian cannot legally represent the young person in the Children's Court. This may create a situation where young people or their families feel compelled to secure legal counsel in order to support their appearance in court. Legal Aid ACT provides a duty law services at the ACT Children's Court on sitting days, which could offer one-off advice and assistance for free to a young person at their court appearance.

If the young person pleads guilty or is found guilty, and are sentenced for failing to vote, they may face the possibility of a conviction being recorded on their criminal history. The Children's Court has a discretion to make a non-conviction order. If the Court makes a non-conviction order, there is also the possibility the Children's Court may make an ancillary order which would be any order it might have made had the person been convicted. If a young person was convicted of failing to vote, the conviction would remain on the young person's criminal record until it became a 'spent conviction'. When the offence becomes a 'spent conviction' depends on the nature of the sentence imposed on the young person by the Children's Court.

Impacts of a criminal conviction

The possible impacts of a criminal conviction have been well documented and range from effects on a person's ability to find employment, be approved for rental housing, hold public office, travel overseas to some countries, obtain finance or insurance, obtain professional licenses or registrations, adopt a child or undertake volunteer work.

If a young person is convicted under the failure to enrol or failure to vote provisions, the impacts can be profound and have the potential to change the course of a young person's life, their future endeavours, and their future engagement with the political system and civic society. While this is true of any member of the community who comes into contact with the justice system because of equivalent offences, the effects may be particularly serious for young people who are yet to establish themselves in employment or otherwise seeking to make important transitions into adult life.

Human Rights considerations

The proposal engages the right to take part in public life (s 17, Human Rights Act) and the rights of the child. Article 12 of the *Convention on the Rights of the Child* provides for children to freely express views in all matters affecting them. In support of this right, the Committee on the Rights of the Child has encouraged the adoption of policies to increase opportunities for adolescents to engage in political participation.

However, in relation to this proposal, there is a tension between these rights and the rights of every child to be afforded the protection needed by virtue of being a child (s 11, Human Rights Act). As noted in the Government Submission, the Government considers there are potential human rights implications with any proposal which imposes a penalty for failure to enrol or vote on minors.

Imposing a penalty on a minor is likely to limit the right of children under section 11(2) of the *Human Rights Act 2004* (Human Rights Act) which protects the right of every child to be afforded the protection needed by the child because of being a child, without distinction or discrimination of any kind. A proposal to lower the voting age to allow young people aged 16 and 17 years of age to vote is likely to promote the right of children by giving them a voice, enabling them to express their own views and to determine their own best interests. However, any penalty imposed on young people for failing to vote, as required to make voting compulsory under the ACT legislative framework, effectively forces young people to share those views or face being penalised, which will be a limitation on this right.

As provided in section 28 of the Human Rights Act, all rights may be subject to reasonable limitation. The current requirement in Australia for a person to be 18 years old or older in order to vote is considered likely to be a reasonable limitation on the rights of the child.

Regarding the penalties for failing to enrol and vote, imposing criminal penalties on minors might be reasonably justified where the purpose of the limitation is to protect the human rights of other members of the public. However, in this instance, it is more difficult to justify imposing a penalty on 16- or 17-year-olds for failing to vote, when no other person would be harmed or have their human rights limited by that inaction. Criminal penalties for minors (above the age of criminal responsibility) will generally be justified where they relate to prohibiting anti-social behaviour likely to harm others or themselves. However, greater justification is likely to be required for imposing criminal sanctions against a minor for failing to take a positive action, particularly where failing to do so would not cause clear harm to others or themselves. In analogous situations such as a failure to attend school, a parent rather than the minor is held responsible for the failure to attend and subject to criminal penalty. Other criminal sanctions against minors for a failure to comply with positive obligations generally relate to areas of regulation where the minor has opted in to take on responsibilities – such as entering employment and thus needing to lodge a tax return, or obtaining a driver's licence and having to obey road rules. Therefore, for a failure to vote penalty to be reasonably justified it would require the criminal sanctions to be the least restrictive approach reasonably available to achieve a legitimate objective.

If the young person pleads not guilty to the offence, it could lead to a hearing in the Children's Court. This would result in a limitation on the right of children in criminal process, as in section 20 of the Human Rights Act. This right requires children to be treated in a way that is appropriate for a person

of the child's age. Article 40(1) of the Convention on the Rights of the Child provides that all criminal processes involving children must promote rehabilitation and their ability to taken on a constructive role in society. While the processes and procedures of the Children's Court are set up to protect this right, and ensure children appearing before the court are supported and have access to legal advice and representation as they choose, it is possible that bringing a child before the Children's Court, for failing to vote, would not be a process that promotes their engagement in future political processes.

Any legislative reform to lower the voting age would need to give consideration to the end-to-end failure to vote process, including the potential for children to be brought before the Children's Court, to identify how reforms could be made to ensure the limitation on this right is reasonable and proportionate.

Noting the impact that a compulsory requirement to vote may have on the broader family, rather than just the young person themselves, there is potential for a limitation on the right of the family under section 11(1) of the Human Rights Act.

There is also potential for a law to limit the right to privacy under section 12 of the Human Rights Act, which states that everyone has a right not to have their privacy, family, home, or correspondence interfered with, and not to have their reputation unlawfully attacked. The right to privacy can be interpreted as a right to live free from interference and a right to autonomy. Arbitrary interference in a person's private or family life, even if that interference is lawful, can be a limitation if it is seen to be unreasonable, unnecessary or the degree of interference is not proportionate to the need. There may be an argument that a law to require a young person to vote or face a penalty is an unreasonable interference in the young person's life, and the requirement is not proportionate to the need of seeking greater engagement of young people in the political process.

The right to take part in public life, under section 17 of the Human Rights Act, ensures every citizen has the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives and the right and opportunity to vote and be elected at periodic elections. Under the International Covenant on Civil and Political Rights (ICCPR), this right may be subject to reasonable restrictions including setting a minimum age limit on the right to vote, if they are justifiable on objective and reasonable criteria. As detailed above, the current requirement in Australia for a person to be 18 years old or older to vote is considered likely to be a reasonable limitation on this right of the child in the context of our electoral system where voting is mandatory and failure to vote is subject to penalty. The introduction of a failure to vote penalty for young people may create a tension between these two human rights. That is, while lowering the voting age to increase political engagement of young people aims to enhance young people's right to take part in public life, the imposition of penalties for failure to vote may result in a limitation on rights of children to be protected without discrimination.

Consultation with young people

The Government notes that despite the tight timeframes, the Standing Committee undertook a community consultation process which included seeking public submissions, conducting an online survey, and holding a public hearing.

While there were 18 written submissions received, and 438 responses to the online survey, Government notes that only 26 of the 438 responses (just under six percent of responses) were from young people under 18 years of age. The Government welcomes further opportunities to consult young people on the issues that are important to them, ensuring consultation occurs in a way that captures young people's attention, removes barriers to engagement and allows their voices to be heard.

Government currently engages young people through the Youth Advisory Council (YAC), which is made up of 15 young people aged between 12 and 25 years. The YAC provides these young people with an opportunity to:

- take a leading role in participation and consultation activities on issues that affect their lives
- raise awareness of the aspirations, needs and concerns of young people within government and the community, and
- facilitate interaction between young people, the ACT Government and the wider community.

The ACT Government is interested in continuing to enhance the effectiveness of the YAC as a representative voice for young people. We are also open to exploring broader opportunities to engage young people in democratic and participatory processes which help shape our shared future, separate to the question of lowering the voting age.

Thank you for the opportunity to provide these comments in response to the Standing Committee's Report 4.

The Government remains committed to increasing the engagement of young people in the political process and in Government decision-making.

Yours sincerely



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Special Minister of State

22 March 2022