

**ACT Legislative Assembly
Committee on Education, Training and Young People**

Inquiry on Lowering Voting Age to 16

**Submission from Graeme Orr
Associate Professor, Law, The University of Queensland**

General

I was invited by the committee secretary to give an opinion on some specific legal issues related to this issue. Following those three issues, I raise two further issues which may be relevant should the committee wish to lower the voting age.

On the overall issue, I support at least a trial lowering of the voting age, without being doctrinaire about it. There is no ‘magic’ in the current age of 18, nor is there is a single age of majority. Rather there are various ages between 15 and 18 at which the law grants rights or imposes obligations. If 16 is thought too low, 17 would be a suitable compromise – 17 is a typical age for finishing school and hence seeking full-time work or higher study, for driving and of course is well into the age of consent. At seventeen the majority of people have been active in the workforce, if only on a casual or part-time basis. At that age, people are well passed the age of compulsory schooling. With respect to the submission by Mr Greg O’Regan, the ability to vote is not earned, but a fundamental civil right. The primary question for the committee is setting a reasonable age as a marker of maturity – where maturity means the capacity to engage meaningfully in the public sphere and understand debates about government.

It is exciting that the ACT is seriously considering the issue. It is a small jurisdiction where, in the spirit of federalism, such a reform could be trialled and monitored, for the benefit of the debate in other jurisdictions. If the voting age were lowered, it could be done with a sun-rise clause permitting sufficient time to evaluate its success in terms of the proportion of newly enfranchised who enrolled and voted, and any flow-on increase in the enrolment and voting rates of those youth over 18.

1. Compulsory Enrolment

Section 67B of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) mandates compulsory enrolment of ‘every person who is entitled to be enrolled’. Its purpose is to assist electoral administrators ensure the roll is a comprehensive list of those eligible to vote, something of value to campaigners and, more importantly, to the integrity of the roll.

On the face of it, s 67B of the Self-Government Act and provisional enrolment under s 75 of the *Electoral Act 1992* (ACT), are in literal tension. Under s 75(1)(a) the ‘commissioner *shall enrol*’ a 17 year old provisional claimant: it is more than

arguable that a 17 year old is 'entitled to be on the roll' since the commissioner has an enforceable duty to honour such a claim.

Section 75(1)(b) seeks to introduce a distinction between the idea of being on the roll and being 'entitled to be enrolled for the electorate'. This seems semantic. I do not believe it is the real source of the validity of s 75 in the face of s 67B's requirement of compulsory enrolment.

Legislation is to be read purposively and not with a blind literalism. The clear purpose of s 75 is to create a category of 'provisional enrolment', as a secondary, shadow class of names on the roll of people who as yet have no voting entitlement. Once a person turns 18, their provisional enrolment automatically matures into full enrolment in the sense of a voting entitlement. Understood this way, s 75 is consistent with compulsory enrolment under s 67B because:

- (i) it supports compulsory enrolment of eligible voters, by encouraging 17 year olds to prepare in advance for their enfranchisement (and hence maximising enrolment of eligible voters at 18) and
- (ii) giving the electoral commission advance ability to check the names/entitlement of such future voters.

It follows that the ACT Legislature could allow 16 year olds to be on the roll by simply amending s 75(1)(a) of the Electoral Act by replacing 'at least 17 years old' with 'at least 16 years old'.

But to resolve any doubt about the validity of provisional enrolment (at whatever age) the Commonwealth Parliament should be asked to amend s 67B of the Self-Government Act to make it explicit that schemes of provisional enrolment are not caught. This would be consistent with the *Commonwealth Electoral Act 1918* (Cth), where the compulsion to enrol in s 101 of that Act explicitly does not extend to provisional enrolments under s 100 of that Act.

It is clear, however, as the submission from ACT Elections points out, that s 67B is a bar to enfranchising 16 or 17 year olds *unless* they are compelled to enrol. It would take a Commonwealth amendment to s 67B to permit one class of eligible voters to enjoy voluntary enrolment. I come to this conclusion because both the literal meaning of s 67B and its purpose— ie to ensure a comprehensive roll of those *eligible to vote* — are in harmony.

In coming to this advice I note the relevant Explanatory Memoranda shed no light on the matter, presumably as the provisions drew on well established electoral practices/concepts and were thought not to require any clarification.

2. Compulsory Voting

Section 129 of the *Electoral Act 1992* (ACT) enacts compulsory voting for practical purposes. But the real source of that requirement is s 4(1)(c) of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT), which states that 'voting in an election shall be compulsory'.

Section 129 does *not*, in fact, enact compulsory voting for *all* classes of voters. Section 129(2) exempts overseas, Antarctic, prisoner and itinerant voters from compulsion, and not simply in the administrative sense of giving them an irrefutable 'valid or sufficient reason' for failing to vote, but by excluding the application of the compulsion rule. I will assume s 129(2) is valid on the argument that the entrenchment Act does not state that 'voting by all eligible enrollees shall be compulsory' but merely sets up a broad, semi-constitutional requirement that the overall system be classed as compulsory. If so, it is unclear whether a class of voters based on young age could be exempt without amending the entrenchment act. It would depend upon how strictly a court read the entrenchment Act requirement, but it is safer to assume that even if it would permit the relatively small, special exemptions in s 129(2), it probably would not permit the exemption of a general class based on age, even if that class only represented a few percent of eligible voters.

If it were desired to enfranchise 16 or 17 year olds, but not compel them to vote, three solutions may be considered:

(a) Erect less onerous rules about what constitutes a 'valid or sufficient reason' for 16-17 year olds who do not turnout at the polls. There is nothing magical in the mix of legislative and administrative 'reasons' that have been adopted in the past as 'valid or sufficient'. High Court cases merely say that parliaments may exclude political apathy, disenchantment or insufficiency of choice from the excuses for not voting; the converse is that parliaments can include such excuses as valid or sufficient reasons.

So, for example, 16/17 year olds could be permitted to cite that they lacked sufficiently informed political opinions or preferences to vote in the election. This could be done sincerely (eg by signing a statement to that effect included in their 'show cause' letter) or by statutory declaration.

There may be two objections to this proposal. One is that if a large number of young people do not vote, they may find their first experience of the electoral system to be the negative one of opening a 'show cause' letter. But would that be any worse than that which 18-20 year olds currently face? A second downside would be that many young people, in their first experience of any electoral system, may mistakenly imagine that lacking sufficient opinions to vote will be an excuse when they turn 18 and face both ACT and Commonwealth elections.

(b) 16/17 year olds could be issued with a distinct ballot paper which made it clear that if they genuinely had no choice, they could write 'none of the above' on the ballot. I have argued elsewhere that such an option should be available to everybody in a compulsory voting democracy, to register the real level of discontent. I do understand that political parties do not want to encourage informal voting, even when it is deliberate and sincere. I believe however that such a compromise is both democratic and would allow the ACT to gauge how many young people are politically disenchanted or apathetic.

(c) Amend s 4(1)(c) of the entrenchment Act. Obviously this involves abiding by the manner and form provisions, which are discussed further in relation to this Act in Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) pp 204-206.

3. Candidacy Rules

The Committee secretary notes that, at present, the same age applies to candidacies as for voting, ie 18 years minimum. Lowering the voting age would remove that nexus, unless enrollees under 18 were also allowed to stand as candidates. As the secretary rightly notes, there is no legal requirement for a nexus. In truth, there is no magic to the nexus apart from a form of symmetry between the pool of candidates and electors.

Higher ages for candidacy than voting rights are not uncommon, the most obvious being the US rules that presidential candidates be 35, Senators 30 and Representatives at least 25. If such higher ages are justified it is not because of concerns about education, but about maturity/capacity to serve in a demanding, full-time role. In Australia, a host of disqualifications apply to candidates and MPs, but not voters: for example rules against the holding of public service jobs; dual citizenship and for a long time, rules that allowed most prisoners to vote but few to hold office.

That said, there is no reason why 16/17 year olds, if they can vote, should not also be able to stand. In practice, few will. It is very rare for the mainstream parties to endorse candidates who are not close to or above 30, and even then, typically for unwinnable seats. Ultimately it would be for the electorate and media to determine if a 16/17 year old candidate is too 'green'.

Dependent young people – an argument for compulsory enrolment/voting

The intention behind the 'half-way house' of lowering the voting age without compulsory enrolment or voting for those newly enfranchised is presumably as a compromise, to reflect the fact that some young people will have no political interest or engagement.

The cleanest legislative solution would simply be to lower the voting age to 16, but apply the same compulsion to enrol and vote to citizens over that age. (Younger people could have a reduced fine – there is ample precedent for fines to be tailored to capacity to pay and relative culpability).

One issue with a lower voting age is that if younger people are less likely to be politically engaged, some will simply vote the way their parents - or alternatively an influential friend or peer group - dictates. There is nothing inherently wrong with this, given that historically voting preferences were typically inherited or mirrored that of significant others such as spouses.

A problem with voluntary voting is that vulnerable or dependent groups may disproportionately turnout, depending on the level of influence and dependency. For example, middle class parents may be more likely to push their teenage children into both going to the polls and supporting the party they favour. This may distort, albeit in small percentages, the effect of the principle of compulsory voting which otherwise governs the electoral system – namely that an election is a survey of as close to 100% of eligible voters as possible.

Vulnerable young people – an argument for stiffer laws against corruption

Occasionally, concerns about bribery or other forms of undue influence are raised in relation to proposals to lower the voting age. Are teenagers more susceptible to bribery because they are less politically interested or have limited incomes?

It should be noted that this fear is partly contradicted by two other common impressions:

- (a) that some teenagers are more ideologically committed or idealistic (and hence less likely to sell their vote than an apolitical person); and
- (b) that others teenagers, as just mentioned, may be so nestled within a family or peer group that they vote slavishly in accordance with that family/group's preferences (and hence unlikely to be bribable).

In any event, there is scant evidence of such crude forms of vote-buying at any level of public elections in Australia over the last century.

The Committee however, to reinforce this clean practice, might give attention to stronger penalties and political consequences for anyone found to have bribed, intimidated or unduly influenced a young person in relation to their electoral choices.

**Dr Graeme Orr, Associate Professor, Law, The University of Queensland Q 4072
g.orr@law.uq.edu.au**