



Disenfranchising persons of “unsound mind”: discrimination
in Australia’s electoral law

Submission to the Australian Law Reform Commission Inquiry on Legal
Barriers for People with Disability

January 2014

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Freedom. Respect. Equality. Dignity. **Action.**

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1. Executive Summary

1. The HRLC welcomes the Australian Law Reform Commission’s (**ALRC**) Inquiry into Legal Barriers for People with Disability (**Inquiry**).
2. The HRLC works to protect the right to vote in Australian law through litigation and advocacy. We have been involved in two landmark cases in the High Court that have strengthened the right to vote in Australian law. In *Roach v Electoral Commissioner* the High Court first recognised that the Australian Constitution protects the right to vote and struck down a blanket ban on prisoners voting. In *Rowe v Electoral Commissioner*, the High Court struck down laws that required the electoral rolls to be closed on the date of the issue of the writs. It is estimated that over 180,000 people were able to vote in the 2013 election as a result of the decision in that case.
3. This submission focuses on the right to vote for people with disabilities. The *Commonwealth Electoral Act 1918* (**Electoral Act**) currently prevents a person who “by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting” from enrolling and voting in any Senate or House of Representatives Election (the **unsound mind exclusion**).¹
4. The exclusion of persons of “unsound mind” from the franchise is vague, stigmatising and overly broad, and does not reflect the true capacity of people with disabilities to make decisions about voting.
5. The exclusion violates the right to vote of persons with disabilities, their right to equality and their right to freedom from discrimination on the basis of disability.²
6. People should not be excluded from the electoral role on the basis of a perceived or actual intellectual disability or psychosocial disability (disability caused by a mental health condition).
7. All persons who are of voting age, regardless of any disability, should be enrolled to vote and should be provided with appropriate support, where necessary, to exercise their right to vote.
8. The Australian Government should actively engage with people with disabilities and their representative organisations to reform the electoral legislation so that it complies with Australia’s relevant human rights obligations.

¹ *Commonwealth Electoral Act 1918* (Cth) ss 93 and 118.

² Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights; Articles 4, 12 and 29 of the Convention on the Rights of Persons with Disabilities. See Section 3 and Appendix.

Recommendation 1:

The exclusion from enrolment and voting of persons of unsound mind in the Electoral Act should be removed and the Act should be amended to reflect the fundamental principles of non-discrimination, presumption of legal capacity and supported decision making in the Convention on the Rights of Persons with Disabilities.

Recommendation 2:

Australia should adopt concrete measures to support people with disabilities to exercise their right to vote on an equal basis with others. The measures should be developed in consultation and with the direct participation of people with disabilities.

Recommendation 3:

The Government should commission research to better understand who is disenfranchised by the provision and the circumstances in which their names are removed from the electoral roll.

2. The right to vote for persons with disabilities

2.1 The unsound mind exclusion

9. The Electoral Act entitles all Australian citizens (and some others) who are over 18 years of age to enrol to vote in federal elections(s 93(1)). However, it prevents people of “unsound mind” from enrolling or voting in the following terms (s 93(8) (the **unsound mind exclusion**):

A person who:

(a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or

...

is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.

10. The unsound mind exclusion is vague and broad. There is no definition of “unsound mind” provided in the Electoral Act or at common law. Disenfranchisement of persons of unsound mind could conceivably be applied to persons with a range of impairments, including intellectual and psychosocial disabilities, acquired brain injury or a degenerative brain condition such as dementia. Many of these people could, or could with assistance, vote.

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11. Further, the exclusion may disenfranchise people with episodic mental health issues such as bipolar disorder or schizophrenia, who may be judged by a medical practitioner as fitting within the unsound mind exclusion (or any exclusion based on legal capacity) during some stages of their illness but may be perfectly capable of voting independently on election day.
 12. In practice, people of “unsound mind” are likely to be removed from the electoral roll by others. Any elector can object to the enrolment of another person on the basis of the “unsound mind” provisions and the objection must be accompanied by the opinion of a medical practitioner stating that “in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting.”³
 13. According to the AEC, between 2008 and 2012, 28,000 people have been removed from the electoral roll under the unsound mind provisions, with almost half of these removals occurring in 2010 during the federal election.⁴ Unfortunately, we are unable to find any data that reveals the circumstances in which people were removed. For example, we have been unable to find information on the disabilities the electors had or the relationship of the objector to those people removed from the role. It is therefore impossible to know whether people who may have the capacity to vote, with or without assistance, are being removed from the roll. The Government should commission research to better understand who is disenfranchised by the provision and why.

2.2 The right to vote

14. Voting in a parliamentary election is a human right recognised under Australian and international law.
15. In *Roach v Electoral Commissioner* [2007] HCA 43, Australia’s High Court found that the right to vote lies at the heart of Australia’s system of representative government. The High Court ruled that Australians’ voting rights should not be limited or infringed except where absolutely necessary and then only to the extent that the limitation is proportionate.⁵
16. Australia is party to all the major international human rights treaties and is thereby obliged to protect and promote all human rights under international law, including the right to vote.⁶ The

³ *Commonwealth Electoral Act*, s 118.

⁴ Joint Standing Committee on Electoral Matters *Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, August 2012 at 29.

⁵ *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007); *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010).

⁶ Australia is a party to the following instruments that protect rights relevant to electoral systems - the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976); *International Convention of the Elimination of All Forms of Racial Discrimination*: Opened for signature on 21 December 1965, 660 UNTS 195 (entered into force on 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*: Opened for signature on 1 March 1983, 1249 UNTS 13 (entered into force on 3 September 1981; and the *Convention*

importance of the universality of the right to vote is evident within the Australian democratic system where voting is not merely encouraged, but compulsory.

17. The right to vote is also protected in the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party (art. 25)⁷
18. The United Nations Human Rights Committee has stated that the right to participate in public life “lies at the core of democratic government...”,⁸ with the right to vote being “arguably the most important political right”.⁹
19. The right to vote must be enjoyed equally and without discrimination on the grounds set out in the ICCPR.¹⁰ Although the right to vote under the ICCPR can be limited, any limitation must be based on objective and reasonable criteria.¹¹ For example, it may be reasonable to set a minimum age for voting.¹²

2.3 The right to vote for persons with disabilities

20. The Convention on the Rights of Persons with Disabilities articulates the way in which existing human rights apply to people with disabilities.
21. In relation to voting, the CRPD requires Australia to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected” by (article 29(a)):

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation...;

on the Rights of Persons with Disabilities: Opened for signature on 30 March 2007, 993 UNTS 3 (entered into force on 3 May 2008).

⁷ The right is also protected in Article 21 of the UDHR, U.N. Doc A/810 (1948); Article 5 of the International Convention of the Elimination of All Forms of Racial Discrimination: Opened for signature on 21 December 1965, 660 UNTS 195 (entered into force on 4 January 1969); Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women: Opened for signature on 1 March 1983, 1249 UNTS 13 (entered into force on 3 September 1981).

⁸ *Wesberry v Sanders* 376 US 1, 17 (1964) (Black J, for the majority);

⁹ UN OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*. 21 December 2011 A/HRC/19/36

¹⁰ ICCPR, Articles 2 and 26.

¹¹ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, 1996.

¹² Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, paragraph 10.

- (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice...
22. The CRPD also requires states to actively promote participation by persons with disability in the conduct of public affairs through civil society organisations (article 29(b)).
23. The rights and obligations contained in the CPRD reflect a movement away from a medical model of disability to a social model. This is protected in the CRPD through two key features relevant to voting:
- (a) **Presumption of legal capacity:** Australia must recognise that persons with disabilities enjoy legal capacity on an equal basis with others (article 12); and
 - (b) **Assisted voting:** Australia must take positive steps to ensure all eligible people have the actual opportunity to exercise their voting rights. This includes, among other measures, allowing persons with disabilities to be assisted in voting by a person of their choice and disseminating easy to understand information regarding the process (article 29).¹³
24. The CRPD also makes it clear that Australia must not restrict the right of persons to participate in public life on the basis of a perceived or actual intellectual or psychosocial disability.¹⁴
25. In 2013, the CRPD Committee considered the unsound mind exclusion and recommended that Australia enact legislation to restore the presumption of the capacity of persons with disabilities to vote and exercise choice, and ensure all aspects of voting in an election are made accessible to all citizens with disabilities.¹⁵
26. The unsound mind exclusion violates Australia’s obligations under the CRPD, as it:
- (a) impermissibly limits the right to vote based on disability;
 - (b) undermines Australia’s positive obligation to assist people to vote; and
 - (c) reinforces harmful stereotypes, prejudices and practices related to persons with disabilities.
27. These are discussed below.

¹³ UN OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*. 21 December 2011 A/HRC/19/36 at [15].

¹⁴ UN OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*. 21 December 2011 A/HRC/19/36 at [29]; Committee on the Rights of Persons with Disabilities in *Bujdoso v Hungary Communication No. 4/2011* 9 September 2013 CRPD/C/10/D/4/2011 at [9.4]

¹⁵ Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of Australia*, 21 October 2013, CPRD/C/AUS/CO/1

3. The unsound mind exclusion violates the right to vote

3.1 The unsound mind exclusion is impermissible disability-based discrimination

28. The CRPD does not allow any restrictions on the right to vote to be based on disability or legal capacity.¹⁶ In its 2013 decision, the CRPD Committee stated that:

Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including an individualised assessment, constitutes discrimination on the basis of disability...¹⁷

29. In 2013, the Committee for the CRPD asked Australia to amend the unsound mind exclusion, as it automatically excludes persons with disabilities from the roll:

The Committee is concerned that persons with disabilities, in particular those with intellectual or psychosocial disabilities, are automatically excluded from the electoral roll. The Committee is further concerned that persons with disabilities face significant barriers in the voting process.¹⁸

30. Under the Electoral Act persons of unsound mind are only removed from the electoral roll if the objection is accompanied by the opinion of a medical practitioner who provides an individualised assessment of a person’s actual capacity to vote.

31. However, the CRPD Committee has declared that even systems with individualised assessments of capacity can violate the right to vote on an equal basis with others if capacity tests are only performed on persons with disabilities. In *Bujdoso v Hungary*, persons under guardianship were subject to capacity assessments by a psychologist and examination by a court before having their voting rights removed. The CRPD found that this impermissibly breached the right to vote of those people.¹⁹

32. Nor can the right of a person to vote be limited on the basis of legal capacity. The Office of the High Commissioner for Human Rights, in examining this argument, states that such a restriction would be “inconsistent with the provisions of Article 12, paragraph 2 of the Convention, which recognises that persons with disabilities enjoy legal capacity ‘on an equal basis with others in all aspects of life.’”²⁰

¹⁶ Committee on the Rights of Persons with Disabilities in *Bujdoso v Hungary Communication No. 4/2011* 9 September 2013 CRPD/C/10/D/4/2011 at [13]

¹⁷ Committee on the Rights of Persons with Disabilities in *Bujdoso v Hungary Communication No. 4/2011* 9 September 2013 CRPD/C/10/D/4/2011 at [19.4]

¹⁸ Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of Australia*, 21 October 2013, CPRD/C/AUS/CO/1

¹⁹ Committee on the Rights of Persons with Disabilities in *Bujdoso v Hungary Communication No. 4/2011* 9 September 2013 CRPD/C/10/D/4/2011 at [9.4]

²⁰ UN OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*. 21 December 2011 A/HRC/19/36 at [15].

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33. Under the current system in Australia, only those of “unsound mind” are required to demonstrate a level of understanding of the nature and significance of voting.
 34. Levels of understanding of the nature and significance of voting and Australia’s political system vary widely throughout Australia. While it is possible that some persons of unsound mind may, in conventional terms, be unable to understand the nature and significance of enrolment and voting, many persons deemed to be of “sound mind” may be unable to pass the same test.²¹
 35. The problem is compounded by the difficulty in formulating a test to determine whether a person understands the nature and significance of enrolment or voting. Levels of understanding of the system vary widely across the entire population, as do views as to what constitutes a meaningful vote. Does the person need to be able to name the different political parties or know the names of the Prime Minister and Opposition leader? Does the person’s capacity to exercise choice have to be stable, or can a person have moments of lucidity? Are medical practitioners the appropriate people to conduct this test? Do we elevate doctors to the position of democratic gate keeper?²² These are just a few of the problems PWD Australia raised in relation to attempts to assess a person’s capacity to vote.²³
 36. As the Harvard Law School Disability Project said in its submissions to the CRPD Committee, “it is not for the State to determine what is a valid political opinion”. If the intent of the law is to protect the system from persons who cannot understand its significance, and if there are people of both “sound mind” and “unsound mind” incapable of such understanding, restricting an assessment only to the latter amounts to discrimination.²⁴
 37. American and Canadian jurisprudence already demonstrates a focus on providing people with disabilities with feasible options that enable them to continue to exercise their right to political participation.²⁵

²¹ The problem is actually compounded by the lack of guidance as to the level of understanding that a person must have of the nature and significance of enrolment or voting. Levels of understanding of the system vary widely across the entire population, as do views as to what constitutes a meaningful vote. Does the person need to be able to name the different political parties or know the names of the Prime Minister and Opposition leader? Does the person’s capacity to exercise choice have to be stable, or can a person have moments of lucidity?

²² People with Disability Australia 'Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Submission of People With Disability Australia (PWD) 13 July 2012

²³ People with Disability Australia 'Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Supplementary Submission from People with Disability Australia (PWD) 30 July 2012.

²⁴ Harvard Law School Project on Disability submissions in Committee on the Rights of Persons with Disabilities *Bujdosó v Hungary Communication No. 4/2011* 9 September 2013 CRPD/C/10/D/4/2011.

²⁵ M.J. Prince, *The Electoral Participation of Persons with Special Needs*, Working paper Series on Electoral Participation and Outreach Practices (2007); M Scharuben, 'Ensuring the Fundamental Right to Vote for Elderly Citizens in the United States' 9 Thomas M. Cooley Journal of Practical and Clinical Law 307; F.T. Sherman, 'Get out the demented vote!' 59(10) *Geriatrics* 11 (2004).

38. People defined under Canadian law as having a ‘mental disability’ have had the right to vote, and have been exercising this right, in Canadian federal elections since 1993. This followed a Canadian court decision holding that the Canadian electoral law which excluded from voting “every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease,” was a violation of the right to vote under the *Canadian Charter of Rights*.²⁶ Following that case the Canadian Parliament chose to completely remove the voting ban on people with ‘mental disability’, despite recommendations to retain disenfranchisement of a more targeted group of people with mental disability. More recently, Croatia in 2012 adopted the *Register of Voters Act* which gave all people the right to vote regardless of disability or legal capacity.²⁷

3.2 Failure to support people with disability to vote

39. Under the CRPD, Australia has a positive duty to support people with disability to exercise their voting rights, including allowing persons with disabilities to be assisted in voting by a person of their choice.²⁸
40. Australia has implemented some measures to increase the accessibility of electoral processes, including election guides in accessible formats, telephone and postal voting and accessible polling booths²⁹.
41. However, the unsound mind exclusion undermines Australia’s positive obligation to assist people to vote.
42. As set out above, the unsound mind exclusion disenfranchises people with disabilities who, with the appropriate support, could exercise their right to vote.
43. The unsound mind exclusion directs the system towards preventing people with intellectual or psychosocial disabilities from voting, instead of supporting them to participate in the electoral process.

²⁶ *Canadian Disability Rights Council v Canada* [1998] 3 FC 622.

²⁷ Branka Meic ‘The right to vote: A step forward in achieving equality for people with disabilities’ *UNDP* 15 April 2013 <http://europeandcis.undp.org/blog/2013/04/15/the-right-to-vote-a-step-forward-in-achieving-equality-for-people-with-disabilities/>; Other info found here: Canadian Journal of Elder Law http://www.law.syr.edu/media/documents/2009/1/Kohn__Cognitive_Impairment__Right_to_Vote_Final_PDF.pdf

²⁸ UN OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*. 21 December 2011 A/HRC/19/36 at [15].

²⁹ Commonwealth of Australia “United Nations Office of the High Commissioner for Human Rights Cable Request: GU625357L: Participation of Persons with Disabilities in Political and Public Life—Australia’s response to the Officer of the High Commissioner’s Request”, www.ohchr.org/Documents/Issues/Disability/PoliticalParticipation/States/ResponseAustralia1.doc

3.3 Law is vague and stigmatising

44. Under Article 8 of the CRPD, Australia has an obligation to raise awareness throughout society of persons with disabilities and to foster respect for the rights and dignity of persons with disabilities. This includes the obligation to combat stereotypes, prejudices and harmful practices.
45. The CRPD Committee has linked this obligation closely with the requirement that States move away from a medical model towards a social and human rights based model of disability.³⁰
46. By utilising terms such as “unsound mind”, the Electoral Act is not only failing to combat stereotypes and prejudices, but is in fact perpetuating prejudicial and stigmatising attitudes towards persons with disabilities.
47. HRLC supports PWD Australia previous submission that the language of “unsound mind” should be removed from the legislation. It is a “label used to describe a person who has been judged to lack the functional capacity to make rational choices” and is derogatory, judgemental and stigmatising.³¹

4. Reforming the Electoral Act

48. The unsound mind exclusion should be removed and the Electoral Act should be amended to reflect the fundamental principles of non-discrimination, presumption of legal capacity and supported decision making in the CRPD.
49. Amendments to the legislation and to the policies and practices of the Electoral Commission should be done in consultation with, and with the active participation of, persons with disabilities. This is necessary for Australia to fulfil its obligations under Article 4(3) of the CRPD. This approach would empower persons with disability to contribute to the political process to the extent possible, and provide them with the assistance required to do so.
50. HRLC submits that amendments should include the following:
 - (a) that all persons of voting age be enrolled to vote, regardless of any intellectual or psychosocial disability;
 - (b) that all persons with disability be supported to participate in elections, including, if they wish, the provision of support in exercising their vote by a person of their own choice, and if necessary to make a decision about their own capacity to participate;

³⁰ Committee on the Rights of Persons with Disabilities Concluding Observations on China [CRPD/C/CHN/CO/1 and Peru CRPD/C/PER/CO/1](#)

³¹ People with Disability Australia 'Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Supplementary Submission from People with Disability Australia (PWD) 30 July 2012.

- (c) the provision of accessible and easily understandable information regarding the electoral process; and
- (d) the creation of an appropriate mechanism to excuse people from being fined for not voting on election day if the reason for not voting related to an intellectual or psychosocial disability.