

9. Electoral Matters

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Summary

9.1 Australia has obligations under the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) to guarantee that people with disability 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’ to vote and be elected.¹

9.2 This chapter discusses issues which arise in relation to Commonwealth electoral law for people who may require decision-making support. It has three parts. The first part focuses on the sections of the *Commonwealth Electoral Act 1918* (Cth) which relate to entitlements to enrol and vote and objections to enrolment. The ALRC proposes amendment to s 93(8)(a), commonly referred to as the ‘unsound mind’ provision, to provide that the relevant threshold is whether a person has decision-making ability with respect to enrolment and voting at the relevant election. The ALRC also proposes the introduction of a statutory test for determining whether a person meets the relevant threshold, focusing on the decision-making supports available; the development of additional guidance in relation to the determination; and that the Australian Electoral Commission (AEC) collect and make publicly available information about the new provisions. The ALRC asks a question about the evidence required to support an objection to enrolment.

¹ *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 29. See also *Ibid* arts 4, 12; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2, 25, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights 1948* art 21.

9.3 The second part of the chapter relates to supported decision-making and voting. The ALRC proposes amendment to s 234(1) of the *Commonwealth Electoral Act* which provides a form of supported decision-making, and asks what further changes, if any, are required to the Act or relevant legal frameworks to facilitate the provision of support to people who may require decision-making support, including by secret ballot.

9.4 The third part of the chapter discusses compulsory voting and fines for failure to vote. There is a concern that people with disability who are on the electoral roll may be fined disproportionately for failing to vote. An elector may avoid a fine if they had a 'valid and sufficient reason' for failing to vote. The ALRC proposes that the Australian Electoral Commission develop guidance material to assist Divisional Returning Officers to determine whether a person with disability has a valid and sufficient reason for failing to vote.

Entitlement to enrolment and to vote

9.5 This first part of the chapter focuses on s 93(8)(a) and pt IX of the *Commonwealth Electoral Act* which relate to persons entitled to enrolment and to vote and objections to enrolment. The ALRC makes a number of proposals. First, the ALRC proposes amendment to the threshold under s 93(8)(a) which deals with circumstances in which a person's name may not be placed or retained on the electoral roll. The ALRC then proposes amendment to the approach to and determination of voting eligibility and the need for research and data collection with respect to these provisions. The ALRC also discusses issues relating to the range of professionals entitled to provide a certificate required to support an objection to enrolment.

9.6 The combined effect of the ALRC's proposals in this section is that, even where an objection is made to the enrolment of an elector with disability:

- the threshold under s 93(8)(a) would be more appropriate and relevant to the particular election—whether the person has decision-making ability with respect to enrolment and voting at the relevant election;
- there would be a focus on the available decision-making assistance and supports in determining whether the person meets the necessary threshold;
- further guidance incorporating the National Decision-Making Principles would be available for medical practitioners and others undertaking assessments and providing medical certificates which must accompany a written objection; and
- there would be greater data about the operation and use of s 93(8)(a) of the *Commonwealth Electoral Act*.

Threshold

Proposal 9–1 Section 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person of ‘unsound mind’ who is ‘incapable of understanding the nature and significance of enrolment or voting’ is not entitled to have their name on the electoral roll or to vote in any Senate or House of Representatives election. This should be amended to replace the current wording with: ‘does not have decision-making ability with respect to enrolment and voting at the relevant election’.

9.7 In this section, the ALRC proposes amendment to s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), which contains the threshold relevant to determining whether a person is entitled to have their name placed or retained on the electoral roll and to vote.

9.8 Section 93(8)(a) provides that a person is not entitled to have their name placed or retained on the electoral roll, or to vote at any Senate or House of Representatives election, where they are a person ‘who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting’.

9.9 To remove a person from the electoral roll based on this provision there are a number of steps:

- a written objection must be lodged by an enrolled elector;²
- the objection must be supported by a medical certificate;³
- the AEC must give the individual an opportunity to respond to the written objection;⁴ and
- the Electoral Commissioner will determine the objection.⁵

9.10 There are a variety of avenues to challenge a decision to remove a person’s name from the electoral roll.⁶

9.11 People with Disability Australia and the Australian Centre for Disability Law highlighted that provisions of this type ‘all too often’ seek to remove or limit a person’s legal agency to exercise their rights:

2 *Commonwealth Electoral Act 1918* (Cth) ss 114–116. The AEC cannot object on the grounds specified in s 93(8)(a).

3 *Ibid* s 118(4).

4 *Ibid* ss 116–118.

5 *Ibid* s 118. The Electoral Commissioner may make any inquiries he or she considers necessary to ascertain the facts relevant to the objection.

6 Including internal review and review by the Administrative Appeals Tribunal under the *Commonwealth Electoral Act 1918* (Cth) pt X, and under the *Disability Discrimination Act 1992* (Cth); the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and by the Commonwealth Ombudsman.

Frequently, this is due to a conflated understanding of legal capacity with mental capacity. For example, provisions which make exception for people with ‘unsound mind’, ‘disability’, ‘mental incapacity’ or ‘incompetence’ are expressing the view that the existence of a cognitive impairment permits a limitation on the exercise of legal agency and thus recognition of legal capacity as a whole.⁷

9.12 The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) has recommended that Australia ‘enact legislation restoring the presumption of the capacity of persons with disabilities to vote and exercise choice; and to ensure that all aspects of voting in an election are made accessible to all citizens with a disability’.⁸

9.13 Section 93(8)(a) itself has attracted a range of criticism.⁹ For example, The Human Rights Law Centre stated that ‘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’.¹⁰ Stakeholders also expressed the view that the provision is ambiguous.¹¹

9.14 The Public Interest Advocacy Centre (PIAC) highlighted that, in some circumstances, ‘people of “sound mind” do not understand the “nature and significance of enrolment and voting”’,¹² but are still entitled to vote.¹³

9.15 The Australian Government Electoral Reform Green Paper highlighted that, while there are some concerns about the provision, as it makes provision for removal of a person’s right to vote, it is a necessary provision in order to protect the integrity of the electoral system. It also emphasised that

in practice however, no test for ‘soundness of mind’ is conducted when a person seeks to enrol or approaches a polling booth on election day. In practice the provision is ‘used’ when a person raises a concern with the AEC ... These concerns are generally raised by persons close to the elector in question.¹⁴

7 PWDA, ACDL and AHRC, *Submission 66*.

8 Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)’ (United Nations, 4 October 2013).

9 See, eg, PWDA, ACDL and AHRC, *Submission 66*; The Human Rights Law Centre, *Submission 54*; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and Australian Centre for Disability Law, *Submission 90 to the Minister of State, Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009.

10 The Human Rights Law Centre, *Submission 54*.

11 *Ibid*; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and Australian Centre for Disability Law, *Submission 90 to the Minister of State, Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009.

12 Public Interest Advocacy Centre, *Submission 41*.

13 See also, People with Disability Australia and Australian Centre for Disability Law, *Submission 90 to the Minister of State, Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009.

14 Australian Government, *Electoral Reform Green Paper—Strengthening Australia’s Democracy*, (2009) 42.

9.16 There has also been Parliamentary consideration of the provision.¹⁵ At a Commonwealth level, in 2012 the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) contained amendments to the provision. However, the Government accepted the recommendation of the Joint Standing Committee on Electoral Matters, which expressed the view that it was not satisfied that there was any ‘pressing need to remove or substitute the phrase “unsound mind” or that it breaches any international obligations in relation to rights to electoral participation’.¹⁶

9.17 There are two key elements of s 93(8)(a). The first relates to removal of entitlement to enrolment and to vote because of disability (‘by reason of being of unsound mind’). The second relates to the relevant threshold of mental or intellectual capacity required (‘incapable of understanding the nature and significance of enrolment and voting’). This threshold is broad and is neither context nor time-specific. There is no statutory articulation of what the threshold requires, appearing to apply a global and once-off assessment of a person’s mental or intellectual capacity, and as a result the provision is inconsistent with the approach taken by the CRPD and the National Decision-Making Principles.

Options for reform

9.18 There are a number of possible options for amendment of s 93(8)(a). First, the phrase ‘unsound mind’ could be removed, but the second part of the formulation, ‘is incapable of understanding the nature and significance of enrolment and voting’ could be retained. The removal of the phrase ‘unsound mind’ is important in light of the challenges of language discussed in chapter 2, to comply with Australia’s obligations under art 8 of the CRPD,¹⁷ and to remove a phrase that stakeholders consider ‘derogatory, judgemental and stigmatising’.¹⁸ However, stakeholders have indicated this amendment alone is insufficient and that the rewording of only this phrase may broaden the disqualification.¹⁹

9.19 Secondly, it would be possible to replace the entire phrase with ‘does not have decision-making ability with respect to enrolment and voting’ or some other similar phrase. For example, People with Disability Australia and the Australian Centre for Disability Law have argued that the provision should be amended to include the

15 At a state level, in relation to the equivalent provision, the Victorian Electoral Matters Committee stated that it ‘encourages the [Victorian Electoral Commission] to work directly with the Department of Justice and Chief Parliamentary Counsel (Department of Premier and Cabinet) to develop an appropriate terminology’: Electoral Matters Committee, ‘Inquiry into the Conduct of the 2010 Victorian State Election and Matters Related Thereto’ (May 2012) [7.49].

16 Joint Standing Committee on Electoral Matters, ‘Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth)’ (August 2012). The Bill was amended to exclude the provisions relating to unsound mind and subsequently passed and given Royal Assent on 27 March 2012.

17 Article 8 contains a duty to undertake to adopt immediate, efficient and appropriate measures to combat stereotypes and prejudice in relation to people with disability in all areas of life: *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 8.

18 The Human Rights Law Centre, *Submission 54*.

19 Joint Standing Committee on Electoral Matters, above n 16, [2.89].

threshold ‘a lack of capacity to exercise choice’ in relation to electoral questions,²⁰ reflecting the reasoning of Gleeson CJ in *Roach v Electoral Commission*:

the rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases. The rationale is related to the capacity to exercise choice.²¹

9.20 A third option may be to replace the entire phrase with ‘does not have decision-making ability with respect to enrolment and voting at the relevant election’. The inclusion of ‘at the relevant election’ recognises that capacity can fluctuate and is context and time-specific and the threshold should make provision for that by requiring consideration of the specific decision-making ability required to be enrolled and vote at a particular election. This formulation incorporates the views of stakeholders such as PIAC, which submitted that ‘any determination as to whether a person lacks capacity to vote should be decision-specific, and only apply to voting at a particular election as opposed to a blanket disqualification from the electoral process’.²²

9.21 Finally, an option suggested by some stakeholders would be to remove the provision entirely and allow all people to remain on the electoral roll, but make provision for impaired decision-making ability to be considered as a valid and sufficient reason for failure to vote under s 245(4) of the *Commonwealth Electoral Act*, and for waiver of the associated fine.²³ Waiver of fines is an important mechanism to ensure that people with disability do not accumulate debts. This mechanism allows people with fluctuating capacity to remain on the electoral roll and not be penalised if they fail to vote, but can do so if they are able. However, this needs to be balanced with the fact that voting is compulsory and there is a need to ensure the integrity of the electoral system. The joint judgment of Gummow, Kirby and Crennan JJ in *Roach v Electoral Commission* states that s 93(8)(a) of the *Commonwealth Electoral Act*

plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.²⁴

9.22 Concern about the integrity of the electoral system if such an approach was taken has also been expressed by the AEC and the Joint Standing Committee on Electoral Matters.²⁵

9.23 Further, voting is compulsory in Australia (unlike in Canada which is the jurisdiction highlighted by stakeholders in support of this approach) and such a

20 People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009. See also: Public Interest Advocacy Centre, *Submission 41*.

21 *Roach v Electoral Commissioner* [2007] HCA 43, 9.

22 Public Interest Advocacy Centre, *Submission 41*. See also People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009.

23 See, eg, Nina Kohn, ‘Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections’ (2008) 1 *Canadian Journal of Elder Law* 29.

24 *Roach v Electoral Commissioner* [2007] HCA 43, 88.

25 Joint Standing Committee on Electoral Matters, above n 16, [2.93].

controversial proposal would change the nature of voting and voter exclusion in Australia with implications beyond this Inquiry. Most democratic countries have some capacity-related qualifications for voting. In light of this, the ALRC does not consider it appropriate to remove s 93(8)(a) entirely.

9.24 The ALRC's view is that the third approach is the most appropriate. The ALRC considers it is necessary to amend the provision to remove the reference to 'by reason of being of unsound mind'. While it has a particular historical evolution,²⁶ this phrase is inconsistent with the CRPD and the National Decision-Making Principles. As the ALRC is asked to provide a model in Commonwealth laws, it is not appropriate to retain such a phrase in Commonwealth legislation. Further, any test for capacity with respect to enrolment and voting should be based on a person's decision-making ability in the context of the particular electoral decision which they face, in a particular election. As a result, the ALRC also proposes to substitute 'incapable of understanding the nature and significance of enrolment and voting', with 'does not have decision-making ability with respect to enrolment and voting at the relevant election'. This ensures the threshold is not a status-based assessment, and is consistent with the National Decision-Making Principles, to the extent that the threshold relates to ability with respect to a particular decision, at a particular time, rather than more broadly. There would need to be a number of ancillary changes to the *Commonwealth Electoral Act* to reflect this amendment.

9.25 The ALRC recognises the proposed new threshold raises many issues that may need to be resolved before implementation. For example, requiring consideration of decision-making ability with respect to enrolment and voting at a relevant election requires consideration of how such a threshold would operate in practice, including for example to take account of fluctuating capacity.

Test and assessment

Proposal 9–2 The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that a person lacks decision-making ability with respect to enrolment and voting at the relevant election if they cannot:

- (a) understand the information relevant to decisions that they will have to make associated with enrolment and voting at the relevant election;
- (b) retain that information for a sufficient period to make the decision;
- (c) use or weigh that information as part of the process of making decisions;
and
- (d) communicate their decision in some way.

26 See discussion in Ch 2.

Proposal 9–3 The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that decision-making assistance and support should be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

Proposal 9–4 The Australian Electoral Commission should develop a guide to assessing ability for the purposes of determining whether a person ‘does not have decision-making ability with respect to enrolment and voting at the relevant election’ consistent with the National Decision-Making Principles.

9.26 In addition to amending the threshold or standard under s 93(8) of the *Commonwealth Electoral Act*, the ALRC also considers it is necessary to amend the Act to introduce a statutory test for the purposes of determining whether a person has reached the relevant threshold, but that the focus of any assessment must be on the decision-making supports available, rather than capability. In addition to the statutory test, the ALRC proposes that the AEC develop guidance to assist medical practitioners and others in determining whether a person has or does not have decision-making ability with respect to enrolment and voting at the relevant election.

Test

9.27 Currently, there is no statutory test for determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election. In the ALRC’s view, there should be a statutory test and that test should be based on a person’s decision-making ability in the context of the relevant election and the available decision-making assistance and support.

9.28 The proposal would introduce a new test into the *Commonwealth Electoral Act*, the key elements of which reflect the National Decision-Making Principles.

Assistance and support

9.29 The existing test of whether a person is of ‘unsound mind’ and ‘is incapable of understanding the nature and significance of enrolment and voting’ does not consider the possible role of assistance and support for electors.

9.30 The ALRC proposes that in addition to a new threshold and test, the available decision-making assistance and supports must be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.²⁷

9.31 Decision-making support and assistance and supported decision-making are discussed further in the next part of this chapter.

27 This proposal reflects a key element of the National Decision-Making Principles: Ch 3.

Guide to assessment

9.32 Under the current law, an objection must be supported by a certificate from 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.²⁸

9.33 The ALRC asks a question about the categories of professionals who should be entitled to provide such evidence later in this chapter. Regardless of which professionals undertake this assessment, the ALRC proposes that the AEC, in consultation with its Disability Advisory Committee and others, develop a guide to assessing ability for the purpose of determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election. The guide should be aimed at medical practitioners and AEC employees. The guide or guidance material should incorporate and have regard to the National Decision-Making Principles and associated principles for determining decision-making ability. The NSW Capacity Toolkit also provides a useful model.²⁹

Evidence

Question 9–1 Section 118(4) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate of a medical practitioner. Should this be amended to provide that an objection may also be accompanied by a statement from a range of qualified persons, including a psychologist or social worker, concerning an elector's decision-making ability with respect to enrolment and voting?

9.34 Section 118(4) of the *Commonwealth Electoral Act* provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate 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.

9.35 It has been suggested that this provision should be broadened to provide that other professionals who may be associated with the care or support of a person with impaired decision-making ability may provide a certificate in support of an objection.

9.36 In 2012, the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) contained an expanded list of qualified persons similar to the one outlined in Question 9–1 above. The AEC explained the reasoning behind the amendment was to remove the 'impost on individuals or their families by requiring them to go to a medical practitioner, particularly if they already had a relationship with

28 *Commonwealth Electoral Act 1918* (Cth) s 118(4).
29 New South Wales, Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

a psychologist, a psychiatrist or a social worker ... We wanted a process that was going to be relatively inexpensive, that was still going to have some security about it'.³⁰

9.37 However, the Joint Standing on Electoral Matters that inquired into the Bill said that it was 'not satisfied that there is any pressing need ... that professions other than medical practitioners should be able to make determinations about a person's capacity to understand the nature and significance of enrolment and voting'.³¹

9.38 On the one hand, in light of moves away from the medical model of disability, and given the relationship people with disability may have with a range of medical and other professionals who are in a strong position to assess the true decision-making ability of the person, it may be beneficial to expand the category of professionals entitled to provide evidence in support of an objection. On the other hand, the evidence required for removing a person from the electoral roll should be of a high standard given the significance of removal,³² and the regulation and registration of medical practitioners adds an additional safeguard with respect to the assessment process that should be mirrored with respect to any additional categories of professionals. As a result, the ALRC is interested in stakeholder feedback on the appropriate categories of professionals who should be entitled to provide evidence in support of an objection.

Research and data collection

Proposal 9–5 The Australian Electoral Commission should collect, and make publicly available, information about the operation of s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), including the number of people removed from the electoral roll, the reason, and whether they responded to the objection.

9.39 In 2008–09, 5735 electors were removed from the electoral roll under s 93(8)(a) of the Act. This number peaked in 2010–11 at 13,082 (an election year), and in 2011–12 it was 5445.³³ However, information about removals from the electoral roll is limited and not readily publicly available. For example, there is no publicly available information about the number or nature of objections, or responses to objections, or the reasons for people being removed from the roll.³⁴

9.40 As a result, there is stakeholder concern about the lack of data available in relation to s 93(8)(a) of the Act. For example, the Human Rights Law Centre

30 Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 18 (Paul Pirani); Joint Standing Committee on Electoral Matters, above n 16, [2.86]; Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 18 (Paul Pirani).

31 Joint Standing Committee on Electoral Matters, above n 16.

32 Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 16 (Ngila Bevan, People with Disability Australia).

33 Australian Electoral Commission, Submission 2.1 to Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral and Referendum (Improving Electoral Procedure) Bill 2012* (Cth), (2012) 5.

34 See, eg, The Human Rights Law Centre, *Submission 54*.

recommended that research be commissioned to ‘better understand who is disenfranchised by the provision and the circumstances in which their names are removed from the electoral roll’.³⁵

9.41 The ALRC considers that this type of data would assist in informing policy development in this area and so proposes that the AEC collect and publicise information about the operation of s 93(8)(a) of the Act.

Supported decision-making and voting

Proposal 9–6 Section 234(1) of the *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that ‘if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter’s ballot paper’.

Question 9–2 What further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of assistance and support to people who require decision-making support to vote, including by secret ballot?

9.42 Australia’s obligations under the CRPD include ensuring the accessibility of voting procedures, facilities and materials; protecting the right to vote by secret ballot; and where necessary, and at their request, allowing people with disability assistance in voting by a person of their choice.³⁶

9.43 In light of these obligations, and the proposal above requiring decision-making assistance and support to be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election, there is a need to ensure the Act contains provision for appropriate decision-making assistance and support.

9.44 Section 234(1) of the *Commonwealth Electoral Act* currently provides that ‘if any voter satisfies the presiding officer that his or her sight is so impaired or that the voter is so physically incapacitated or illiterate that he or she is unable to vote without assistance’, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter’s ballot paper’.

35 Ibid.

36 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 29, 4, 12. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 25, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights 1948* art 21.

9.45 This provision already provides for a form of supported decision-making. However, in order to ensure consistency with the ALRC's approach and the use of appropriate language, and to expand the category of people who may rely on the provision, the ALRC proposes that the provision be amended. It may be possible to include a more appropriately worded example in the Act. Specifically, the ALRC proposes the section be amended to provide that 'if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter's ballot paper'.

9.46 In addition to assistance in marking and depositing the ballot paper, people may require additional assistance in relation to enrolment and voting. For example, a person may require support to complete enrolment forms, update their address, or to obtain and understand information about candidates or voting procedures.

9.47 While the AEC and relevant state and territory electoral commissions have introduced a range of measures to increase electoral accessibility,³⁷ there remains a need for Australia to 'adopt concrete measures to support people with disabilities to exercise their right to vote on an equal basis with others'.³⁸

9.48 In addition, the difficulty with any support related to the voting procedure is respecting the right to a secret ballot. PIAC submitted that 'ensuring a secret ballot is an essential element of Australia's democracy, yet this is not readily available to people with disability'.³⁹

9.49 A number of stakeholders suggested support mechanisms that would allow people with disability to vote independently and in secret, including the use of logos or symbols; templates; assisted voting; electronically assisted voting; and outreach models.⁴⁰

9.50 The ALRC is interested in what further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of such decision-making assistance and support to people, including by secret ballot.

Fines for failure to vote

Proposal 9-7 The Australian Electoral Commission should develop or amend guidance for Divisional Returning Officers to assist them to determine if a valid or sufficient reason for failing to vote exists in circumstances where an elector is a person with disability.

37 See, eg Australian Electoral Commission, *Submission 10*.

38 The Human Rights Law Centre, *Submission 54*.

39 Public Interest Advocacy Centre, *Submission 41*.

40 *Ibid.*

9.51 There is a concern that people with disability who are on the electoral roll may be fined for failing to vote because they did not understand when or where booths were open, could not get to a polling station, or for some other reason associated with their disability.⁴¹

9.52 Section 245 of the *Commonwealth Electoral Act* relates to compulsory voting. Section 245(4) provides that a Divisional Returning Officer (DRO) is not required to send or deliver a penalty notice if he or she is satisfied that the elector: is dead, was overseas, was ineligible to vote or ‘had a valid and sufficient reason for failing to vote’.

9.53 Some stakeholders have advocated for inclusion of disability as a specific criterion excusing failure to vote. In particular, PIAC and People with Disability Australia and the Disability Discrimination Legal Centre have argued that s 245(4) should be amended to ‘include people with an intellectual or psychiatric disability who are unwell at election time’ as a valid and sufficient reason for failing to vote.⁴²

9.54 The ALRC’s view is that status-based approaches to disability—even where they operate in favour of the person with disability, for example to waive a fine—should be avoided. Accordingly, the ALRC does not consider it appropriate to amend the section to specifically include disability as a separate criterion, or a statutorily defined valid and sufficient reason for failing to vote.

9.55 However, determining what constitutes a valid and sufficient reason for not voting is at the discretion of the DRO for each electorate to determine. The AEC states that

the original decision of the DRO as to whether a reason for not voting is valid and sufficient is based on the merits of each individual case, in accordance with the law as previously interpreted by the courts, and within the boundaries of administrative guidelines developed by the AEC to assist DROs.⁴³

9.56 Administrative guidelines developed by the AEC, in consultation with the AEC Disability Advisory Committee,⁴⁴ may provide a useful document in which to provide additional guidance to DROs in relation to the potential impact of disability on an electors’ ability to vote. As a result, the ALRC proposes that the AEC amend existing administrative guidelines, or develop new guidance for DROs in determining what constitutes a valid and sufficient reason for failure to vote, including examples relating to disability.

Other issues

9.57 The Issues Paper highlighted a number of broad issues affecting people with disability in relation to voting, including the lack of easily understood information

41 See, eg, *Ibid*; People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009.

42 People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, 2009. See also The Human Rights Law Centre, *Submission 54*.

43 Australian Electoral Commission, *Electoral Backgrounder: Compulsory Voting* (April 2010) [30].

44 Australian Electoral Commission, *Submission 10*.

about candidates, voting and preferences; difficulties enrolling; and access to voting (though noting this has improved somewhat with wheelchair accessible polling stations, telephone voting and postal voting).⁴⁵

9.58 In submissions to the Issues Paper, stakeholders raised a range of systemic issues concerning enrolment and voting: for example, the need to ensure the AEC provides accessible information in a variety of formats and does so in a timely way prior to an election.⁴⁶ The AEC's National Disability Strategy includes actions and target outcomes relevant to improving the accessibility of websites and publications, which may go some way to addressing these concerns.⁴⁷

9.59 Stakeholders also suggested that in addition to imposing obligations on the AEC in relation to provision of information, obligations should also be imposed on political parties and that receipt of electoral funding should be conditional upon the provision of accessible information.⁴⁸

9.60 To an extent these issues are broadly relevant to the issue of decision-making assistance and support. While these are important issues in the lives of people with disability, they do not relate directly to individual decision-making, and the ALRC does not intend to make proposals in these areas.

9.61 Finally, there is some inconsistency between jurisdictions with respect to the matters discussed in this chapter. Given this, the ALRC suggests it may be useful for the AEC, and state and territory governments and electoral commissions, to consider ways to increase uniformity and introduce best practice approaches to electoral matters across jurisdictions consistent with ALRC proposals.

45 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) [166].

46 See, eg, Public Interest Advocacy Centre, *Submission 41*; People with Disability Australia and Australian Centre for Disability Law, *Submission 90 to the Minister of State, Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

47 Australian Electoral Commission, *National Disability Inclusion Strategy 2012–2020*, (February 2013).

48 See, eg, Public Interest Advocacy Centre, *Submission 41*. A candidate or Senate group is eligible for election funding if they obtain at least 4% of the first preference vote in the division or the state or territory they contested. *Commonwealth Electoral Act 1918* (Cth) ss 294, 297.