



Disenfranchising persons of “unsound mind”:
discrimination in Australia’s electoral law (Part 2)

Submission to the Australian Law Reform Commission

Discussion Paper: *Equality, Capacity and Disability in
Commonwealth Laws*

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Overview

In January 2014 the Human Rights Law Centre (**HRLC**) made a submission to the Australian Law Reform Commission’s (the **ALRC**) inquiry into *Equality, Capacity and Disability in Commonwealth Laws*. The HRLC submission focused on the electoral disenfranchisement of persons “of unsound mind” in section 93(8)(a) (the **unsound mind laws**) of the *Commonwealth Electoral Act 1918* (Cth) (the **Electoral Act**) arguing that the exclusion was stigmatising, archaic and discriminatory and ought to be removed.

This submission responds to the amendments proposed to the unsound mind laws in the ALRC’s most recent discussion paper, *Equality, Capacity and Disability in Commonwealth Laws* (the **discussion paper**).

The HRLC welcomes and supports the ALRC’s proposals to remove the phrase ‘unsound mind’ from s 93(8)(a) and to collect and share data on the operation of s 93(8)(a).

However, the HRLC has concerns about the new test proposed by the ALRC that would disenfranchise people who fail to meet a threshold of ‘decision-making ability’.

The decision-making ability test drafted in the terms proposed is inconsistent with the right to freedom from disability-based discrimination in international law. The test allows disenfranchisement based on a doctor’s assessment of a persons’ decision-making ability. Recent commentary from the Committee on the Rights of Persons with Disabilities (**CRPD Committee**) suggests that any disenfranchisement of persons based on decision-making ability is a violation of international human rights law.

The decision-making ability test poses an unfair and high threshold insofar as it requires a person to understand, weigh, retain and communicate information relevant to a particular election. The overly broad terms of the test risks disenfranchising some people with disabilities who express a wish to vote and who could, if provided appropriate assistance and support, exercise that right. In doing so, it may also indirectly discriminate against people with disabilities, given that many people without disabilities will vote without understanding, weighing and retaining information relevant to an election but their right to vote is unlikely to be doubted. Indeed, the decision-making test as proposed may be more difficult to meet than the current ‘unsound mind’ exclusion.

The government is yet to articulate any evidence-based rationale for limiting the right to vote based on decision-making ability. Many European countries, including the UK, have removed restrictions on voting based on mental incapacity

The HRLC submits that regardless of decision-making ability, where a person expresses a wish to vote and could do so with appropriate supports and assistance, this should be sufficient basis upon

which to allow a person to vote. This test reflects recent developments in disability rights and the state obligations to provide supports and assistance to enhance the enjoyment of rights, rather than the disenfranchisement of people based on a qualitative assessment of that person’s individual decision-making ability.

However, if the decision-making test is adopted, the HRLC submits that:

- (a) The disenfranchisement of individuals on the basis merely of a medical practitioner or other professional person’s assessment does not provide people with disabilities a fair process or the opportunity to be heard prior to losing their vote. Consideration should be given to judicial oversight of decisions to disenfranchise people based on decision-making ability.
- (b) The Guidelines to be prepared for assessors of a person’s decision-making ability will be critical in providing some protection of rights of people with disabilities. The Australian Electoral Commission should consult closely with people with disabilities and disability organisations in the development of assessment guidelines used to assess a person’s decision-making ability.
- (c) The decision-making ability test should take into account not just the person’s decision-making ability in light of available supports, but should extend to reasonable supports. While consideration of available support is to be commended, there is currently a lack of appropriate support available to ensure people are not unnecessarily disenfranchised. This could lead to individuals not meeting the threshold when, with reasonable support, they may otherwise be able to vote.

2. Problems with the ‘decision-making ability’ test and assessment

The HRLC welcomes the ALRC’s proposal to remove the unsound mind exclusion.

In its place the ALRC proposes that s 93(8)(a) be drafted so as only to exclude persons who do not have ‘decision-making ability with respect to enrolment and voting at the relevant election’ (proposal 9-1) (the **decision-making ability test**).

The ALRC proposes a statutory test whereby a person lacks the “decision-making ability with respect to enrolment and voting” if they cannot (proposal 9-2):

- (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 that decision in some way.

The ALRC proposes that that the Electoral Act also be amended to require that a person’s access to decision-making assistance and support should be taken into account in determining whether a person has decision-making ability (proposal 9-3).

The discussion paper also suggests that the AEC develop guidelines to assist decisions makers to make determinations of a person’s decision-making ability with respect to enrolment and voting consistent with the National Decision-Making Principles (proposal 9-4).

The HRLC is concerned that:

- (a) The decision-making ability test drafted in the terms proposed is inconsistent with the right to freedom from disability-based discrimination in international law.
- (b) The decision-making ability test is drafted in overly broad terms that risks disenfranchising some people with disabilities who express a wish to vote and who could, if provided appropriate assistance and support, exercise that right. In doing so, it may also indirectly discriminate against people with disabilities.
- (c) The government is yet to articulate any evidence-based rationale for limiting the right to vote based on decision-making ability.

These issues are discussed below.

2.1 ‘Decision-making ability’ test may violate international law

The bulk of the HRLC’s submissions on international human rights law are contained in our January 2014 submission to the ALRC.

However, since that submission was written the Committee on the Convention on the Rights of Persons with Disabilities (**CRPD Committee**) has articulated a relevant position on legal capacity and political rights, stating that a person’s decision-making ability is not a justification for removing their right to vote.¹ In April 2014, the CRPD Committee said:

In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). **This means that a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote**, the right to stand for election and the right to serve as a member of a jury.²

This statement by the CRPD Committee reflects a departure from the Human Rights Committee’s 1996 statement that ‘established mental incapacity may be a ground for denying a person the right to vote or to hold office’.³ Decision-making ability and legal capacity were historically considered legitimate reasons for preventing people from voting. However, there have been significant changes in the conception and understanding of disability rights in the last 20 years.

The CRPD Committee’s statement can be seen as a consolidation of these recent developments. The CRPD itself reflects a move away from a medical and protectionist view of disability towards a social and rights based approach in which people with disabilities have a right to enjoy equal legal capacity.

¹ Committee on the Rights of Persons with Disabilities *General Comment No. 1: Article 12: Equal recognition before the law* Adopted 11 April 2014 CRPD/C/GC/1 Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en accessed 24 June 2014. The General Comment provides commentary on both Article 12 of the CRPD and Article 29. Article 12 calls for equal recognition before the law and for states to recognise that persons with disabilities enjoy equal capacity on an equal basis with others in all aspects of life. Article 29 requires states to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others...including the right and opportunity for persons with disabilities to vote and be elected.

² Committee on the Rights of Persons with Disabilities *General Comment No. 1: Article 12: Equal recognition before the law* Adopted 11 April 2014 CRPD/C/GC/1 Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en accessed 24 June 2014 at [48].

³ Human Rights Committee, *General Comment 25*, UN Doc CCPR/C/21/Rev.1/Add 7 (1996), [4]. The Human Rights Committee has not commented recently on individualised assessments of decision-making ability as a basis for removing voting rights.

This progress was echoed by the Office of the High Commissioner for Human Rights in 2011, stating that ‘restrictions of the right to vote and stand for election on the basis of a psychosocial or intellectual disability are not consistent with modern human rights standards on disability.’⁴

2.2 The test based on ‘decision-making ability’ poses too high a threshold

The limitation of voting rights based on decision-making ability poses too high a threshold. Insofar as the test requires a person to understand, retain and weigh information as part of a process of making decisions, it makes false assumptions about the decision-making ability required to vote.

Many people with dementia, for example, may have impaired decision-making ability regarding day to day decisions, but nonetheless maintain long-held and firm views on which person or party should be in government. The decision-making test threatens to disenfranchise these people.

Regardless of decision-making ability, voters choose how to cast their vote for a variety of different reasons – there is no general requirement that people’s decisions be rational, based on available information or even informed by the current party policies. Some may vote based on promised policies and programs, others on how their parents have voted, on the candidate’s hairstyle, artistic qualities of advertisements or who their friend is voting for.⁵ Indeed, the High Court has previously found that an inability to express a preference between candidates is not a sufficient reason not to vote.⁶

Requiring a person to weigh up information to make a choice between candidates may even impose a higher threshold than the current unsound mind provision which merely requires a person to understand the nature and significance of enrolment and voting.

To require persons to prove their ability to understand and weigh up information imposes a burden and requirement that will unfairly affect persons with a disability and may therefore amount to indirect discrimination. Although this may not appear discriminatory on its face, it is more likely that persons with disabilities would have their ability questioned and would have more difficulty meeting the requirement.

⁴ Office of the High Commissioner for Human Rights *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 at [31]

⁵ Janos Fiala-Butora, Michael Ashely Stein, Janet E. Lord ‘The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities’ *Harvard International Law Journal* Vol. 55(1) 2014, 71 at 87.

⁶ *Faderson v Bridger* (1971) 126 CLR 271

2.3 No clear rationale for limiting voting rights based on decision-making ability

Any limitation of fundamental human rights such as the right to vote must be based on objective and reasonable criteria and implemented for a compelling, specific and legitimate aim.⁷ This might also be described as requiring a ‘pressing and substantial’ objective,⁸ reflecting a need to balance the interests of society with those of individuals and groups.

Secondly, the means used by the State to limit rights must be proportionate to the purpose of the limitation.⁹ The onus of establishing that a limitation is reasonable and proportionate rests on the party seeking to rely on the limitation, which will usually be the government.¹⁰

The government has not articulated a rationale for restricting voting based on peoples’ decision-making ability; it has only described broadly the aim of “preserving the integrity of the electoral system”.¹¹ Whilst there is undoubtedly a need to preserve the integrity of the electoral system, it is unclear why it is necessary to disenfranchise of individuals on the basis of their decision-making ability in order to preserve that integrity.

Regardless of disability, not all voters cast their vote by understanding, retaining and weighing information relevant to an election (as required under the ALRC’s proposed decision-making test). Requiring individuals with impaired decision-making ability to vote in this way imposes a burden upon people with a disability that is not imposed upon the general population.

If the concern is that people with impaired decision-making ability will not cast their votes rationally or according to process, the integrity of the system is at far greater risk from informal voting than votes cast by people with impaired decision-making ability. . Currently around 7000 people are disenfranchised each year on the basis of the unsound mind provision, and yet in the September 2013 Federal election, 5.91% of the total votes cast were informal, totalling 811,143 votes.¹² Informal or invalid votes have a much higher chance of adversely influencing an election outcome.

⁷ See Human Rights Committee, *General Comment 25*, UN Doc CCPR/C/21/Rev.1/Add 7 (1996), [4] and *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [150] (Warren CJ).

⁸ The Supreme Court in Canada (Attorney-General) v Hislop [2007] 1 SCR 429, [44]. See also *R v Oakes* [1986] 1 SCR 103, cited with approval by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, [145].

⁹ The most widely accepted test of proportionality is derived from the Canadian case *R v Oakes* [1986] 1 SCR 103.

¹⁰ *Ibid*, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108

¹¹ This is reflected in the ALRC’s discussion paper, Chapter 9.

¹² Australian Electoral Commission *Virtual Tally Room, Election 2013: Informal Votes by State* <http://results.aec.gov.au/17496/Website/HouseInformalByState-17496.htm> 4 November 2013, accessed 24 June 2014.

In fact, other countries have shown that it is unnecessary for electoral laws to restrict peoples’ votes based on decision-making ability. In 2011 the European Council Committee of Ministers in 2011, recommended the removal of voting ‘restrictions based on legal capacity’ and the ‘abolition of voting tests’.¹³ Canada and at least 10 European countries including the UK do not impose any restriction on voting rights based on cognitive ability.¹⁴

The HRLC acknowledges that Australia’s compulsory voting system presents a slightly different context given that people are subject to penalties if they remain on the electoral roll but do not vote. Whilst this difference is significant, it is not insurmountable. The important principle is that persons who express a wish to vote, and who could exercise that right with the appropriate assistance and support, are provided the opportunity to do so.

As the discussion paper suggests, there are options available short of disenfranchising people that would to overcome the penalties for failing to vote under our compulsory voting system. These include making voting optional for people with certain disabilities or making disability a valid excuse for failing to vote.¹⁵ For a limitation to be valid, it ought to be the least restrictive, therefore these options should be considered before completely disenfranchising people based on impaired decision-making ability.

¹³ Council of Europe Committee of Ministers, *Recommendation CM/Rec(2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life* November 2011, available at <https://wcd.coe.int/ViewDoc.jsp?id=1871285&Site=CM>. accessed 23 June 2014.

¹⁴ European Union Agency for Fundamental Rights *The Right to Political Participation of persons with mental health problems and persons with intellectual disabilities* 2010 available at http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability_en.pdf, accessed 18 June 2014. The United Kingdom removed restrictions on the basis of mental capacity in 2006 *Electoral Administration Act 2006* section 73 and the *Electoral Commission Guidance on Entitlement to Register* at 5.3 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/43954/Part-B-Entitlement-to-register-March-2010.pdf

¹⁵ This is similar to a submission put forward by the The Cambridge Intellectual & Development Disabilities Research Group *Submission to the Committee on the Rights of Persons with Disabilities from the Cambridge Intellectual and Developmental Disabilities Research Group (www.cidddrg.org.uk) responding to the call for papers on: The Participation of Persons with Disabilities in Political and Public Life* October 2011 www.cidddrg.org.uk/assets/files/Article-29-CRPD-15-10-11.pdf;

Recommendation 1:

The ALRC should not recommend that people who lack ‘decision-making ability’ be disenfranchised. Such a recommendation may violate Australia’s international human rights law obligations, indirectly discriminate against people with disabilities and the need for such a test has not been demonstrably justified by the government.

3. A broader test based on available supports

The HRLC submits that regardless of decision-making ability, where a person expresses a wish to vote and could do so with appropriate supports and assistance, this should be sufficient basis upon which to allow a person to vote. Such a test or threshold would be consistent with the National Decision Making Principles in Chapter 3 of the Discussion Paper, including placing the emphasis on the will and preferences of the individual.

In 2010 the European Union Agency for Fundamental Rights provided an articulation of this kind of test.¹⁶ It stated that “restrictions on voting rights of persons with disabilities should only be allowed in circumstances where not measures could be taken that would accommodate their specific needs.”¹⁷ The test reflects recent developments in disability rights and the state obligations to provide supports and assistance to enhance the enjoyment of rights, rather disenfranchisement of people based on a qualitative assessment of that person’s individual decision-making ability.

¹⁶ The Agency is one of the EU’s decentralized agencies set up to provide expert advice to the EU and member states on fundamental rights issues.

¹⁷ EU Agency for Fundamental Rights, *The right of political participation of persons with mental health problems and persons with intellectual disabilities*, November 2010, available at <https://www.fra.europa.eu/en/publication/2010/right-political-participation-persons-mental-health-problems-and-persons>, accessed on 18 July 2014. See also, the American Bar Association Commission on Law and Aging Standing Committee on Election Law and Commission on Mental and Physical Disability Law recommended that a person only be disenfranchised by a competent judge finding, on clear and convincing evidence, after due process protections are afforded, that a person ‘cannot communicate, with or without accommodations, a desire to participate in the voting process.’ American Bar Association, Commission on Law and Aging, Standing Committee on Election Law, Commission on mental and physical disability law, *Report to the house of delegates: Recommendation 2007* http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/voting_rec_final_approved.authcheckdam.pdf; see also Hurme and Appelbaum ‘Defining and assessing capacity to vote: the effect of mental impairment on the rights of voters.’ *McGeorge Law Review* 38 (2007) 931-979

The HRLC understands that there may be some people who cannot express a wish to vote and who are incapable of exercising their right to vote, such as persons in a persistent vegetative state. This situation could be characterised as one in which appropriate supports could not be provided.

Recommendation 2:

The ALRC should recommend that restrictions on voting rights of persons with disabilities should only be allowed in circumstances where not measures could be taken that would accommodate their specific needs.

4. A right to fair hearing before losing your vote

The discussion paper proposes that evidence of a person’s decision-making ability could be provided by a range of qualified persons beyond medical practitioners, as is currently the case (proposal 9-5).

The HRLC welcomes the expansion of assessors beyond medical practitioners. The use of medical practitioners perpetrates the medical model of disability and puts medical practitioners in the position of gate keepers to political participation. However the broadening of persons who can make the assessment – to those in a position of carer, guardian, or manager of a residential facility – highlights a broader problem of unfairness in the process for disenfranchising people. There may situations wherein persons responsible for the everyday care of an individual and for assisting them with enrolments and voting, may not have the necessary objectivity to assess a person’s decision-making ability.

Where the assessment of decision-making ability is in the hands of one person, the process does not sufficiently safeguard the voting rights of people with disabilities, nor does it allow for a fair hearing or the consideration of the views of the individual who may be disenfranchised.

The existing system under the *Electoral Act* fails to provide individuals with a fair and accessible opportunity to provide evidence and comment on their disenfranchisement. Currently an individual whose enrolment has been objected to is notified by mail and may respond in writing within 20 days. This presumes the individual will have the capacity to read and understand the letter and to respond, arguably requiring a higher level of decision-making ability than is required to vote. There is no provision for assistance or special measures to ensure the individual understands the consequences of the letter, or is able to read or respond to the letter adequately. Arguably this leads to the disenfranchisement of an individual without a fair hearing.

The Venice Commission’s Code of Good Practice in Electoral Matters of 2002 stated that while individuals could be disenfranchised on the basis of mental incapacity, a finding of mental incapacity could only be imposed by express decision of a court of law.¹⁸ The American Bar Association in 2007 also recommended that a person could only be disenfranchised by a competent judge finding, on clear and convincing evidence, after due process protections are afforded, that a person ‘cannot communicate, with or without accommodations, a desire to participate in the voting process.’¹⁹

Recommendation 3:

That the *Electoral Act* be amended to ensure individuals are provided with a fair hearing, including the assistance and supports needed to respond to an objection under section 93(8)(a), before losing their right to vote.

5. Civil society role in developing assessment guidelines

Should the decision-making ability test be adopted, the HRLC welcomes application of the test at each particular election being held. This reform will ensure that people whose decision-making ability fluctuates, such as people with episodic mental illness, will be able to vote during times when they have decision-making ability. The HRLC notes that the proposal does not outline how this is to be implemented.

In order to ensure implementation caters to the needs and preferences of those who it may affect, the AEC should ensure the participation of people with disabilities and disability advocacy organisations in the development of any guidelines for making that assessment.

¹⁸ European Commission for Democracy through Law (the Venice Commission), Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, adopted by the Venice Commission at 52nd session (18-19 October 2002), Opinion No. 190/2002, doc. CDL-AD (2002) 23 rev.

¹⁹ American Bar Association, Commission on law and aging, Standing committee on election law, Commission on mental and physical disability law, *Report to the house of delegates: Recommendation 2007*
http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/voting_rec_final_approved.authcheckdam.pdf

Recommendation 4:

If the decision-making ability test is adopted, the Australian Electoral Commission should work closely with people with disabilities and disability advocacy groups to ensure election-specific tests and assessment are appropriately structured for the needs of people with disabilities who may be affected by section 93(8)(a)

6. Available versus reasonable assistance and support

The ALRC proposes that consideration of decision-making ability would include consideration of *available* decision-making assistance and support. This would include the ability for a person to have someone supporting them when they vote. The HRLC supports this proposal subject to one amendment.

By focusing only on available supports, individuals may be at risk of disenfranchisement simply because reasonable supports have not been made available. The Commonwealth and the AEC should therefore take steps, in consultation with disability support groups to address this gap and ensure that all persons who, with reasonable supports, would be capable of voting, are able to access those supports and to vote.

Recommendation 5:

That ALRC should recommend that the Commonwealth Government and AEC take steps to ensure all reasonable decision-making assistance and supports are readily available taken into account in determining a person’s decision-making ability.