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## **JOINT STANDING COMMITTEE ON ELECTORAL MATTERS**

### **INQUIRY INTO THE ELECTORAL AND REFERENDUM AMENDMENT (IMPROVING ELECTORAL PROCEDURE) BILL 2012**

#### **SUBMISSION OF PEOPLE WITH DISABILITY AUSTRALIA (PWD)**

**13 JULY 2012**

#### **Annex: OHCHR Thematic Study on Participation in Political and Public Life by Persons with Disabilities (Advanced edited version), December 2011**

Contact:

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People with Disability Australia Incorporated (PWD) is a national disability rights and advocacy organisation. Our primary membership is made up of people with disability and organisations primarily constituted by people with a disability. PWD also has a large associate membership of other individuals and organisations committed to the disability rights movement. Founded in 1981, the International Year of Disabled Persons, PWD seeks to provide people with disability a voice of our own. We have a cross disability focus representing the interests of people with all kinds of disability. PWD is a non-profit, non-government organisation.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are respected and celebrated.

## 1. Introduction

1. PWD recognises the goodwill behind the intention to repeal the expression “by reason of being of unsound mind” from the wording of Paragraph 93(8)(a) of the Commonwealth Electoral Act 1918 (CEA) The current phrasing is derogatory, judgemental and stigmatising; PWD supports its removal from the legislation.
2. Unfortunately, the substitution of this phrase by the words “in the opinion of a qualified person” (as defined by an addition to Section 93) is mere semantics. The proposed amendment does not address the discriminatory nature of the paragraph as a whole, which provides for an assessment of a person’s capability to “understand the nature and significance of enrolment and voting”. PWD recommends that Paragraph 93(8)(a) be repealed in its entirety for the reasons outlined in this submission.
3. To the extent that they involve linguistic changes, PWD agrees that the proposed amendments are technical in nature, especially as they have been motivated by a desire to ameliorate the genuine concerns of parents, families, carers and the medical profession (as outlined in the Explanatory Memorandum) who duly felt that the language was inappropriate. However, the failure of the proposed amendments to address the discrimination embodied in Paragraph 93(8)(a) is disrespectful to people with a disability and raises serious human rights issues under both the International Covenant on Civil and Political Rights (ICCPR) – as referenced in the Explanatory Memorandum – and the Convention of the Rights of Persons with Disabilities (CRPD).<sup>1</sup>
4. The progress of Australia in implementing the rights embodied in both of these international conventions is due to be examined by the respective Committees to these treaties in 2013. PWD strongly encourages the Joint Standing Committee on Electoral Matters to take the opportunity of its consideration of the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (ERA) to work towards bringing Australian law into compliance with its international obligations regarding the right to vote of people with disability.

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<sup>1</sup> ICCPR and CRPD ratified by Australia on 13 August 1980 and 17 July 2008 respectively.

## 2. International law

5. ICCPR Article 25 recognizes that every citizen should have the right and the opportunity, without undue restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives; and to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.
6. In interpreting this provision, Human Rights Committee (HRC) General Comment No. 25 (1996) surmised that “established mental incapacity may be a ground for denying a person the right to vote or to hold office.”<sup>2</sup> In other words, it was envisaged that the existence of a psychosocial disability (mental health problem) or intellectual disability may in some circumstances be seen as a justifiable reason to restrict a person’s right to political participation. As Manfred Nowak has noted, “a certain contradiction can be seen between the principle of universal – i.e. unlimited – suffrage and the authorization, in the chapeau of article 25, to provide for reasonable restrictions”.<sup>3</sup>
7. In 2008, twelve years after the HRC General Comment No.25, the CRPD entered into force. CRPD Article 29 provides that “States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake 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”.
8. As reiterated in the recent Thematic Study on Participation in Political and Public Life by Persons with Disabilities published by the United Nations (UN) Office of the High Commissioner on Human Rights (OHCHR) in December 2011 (and annexed to this submission),

*Article 29 of the CRPD “does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, any exclusion or restriction of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability would constitute “discrimination on the basis of disability” within the meaning of Article 2 of the Convention [CRPD]”<sup>4</sup>.*

9. The Thematic Study examines the argument that any restriction or curtailment of the right of a person with a disability to participate in public life may not in fact be based on disability itself but rather on a lack of legal capacity.

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<sup>2</sup> General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, para. 4, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>

<sup>3</sup> Manfred Nowak, ‘UN Covenant on Civil and Political Rights: CCPR Commentary’, 2nd revised ed. (Kehl am Rhein, Engel, 2005), p. 576.

<sup>4</sup> OHCHR Thematic Study on Participation in Political and Public Life by Persons with Disabilities (Advanced edited version for consideration by the Human Rights Council at their 19<sup>th</sup> session in March 2012), December 2011, para 29. Available at <http://www.ohchr.org/EN/Issues/Disability/Pages/ParticipationPoliticalAndPublicLife.aspx>

10. Such a restriction, the report states, 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”.*

This provision does not provide for any exception.

It requires States parties to take appropriate measures *“to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.* Consequently, deprivation of legal capacity based on a perceived or actual mental illness or psychosocial disability may constitute a violation of the obligations set out in Article 12 [of the CRPD].<sup>5</sup>

11. In summary, the CRPD does not provide any basis on which the right to vote or to participate in public affairs of a person with a psychosocial and/or intellectual disability can be restricted.<sup>6</sup>
12. Furthermore, the UN High Commissioner for Human Rights issued a statement for the international day of people with disabilities, 3 December 2011.<sup>7</sup> She stated that people with disabilities *“are prevented from exercising this right because of discriminatory laws, the lack of accessible voting booths or because electoral material and information is not available in accessible formats such as sign language and Braille. Such obstacles prevent the exercise of one of the most fundamental human rights – to have a say in one’s own government.”*

She concluded that *“individuals with disabilities should certainly be able to vote and participate in decision-making at the community, local and national levels. It is the obligation of the State to ensure this is possible.”*

13. These global developments have been mirrored by regional human rights bodies. In March 2011, Thomas Hammarberg, the then Council of Europe Commissioner for Human Rights, issued an official Statement on the right to political participation of people with disabilities, stating that:

*“There is no room for procedures in which judges or medical practitioners would assess the voting competence of a person and then give a green light—or not.”<sup>8</sup>*

14. In November 2011 the Committee of Ministers of the Council of Europe adopted a Recommendation affirming that:

*“All people with disabilities, whether they have physical, sensory, or intellectual impairment, mental health problems or chronic illnesses, have the right to vote on the same basis as other citizens, and should not be deprived of this right by any law limiting their legal capacity, by any judicial or other decision or by any*

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<sup>5</sup> Ibid, para 30.

<sup>6</sup> Recommendations, Concluding Observations and Jurisprudence of the CRPD Committee is available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx>

<sup>7</sup> OHCHR Press Release, “Pillay: States must remove obstacles to political participation by individuals with disabilities”, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11673&LangID=E>

<sup>8</sup> Available at [http://commissioner.cws.coe.int/tiki-view\\_blog\\_post.php?postId=127](http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=127)

*other measure based on their disability, cognitive functioning or perceived disability”.*

The recommendation goes on to call for European governments to ensure that “their legislation overall does not discriminate against persons with disabilities in political and public life.”<sup>9</sup>

15. Following advocacy by disabled people’s organisations, in December 2011 the Venice Commission (a constitutional law think tank affiliated with the Council of Europe) also amended one of its key documents on electoral matters.<sup>10</sup> The Venice Commission’s previous text stated that, “no person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote and to be elected is imposed by an individual decision of a court of law because of proven mental disability.” The revised text rejects this approach, and instead says that, “universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities and the case law of the European Court of Human Rights.”

## Summary and Recommendation

**16. PWD respectfully invites the Joint Standing Committee to repeal Paragraph 93(8)(a) of the CEA as it is not in conformity with the CRPD. Moreover, and in light of the developments in international human rights law and discourse outlined above, the existence of an actual or perceived psychosocial and/or intellectual disability should not be interpreted as a ground to restrict political rights guaranteed under Article 25 of the ICCPR, whether indicated by an automatic curtailment of that person’s legal capacity to act, or whether restricted through an individualised court decision or the opinion of a “qualified person” as proposed by the ERA Bill.**

### 3. Australian Context

17. Electoral legislation which is premised on presumptions of capacity, non-discrimination, and universal suffrage negates the need to debate or remodel the wording, intention, or *raison d’être* of the phrase “incapacity to understand the nature and significance of enrolment and voting” as used in Paragraph 93(8)(a) or indeed any other capacity based assessment tool.<sup>11</sup> The general population is not compelled to undergo such a test in order to exercise their democratic rights.

18. Repeal of Paragraph 93(8)(a) would provide for all people with an actual or perceived, temporary or long term physical, intellectual or sensory impairment to be recognised as citizens and thus be permitted to exercise their right to vote (subject to the other eligibility

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<sup>9</sup> Available at <https://wcd.coe.int/ViewDoc.jsp?id=1871285&Site=CM>

<sup>10</sup> “Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections”, Adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011), CDL-AD(2011)045.

<sup>11</sup> See the OHCHR Thematic Study (attached) for examples of countries that have no voting eligibility restrictions.

requirements in Paragraphs 93(3)(4)(5)(7) and (8b) of the CEA). This amendment would also satisfy the *Roach v Electoral Commission* jurisprudence as international law precludes disability in any form from constituting a “substantial reason for exclusion” from participation in the life of the community, a qualification observed by then Chief Justice Gleeson.<sup>12</sup>

19. It follows that the provisions in Paragraphs 114, 115, 116 and 118 of the Commonwealth Electoral Act which govern objections to a person’s eligibility to be on the electoral role based on Paragraph 93(8)(a) must also be repealed.
20. Practical matters such as the frequency of local, State and Federal elections in Australia or the compulsory requirement to vote should not distract attention from, or create obstacles to, realising the right to vote for all people with disabilities.
21. It is in the interests of democracy that citizens are encouraged and supported to be politically engaged, that they enrol to vote, and vote ‘on the day’. For people with disabilities to participate on an equal basis with others this involves the provision of accessible information and methods of voting that are appropriate to individual needs. PWD welcomes the positive steps taken to achieve these ends made by The Australian Electoral Commission in recent years.
22. In some instances a person with a disability may not be able to vote ‘on the day’ for reasons unrelated to accessibility. However, this does not mean that they may not be able to vote on any other day in the future. The same is true for any other member of the public on the electoral role which is why Paragraph 245(4)(d) of the CEA provides for an exemption to the penalty for a failure to vote if a “valid and sufficient reason” can be provided. The interpretation of this clause should be wide enough to include temporary or longer-term situations experienced by people with disability (in particular a person with a psychosocial disability and/or intellectual disability and/or increasingly, a degenerative condition which effects brain function), which has restricted their ability to make a choice about voting on that day.

## Evaluation

23. **People with disability have the right to vote on an equal basis with others. As such, all people with disability have the right to be on the electoral role as recognition of their citizenship, inclusion and participation in society. The nature of that right is distinct from whether a person exercises their right to vote on polling day as required by law. If, like any other citizen, a person with disability is unable to vote on polling day then they should also be exempt from penalty if they provide a valid reason. It may be that for a person with a disability the reason provided is related to their disability and the effects it had on their ability to make choices on that specific day. However, democracy requires that this determination be made after the opportunity to vote has been granted and not before.**
24. **Thank you for the opportunity to make a submission to this Inquiry.**

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<sup>12</sup> *Roach v Electoral Commission* (2007) 233 CLR 162 at 174.