



people with disability

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SUPPLEMENTARY SUBMISSION 5.1

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Economic and Social Council of the United Nations

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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

SUPPLEMENTARY SUBMISSION FROM PEOPLE WITH DISABILITY AUSTRALIA (PWD)

30 JULY 2012

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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.

Following the hearing conducted on 16 July 2012, PWD would like to make the following additional comments:

Discrimination

1. PWD agrees that the term “unsound mind” is problematic and supports its removal from the legislation. In law, the term “unsound mind” is a label used to describe a person who has been judged to lack the functional capacity to make rational choices. In terms of the practical application of the legislation under review, this label is usually applied to people with an intellectual and/or psychosocial disability and/or a degenerative brain condition, and it is that specific group of people that the legislation is intended to target.
 2. PWD reiterates the content of our previous submission which advocates for paragraph 93(8)(a) of the Electoral Act 1918 to be repealed in its entirety on the basis that it permits a restriction to the right of people with disability to political participation. This is direct discrimination and a human rights violation (Disability Discrimination Act 1992(DDA), Convention on the Rights of Persons with Disabilities, International Covenant on Civil and Political Rights).
 3. If the wording was amended to read “in the opinion of a qualified person” then the scope of the provision would be widened to include any person judged incapable of “understand[ing] the nature and significance of enrolment and voting”. Despite the neutral wording, this would still amount to indirect discrimination of people with intellectual and/or psychosocial disability as in practice they are the people who are most likely to have their capacity challenged and so would be the most predominantly disadvantaged (DDA). It may also amount to indirect discrimination on the basis of age as older people, particularly those with degenerative brain conditions such as Alzheimer’s or dementia would be similarly disadvantaged (Age Discrimination Act 2004 (ADA)).
 4. For the reasons laid out in our previous submission, PWD argues that this form of indirect discrimination would not be reasonable in the circumstances. Firstly, because removing the right to be enrolled and to vote on grounds of functional capacity is discriminatory and a human rights violation. Secondly, because removing a person from the electoral role is a disproportionate response to concerns that a person with a disability, their family or carer, may be inconvenienced by a failure to comply with compulsory voting requirements. These fears can be addressed through interpretation of the “valid and sufficient reason” provision in Paragraph 245(4)(d). Therefore, an amendment of the wording in its proposed form would merely mount to the introduction of an alternative form of unlawful discrimination into the Act.
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Application

5. PWD has the following concerns regarding the definition of a “qualified person” (doctor, psychiatrist, psychologist, social worker) and the process through which they may come to form their opinion that a person is incapable of “understand[ing] the nature and significance of enrolment and voting” (hereinafter “incapable”):
6. What would be the assessment tool used to deem that a person was “incapable”? Would it be based on a medical assessment? If so, how could it be used by non-medically qualified professionals such as social workers? Would it be diagnostically based? If so, might this risk the provision being applied to whole categories of populations without due consideration of individual circumstances or merely for the sake of convenience, for example, people residing in aged care facilities, licenced boarding houses or psychiatric institutions? Would it be based on an assessment of functional capacity? If so, how will changes in functional capacity over time be factored in? Would the “opinion” remain valid indefinitely or until successfully challenged, or would it be time limited or valid only for a specific election?
7. Universal suffrage is an integral part of democracy and the power to remove the right of a person to participate in the political process is a significant one. Would the “opinion of a qualified person” simply be a conclusion they make based on their own degree of experience and professional judgement? Alternatively, what mechanisms would exist to ensure that any assessment tool was used consistently across jurisdictions and across the professions of the “qualified persons”, especially as they represent different knowledge and skill sets? Which body would provide guidelines and/or training to the professions on how to use the assessment tool and monitor standards, compliance and complaints or appeals? What would be the financial implications of running this system? Would these costs be proportionate to the policy goal of disenfranchising people deemed “incapable”, especially in light of the fact that the policy goal in itself is discriminatory?
8. A brief outline of some of the problems that would be encountered in applying the proposed amendments serves to strengthen the argument that such amendments would constitute indirect discrimination. Despite the neutral wording, people with intellectual and/or psychosocial disability would remain the primary group of people affected by the amended legislation. Moreover, because of the range of professions deemed qualified to assess capability, the breadth of environments that they work in, and the difficulties present in ensuring consistent application of a capability test, the opportunities for using the provision to disenfranchise more people – with or without a disability that may trigger use of the currently worded legislation – especially the elderly, would increase; as would the risk of misapplication and abuse. Australian Electoral Commission statistics indicate that there has already been a rise of just over 13% in the number of people disenfranchised by this provision since 2007.¹

Thank you for the opportunity to make a submission to this Inquiry.

¹ 4,812 people between 1 January 2007 and the 2007 federal election, paragraph 4.54, page 42 of the Australian Government Electoral Reform Green Paper 2009. 5 445 people were removed from the roll by objection on the grounds of unsound mind in 2011–12, paragraph 4.6, page 18, AEC submission to this Inquiry.
