

Comment

Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights

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Abstract

In Australia, persons with intellectual disabilities are denied the right to vote by s 93(8) of the *Commonwealth Electoral Act 1918* (Cth), which excludes persons of ‘unsound mind’ from the electoral roll. It is argued in this comment that s 93(8) is both illegal and unjustified. This provision contravenes international law; the right to vote is enshrined in numerous international legal instruments, and the UN *Convention on the Rights of Persons with Disabilities* (‘CRPD’) specifically guarantees this right for persons with disabilities. In a recent decision by that Convention’s Committee, it was stated unequivocally that the CRPD does not allow for any restrictions on the voting rights of persons with disabilities. This comment also considers the two predominant non-legal rationales for s 93(8), namely threats to the integrity of the electoral process, and concerns that persons with intellectual disabilities may be unfairly fined for failing to vote. The first is unsupported by evidence, while the second can be addressed using less restrictive means. Neither is sufficient to support the denial of a fundamental democratic right to an entire class of persons. In light of these arguments, it is concluded that s 93(8) and its supporting provisions should be repealed.

I Introduction

The right to vote is enshrined in numerous international human rights instruments, and has been deemed ‘arguably the most important political right’.¹ Yet in the majority of democratic nations, including Australia, this right is denied to persons with intellectual disabilities.² This issue was considered by the Australian Law Reform Commission (‘ALRC’) in its Inquiry into Equality, Capacity and Disability

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¹ United Nations (‘UN’) Office of the High Commissioner for Human Rights (‘OHCHR’), *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Participation in Political and Public Life by Persons with Disabilities*, A/HRC/19/36 (2011) [7].

² Kay Schriener, Lisa A Ochs and Todd G Shields, ‘The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities’ (1997) 27(3) *Publius: The Journal of Federalism* 75, 76; Ludvig Beckman, ‘Political Equality and the Disenfranchisement of People with Intellectual Impairments’ (2007) 6(1) *Social Policy and Society* 13, 13, 21.

in Commonwealth Laws.³ In its Final Report on the issue, the ALRC recommended the repeal of the provisions of the *Commonwealth Electoral Act 1918* (Cth) excluding persons with an intellectual disability from the electoral roll.⁴ This recommendation is an important and positive change of position from the ALRC's Discussion Paper, in which the ALRC recommended only that the wording be amended, leaving the substance of the provision intact.⁵ It is argued here that the position of the Final Report is preferable, as it acknowledges the fact that, regardless of the wording of such a provision, the continued denial of voting rights to persons with intellectual disabilities is blatantly discriminatory and contrary to international law.

This comment outlines existing Australian law relating to voting rights and intellectual disability, before examining Australia's international law obligations. It concludes that, by providing that persons of 'unsound mind' may be excluded from voting, Australia fails to comply with its obligations under international law. Despite reaching this conclusion, it is nevertheless worthwhile to assess the purported justifications for the continued denial of voting rights. The most common rationale argues that exclusion is necessary to protect the 'integrity' of the electoral process. This rationale is insufficient to justify the denial of voting rights, particularly in the absence of evidence that voting by persons with intellectual disabilities in any way threatens electoral integrity. A second rationale suggests that this exclusion is intended to protect persons with intellectual disabilities from being penalised for failure to vote. The denial of voting rights is, however, a disproportionate response to this problem, as there are other mechanisms already in place that can achieve this goal without disenfranchising persons with intellectual disabilities. Ultimately, it is argued that s 93(8) and its supporting provisions should be repealed.

II Voting Rights and Intellectual Disability in Australia

The central provision relating to the voting rights of persons with intellectual disabilities in Australia is s 93(8) of the *Commonwealth Electoral Act 1918* (Cth). Section 93(8) provides that, along with those convicted of treason, a person who

by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting ... is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.

Though framed as a blanket exclusion, the section is actually applied only following objection by another elector. Section 114(1A) of the Act provides that an elector may object to the enrolment of another person on the basis of their being of 'unsound mind'. Provided that the objection is accompanied by a certificate from a medical practitioner, under s 118 of the Act the Electoral Commissioner can

³ Australian Law Reform Commission ('ALRC'), *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).

⁴ *Ibid* Recommendation 9-1.

⁵ ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014) [9.24].

remove that person from the electoral roll. Section 116 requires that the person who is to be removed from the roll must be notified of the objection and of the means by which that person can answer the objection. After notification, that person has 20 days to respond.⁶ If there is no response, then that person is removed from the roll.

The meaning of ‘unsound mind’ is unclear, as it is an archaic term with no medical significance. However, the intended target of the provision is clearly persons with an intellectual or psychosocial disability.⁷ There are no guidelines as to how a medical practitioner should examine a person’s ability to understand the nature and significance of enrolment or voting,⁸ nor is the medical practitioner required to give reasons for their conclusion. Instead, the medical practitioner is simply required to sign a form stating: ‘I am a registered medical practitioner and consider that the following person by reason of being of unsound mind is incapable of understanding the nature and significance of enrolment and voting’.⁹ Between 2009 and 2012, 28 603 electors were removed from the roll under these provisions.¹⁰ The Australian Electoral Commission (‘AEC’) does not disclose further information, for example concerning the exact nature of the ‘unsoundness of mind’ in particular instances.¹¹

Section 93(8) was briefly considered by the High Court of Australia in *Roach v Electoral Commissioner* (‘*Roach*’).¹² In that case, the Court held that Parliament could not now legislate to remove universal adult suffrage, and that, to this extent, there is an implied constitutional right to vote.¹³ The Court noted, however, that certain groups could be disqualified from voting for a ‘substantial reason’,¹⁴ where such disenfranchisement is ‘reasonably appropriate and adapted’ to a purpose that is ‘consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’.¹⁵ While holding that denying the right to vote to those serving sentences of less than three years’ imprisonment did not meet this test, the Court held that depriving persons of ‘unsound mind’ of that right was acceptable. Chief Justice Gleeson stated that the rationale for the exclusion of those of ‘unsound mind’ was ‘obvious’, and relates to

⁶ Australian Electoral Commission, ‘Objection claim that an elector should not be enrolled’ (2013) <www.aec.gov.au/Enrolling_to_vote/pdf/forms/objection/er005aw-1213.pdf>.

⁷ People with Disability Australia (‘PWD’), Submission 5.1 to the Joint Standing Committee on Electoral Matters, *Review of the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, 30 July 2012, [2], [3].

⁸ Jason H Karlawish and Richard J Bonnie, ‘Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations’ (2007) 38 *McGeorge Law Review* 879, 891.

⁹ *Ibid.*

¹⁰ Australian Electoral Commission (‘AEC’), Supplementary Submission 2.1 to the Joint Standing Committee on Electoral Matters, *Review of the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, 23 July 2012, 5.

¹¹ AEC, Submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, Submission 2 (2012) [4.6].

¹² (2007) 233 CLR 162.

¹³ *Ibid* 173–4.

¹⁴ *Ibid* 174.

¹⁵ *Ibid* 173, 199.

the ‘capacity to exercise choice’.¹⁶ The joint judgment of Gummow, Kirby and Crennan JJ stated that s 93(8) ‘plainly is valid’,¹⁷ and that it serves the legitimate end of ‘protect[ing] the integrity of the electoral process’.¹⁸

In 2012, the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) was put before the House of Representatives. This Bill sought to amend s 93(8), to remove the term ‘unsound mind’, and provide instead that a person is not entitled to vote if that person ‘in the opinion of a qualified person is incapable of understanding the nature and significance of enrolment and voting’.¹⁹ The Bill was sent to the Joint Standing Committee on Electoral Matters, which recommended that there was ‘no pressing need’ to remove the term ‘unsound mind’, and that s 93(8) should remain unamended.²⁰ This recommendation was accepted.²¹

This issue has arisen again in the ALRC Inquiry into Equality, Capacity and Disability in Commonwealth Laws.²² The ALRC recommended in its Discussion Paper that reference to ‘unsound mind’ be removed, and replaced with a provision excluding from voting persons who lack ‘decision-making ability with respect to enrolment and voting at the relevant election’.²³ The ALRC reiterated the comments of the joint judgment in *Roach*²⁴ that allowing persons with intellectual disabilities to vote constitutes a threat to the ‘integrity of the electoral system’.²⁵ The ALRC also raised concerns relating to the fact that voting is compulsory, suggesting on this basis that repealing s 93(8) would ‘change the nature of voting and voter exclusion in Australia’.²⁶

In its Final Report on the issue, the ALRC has altered its position, recommending the repeal of the provisions denying persons with an intellectual disability of their right to vote.²⁷ The Report notes significant stakeholder support for the repeal of s 93(8) and general opposition to the introduction of a new capacity test,²⁸ such as that proposed in its Discussion Paper. The Report argues that the ‘unsound mind’ provisions should be repealed, and that a new provision should be enacted to provide an exemption from compulsory voting for persons who are unable to vote due to lack of ‘decision-making’ ability.²⁹

¹⁶ Ibid 175.

¹⁷ Ibid 200.

¹⁸ Ibid.

¹⁹ Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) (First Reading Bill), 3.

²⁰ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012* (2012) [2.91], [2.94].

²¹ Supplementary Explanatory Memorandum, The Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth).

²² ALRC, above n 3.

²³ ALRC, above n 5 [9.20].

²⁴ (2007) 233 CLR 162.

²⁵ ALRC, above n 5, [9.21].

²⁶ Ibid [9.23].

²⁷ ALRC, above n 3, Recommendation 9-1.

²⁸ Ibid [9.15], [9.20].

²⁹ Ibid [9.26].

III Comparative Approaches Internationally

Australia is not alone in restricting the right to vote for persons with intellectual disability. A study from 2012 found that, of the 92 democratic states examined, 16 placed no restrictions on the right to vote of persons with intellectual disabilities, while all of the other 76 states continued to restrict this right in various ways, some by automatic exclusion and others following individual assessment.³⁰ Although this in no way justifies Australia's policy, it is nevertheless worthwhile acknowledging that denying voting rights to persons with intellectual disabilities is apparently the global norm.

IV International Law

Despite this tendency among democratic states, there is a significant body of international law indicating that states are bound to accord the right to vote to persons with intellectual disabilities. A number of human rights instruments — to which Australia is a party — recognise and protect the right to vote. Article 21 of the *Universal Declaration of Human Rights*³¹ and art 25 of the *International Covenant on Civil and Political Rights*³² ('*ICCPR*') stipulate that every citizen has the right to take part in public affairs, and both also guarantee the right to vote by universal and equal suffrage. In 1996, in its General Comment relating to art 25 of the *ICCPR*, the Human Rights Committee stated that this provision 'lies at the core of democratic government'.³³ Several other human rights conventions also guarantee the right to vote in particular contexts, for example in relation to racial discrimination³⁴ and discrimination against women.³⁵ In none of these instruments is it suggested that there is any scope for exceptions on the basis of disability. However, in the 1996 General Comment, mentioned above, the Human Rights Committee argued that 'established mental incapacity' may be sufficient justification to deny the right to vote.³⁶ Despite repeatedly stressing the need to accord the right to vote without discrimination, and even particularly noting that restricting this right on the ground of physical disability would be 'unreasonable',³⁷ the Committee nevertheless stated in this same Comment that discrimination on the basis of intellectual disability is permissible under the *ICCPR*.

³⁰ Ludvig Beckman, 'The Accuracy of Electoral Regulations: The Case of the Right to Vote by People with Cognitive Impairments' (2014) 13(2) *Social Policy & Society* 221, 225.

³¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

³² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

³³ Human Rights Committee, *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev1/Add7, (adopted 12 July 1996) [1] ('*General Comment 25*').

³⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(c).

³⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) arts 7–8.

³⁶ *General Comment 25*, UN Doc CCPR/C/21/Rev1/Add7, above n 33, [4].

³⁷ *Ibid* [10].

Whatever the merits of that argument at the time, it is now plainly incompatible with the *Convention on the Rights of Persons with Disabilities* ('CRPD').³⁸ The CRPD, to which Australia is a party, prohibits discrimination on the basis of disability in art 5. Discrimination for the purposes of the CRPD is defined in art 2 as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms' in, among other things, the political field. It is difficult to reconcile this provision with denial of voting rights on the basis of intellectual disability.

Voting rights are addressed specifically in art 29(a) of the CRPD, which requires that states parties ensure full and effective participation in political life for persons with disabilities, including the 'right and opportunity' to vote. The right to vote is expressed without exception. This right was recently reinforced by the Human Rights Council, which called upon states to ensure full participation in political life for persons with disabilities on an equal basis with others, noting particularly the need for states to provide both the right and opportunity for persons with disabilities to vote.³⁹ Notably, many states restrict the right to vote based on whether a person is institutionalised or under legal guardianship.⁴⁰ Attempts have therefore been made to justify such restriction, with states parties arguing that these restrictions do not discriminate based on disability, but are focused instead on legal capacity.⁴¹ Such an argument is plainly not compatible with the CRPD, as art 12(2) provides that persons with disabilities have the right to enjoy legal capacity on an equal basis with others in all areas of life.⁴² The Committee on the Rights of Persons with Disabilities ('the CRPD Committee') has noted in several Concluding Observations that the fact that a state deprives a person of legal capacity is not sufficient justification under the CRPD to deny that person the right to vote.⁴³ The CRPD Committee has further noted that art 12 protects the right to legal capacity in all areas of life, including political life, and so art 12 functions as a further protection of voting rights for persons with a disability.⁴⁴ The CRPD Committee

³⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

³⁹ Human Rights Council, *Rights of Persons with Disabilities: Participation in Political and Public Life*, UN Doc A/HRC/19/L9/Rev1 (20 March 2012).

⁴⁰ European Union Agency for Fundamental Rights, *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities* (2010) 15–20.

⁴¹ Eg, *Kiss v Hungary* (European Court of Human Rights, Application No 38832/06, 20 May 2010), [26]–[27].

⁴² OHCHR, UN Doc A/HRC/19/36, above n 1, [30].

⁴³ Committee on the Rights of Persons with Disabilities ('CRPD Committee'), *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Tunisia*, CRPD/C/TUN/CO/1 (13 May 2011) [35]; Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru*, CRPD/C/PER/CO/1 (20 April 2012) [47]–[48]; Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Hungary*, CRPD/C/HUN/CO/1 (22 October 2012) [46]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, CRPD/C/AUS/CO/1 (4 October 2013) [51]–[52].

⁴⁴ Committee on the Rights of Persons with Disabilities, *Views of the Committee on No 4/2011: Communication Bujdosó v Hungary*, UN Doc CRPD/C/10/D/4/2011 (adopted 9 September 2013).

has noted also that, at the least, such provisions must involve a presumption of voting capacity of persons with intellectual disabilities.⁴⁵

This issue was addressed by the European Court of Human Rights in the case of *Kiss v Hungary*.⁴⁶ In that case, the applicant was excluded from registering to vote on the ground that he was under partial guardianship. The Court held that this exclusion contravened the right to free elections in art 3 of Protocol 1 to the *European Convention on Human Rights*.⁴⁷ The Court rejected the argument by the state party that automatically disenfranchising all persons under legal guardianship constituted a proportionate interference with the right to free elections, but left unresolved the question of the legitimacy of disenfranchisement pursuant to an 'individualised judicial evaluation'.⁴⁸

Any suggestion that there could be justifiable exceptions to the right to vote on the basis of intellectual disability was, however, unequivocally rejected by the Committee in the *Bujdoso v Hungary* communication.⁴⁹ This communication concerned the removal from the electoral register by Hungary of the names of six persons with intellectual disabilities on the basis that they had been placed under guardianship. Hungary sought to argue that this denial of voting rights was justified, as the legislation had been amended to provide for individual judicial assessment of the capacity to vote of a person under guardianship, meaning that persons with intellectual disabilities were not automatically excluded from voting.⁵⁰ The Committee rejected this argument, and stressed that art 29 of the *CRPD* 'does not provide for any reasonable restriction or exception for any group of persons with disabilities'.⁵¹ On this basis, the Committee held that denying the right to vote to a person on the basis of intellectual disability, even when denial is based on an individualised assessment of capacity, breaches art 29 and falls within the *CRPD* definition of discrimination in art 2.⁵² Following this communication, it is clear that there is no scope under the *CRPD* for exceptions to the right to vote based on intellectual disability.

This issue has been further addressed by the Committee in its concluding observations on the reports made to the Committee by several states. For example, in its observations on Tunisia, the Committee recommended the 'urgent adoption' of legislation to ensure persons with intellectual disabilities can exercise the right to vote on an equal basis with others.⁵³ Similar comments have been made in a number of other Concluding Observations, and the Committee has noted repeatedly that the right to vote should be extended to all persons with disabilities,

⁴⁵ See, eg, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) [52].

⁴⁶ *Kiss v Hungary* (European Court of Human Rights, Application No 38832/06, 20 May 2010).

⁴⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁴⁸ *Kiss v Hungary* (European Court of Human Rights, Application No 38832/06, 20 May 2010), [44].

⁴⁹ Committee on the Rights of Persons with Disabilities, UN Doc CRPD/C/AUS/CO/1, above n 45.

⁵⁰ *Ibid* [4.3].

⁵¹ *Ibid* [9.4].

⁵² *Ibid* [9.4].

⁵³ Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Tunisia*, CRPD/C/TUN/CO/1 (2011) [35].

even those in institutions or deprived of legal capacity.⁵⁴ In this way, the Committee has repeatedly made clear that the right to vote cannot be denied on any basis to persons with disabilities, irrespective of legal status, type of impairment, or institutionalisation.

The *CRPD* imposes further obligations on states parties beyond simply requiring that they not deny the right to vote. The UN Office of the High Commissioner for Human Rights has noted that art 29 provides not only for the right, but also for the opportunity to vote, thereby imposing a duty on states to actively ensure that persons with disabilities are in fact given the opportunity to exercise their right to vote.⁵⁵ This can be seen in art 29(b), which requires states parties to promote an environment in which persons with disability can effectively participate in public affairs. Similarly, art 29(a)(i) provides that states parties should ensure that voting procedures are accessible to persons with disabilities, an obligation that is reinforced by art 9, which imposes a general obligation on states to identify and eliminate barriers to accessibility for persons with disability. Each of these provisions requires states to take active steps to ensure that the right to vote is, in fact, being enjoyed and exercised by persons with disabilities. In this way the voting provisions reflect a general principle of the *CRPD*, namely the need for states parties to provide ‘reasonable accommodation’. The definition of discrimination in art 2 includes denial of reasonable accommodation; this means that states are required to make ‘necessary and appropriate modification and adjustments’ to provide for the enjoyment and exercise of rights on an equal basis with others. Ultimately, international law requires states parties to do more than provide formal equality in voting rights to comply with their obligations under the *CRPD*; states must take active measures to ensure that persons with a disability are in fact able to enjoy and exercise their right to vote on an equal basis with others.

V Australia’s Compliance with International Law

Australia’s electoral laws are evidently in breach of the voting rights provisions in the *CRPD*. Section 93(8) of the *Commonwealth Electoral Act 1918* (Cth) discriminates on the basis of disability by restricting people of ‘unsound mind’ from voting. Though the meaning of ‘unsound mind’ is unclear, there is little question that it is targeted at persons with intellectual disabilities, particularly as a person can only be excluded following assessment by a medical practitioner. Though the High Court in *Roach*⁵⁶ argued that this was a reasonable and justifiable exception to universal suffrage, the above analysis demonstrates that international law does not allow for any exception to the right to vote based on disability. By expressly excluding persons with intellectual disabilities from voting, this law unquestionably contravenes the *CRPD*.

⁵⁴ See Committee on the Rights of Persons with Disabilities, UN Doc CRPD/C/10/D/4/2011, above n 44.

⁵⁵ OHCHR, UN Doc A/HRC/19/36, above n 1, [15]

⁵⁶ (2007) 233 CLR 162.

The Human Rights Law Centre ('HRLC') argues that the use of the term 'unsound mind' may in itself be a breach of the *CRPD*.⁵⁷ Specifically, the HRLC refers to art 8 of the *CRPD*, which requires states to 'foster respect for the rights and dignity of persons with disabilities'. The use of an archaic and 'stigmatising' term, the HRLC argues, is in breach of this provision.⁵⁸ Even if the term 'unsound mind' were to be removed, as proposed by the 2012 Bill and recommended in the ALRC's Discussion Paper (though not included in the Final Report), this law would remain in breach of the *CRPD*. Removing the term 'unsound mind' would alleviate concerns relating to art 8; however, as noted by People with Disability Australia ('PWD'), doing so would not be sufficient to meet Australia's obligations with regard to voting rights under the *CRPD*.⁵⁹ While this may achieve formal equality, the provision would nevertheless continue to target persons with intellectual disabilities. As noted above, the *CRPD* is focused on substantive equality; it is not enough that the law does not directly discriminate, instead Australia is obliged to take active measures to ensure that the right to vote is in fact able to be enjoyed and exercised by persons with intellectual disabilities on an equal basis with others. Even without the term 'unsound mind', the legislation would still involve a test of capacity administered on the basis of complaints from other electors requiring assessment by a medical practitioner. The role of the medical practitioner is particularly significant here; disenfranchisement would continue to be based on the existence of some identifiable medical condition, and so the provision would affect only those with some clinical impairment.

Even if s 93(8) and the accompanying provisions concerning disqualification were removed, a further obligation would need to be addressed, namely the need to make reasonable accommodation to ensure that persons with intellectual disabilities are able in practice to fully and equally enjoy their voting rights. Many factors beyond direct voting restrictions operate to prevent persons with disability from the full and equal exercise of their voting rights. Inaccessible polling places, lack of easily comprehensible electoral information, confusing or difficult ballot design, and inadequately trained electoral officials have all been identified as issues that can prevent persons with disability from exercising the right to vote on an equal basis with others.⁶⁰ It is beyond the scope of this comment to assess exactly what measures must be undertaken to provide reasonable accommodation, but it is worthwhile recognising this important duty imposed by international law. This obligation is particularly significant in Australia given the imposition of penalties for failure to vote.

⁵⁷ Human Rights Law Centre, *Disenfranchising Persons of "Unsound Mind": Discrimination in Australia's Electoral Law*; Submission No 54 to the Australian Law Reform Commission, *Inquiry into Legal Barriers for People with Disability* (January 2014).

⁵⁸ *Ibid* [46].

⁵⁹ People with Disability Australia ('PWD'), Submission 5 to the Joint Standing Committee on Electoral Matters, *Review of the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, 13 July 2012,.

⁶⁰ Pamela S Karlan, 'Framing the Voting Rights Claims of Cognitively Impaired Individuals' (2007) 38 *McGeorge Law Review* 917, 921; Janet E Lord, Michael Ashley Stein and János Fiala-Butora, 'Facilitating an Equal Right to Vote for Persons with Disabilities' (2014) 6(1) *Journal of Human Rights Practice* 115, 132.

VI Rationales for Discrimination

In *Roach*,⁶¹ the High Court held that the ‘unsound mind’ provision had an ‘obvious’ rationale⁶² and that the denial of voting rights to persons with intellectual disabilities serves an end that ‘plainly enough, is consistent and compatible with the maintenance of the system of representative government’.⁶³ Although the above analysis suggests that this denial of rights contravenes international law, authorities such as the High Court have suggested that such denial is justified. It is therefore worthwhile examining the suggested non-legal rationales for this discrimination.

A *The ‘Integrity’ of the Electoral Process*

The joint judgment of Gummow, Kirby and Crennan JJ in *Roach* held that excluding persons with intellectual disabilities from voting is justified because it ‘protect[s] the integrity of the electoral process’.⁶⁴ This appeal to the ‘integrity’ of elections is perhaps the most common rationale used in support of such exclusion,⁶⁵ and was relied upon by, for example, the Joint Standing Committee on Electoral Matters.⁶⁶ Though neither the High Court nor the Committee explain the exact nature of the purported threat to the integrity of elections, most arguments to this effect rely on the possibility of fraud, manipulated voting, or voting by persons lacking voting ‘capacity’.⁶⁷

1 *Fraud*

In relation to fraud, there is no clear evidence to support this rationale.⁶⁸ As Fiala-Butora, Stein and Lord note, there are limited statistics on electoral fraud generally, and no particular evidence of electoral fraud involving voters with intellectual disability.⁶⁹ In the absence of any evidence to this effect, the possibility of electoral fraud is clearly an insufficient rationale for disenfranchisement, as the High Court of Australia itself held in relation to restrictions on late enrolment in *Rowe v Electoral Commissioner*.⁷⁰

⁶¹ (2007) 233 CLR 162.

⁶² *Ibid* 175.

⁶³ *Ibid* 200.

⁶⁴ *Ibid*.

⁶⁵ János Fiala-Butora, Michael Ashley Stein and Janet E Lord, ‘The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities’ (2014) 55 *Harvard International Law Journal* 71, 85; Schriner, Ochs and Shields, above n 2.

⁶⁶ Joint Standing Committee on Electoral Matters, above n 20.

⁶⁷ Fiala-Butora, Stein and Lord, above n 65, 85.

⁶⁸ *Ibid* 86; Nina A Kohn, ‘Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity’ (2007) 38 *McGeorge Law Review* 1065, 1076.

⁶⁹ Fiala-Butora, Stein and Lord, above n 65, 85–6.

⁷⁰ (2010) 243 CLR 1.

2 *Manipulated Voting*

Similarly, there is limited data to support concerns that persons with intellectual disabilities are more likely to be subject to manipulation in relation to voting.⁷¹ In light of this, if there are genuine concerns about voter manipulation, it is unclear why only persons with intellectual disabilities should be excluded from voting. Even assuming that persons with intellectual disabilities are more likely to be subject to electoral manipulation, this does not justify disqualification from voting; instead, as Schriner, Ochs and Shields argue, it points to the need for greater protections, for example ensuring secrecy of the ballot, and the enforcement of anti-coercion laws.⁷² As Redley and colleagues note, denying voting rights to a class of people based merely on the speculative, unproven possibility that they may be unduly influenced by some other person or persons is wildly out of proportion to the end of protecting the ‘integrity’ of the vote.⁷³

3 *Voting Capacity*

The most widely cited threat to electoral integrity comes from those lacking ‘capacity’ to vote.⁷⁴ This rationale has been used to justify different forms of restriction on the right to vote. Some states have used this as justification for automatic exclusion clauses, generally denying the right to vote to all persons in institutions or under guardianship.⁷⁵ Such policies involve an outdated medical model of disability, directly linking a person’s capacity with a clinical impairment, rather than actually ascertaining the extent of that person’s functional abilities.⁷⁶ To indiscriminately exclude all persons with intellectual disabilities, or all persons under guardianship, fails to recognise the wide variety of impairments and varying levels of capacity that fall within this label. As noted by the European Court of Human Rights in *Kiss v Hungary*, this will inevitably exclude a large number of people who unquestionably have capacity.⁷⁷ Several studies have shown that there is only a limited connection between intellectual disability and capacity to vote,⁷⁸ and that a majority of persons with disability have voting capacity.⁷⁹ For this reason, appeals to voting capacity cannot justify automatic denial of voting rights to persons with intellectual disabilities.

⁷¹ Fiala-Butora, Stein and Lord, above n 65, 86–7; M Redley et al, ‘The Voting Rights of Adults with Intellectual Disabilities: Reflections on the Arguments, and Situation in Kenya and England and Wales’ (2012) 56(11) *Journal of Intellectual Disability Research* 1026, 1028.

⁷² Schriner, Ochs and Shields, above n 2, 92.

⁷³ Redley et al, above n 71, 1028.

⁷⁴ Ibid 1027–8; Fiala-Butora, Stein and Lord, above n 65, 88; Karlawish and Bonnie, above n 8, 885.

⁷⁵ Fiala-Butora, Stein and Lord, above n 65, 88.

⁷⁶ Redley et al, above n 71, 1028.

⁷⁷ *Kiss v Hungary* (European Court of Human Rights, Application No 38832/06, 20 May 2010), [39].

⁷⁸ See, eg, Paul S Appelbaum, Richard J Bonnie and Jason H Karlawish, ‘The Capacity to Vote of Persons with Alzheimer’s Disease’ (2005) 162(11) *American Journal of Psychiatry* 2094; Jessica N Link et al, ‘Assessing Voting Competence and Political Knowledge: Comparing Individuals with Traumatic Brain Injuries and “Average” College Students’ (2012) 11(1) *Election Law Journal* 52.

⁷⁹ Fiala-Butora, Stein and Lord, above n 65, 88.

Other states have utilised the same rationale as a justification for exclusion based on individualised assessment of a person's capacity.⁸⁰ In most cases, however, the exclusion is still predicated on intellectual disability. Restrictions on voting rights in this form continue to correlate incapacity to vote with disability; that is, any form of capacity test applies only to persons with intellectual disabilities and not to the general populace. If the integrity of the election is genuinely threatened by persons lacking capacity to vote, then it is unclear why capacity testing would be restricted to persons with intellectual disabilities. A number of studies have demonstrated that there is only a weak relationship between intellectual disability and lack of capacity to vote.⁸¹ One such study by Link and colleagues in 2012 compared the scores achieved on the 'Competency Assessment Tool for Voting' (a set of criteria developed by a federal district court in the United States) by persons with Traumatic Brain Injury ('TBI') on the one hand and college students on the other.⁸² The study found that scores on these tests did not differ significantly between the two groups, finding further that there were similar levels of knowledge concerning the relevant election and politics generally.⁸³ In light of these findings, Link and colleagues argued that it would be unjust to apply a capacity test to a 'demonstrably competent group', such as those with TBI or persons with intellectual disabilities, and not to all voters.⁸⁴

Given that there are apparently very limited differences in the voting capacity of persons with intellectual disabilities and electors generally, there is no clear reason for capacity testing to be applied only to the former group. Notably, there have been no concerns raised about threats to the integrity of the electoral process in Australia resulting from voting by persons without intellectual disabilities, but who nevertheless cannot understand the nature and significance of elections and voting.

Even if such concerns were raised, a better response would be to provide reasonable accommodation to ensure that as many persons as possible were able to exercise their right to vote. Beckman makes this point through reference to the argument of John Stuart Mill that 'excluding people for illiteracy when there is no public school is unjust'.⁸⁵ It would be similarly unjust to exclude persons from voting on the basis of a lack of voting capacity without providing such persons with the greatest opportunity to vote, for example through the provision of easy-to-understand information, targeted specifically to such persons, concerning the particular election and the electoral process generally.

Another problem with this rationale lies in the difficulty in defining voting capacity. It is generally accepted that it would be unacceptable to restrict voting rights based on educational requirements or literacy tests.⁸⁶ Beyond this, the standard required to be deemed electorally capable is the subject of substantial

⁸⁰ *Ibid.*

⁸¹ Appelbaum, Bonnie and Karlawish, above n 78; Link et al, above n 78.

⁸² Link et al, above n 78.

⁸³ *Ibid* 60.

⁸⁴ *Ibid.*

⁸⁵ Beckman, above n 2, 18.

⁸⁶ *General Comment 25*, UN Doc CCPR/C/21/Rev1/Add7, above n 33; Redley et al, above n 71, 1027.

contention, and proposed requirements of capacity vary widely.⁸⁷ The definitional uncertainty surrounding capacity does not necessarily mean that capacity-testing, if applied uniformly to all electors and not only to persons with intellectual disabilities, is entirely unjustified. It does, however, suggest that, any such test must include clearly defined standards. In Australia, electoral law provides only that a person is excluded from voting if, 'by reason of unsound mind' they are 'incapable of understanding the nature and significance of enrolment and voting'.⁸⁸ There are no guidelines as to what elements of enrolment and voting must be understood by that person, nor what level of understanding is required. As Beckman notes, 'vague and ambiguous' standards such as this create a serious risk of arbitrary disenfranchisement.⁸⁹ Notably, this unguided discretion is exercised by a medical practitioner, despite the fact that the requirement of understanding the nature and significance of voting is evidently not a medical standard. As noted by Schriener, Ochs and Shields, the views of professionals concerning capacity are not inherently superior to those of laypersons, and are often merely a 'sanctified version' of prejudices held by the public generally.⁹⁰ This is particularly the case where the capacity being assessed is not directly related to the expertise of the professional, as is the case with the 'unsound mind' provision in Australia.

B *Compulsory Voting and Penalties*

Another argument raised to support the continued denial of voting rights to persons with intellectual disabilities focuses on the existence of compulsory voting in Australia. In its Discussion Paper, the ALRC noted these concerns, arguing against repealing s 93(8) in part on the basis that doing so would 'change the nature of voting and voter exclusion in Australia'.⁹¹ Similarly, in the 2008 *Electoral Reform Green Paper*, it was argued that the provision protects persons with intellectual disabilities from being penalised for failing to vote and thereby serves their 'best interests'.⁹² On this basis, it has been argued that the provision is not in fact an exclusion, but rather is an 'excuse'.⁹³

Even if reasonable accommodation were made in all cases, there are nevertheless conceivable instances in which persons with intellectual disabilities may be incapable of voting on election day.⁹⁴ There should undoubtedly be measures in place to assure that individuals are not penalised in such instances. However, pre-emptive disqualification of persons with intellectual disabilities, even after individualised assessment, is disproportionate to this aim. Section 245(4)(d) of the *Commonwealth Electoral Act 1918* (Cth) provides that no penalty will follow from failure to vote if the elector 'had a valid and sufficient reason for failing to vote'. As PWD argue, a more proportionate response would be

⁸⁷ Fiala-Butora, Stein and Lord, above n 65, 89; Redley et al, above n 71, 1027.

⁸⁸ *Commonwealth Electoral Act 1918* (Cth) s 93(8).

⁸⁹ Beckman, above n 30, 222.

⁹⁰ Schriener, Ochs and Shields, above n 2, 94.

⁹¹ ALRC, above n 5, [9.23].

⁹² Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, Department of the Prime Minister and Cabinet (2009) 42.

⁹³ Karlawish and Bonnie, above n 8, 891.

⁹⁴ Fiala-Butora, Stein and Lord, above n 65, 89.

to give a sufficiently broad interpretation to s 245(4)(d) to include instances where a person's disability restricts that person from voting in a particular election.⁹⁵ The section could be amended, as the ALRC recommend, to specify that penalties should not be applied where a person, by reason of intellectual disability, is incapable of voting at a particular election.

Karlawish and Bonnie note that AEC officials have substantial discretion in choosing whether or not to penalise failure to vote in particular cases.⁹⁶ This discretion could surely be extended to persons with a disability who are unable to vote in a particular election. In fact, Karlawish and Bonnie point to a comment made in an AEC background paper specifically stating that it is 'unlikely' that a fine would be imposed on 'the intellectually disabled'.⁹⁷ In light of these existing mechanisms, s 93(8) is both disproportionate and redundant if its true purpose is to prevent unfair penalisation for failure to vote.

VII Conclusion

Australia's continued denial of voting rights to persons deemed to be 'of unsound mind' is illegal and unsupported by any clear rationale. The right to vote is guaranteed by a number of international human rights instruments to which Australia is a party, and the *CRPD* makes clear that the right to vote must be accorded without exception on the basis of intellectual disability. Even if the phrase 'unsound mind' were removed entirely, s 93(8) would continue to discriminate against persons with intellectual disability in practice, and would remain in breach of international law. Further, the suggested non-legal justifications for the provision are not persuasive, and are largely unsupported by empirical evidence. Given the absence of any convincing rationale for discrimination, and in light of the impetus provided by the report of the ALRC, s 93(8) of the *Commonwealth Electoral Act 1918* (Cth) should be repealed, along with the accompanying provisions outlining the procedure for disqualification. Doing so would remove from Australian law a provision that is both illegal and unjustified.

⁹⁵ PWD, above n 59, 22.

⁹⁶ Karlawish and Bonnie, above n 8, 890.

⁹⁷ *Ibid* 890.