Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

7 October 2022

Dear Committee Secretary,

RE: Inquiry into the 2022 federal election

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to Joint Standing Committee on Electoral Matters, responding to terms of reference (c) and (f) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. S 93(8)(a) of the *Electoral Act 1918* (Cth) should be repealed, and a new s 245(4)(e) should be enacted which reads 'was unable to vote due to a lack of decision-making ability'.

2. The Commonwealth Parliament should amend the *Electoral Act 1918* (Cth) to include regulation of truth in political advertising akin to the legislative regimes established in the Australian Capital Territory and South Australia.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

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Introduction

This submission is about broadening the franchise and introducing truth in political advertising laws. We are lucky to live in a country where we have such a robust electoral system. One of our system's strengths is the possibility for it to adapt overtime. Our recommendations should be adopted with the purpose of ensuring equality and integrity in our electoral system.

1. Broadening the Franchise – Unsound Mind

The Government should repeal s 93(8)(a) and amend s 245(4) of the *Electoral Act 1918* (Cth) ('the Act') to include persons with intellectual disabilities in the franchise.

S 93(8)(a) provides that any person:

> being of unsound mind … 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.

This provision should be repealed because it denies people with intellectual disabilities the right to vote, in contravention of international law.[1]

There is no constitutional issue with this provision remaining. In *Roach v Electoral Commissioner* the High Court implied a constitutional right to vote,[2] however the Court noted that there was 'substantial reason' for certain disenfranchisement and this extended to people of 'unsound mind'.[3] Gleeson CJ said that it was 'obvious' that people of 'unsound mind' were excluded,[4] whilst Gummow, Kirby and Crennan JJ stated that s 93(8) 'plainly is valid' because it 'protects the integrity of the electoral process'.[5]

However, we submit that s93(8)(a) should be repealed because the Government owes a moral duty to persons with intellectual disabilities to ensure that they are not prohibited from voting.

History

In 2012, the *Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012* (Cth) ('the Bill') was put before the House of Representatives. The Bill sought to amend s 93(8) to provide 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'. The Joint

[1] See generally, Trevor Ryan, Andrew Henderson and Wendy Bonython, 'Voting with an 'Unsound Mind'? A Comparative Study of the Voting Rights of Persons with Mental Disabilities' (2016) 39(3) University of New South Wales Law Journal 1038.
[2] (2007) 233 CLR 162, 173 (Gleeson CJ).
[3] Ibid 174.
[4] Ibid 175.
[5] Ibid 200 (Gummow, Kirby and Crennan JJ).

Standing Committee on Electoral Matters recommended that there was 'no pressing need' to remove the term 'unsound mind' and that s 93 should remain unamended.[6]

This Committee also considered the voting rights of persons with intellectual disabilities in its 'Report on the Conduct of the 2019 federal election' ('2019 Report').[7] This Committee noted that the phrase 'unsound mind' is 'outdated and pejorative', and that the AEC agrees that the terminology should be substituted and modernised.[8] Yet, no changes have been implemented in this regard.

The Australian Law Reform Commission has instead recommended that s 93(8)(a) should be repealed and a new provision should be enacted that provides an exemption from compulsory voting for persons who are unable to vote due to a lack of 'decision-making' ability.[9]

Possible reform

We submit that a complete repeal, rather than amendment of s 93(8)(a), should be favoured.

There are two main arguments which have been proposed in favour of amending, rather than entirely repealing s 93(8)(a).

1. The section protects the integrity of the voting system; and
2. The section protects persons with intellectual disabilities from being penalised for a failure to vote.

The first of these arguments was cited by the AEC in this Committee's 2019 Report.[10] The AEC said that there must be:

> … a mechanism for dealing with those electors who … [are] incapable of understanding the nature and significance of enrolment and voting … in order to protect the integrity of the electoral system.

There is limited evidence to support this position.[11] Studies have found that there is a very weak relationship between intellectual disability and lack of capacity to vote.[12] Further, if the concern is integrity, then it is incongruous that a person with an intellectual disability is prohibited from voting but other electors who do not have an intellectual disability but nevertheless do not

[6] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012* (2012).
[7] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (2020) [7.65] – [7.72].
[8] Ibid [7.66], [7.68].
[9] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) 20.
[10] Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* [7.67].
[11] Jonathon Savery, 'Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights' (2015) 37(2) *Sydney Law Review* 287, 296.
[12] Ibid 298.

understand the significance of voting are still able to vote. The repeal of the provision would not harm integrity and would advance the rights of persons with intellectual disabilities.

The second of these arguments was also cited by the AEC in this Committee's 2019 Report.[13] The AEC said that there must be a mechanism 'to allow those who are in some way mentally incapable of casting a vote not to be penalised for not voting.'

Whilst persons with intellectual disabilities should not be penalised, s 93(8)(a) is disproportionate to the aim of ensuring that persons with intellectual disabilities are not penalised. Section 93(8)(a) pre-emptively disqualifies persons with an intellectual disability. This restricts the voting rights of people with disability in too harsh a way if the aim is to prevent these peoples from being penalised. Instead, the Committee should recommend the repeal of s 93(8)(a) and that a new s 245(4)(e) should be enacted which specifies that penalties should not be applied to people with intellectual disabilities. If the rationale of s 93(8)(a) is to prevent persons with intellectual disabilities from being penalised, then it can be achieved through an amendment to s 245(4) and not the continued restriction imposed in s 93(8)(a).

International law principles

International law principles support persons with intellectual disabilities being included in the franchise.

Australia is a party to the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').[14] Section 93(8)(a) expressly contravenes Article 5 of the *CRPD*. Article 5 prohibits discrimination on the basis of disability. Article 2 defines discrimination 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'. We submit that by discriminating and restricting persons with intellectual disabilities from voting, Australia continues to contravene the *CRPD*.

Further, Article 29 provides that states must ensure that 'voting procedures, facilities and materials are appropriate, accessible and easy to understand and use'. The repeal of s 93(8)(a) is only the first step. The *CRPD* imposes a positive obligation on Australia to ensure there are no impediments to any persons with intellectual disabilities from voting.

Conclusion

Section 93(8)(a) should be repealed in order to advance the voting rights of persons with intellectual disabilities and for Australia to fulfil its obligation under the *CRPD*.

[13] Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election* [7.67].
[14] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

Recommendation 1: S 93(8)(a) of the *Electoral Act 1918* (Cth) should be repealed, and a new s 245(4)(e) should be enacted which reads 'was unable to vote due to a lack of decision-making ability.'

2. Truth in Political Advertising Laws

False and misleading political advertisements undermine the legitimacy of our democracy and erode public confidence in the electoral process. With the dawn of social media and 'fake news' weaponised by politics, the burden is on voters to find the truth.[15] Exposure to misinformation, particularly misinformation espoused from political office holders undermines voter's confidence in the electoral system and their elected representatives. We submit that Australia also needs these laws in response to deliberately false attack advertising in the 2016 and 2019 elections.[16]

Attempts to enact false political advertising laws in Australia have been mostly unsuccessful in the past, at both a State and Federal level, with only the Australian Capital Territory and South Australia having such laws.[17] The Commonwealth's attempts through section 392 of the Act were repealed in 1983, on the understanding that they were not enforceable.[18] The largest barrier to enforcement is the subjectivity of truth and concerns that it would undermine the legitimacy of the Australian Electoral Commission.[19]

However, what the ACT and SA did, was to leverage an established mechanism by which to find the truth; the courts. The Australian court system has an important, albeit often overlooked role, in elections as the 'Courts of disputed returns'.[20] They have the ultimate say in disputes arising from elections. The reason they hold this position is that the judiciary has well-established independence from the political process and a pre-established tool for obtaining the truth through the rules of evidence.[21]

The ACT and SA laws adopt identical language and have two important aspects:

- Prevention and take-down orders from the Electoral Commissioner;[22] and

[15] John Brumette, et al, 'Read All About It: The Politicization of "Fake News" on Twitter' (2018) 95(2) J*ournalism and Mass Communication Quarterly* 497.
[16] See, eg, Andrea Carson, Aaron J Martin & Shaun Ratcliff, 'Negative campaigning, issue salience and vote choice: assessing the effects of the Australian Labor party's 2016 "Mediscare" campaign' (2020) 30(1) *Journal of Elections, Public Opinion and Parties* 83.
[17] See, eg, *Electoral Act 1992* (ACT) s 297A.
[18] *Commonwealth Electoral Act 1918* (Cth) s 329(2) as repealed by *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 114.
[19] Katie Burgess, 'Truth in Political Advertising Laws "Unworkable", ACT Electoral Commission Says' The Canberra Times (online, 25 July 2017).
[20] See *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018)
[21] See generally *Evidence Act 1995* (Cth).
[22] See, eg, *Electoral Amendment Act 2020* (ACT) subs 297A(3).

- Final court-imposed take-down orders and offences.[23]

The first stage, enacted by the respective Electoral Commissioner, acts as a formal and public order to the responsible person or political party. Importantly, this can occur during or before an election period and can act to remove potential harmful and false advertising before it has too significant an effect on the election. Although Electoral Commissioners have been hesitant to exercise these powers, the SA Electoral Commissioner has exercised this power seventeen times in the 2014 and 2018 elections without a single prosecution of the offence.[24] This is despite hesitancy about the effects on the independence and the Electoral Commission in 2014.[25] A study of South Australia's false political advertising regime found that 'the provisions in South Australia ... score very well in terms of both operability and perceptions'.[26]

The second stage, enacted by Supreme Courts or the High Court, imposes general deterrence from engaging in false advertising after the fact in a more objective and authoritative manner. Suggesting that truth in political advertising laws are not enforceable also misconstrues the purpose of these laws. Laws can be, amongst other things, a deterrent against actions.[27] Although there may be challenges to enforcement, the existence of the law establishes a norm by which politicians, political parties and other political advertisers should assess their conduct.[28] The fear of sanction, either by warning or by prosecution in a court, is sufficient to deter politicians from deliberately engaging in false or misleading political advertising. It also serves to promote caution when engaging with political advertising to ensure that all statements are true and not wildly misleading.

Ultimately, introducing truth in political advertising laws, akin to those already in operation in the ACT and SA, will restore some trust in the Australian democratic system.

Recommendation 2: The Commonwealth Parliament should amend the *Electoral Act 1918* (Cth) to include regulation of truth in political advertising, akin to the legislative regimes established in the Australian Capital Territory and South Australia.

3. Conclusion

We would welcome the opportunity to speak to Committee about this submission should the Committee deem it necessary.

[23] See, eg, *Electoral Amendment Act 2020* (ACT) subs 297A(3)5.
[24] Jake Evans, 'ACT passes new political advertising laws to ensure voters are not 'deceived on the way to the ballot box', ABC News (online, 28 August 2020).
[25] Ibid.
[26] Alan Renwick and Michela Palese, *Doing Democracy Better: How can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (Report, University College London, March 2019).
[27] Ben Knight, 'Do harsher punishments deter crime?', *UNSW Newsroom* (online, 16 July 2020).
[28] Liam Brodrick and Sebastian Mazay, Submission No 13 to ACT Standing Committee on Justice and Community Safety, *Inquiry into 2020 ACT Election and the Electoral Act*, 5 May 2021, 5.