

Human Rights Law Centre

14 October 2022

Ms Kate Thwaites MP
Joint Standing Committee on Electoral Matters
Parliament House
Canberra, ACT

Dear Chair,

Inquiry into and report on all aspects of the conduct of the 2022 federal election and matters related thereto

We welcome the opportunity to contribute to the Joint Standing Committee on Electoral Matters' (**Committee**) review of the conduct of the 2022 federal election.

Political integrity and the health of our democracy was a front-and-centre issue in the 2022 federal election. This federal Parliament has a strong mandate to pursue ambitious reforms that will secure a more robust democracy for generations to come. The work of this Committee will be instrumental in achieving much needed reforms with respect to:

1. campaign finance, including making political income more transparent and capping election spending;
2. prohibiting inaccurate or misleading electoral matter; and
3. removing barriers to voting for different communities, most pressingly for Aboriginal and Torres Strait Islander people living on homelands, but for others including people with disability, people in prison, people aged 16 and 17, permanent residents and New Zealand citizens residing long term in Australia.

This submission addresses each of these reforms, with recommendations grounded in human rights principles.

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1

Contents

Recommendations	3
Australia needs strong campaign finance laws.....	6
(a) We need to cap election spending.....	6
(b) We need greater transparency of political donations	10
(c) We need a ban on large political donations	12
(d) We need stronger regulation of federal government advertising	12
(e) The 2021 significant third party amendments should be wound back.....	13
Australia needs laws to prohibit inaccurate or misleading electoral matter	14
(a) The precedent in South Australia	15
(b) Principles for federal laws	16
Australia needs to address barriers to voting	19
(a) Barriers to voting experienced by Aboriginal and Torres Strait Islander people.....	19
(b) Barriers to voting experienced by people with disability	23
(c) People in prisons should have the right to vote	28
(d) 16 and 17 year olds should have the right to vote.....	32
(e) Permanent residents and New Zealand citizens residing in Australia should have the right to vote	36

Recommendations

- 1** The Committee recommend that election spending caps be introduced, and:

 - be set per House and Senate electorate, and also capped at national level;
 - be set at a level taking account of what the average Australian could reasonably be expected to raise in order to run, and take account of the amount of spending needed to achieve name recognition in challenging a high-profile incumbent;
 - be higher for independents and small parties than for candidates endorsed by a national political party
 - commence 20 months from the previous federal election;
 - aggregate the spending of associated entities with the candidate or political party with which they are associated;
 - apply to third parties and significant third parties in a proportionate way.

- 2** The Committee recommend that the disclosure threshold, at least for third parties and significant third parties, be set at \$2,500 per annum. Further, that third parties be defined as people or entities that have incurred over \$20,000 in electoral expenditure in a financial year.

- 3** The Committee recommend that candidates, political parties and associated entities be required to disclose their income in real time, or close to real time.

- 4** The Committee recommend that third parties and significant third parties not be required to disclose their donations in real time, or close to real time.

- 5** The Committee recommend that the definition of “gift” in the *Commonwealth Electoral Act 1918* (Cth) be broadened to include all income that could lead to donors gaining access to politicians, including income from fundraising events and membership to political parties’ business forums.

- 6** The Committee recommend that candidates and political parties be required to disclose their electoral expenditure, itemised to allow for better regulation in the future.

- 7** The Committee recommend that caps on donations be introduced for candidates, political parties and associated entities.

- 8** The Committee recommend that federal government advertising be better regulated, including legislated rules for when and what type of taxpayer-funded advertising is permitted.

- 9** The Committee recommend that the “significant third party” provisions of the *Commonwealth Electoral Act 1918* (Cth) be amended to:

 - increase the threshold back to \$500,000 in electoral expenditure; and

	<ul style="list-style-type: none"> • revert back to the prior definition of electoral expenditure for significant third parties under s. 287AB of the Electoral Act.
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10	<p>The Committee recommend that a prohibition on publishing inaccurate or misleading electoral matter be introduced into the <i>Commonwealth Electoral Act 1918</i> (Cth). The prohibition should:</p> <ul style="list-style-type: none"> • be enforced by a new body or, failing that, the Australian Electoral Commission; • be incorporated into a code of conduct for parliamentarians; • be broad enough to capture images and videos, not just “statements”; • apply to electoral matter, not just “electoral advertisements”; and • apply to candidates, political parties, associated entities, significant third parties and third parties.
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11	<p>The Committee recommend that all Aboriginal and Torres Strait Islander communities, particularly those on homelands, have adequate access to polling stations in the lead up to and during an elections or referendums.</p>
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12	<p>The Committee recommend that the federal government prioritise funding for programs to increase Aboriginal and Torres Strait Islander enrolment and participation in elections, like the Indigenous Electoral Participation Program.</p>
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13	<p>The Committee recommend the federal government continue to support and resource the trials of direct voter enrolment using email and community mail boxes.</p>
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14	<p>The Committee recommend that the Australian Electoral Commission be adequately funded to develop accessible and appropriate voter education information in Aboriginal and Torres Strait Islander languages in the lead up to and during elections and referendums.</p>
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15	<p>The Committee recommend that the federal government properly resource the provision of accredited interpreters of Aboriginal and Torres Strait Islander languages, particularly on homelands, in the lead up to and during elections and referendums. Where possible and appropriate, interpreters should be employed locally.</p>
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16	<p>The Committee recommend that the Australian Electoral Commission undertake a review, in partnership with the Human Rights Commission and with input from a broad range of people with disability, into the accessibility of voting in Australia and the barriers faced by voters with disability. The Australian Electoral Commission and Parliament should commit to acting on all findings of the review, with sufficient time to be effective prior to the next federal election.</p>
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17	The Committee recommend that the entitlement to telephone voting in the <i>Commonwealth Electoral Act 1918</i> be expanded to include people with disability (beyond the current provision for voting by blind and low-vision Australians).
18	The Committee recommend that access to telephone voting be expanded to voters experiencing illnesses (other than COVID-19) in the period following the postal voting deadline, subject to further consideration of the feasibility of postal voting deadlines in light of the difficulties experienced at the 2022 federal election.
19	The Committee recommend that section 93(8)(a) of the <i>Commonwealth Electoral Act 1918</i> be repealed and replaced with a provision that reflects the principles of non-discrimination, a presumption of legal capacity and supported decision-making.
20	The Committee recommend that all restrictions on the right of people in prison to vote in federal elections and referendums should be removed.
21	The Committee recommend that people in prison are given proactive, targeted, culturally appropriate, and properly resourced voter education and enrolment measures in the lead up to, and during an election or referendum.
22	The Committee recommend that the Australian Electoral Commission, where practicable and possible, should prioritise mobile polling teams to attend prisons and other places of detention.
23	The committee recommend that s 93(1)(a) of the <i>Commonwealth Electoral Act 1918</i> be amended to allow all persons who have attained 16 years of age the right to vote ahead of the next federal election.
24	The Committee recommend that long term permanent residents be able to enrol and vote in federal elections.
25	The Committee recommend that New Zealand citizens who have resided in Australia continuously for 12 months should be eligible to vote.

Australia needs strong campaign finance laws

Standards for integrity and accountability in our national politics are slipping.¹ The weakest regulation of money in politics in the country is at federal level,² and we are lagging far behind many liberal democracies.

This laissez-faire regulation of influence in federal Parliament is leading to multiple problems for our democracy:

- it is undermining fairness and political equality. Our constitution enshrines Australians' equal opportunity to participate in our representative democracy.³ And yet, currently, billionaires can use vast sums of cash to buy a national platform that is well out of reach to the rest of us. Powerful industries can give multi-million dollar donations in exchange for favourable treatment.
- it is leaving us exposed to corruption. The ever-increasing cost of election campaigns puts pressure on politicians to keep the donations coming in. Big industries are bankrolling the major political parties' election campaigns in exchange for access, close relationships and favourable treatment.⁴
- it is leading to poorer public policy outcomes. In the Human Rights Law Centre's 2022 report, *Selling Out: How Powerful Industries Corrupt our Democracy*, we documented how the fossil fuels, tobacco and gambling industries have used their wealth to manipulate public policy outcomes in Australia. These harmful industries have successfully blocked climate action, laws to reduce gambling harm, and a ban on personal nicotine imports.
- it is creating a system in which candidates in most electorates need access to significant wealth to pose a realistic challenge to an incumbent. This is denying Australian voters the opportunity to vote for excellent candidates, and is a barrier to making our Parliament diverse and truly representative.

(a) We need to cap election spending

Two-thirds of European countries limit the amount a candidate can spend on an election campaign⁵ and overseas jurisdictions most similar to Australia – the United Kingdom,

¹ Transparency International Australia, *Corruption Perceptions Index*, January 2022.

² Centre for Public Integrity, *The Regulation of Electoral Spending and Political Advertising*, February 2020, 1.

³ *McCloy v New South Wales* [2015] HCA 34 at [45] (per French CJ, Kiefel, Bell and Keane JJ), citing *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578; and *Tajjour v New South Wales* (2014) 313 ALR 221 at 271.

⁴ Human Rights Law Centre, *Selling Out: How Powerful Industries Corrupt our Democracy*, January 2022, available at <https://www.hrlc.org.au/reports/2022/1/31/selling-out-how-powerful-industries-corrupt-our-democracy>.

⁵ International Institute for Democracy and Electoral Assistance, 'Are there limits on the amount a candidate can spend?' Political Finance Database <https://www.idea.int/data-tools/data/political-finance-database>.

Canada and New Zealand – all cap election spending. In Australia, Queensland, New South Wales, the ACT and Tasmania’s upper house all have election spending caps.

There are many arguments for introducing spending caps in elections. Spending caps will stop the endless arms’ race between candidates and political parties, relieve the fundraising pressure on candidates and leave parliamentarians, especially Ministers, with more time to govern the country.

Without spending caps, our election debates will remain vulnerable to the disproportionate political influence of billionaires who, with a fraction of their wealth, can buy a national platform. Important public policy debates will continue to be manipulated by big industries. In short, those with the biggest bank balance will continue to crowd out those with the best ideas.

That being said, there are a number of features that effective spending caps should have at federal level.

- i. Different spending caps should be set for Senate and House electorates, and at national level*

For spending caps to be effective, they need to apply per Senate and House electorate, but on top of that, there should be a nation-wide spending cap. To meaningfully reduce current levels of election spending, the national spending cap should be less than the total of the spending cap in each electorate.

- ii. Principles to guide setting the level of election spending caps*

Setting the cap at the right level would be assisted by analysis of better data than is currently publicly available through Australian Electoral Commission (AEC) disclosures. To improve future reform, political parties and candidates should have to disclose their electoral expenditure (not just their total expenditure), and itemise it under different categories (see further below).

The spending cap should be set lower than the current electoral expenditure levels of the major parties, and take account of:

- what the average Australian could conceivably raise to run as an independent candidate in a typical electorate; and
- the spending required to achieve name recognition when in competition with a high-profile incumbent.

Consideration should also be given to having higher spending caps in urban electorates, where the cost of advertising is significantly greater.

- iii. The spending cap should be higher for independents and small parties than for candidates endorsed by a national political party*

Candidates from political parties, especially the major political parties, benefit hugely from the profile and spending of the political party by which they are endorsed. In addition, as independents and minor parties only very rarely form government, they don’t often benefit

from the name recognition and media exposure given to government and opposition candidates.

For this reason, it is necessary to allow independent and minor parties a higher spending cap to go some way to address the inherent disadvantage they face.

iv. *The spending cap period should commence 20 months from the previous election day*

Limiting the period for which the spending cap applies alleviates the burden on political parties, candidates and third parties to track their expenditure throughout the entire Parliamentary term, to the period that it's most relevant. However, if the capped period is too short (e.g. from when the writs are issued), it can render the caps largely ineffective by incentivising actors to frontload their election expenditure.

At Federal level, we don't have fixed election dates, so the cap must apply by reference to the previous polling day. Federal elections occur on average every 32 months, so if the spending cap applies 20 months from the previous polling day, it will apply for an average of 12 months (prior to the election). This is roughly in line with other jurisdictions (10 months in the ACT, 12 months in Qld, 6 months in NSW), and gives enough leeway so that if an election happens exceptionally early (e.g. after 28 months as in the 1996 election), the cap still applies for a sufficiently long period.

v. *Spending by an associated entity should count toward the spending cap of the candidate or political party with which they are associated*

An associated entity's expenditure should be counted toward the candidate or political party's electoral expenditure, as is done in Queensland,⁶ to prevent the proliferation of associated entities and circumvention of the spending cap.

However, for this proposal to work, the definition of "associated entity" in s. 287H of the *Commonwealth Electoral Act 1918* (Cth) (the **Electoral Act**) needs to be amended to capture only those entities that genuinely operate for the benefit of a political party — not those that simply have voting rights as members. Having voting rights within a political party is too tenuous a link to suggest their election spending should be treated the same.

In any case, such an amendment may be necessary for such a spending cap to be constitutionally valid. In *Unions v NSW*,⁷ the High Court held that a NSW provision aggregating expenditure by political parties and "affiliated organisations" for the purposes of a spending cap was invalid.⁸ In its unanimous decision, the High Court noted that affiliated organisations and political parties were not sufficiently close "to be treated as the same organisation for the purposes of expenditure on electoral communications".⁹

⁶ See ss. 204 and 204A *Electoral Act 1992* (Qld).

⁷ *Unions NSW v NSW* [No. 1] [2013] HCA 58.

⁸ "Affiliated organisations" were defined as organisations authorised under the rules of the party to appoint delegates to the governing body of the party or to participate in the preselection of candidates for that party: s. 95G(7) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

⁹ *Unions NSW v NSW* [No. 1] [2013] HCA 58 at [63].

- vi. *If the party has more than one candidate in one House of Representatives electoral district, the cap is to be divided by the number of endorsed candidates*

To prevent the major parties from circumventing the spending cap by running multiple candidates in the one electorate, the cap should apply per political party per electorate for the House of Representatives.

- vii. *Spending caps should apply to third parties and significant third parties*

Spending caps must also be applied to third parties and significant third parties to ensure they don't end up being the dominant political forces in election debates.

Third parties and significant third parties should be permitted to come together on a public campaign of mutual interest and each spend up to their own spending cap. This is particularly the case given, at the time of writing, a constitutional challenge to NSW's "acting in concert" provisions has been filed in the High Court.

However, schemes whereby joint campaigns are designed for the purpose of circumventing spending caps should be prohibited. Further, by virtue of the fact that there are many more third parties than political parties, it is reasonable to make the spending cap for third parties and significant third parties lower than that for candidates and political parties.

To avoid constitutional challenge, the spending cap for third parties should be carefully justified, and not set too low as a proportion of candidate and political party spending.¹⁰ However, there is a balance to be struck between allowing a sufficiently high cap for third parties wanting to campaign on a local issue in an electorate so they can be heard, and third parties that may spend millions nationally, or many millions in collaboration with other third parties. To provide some illustrative figures:

- if candidate spending were capped at \$200,000-\$250,000 per House electorate, third party spending could be capped at \$50,000-\$80,000 (a proportion of between 1:3 and 1:5);
- if the national spending cap for political parties was between \$25 million and \$30 million, the cap on third parties might be reasonably capped at \$3 million (a proportion of roughly 1:10).

Recommendation 1: The Committee recommend that election spending caps be introduced, and:

- **be set per House and Senate electorate, and also capped at national level;**
- **be set at a level taking account of what the average Australian could reasonably be expected to raise in order to run, and take account of the amount of spending needed to achieve name recognition in challenging a high-profile incumbent;**
- **be higher for independents and small parties than for candidates endorsed by a national political party**
- **commence 20 months from the previous federal election;**
- **aggregate the spending of associated entities with the candidate or political party with which they are associated;**
- **apply to third parties and significant third parties in a proportionate way.**

¹⁰ *Unions NSW v NSW [No. 2] [2019] HCA 1.*

(b) We need greater transparency of political donations

While corporate donors may claim that the millions they contribute to the major political parties are an act of goodwill to “support the democratic process”,¹¹ the reality is big political donations are intended to have commensurate political influence.

There is a sliding scale of influence enabled by political donations: at the lower end, a sizeable donation can ensure the donor gets access to a politician that ordinary Australians wouldn't get.¹² In the middle, is what the High Court has described as “clientelism”, or a “more subtle kind of corruption... [where] officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder”.¹³ At the far end, is “quid pro quo” corruption – illegal bribes – where politicians explicitly make promises in exchange for political donations. This last kind may be rare (although until we have a Commonwealth integrity commission, we won't know how rare), but our current political system makes the other forms of influence inevitable.

- i. The disclosure threshold should be \$2,500 for candidates, political parties, associated entities, significant third parties and third parties*

The current disclosure threshold of \$15,200 for donations is far too high, and is a contributing factor to the staggering level of ‘dark money’ in our political system.

Federal Labor and the Greens have previously supported a disclosure threshold of \$1,000. This may be appropriate for political parties, but for charities and community groups this threshold – less than \$20 a week – is too low.

As explained in the Hands Off Our Charities submission, a threshold of \$2,500 for third parties and significant third parties is far more achievable and reasonable. In addition, the total spent from any one donor should exceed \$2,500 before it needs to be disclosed – the current laws require third parties to disclose a donation if just \$1 of the total donation is used on electoral expenditure, which is burdensome and misleading.

In addition to this, if the disclosure threshold is lowered, s. 287 of the Electoral Act needs to be amended to set a new threshold for becoming a third party. We recommend the threshold be \$20,000, consistent with Hands Off Our Charities’ submission.

Recommendation 2: The Committee recommend that the disclosure threshold, at least for third parties and significant third parties, be set at \$2,500 per annum. Further, that third parties be defined as people or entities that have incurred over \$20,000 in electoral expenditure in a financial year.

¹¹ Evidence of Crown Resorts, PricewaterhouseCoopers and ANZ Bank recorded in the Report of the Select Committee into the Political Influence of Donations (June 2018), 34.

¹² D Wood and K Griffiths, “Who’s in the Room: Access and Influence in Australian Politics” *The Grattan Institute*, 23 September 2018.

¹³ *McCloy v NSW* [2015] HCA 34 at [45] per French CJ, Kiefel, Bell, Keane JJ

- ii. *Candidates, political parties and associated entities should be required to disclose their income in real time*

Federal candidates and political parties are required to disclose their donations only once a year, and up to 19 months can elapse between receipt of a donation and its being made public.

Real-time (or close to real-time) disclosure should be required of candidates, political parties and associated entities. Voters should know ahead of casting their ballot who is bankrolling the election campaigns of candidates and political parties. Knowing the timing of a donation can also be informative outside of election years: for instance, additional public scrutiny may follow a government tender process if it is known that corporate applicants made large political donations in the days prior.

Recommendation 3: The Committee recommend that candidates, political parties and associated entities be required to disclose their income in real time, or close to real time.

- iii. *Significant third parties and third parties should not have to disclose their income in real time*

As identified in the Hands Off Our Charities submission, it is much harder for third parties and significant third parties to determine what donations are used on “electoral expenditure”, and it follows that it is much harder to disclose them in real time. The practical effect of such a requirement, would be to silence charities and community groups in the lead up to elections.

In any case, the public imperative for real time disclosure of third parties and significant third parties is not nearly as strong, as they are not in a position to make decisions in the public interest, and the risk of corruption they pose is far lower.

Recommendation 4: The Committee recommend that third parties and significant third parties not be required to disclose their donations in real time, or close to real time.

- iv. *Loopholes in the definition of “gift” should be closed*

Currently, the term “gift” in s. 287 of the *Electoral Act* is narrowly defined and excludes contributions for access to politicians, like:

- (a) fundraising tickets to events for the purpose of meeting politicians;
- (b) membership subscriptions to political parties’ business forums.

This narrow definition means corporations and powerful industry peaks do not have to disclose their contributions, which can run into the hundreds of thousands. On the political party side, these contributions are labelled “other receipts” instead of “gifts”, meaning they are almost impossible to scrutinise.

Recommendation 5: The Committee recommend that the definition of “gift” in the *Commonwealth Electoral Act 1918* (Cth) be broadened to include all income

that could lead to donors gaining access to politicians, including income from fundraising events and membership to political parties’ business forums.

- v. *Electoral expenditure incurred by candidates and political parties should be disclosed*

Currently, political parties and candidates have to disclose all their spending, not just their electoral expenditure. This makes analysing the data to determine trends, like average spending, where it’s spent, the transition from TV and print advertising to digital advertising, virtually impossible. This, in turn, makes campaign finance regulation much harder.

After each election, candidates, political parties and associated entities should be required to disclose their electoral expenditure, itemised under:

- Each electorate where they were active;
- TV, radio and cinema ads;
- Printed ads, materials and billboards;
- Events;
- Social media ads;
- Internet ads; and
- Purchase of, and costs associated with, analysing voter data.

Recommendation 6: The Committee recommend that candidates and political parties be required to disclose their electoral expenditure, itemised to allow for better regulation in the future.

(c) We need a ban on large political donations

While transparency is vitally important, only banning large political donations altogether can effectively stop the influence of money in politics.

Donations to candidates, political parties and associated entities should be capped at between \$15,000 and \$30,000 (indexed, to account for inflation), aggregated across a financial year. Similar to Queensland, the cap should be extended to donations to entities that coordinate with, or operate to a significant extent to support or oppose, a political party or candidate (i.e. the Queensland definition of “associated entities”). Adopting the Queensland approach at federal level would mean donation caps are applied to any new third parties that formed in order to campaign on behalf of a political party, effectively preventing circumvention of the scheme.

Donation caps should not apply to third parties or significant third parties. As only charities and not-for-profits rely on donations, many would be prevented from doing important advocacy while corporations and industry groups would be able to continue drawing on other income.

Recommendation 7: The Committee recommend that caps on donations be introduced for candidates, political parties and associated entities.

(d) We need stronger regulation of federal government advertising

Spending caps will be significantly undermined if governments can continue spending millions of taxpayer funds in advertising that promotes their own agenda. The Department

of Finance's *Guidelines on Information and Advertising Campaigns by Non-corporate Commonwealth Entities* are an inadequate safeguard against this practice.

We have had the benefit of reading the Grattan Institute's recent report *New Politics: Depoliticising taxpayer-funded advertising*,¹⁴ and endorse all of its recommendations. This Committee should recommend legislated rules for taxpayer-funded advertising, an independent panel and strong penalties to prevent state and federal governments from using taxpayer money for politicised campaigns, which is not in the public interest.

Recommendation 8: The Committee recommend that federal government advertising be better regulated, including legislated rules for when and what type of taxpayer-funded advertising is permitted.

(e) The 2021 significant third party amendments should be wound back

The recently legislated *Electoral Legislation Amendment (Political Campaigners) Act 2021* (Cth) was not evidence-based law reform. It has created a significant barrier for independent voices to participate in election debates.

The law applied a new definition of "electoral expenditure" to significant third parties that is so broad that it is virtually impossible to comply with. It has also made compliance with foreign donations restrictions incredibly complex, and has cost some charities many thousands of dollars in legal fees and staff time.

The practical effect of this law is not to increase transparency for third parties — it is to silence them, by imposing so much red tape if they reach the \$250,000 threshold that it acts as an effective spending cap.

The Electoral Act should be amended to:

- increase the threshold back to \$500,000 in electoral expenditure; and
- revert back to the prior definition of electoral expenditure for significant third parties under section 287AB of the Electoral Act.

Recommendation 9: The Committee recommend that the "significant third party" provisions of the *Commonwealth Electoral Act 1918* (Cth) be amended to:

- **increase the threshold back to \$500,000 in electoral expenditure; and**
- **revert back to the prior definition of electoral expenditure for significant third parties under s. 287AB of the Electoral Act.**

¹⁴ Danielle Wood, Anika Stobart, Kate Griffiths, *New Politics: Depoliticising taxpayer-funded advertising*, Grattan Institute, 2022.

Australia needs laws to prohibit inaccurate or misleading electoral matter

Until recently, the wisdom that the remedy for falsehoods and fallacies is more speech, not enforced silence,¹⁵ served Australian democracy relatively well. But a troubling trend has emerged over the last three federal elections which, when seen in the context of the disinformation-fuelled collapsing democracy in the United States, compels a new, stronger approach.

Often, proponents of “truth in political advertising laws” focus on the unfair advantage it can give the liar in an election contest. But the repercussions go well beyond the outcome of any single election. If politicians are not penalised by voters for lying even when called out, it can precipitate a race to the bottom, where misleading the public becomes an accepted tactic to weaponise against opponents. Once this culture has set in, and the Australian public has acclimatised to widespread lying by politicians, our collective grip on facts becomes more tenuous. This spells disaster for accountability of government and, it follows, our democracy.

This, troublingly, may be the trajectory that we are on. In 2016, federal Labor’s “Mediscare” campaign was widely regarded a scandal. But in 2019, the Liberal Party, National Party, United Australia Party and Pauline Hanson’s One Nation Party all fuelled a number of false, viral claims, the most notorious of which was that Labor and the Greens had done a secret deal to introduce a “death tax”. In 2022, disinformation campaigns proliferated further still, and were used by a wider number of actors against a wider array of candidates (although perhaps with less clear success).

Dirty election tactics are not new, nor is political spin. But there is a significant risk that effective disinformation by widespread actors is becoming the new normal. It will be incredibly difficult to reverse this culture once it sets in. We know from the experience in the United States, that the results could be disastrous: there has been a total breakdown in civic trust, leading to political violence and the radicalisation of a large section of the public who have become completely unmoored from facts.

The outcomes have not been so extreme here, but there are steps we should be taking to stop Australia going further down this path.

The immediate, first step is to introduce laws that prohibit inaccurate or misleading electoral matter at federal level. The laws should follow the example set in South Australia, with some amendments (detailed below).

The second, most important step, is to address the spread of disinformation by forcing social media platforms like Facebook, TikTok and Twitter, to be more transparent and accountable for failures to tackle disinformation. Disinformation doesn’t just wreak havoc in elections, and it’s not peculiar to politicians or campaigners: it is spread by many different people, on all manner of topics, all year around. Parliament should establish an inquiry into introducing

¹⁵ *Whitney v. California*, 247 U.S. 357, 377 (1927) (Brandeis, J).

laws to regulate social media platforms following the example of the *Digital Services Act* in the EU.

Finally, we need stronger, consistent regulation of traditional media companies.

Disinformation only threatens societies when it makes it into the mainstream. Too often, this is achieved when media companies irresponsibly platform it (for instance, by reporting on a politician who has spread the disinformation).

The focus of this Committee, and therefore this submission, is on the first step. But to effectively address disinformation, Parliament must pursue steps two and three as matters of priority.

(a) The precedent in South Australia

Until the ACT introduced substantially similar laws in 2020,¹⁶ South Australia was unique in the world as the only jurisdiction to have "truth in political advertising" laws. Section 113 of the Electoral Act 1985 (SA) (**SA Act**) makes it an offence to authorise, cause or permit the publication of an electoral advertisement if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent. The penalties for breach are modest: \$5,000 for a natural person and \$25,000 for a body corporate (subs. 113(2)).

In South Australia, a person can lodge a complaint about a breach of s. 113 of the SA Act online or by writing to the Electoral Commission of South Australia (**ECSA**). Complaints must be accompanied by supporting evidence. According to the ECSA's Feedback and Complaints Policy available online, the ECSA will acknowledge the complaint within 2 business days, and generally it aims to resolve all complaints within 5 business days.¹⁷ If it cannot be resolved in this timeframe, the ECSA will advise the person who made the complaint of the expected timeframe for the response to be resolved.

The ECSA has discretion to decide not to take any action in relation to a complaint. The Feedback and Complaints Policy provides:

Where an electoral complaint is received regarding an electoral advertisement/material which was first published two months or more prior to the date the complaint is made, ECSA may determine not to deal with the matter. In making this determination ECSA will consider matters including (but not limited to)

- *Where the electoral advertisement/material has been published on social media*
 - *how visible the electoral advertisement/material currently is on the relevant page;*
 - *the extent of the audience of the page; and*
 - *how extensively the advertisement/material has been shared or sponsored.*

¹⁶ See section 297A *Electoral Act 1992* (ACT).

¹⁷ Electoral Commission of South Australia, *Feedback and Complaints Policy*, February 2022 <<https://ecsa.sa.gov.au/feedback-and-complaints>>.

- *Where the electoral advertisement/material has been published by any other means:*
 - *How widely the advertisement/material has been distributed;*
 - *The purpose/circumstances of the advertisement/material i.e. whether the advertisement/material was distributed for an event which has now passed.*

If the ECSA does pursue a complaint, it has a suite of compliance mechanisms available to it. This includes issuing a notice requesting the publisher to:

- i. withdraw the advertisement; and/or
- ii. publish a retraction.

If a person refuses, the Commissioner may apply to the Supreme Court of South Australia to order the offending party to withdraw the electoral advertisement and/or publish a retraction.

(b) Principles for federal laws

- i. If a new agency cannot be established, the laws should be enforced by the Australian Electoral Commission*

The AEC has expressed concern that if it were to be the arbiter of truth in contentious matters, it would be politicised and this, in turn, could undermine public trust in its ability to run elections with the greatest integrity. This would be a bad outcome, and the preferable option to be recommended by the Committee should be to create a new body that is independent, efficient and expert in making determinations.

However if that cannot be achieved, we believe some careful consideration of different enforcement mechanisms made available to the AEC would assist. For instance, if the AEC were empowered to issue a “show cause notice” to someone who had published material which *prima facie* appeared inaccurate or misleading, the burden could then shift to the publisher to provide source material or otherwise justify the statement of fact. If the AEC were dissatisfied with the response, it could, like the ECSA, request a retraction or withdrawal, but compulsory orders to do so could only be made by a federal court.

In addition, the AEC should be given sufficient funding to allow it to receive the inevitably high volume of complaints and address them expeditiously, especially in the final days before an election.

There aren’t many alternatives to the AEC for enforcing a prohibition on inaccurate and misleading electoral matter. One alternative is to empower complainants to take the issue directly to the Federal Court. Courts are the gold standard arbiters for truth, being both independent from government and expert in making determinations on whether statements are inaccurate and/or misleading. However such cases could be legally complex and applications would typically require lawyers, making them expensive. In addition, court proceedings take much longer. The expense could be a significant barrier to candidates already facing enormous campaigning costs, and by the time a decision is handed down, the damage may already be done.

Another alternative is empowering the Administrative Appeals Tribunal (AAT) to make orders when approached by an applicant. However, the AAT is undergoing a major review, which would need to be resolved before it could be given more powers. In its current form, the AAT has been so mired in controversy following a high number of political appointments,

any decisions regarding electoral matter would risk worsening trust in elections rather than improving it.

ii. Penalties could be imposed on sitting members of parliament by the relevant House, through a code of conduct overseen by an independent Parliamentary Standards Commission

This Committee review is happening simultaneously with the Joint Select Committee on Parliamentary Standards' review into a code of conduct for, among others, sitting politicians. As a part of that review, the Human Rights Law Centre submitted that a code of conduct should cover conduct that risks undermining public trust and confidence in representative democracy. Egregious examples of spreading inaccurate and misleading electoral matter could qualify as such conduct, and ideally would be investigated by an independent Parliamentary Standards Commission. Where serious breaches have been found, the Parliamentary Standards Commission may recommend sanction by the House, which could include an apology, a temporary suspension from the House, or other proportional penalties as it deems appropriate.

This process would of course not capture candidates who are not sitting members, associated entities, significant third parties or third parties, but it would be a worthwhile additional safeguard as disinformation is most dangerous when spread by elected representatives themselves. Involving Parliament in these matters could also improve the political culture there generally.

iii. The wording of the federal provisions should build on s. 113 of the Electoral Act 1985 (SA)

Section 113 of the SA Act survived constitutional challenge before the SA Supreme Court,¹⁸ albeit before much of the jurisprudence on the implied freedom of political communication had developed. But the safest approach is to adopt its wording, in particular its limitation to statement of fact as opposed to opinion.

That being said, in one respect it should be broadened. We have benefited from reading Marque Lawyers' submission, in which they concluded that the corflutes and signage published by Advance Australia depicting Zali Steggall and David Pocock as Greens candidates was misleading, but would not have breached s. 113 of the SA Act because it "did not contain a statement of fact". It did, however, make a representation as to the existence of a fact, which was equally damaging.

This was not the first time doctored images have been used to mislead voters and damage the reputation of candidates.¹⁹ Unless captured, more misleading images like these will be used in election campaigns. In addition, Parliament should be preparing for the use of deepfakes — false but convincing videos and images of candidates developed with artificial intelligence — which similarly may not contain a "statement" of fact, but can be very damaging.

iv. The laws should apply to electoral matter, not electoral advertisements

In South Australia and the ACT, the laws apply only to "electoral advertisements" although this isn't defined in either law. Much of the most damaging disinformation is not spread via paid advertisements however, but by organic posts on Facebook, Tweets and YouTube videos that go viral.

¹⁸ *Cameron v Becker* (1995) 64 SASR 238.

¹⁹ As noted by Marque Lawyers, similar campaign had been run by Advance Australia against Zali Steggall in the 2019 election, at that time depicting her on traditional Labor corflute insignia. In 2019, the Coalition erected a billboard which included a misleading cropped image of Bill Shorten holding a "Stop Adani" sign, in marginal electorate Capricornia.

Section 4AA of the Electoral Act defines “electoral matter” as matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election. This definition understood by political actors already, is already subject to regulation (for instance, it must be authorised) and would be harder to circumvent.

To disincentivise vexatious complaints to the AEC about Tweets, posts etc that have had little or no impact, the AEC should have discretion not to investigate a complaint about electoral matter when it has not been widely distributed.

v. The prohibition should apply to candidates, political parties, associated entities, significant third parties and third parties

The prohibition on publishing inaccurate and/or misleading electoral matter should only apply to actors who are already regulated by electoral law. Candidates, political parties, associated entities, significant third parties and third parties are already familiar with the operation of the Electoral Act, and it would not be unreasonably burdensome to have them comply with such a law.

That being said, the penalties available should be proportionate to the level of political engagement that the actor has, and the resources put into publishing the inaccurate or misleading electoral matter. For instance, a third party that publishes an inaccurate or misleading Tweet should be treated much more leniently, than a significant third party that invests \$100,000 in inaccurate or misleading billboards.

Recommendation 10: The Committee recommend that a prohibition on publishing inaccurate or misleading electoral matter be introduced into the *Commonwealth Electoral Act 1918* (Cth). The prohibition should:

- **be enforced by a new body or, failing that, the Australian Electoral Commission;**
- **be incorporated into a code of conduct for parliamentarians;**
- **be broad enough to capture images and videos, not just “statements”;**
- **apply to electoral matter, not just “electoral advertisements”; and**
- **apply to candidates, political parties, associated entities, significant third parties and third parties.**

Australia needs to address barriers to voting

The AEC described the 2022 federal election as “the largest and most complex in Australian history”.²⁰ The global pandemic was, of course, one of the factors making this election so logistically challenging, and when thousands of voters looked to be disenfranchised when they fell ill with COVID-19 prior to the cut-off for qualifying for telephone voting, the AEC came under significant pressure.

The issue was partially resolved with a last-minute amendment to Part XVB of the Electoral Act and related regulations and instruments, but no doubt in the confusion, many people still missed the opportunity to vote.

These events prompted the Human Rights Law Centre to create the Barriers to Voting Register, to which we received 51 responses. This submission summarises the most common issues faced by respondents, as well as a number of our other high priority concerns.

(a) Barriers to voting experienced by Aboriginal and Torres Strait Islander people

As of 30 June 2022, the estimated percentage²¹ of eligible Aboriginal and Torres Strait people enrolled to vote in federal elections was significantly lower than non-Indigenous enrolment. The AEC estimates that nationally, 81.7% of eligible Aboriginal and Torres Strait Islander people are enrolled to vote, compared to 97.1% of the non-Indigenous population.²² In the context of an upcoming referendum on an Aboriginal and Torres Strait Islander voice to Parliament, it is critical that sufficient resources be put into enrolling and enabling Aboriginal and Torres Strait Islander people to vote. Related to this, adequate resources must be committed to ensuring Aboriginal and Torres Strait Islander communities across the country receive culturally appropriate, proactive information about voting in elections and referendums.

Article 25 of the *International Covenant on Civil and Political Rights* provides that every citizen shall have the right to vote without any distinctions, including but not limited to race and colour.

Similarly, Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (scheduled to the *Racial Discrimination Act 1975* (Cth)) requires states to guarantee, without distinction as to race:

²⁰ Australian Electoral Commission, *Delivering the 2022 Federal Election*, March 2022, 2.

²¹ Electoral rolls do not include information about cultural identity. The estimated eligible Aboriginal and Torres Strait Islander population enrolled to vote is calculated by the AEC using data from the Australian Bureau of Statistics, the Department of Human Services and others. For more information, visit: <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>

²² Australian Electoral Commission, ‘Indigenous enrolment rate’, *Enrolment program performance indicators and targets*, 1 September 2022, <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>

*Political rights, in particular the rights to participate in elections--to vote and to stand for election--on the basis of universal and equal suffrage.*²³

Contrary to this position at international law, for most of Australia's political history, tens of thousands of Aboriginal and Torres Strait Islander people were deliberately denied the right to vote in state and federal elections. Section 4 of the *Commonwealth Franchise Act 1902* (repealed), the precursor to the Electoral Act, stated that:

*No [A]boriginal native of Australia, Asia, Africa, or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on the Electoral Roll unless so entitled under section forty-one of the Constitution.*²⁴

The Electoral Act was amended in 1962 to give all Aboriginal and Torres Strait Islander people the right to vote in federal elections, but only in 1965 were Aboriginal and Torres Strait Islander people granted the right in Queensland.

This is recent history. And since Aboriginal and Torres Strait Islander people were granted the right to vote, Australian governments have continued to make decisions that deprioritise Aboriginal and Torres Strait Islander people's democratic participation. The Committee must pursue an end to this era, and recommend adequate resourcing of measures to ensure Aboriginal and Torres Strait Islander people can easily and freely vote, be they on homelands, or in suburbs and cities.

i. Voting in homelands is less accessible than in metropolitan regions

Accessing polling outside of metropolitan areas can be difficult, particularly on homelands as people often have to travel further, pre-poll is not an option, and the Human Rights Law Centre has heard anecdotally that polling can be open for shorter periods.

The Human Rights Law Centre was troubled by a late announcement from the AEC that a number of regional polling booths would not be open as a result of staffing shortages. We understand this issue was rectified, and that additional strain was put on the AEC as a result of the pandemic. Nonetheless, it is clear that additional resourcing for the AEC is required to ensure rural and remote parts of the country are better serviced on election day.

Recommendation 11: The Committee recommend that all Aboriginal and Torres Strait Islander communities, particularly those on homelands, have adequate access to polling stations in the lead up to and during an elections or referendums.

²³ *International Convention on the Elimination of All Forms of Racial Discrimination*, art 21.

²⁴ *Commonwealth Franchise Act 1902* (Cth) (repealed), s. 4.

ii. *Underfunding electoral programs for Aboriginal and Torres Strait Islander people has impacted enrolment*

The disparity between Aboriginal and Torres Strait Islander enrolment and electoral participation is due part to decisions taken by successive federal governments over a number of years.

In 1996, the Aboriginal and Torres Strait Islander Education and Information Service was abolished. This service aimed for Aboriginal and Torres Strait Islander self-management in electoral matters.²⁵ This service existed to increase Aboriginal and Torres Strait Islander voter registration, provided education, and developed materials in Aboriginal and Torres Strait Islander languages. Since the abolition of the Service, enrolment rates dropped.²⁶ The AEC did not operate a major program targeting Aboriginal and Torres Strait Islander electors for 13 years after the Service was abolished.²⁷ A similar service based on Aboriginal and Torres Strait Islander self-management should be reinstated.

In their 2021-22 Pre-Budget Submission, the First Nations Justice team at GetUp reported that staffing and funding cuts to the AEC's Indigenous Electoral Participation Program and the AEC's Darwin office in the 2017/18 Federal Budget impacted Aboriginal and Torres Strait Islander enrolment and turnout. The AEC subsequently recommitted funding for the Indigenous Electoral Participation Program in October 2021.²⁸ However, it is clear that additional resourcing is needed to increase Aboriginal and Torres Strait Islander enrolment and turnout.

Recommendation 12: The Committee recommend that the federal government prioritise funding for programs to increase Aboriginal and Torres Strait Islander enrolment and participation in elections, like the Indigenous Electoral Participation Program.

iii. *Inflexible enrolment processes*

In 2012, the Federal Direct Enrolment Update (FDEU) was introduced. *The Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012* amended the Electoral Act to allow the Electoral Commissioner to directly enrol an unenrolled person. The AEC uses trusted third-party data²⁹ from, among others, the Australian Taxation Office and state road authorities to identify, automatically update or enrol people on the electoral roll.

²⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies, 'The right to vote', <<https://aiatsis.gov.au/explore/right-vote>>

²⁶ Norm Kelly, *Directions in Australian electoral reform: professionalism and partisanship in electoral management* (ANU Press, 2012), 69.

²⁷ National Indigenous Australians Agency, *Indigenous Employment Program Evaluation- Final Report*, (September 2021), 12.

²⁸ Australian Electoral Commission, *Increased Investment of Indigenous Electoral Participation Measures*, 8 October 2021 (press release) <<https://www.aec.gov.au/media/2021/10-28.htm>>.

²⁹ Australian Electoral Commission, *Direct Enrolment Update*, 4 October 2022 <https://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/direct.htm>.

However, direct enrolment requires a person to have a gazetted address to be able to participate. Many communities on homelands do not have gazetted addresses, meaning that often they are ineligible to participate in the program and left off the roll.

In July 2022, the AEC was the subject of a complaint to the Australian Human Rights Commission by two Aboriginal men in the Northern Territory. The complainants noted that the Commission was applying the FDEU in a way that caused Aboriginal people living on their homelands to be “suppressed or inhibited” from voting in Federal and Northern Territory elections.³⁰

The complaint is still before the Human Rights Commission; however, the AEC recently announced a positive development in the use of the FDEU. In response to the complaint, the AEC will be trialling the use of direct enrolment communication via email and community mail boxes on homelands in Western Australia, Northern Territory and Queensland in an effort to increase Aboriginal and Torres Strait Islander enrolment rates.³¹

Recommendation 13: The Committee recommend that the federal government continue to support and resource the trials of direct voter enrolment using email and community mail boxes.

iv. Insufficient use of interpreter and translation services in Language

There are reports that the lack of accredited translators employed by the AEC on homelands has impacted Aboriginal and Torres Strait Islander enrolment, turnout, and voting formality on homelands.³² In the Northern Territory electorate of Lingiari alone, about 34% of households reported that a non-English language was used at home, the main languages spoken other than English being Kriol, Djambarrpuyngu and Warlpiri.³³ Lingiari also has the highest rate of unenrolled voters in the country with 80% of eligible voters enrolled.³⁴ The reported turnout in Lingiari during the 2022 election was 66.3%³⁵, however that figure does

³⁰ Roxanne Fitzgerald, ‘Indigenous voters lodge discrimination complaint against Australian Electoral Commission’, *ABC News* (online, 19 June 2021) <<https://www.abc.net.au/news/2021-06-19/nt-voters-racial-discrimination-human-rights-commission/100227762>>

³¹ Australian Electoral Commission, *Significant boost to First Nations enrolment announced*, 1 September 2022, (press release) <<https://www.aec.gov.au/media/2022/09-01.htm>>

³² Roxanne Fitzgerald and Liz Trevakis, ‘Lack of interpreters and ‘unprecedented’ challenges leave some remote NT voters in the lurch this election’, *ABC News* (online, 21 May 2022) <<https://www.abc.net.au/news/2022-05-21/aec-no-interpreters-small-time-window-aboriginal-vote-election/101083240>>

³³ Australian Bureau of Statistics, ‘*Lingiari 2021 Census All persons Quickstats*’ (Webpage) <<https://www.abs.gov.au/census/find-census-data/quickstats/2021/CED701>>

³⁴ Morgan Harrington, ‘*Election 22: Enrolment and participation in the seat of Lingiari*’, (Webinar) <https://www.youtube.com/watch?v=44Q5_VXwrPQ> at 5:12

³⁵ Australian Electoral Commission, ‘*Tally Room. Lingiari, NT*’, 9 June 2022, (Web page) <<https://results.aec.gov.au/27966/Website/HouseDivisionPage-27966-306.htm>>

not factor in people who are eligible but not enrolled to vote. It is estimated that out of all *eligible* voters in Lingiari only 55% cast a ballot, the lowest rate in the country.³⁶

The problems created by a lack of access to accredited interpreters in Aboriginal and Torres Strait Islander languages are not exclusive to elections. An investigation by the Commonwealth Ombudsman has found that despite Aboriginal and Torres Strait Islander language interpreting services being critical for effective government communication:

*...a coordinated whole of government response is still required. While there has been some progress, ongoing barriers to accessing interpreters continue to undermine communication between government and Indigenous language speakers, even for those agencies who have gone to considerable lengths to try to improve accessibility.*³⁷

Recommendation 14: The Committee recommend that the Australian Electoral Commission be adequately funded to develop accessible and appropriate voter education information in Aboriginal and Torres Strait Islander languages in the lead up to and during elections and referendums.

Recommendation 15: The Committee recommend that the federal government properly resource the provision of accredited interpreters of Aboriginal and Torres Strait Islander languages, particularly on homelands, in the lead up to and during elections and referendums. Where possible and appropriate, interpreters should be employed locally.

(b) Barriers to voting experienced by people with disability

This section of our submission was developed in consultation with People with Disability Australia, the national peak disability rights and advocacy organisation. Our recommendations have been endorsed by People with Disability Australia.

People with disability in Australia must be afforded the same opportunity to vote as other Australians. Right now, people with disability face too many barriers to voting in federal elections. The ongoing failure to materially improve voting access for Australians with disability raises anti-discrimination law and constitutional concerns, given Australians' right to vote as recognised by the High Court.

In light of the barriers to voting faced by Australians with disability, there are very real questions about whether the Australian Government is complying with its international obligations under *Convention on the Rights of Persons with Disabilities (CRPD)*. Under the CRPD, a key part of the wider international human rights framework to which Australia is

³⁶ Morgan Harrington, 'Election 22: Enrolment and participation in the seat of Lingiari', (Webinar) <https://www.youtube.com/watch?v=44Q5_VXwrPQ> at 5:51

³⁷ Commonwealth Ombudsman, *Accessibility of Indigenous Language Interpreters, Talking in Language Follow Up Investigation*, (Report No. 06, 2016) December 2016, at 1

bound, it is not permissible to restrict voting on the basis of disability or legal capacity. Article 29 provides:

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:

a) 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, inter alia, by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

These are the human rights standards to which Australia has committed at the international level. It is doubtful whether these standards are presently being met in light of the legal and the non-legal barriers (discussed below) for people with disability voting in Australia today.

- i. The AEC and Parliament must commit to uncovering and addressing the multiple barriers to voting that people with disability experience*

Too often, Australians with disability face a range of compounding barriers to voting: one in five respondents to our Barriers to Voting Register from the 2022 federal election were people with disability. As is clear from the below selection drawn from the many stories shared with us, too little has been done to provide adequate support and assistance to enable Australians with disability to vote in a way that is not burdensome, discriminatory or otherwise unduly impactful. (We share these stories anonymously, with permission.)

Challenges for deaf voters – Electorate of Macnamara

'I am a deaf/hard of hearing person who voted at [a specialist site for people with disability]. Because staff were wearing masks, I was not able to understand what was being said to me. I think staff members did not know that you could take off your mask for a person to lipread for hearing problems. Instead I had to follow the instructions from the visual pictures and not from the woman who served me. I also thought that the accessibility ramps and disability service etc. was very poorly conducted. The staff ought to take accessibility training. The instructions were not too bad after I was told what to do, but it was poorly organised.

Challenges for deaf voters – Electorate of Corio

'My son is profoundly deaf. He had Covid and could not vote in person as he was in isolation. He can text on phone but cannot talk on phone as Auslan is his language. When my husband rang [the AEC], he was told there was no option for the profoundly deaf. He was told my son would get a fine but we just had to explain the situation and the fine would be waived.'

Need for Seating – Electorate of Fraser

‘As a disabled person I have difficulties standing for long periods such as in a queue, so I was keen to find a voting venue without a long queue. I went to four voting centres until I finally found one with a manageable queue. Great – except that when I got my voting forms, I then asked for a sit down booth explaining that I cannot stand to complete them. The staff member looked confused and directed me to a small table where another AEC staff was seated. I explained, as I have done in many previous elections, that I have a right to privacy and do not want someone seated so close as to see my voting. I informed her that if there was not a private seated booth, then I will sit on the floor. which is what I did. I am fine to sit on the floor. However in previous elections this has created a dramatic reaction from staff which is embarrassing for me. This time, fortunately no-one told me to get off the floor, and I was able to vote. But I was embarrassed, stressed and angry. Others who cannot stand or use a wheelchair, will have difficulty accessing voting. I have given feedback about the need for seated stations on many occasions in years past, but nothing seems to change.’

Sensory overload – Electorate of Newcastle

‘My voting location was not suitable for people with trauma, sensory issues, and or processing disorders who become overwhelmed in loud, crowded spaces. Staff weren't understanding of disabilities whatsoever. Person directing to the voting booths didn't take into account the need for space for myself. They wouldn't listen to my support worker when it was pointed out, even though I was clearly struggling and was wearing noise cancelling headphones and sunglasses.’

As these personal experiences indicate, attempts to make voting accessible at the federal level is inadequate to meet the needs of many people with disability. This is profoundly unfair, possibly unlawful and raises constitutional issues and questions of Australia’s compliance with international obligations. Many of the issues raised do not require legal change – they require better resourcing for and a stronger focus by the AEC on the voting experiences of Australians with disability.

The AEC should partner with the Human Rights Commission to undertake a wide-ranging review of the accessibility of voting in Australia and barriers that are presently faced by Australians with a disability in exercising their right and duty to vote, informed by the feedback of people with disability. Such a review should formulate a comprehensive plan for addressing the issues highlighted, which should be implemented prior to the next federal election.

Recommendation 16: The Committee recommend that the Australian Electoral Commission undertake a review, in partnership with the Human Rights Commission and with input from a broad range of people with disability, into the accessibility of voting in Australia and the barriers faced by voters with disability. The Australian Electoral Commission and Parliament should commit to acting on all findings of the review, with sufficient time to be effective prior to the next federal election.

- ii. *The availability of telephone voting should be expanded to allow easier access to voting for people with disability and people who are unwell*

Since the 2013 election, the Blind and Low Vision Telephone-Assisted Voting Service has operated to facilitate telephone voting for Australians with vision impairment. Australians

stationed in Antarctica are also eligible to vote by telephone. As mentioned above, in light of the COVID-19 pandemic, telephone voting was substantially expanded to those who had tested positive for COVID-19 in the days prior to the election.

There were initially concerns about the operation of telephone voting for voters with COVID-19, including in relation to the narrow infection-window which risked leaving some voters with COVID-19 unable to vote. The Human Rights Law Centre was among the groups calling for revised regulations to address this issue, in the days prior to the election.³⁸ This call was ultimately heeded and, by all accounts, telephone voting proceeded relatively smoothly.

Numerous respondents to our Barriers to Voting Register raised the issue that expanded telephone voting would enable people with disability, or an infectious illness other than COVID-19, to vote in a more accessible manner than existing options. For example, one respondent with a disability told us that they became severely-unwell the day after postal voting closed.

We understand that telephone voting requires additional staff resourcing, and capacity and demand cannot always be easily estimated. We also understand that telephone voting brings with it additional barriers in relation to integrity and scrutineering. However, Australians have a constitutional right to vote. It is not good enough to simply say that Australians who are unable to vote in person due to illness or disability can avoid a fine. The Australian government, and the AEC, must do all that is practicable to maximise accessibility to voting.

Take, for example, a voter (like the respondent whose experience we have extracted above) who falls ill after the deadline for requesting a postal vote has passed. At the 2022 election, if they tested positive for COVID-19, they were eligible to vote via telephone. If, however, they tested positive for influenza – a significant infectious illness – they cannot. Their only option is to attend a voting centre in-person and risk getting sicker, and infecting others. Telephone voting was made available at scale to respond to COVID-19 in the 2022 federal election: there is no compelling reason why in future elections, voters with other infectious illnesses should not also have that option. (We note that there were many issues raised about postal voting at the 2022 federal election, which also require further consideration).

For many Australians with disability, expanded telephone voting would significantly improve the accessibility of voting. For this reason, we recommend amending Part XVB of the Electoral Act to permit people with disability to vote by telephone beyond the existing provision for blind and low-vision voters. In our view, the logistical and resourcing challenges posed by such an expansion can be mitigated by prior-registration requirements – as is already the case for blind and low-vision telephone voting. However, existing registration lapses after each election, which can pose difficulties for registered blind and low vision voters. Consideration should be given to an enduring registration system.

While expanding telephone voting would greatly assist many people facing accessibility barriers to voting, we note that it is not a perfect solution. Concerns have been raised by Blind Citizens Australia that telephone voting does not address its policy position of securing a method of voting that is secret, independent and verifiable. Blind Citizens Australia has recently commenced unlawful discrimination proceedings against the NSW Electoral Commission in relation to the removal of the iVote electronic voting platform, in favour of

³⁸ ‘Morrison government must urgently fix Covid voting fiasco’, Human Rights Law Centre (Press Release, 20 May 2022) <<https://www.hrlc.org.au/news/2022/5/20/morrison-government-must-urgently-fix-covid-voting-fiasco>>.

telephone voting.³⁹ Deeper consideration of limited use of electronic voting options or other voting methods which might achieve these principles should form part of the review undertaken by the AEC pursuant to our Recommendation 16.

Recommendation 17: The Committee recommend that the entitlement to telephone voting in the *Commonwealth Electoral Act 1918* be expanded to include people with disability (beyond the current provision for voting by blind and low-vision Australians).

Recommendation 18: The Committee recommend that access to telephone voting be expanded to voters experiencing illnesses (other than COVID-19) in the period following the postal voting deadline, subject to further consideration of the feasibility of postal voting deadlines in light of the difficulties experienced at the 2022 federal election.

iii. *Removing Offensive and Discriminatory Provisions*

Section 93(8)(a) of the Electoral Act provides that 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 their name placed on the electoral roll (**the unsound mind exclusion**).

The unsound mind exclusion is archaic, offensive, discriminatory and contrary to international law. It undermines the constitutionally protected right to vote in Australia and has a disproportionate, disenfranchising impact on certain categories of Australians with disability. The language used in the provision is also derogatory and stigmatising.

In 2014, a report of the Australian Law Reform Commission (**ALRC**), *Equality, Capacity and Disability in Commonwealth Laws*, recommended the amendment of the unsound mind exclusion to focus on a person’s decision-making ability in relation to enrolment and voting in a particular election and give consideration for support and assistance in decision-making when determining if a person met the threshold.

In a submission to the ALRC’s inquiry, the Human Rights Law Centre said:

The unsound mind exclusion is vague and broad. There is no definition of “unsound mind” provided in the Electoral Act or at common law. Disenfranchisement of persons of unsound mind could conceivably be applied to persons with a range of impairments, including intellectual and psychosocial disabilities, acquired brain injury or a degenerative brain condition such as dementia. Many of these people could, or could with assistance, vote.

Further, the exclusion may disenfranchise people with episodic mental health issues such as bipolar disorder or schizophrenia, who may be judged by a medical practitioner as fitting within the unsound mind exclusion (or any exclusion based on legal capacity) during some stages of their illness but may be perfectly capable of voting independently on election day.

In practice, people of “unsound mind” are likely to be removed from the electoral roll by others. Any elector can object to the enrolment of another person on the basis of the “unsound mind” provisions and the objection must be accompanied by the opinion

³⁹ Christopher Knaus, ‘Blind advocates allege NSW’s removal of online voting system is a breach of human rights’, *Guardian Australia* (online, 1 August 2022) <<https://www.theguardian.com/australia-news/2022/aug/01/blind-advocates-allege-nsws-removal-of-online-voting-system-is-a-breach-of-human-rights>>.

of a medical practitioner stating that “in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting.”

According to the AEC, between 2008 and 2012, 28,000 people have been removed from the electoral roll under the unsound mind provisions, with almost half of these removals occurring in 2010 during the federal election. Unfortunately, we are unable to find any data that reveals the circumstances in which people were removed. For example, we have been unable to find information on the disabilities the electors had or the relationship of the objector to those people removed from the role. It is therefore impossible to know whether people who may have the capacity to vote, with or without assistance, are being removed from the roll.

Our position remains unchanged. The Australian Government is yet to accept and implement the ALRC’s recommendation – despite the continued advocacy of civil society groups, most recently in an [open letter of April 2022](#) led by Australian Lawyers for Human Rights and People with Disability Australia, and signed by over 60 relevant bodies and individuals (including the Human Rights Law Centre). As that letter said, “Australian laws must recognise that people with disability enjoy the right to vote on an equal basis with their fellow Australians.”

There is no justification for the unsound mind exclusion in its present form. Its removal is long overdue. The Australian government must accept and adopt the ALRC’s recommendation.

Recommendation 19: The Committee recommend that section 93(8)(a) of the Commonwealth Electoral Act 1918 be repealed and replaced with a provision that reflects the principles of non-discrimination, a presumption of legal capacity and supported decision-making.

(c) People in prisons should have the right to vote

Most jurisdictions around the country have laws that disenfranchise people in prisons.⁴⁰ At federal level, enrolment to vote is compulsory for all Australian citizens or eligible British subjects who are in prison, however if a person is serving a full-time sentence of three years or longer, they cannot vote in a federal election.⁴¹

Article 25 of the ICCPR guarantees the right to political participation in the following way:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

⁴⁰ People in prison people serving a sentence of more than three years cannot vote in elections in the Northern Territory, Queensland or Tasmania. In New South Wales and Western Australia, people in prison serving a sentence of 12 months or more are disenfranchised. In Victoria, an imprisoned person serving a sentence of more than five years is disenfranchised. The ACT and South Australia do not have laws disenfranchising people in prison.

⁴¹ *Commonwealth Electoral Act 1918* (Cth), s8AA.

c) *To have access, on general terms of equality, to public service in his country.*

The United Nations Human Rights Committee has noted that all people deprived of their liberty should enjoy all of the rights set forth in the ICCPR, subject only to restrictions that are unavoidable as a result of being held in a closed environment.⁴²

The right to political participation isn't absolute and may only be subject to reasonable limits that can be demonstrably justified in a free and democratic society.

The United Nations Human Rights Committee in its General Comment No. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service* stated that:

*... State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable... Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.*⁴³

The Committee also noted that if a conviction for an offence is the basis for suspending the right to vote, the period of the suspension should be proportionate to the offence committed, implying that a blanket ban on voting for people in prison that does not consider these factors is not proportionate.⁴⁴

The United Nations Human Rights Committee has also noted that the general disenfranchisement of people in prison is inconsistent with Article 25 of the ICCPR and does not serve the stated goals of rehabilitation contained in Article 10(3) of the ICCPR.⁴⁵

Further, the disenfranchisement of people in prison is disproportionate insofar as it indirectly discriminates against Aboriginal and Torres Strait Islander people (see further below).

ii. *The right of people in prison to vote under the Australian Constitution*

In the landmark case of *Roach v Electoral Commissioner*⁴⁶ the High Court upheld the fundamental right to vote. The Court found that the Howard Government had acted unlawfully and unconstitutionally in imposing a blanket ban denying people in prison the vote.

By majority, the Court in *Roach*, upheld that ss 7 and 24 of the Constitution, which require that the Houses of Parliament be 'directly chosen by the people', enshrine the right to vote in

⁴² United Nations Human rights Committee, *General Comment 21, Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992

⁴³ Australian Human Rights Commission, 'Right to take part in public affairs, voting rights and access to public service', (Web page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/right-take-part-public-affairs-voting-rights-and-access-public-service#:~:text=The%20Human%20Rights%20Committee%27s%20General%20Comment%20No.%2025%3A,other%20rights%2C%20including%20the%20right%20to%20self%20determination>>

⁴⁴ Australian Human Rights Commission, 'Right to take part in public affairs, voting rights and access to public service', (Web page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/right-take-part-public-affairs-voting-rights-and-access-public-service#:~:text=The%20Human%20Rights%20Committee%27s%20General%20Comment%20No.%2025%3A,other%20rights%2C%20including%20the%20right%20to%20self%20determination>>

⁴⁵ Human Rights Committee, International Covenant on Civil and Political Rights, Consideration Of Reports Submitted By States Parties Under Article 40 of the Covenant (CCPR/C/USA/CO/3/Rev.1), 18 December 2006, at 35.

⁴⁶ (2007) 233 CLR 162 (*Roach*).

Australia and that this right may only be limited for a 'substantial reason'⁴⁷ and that any limitation on the franchise be 'appropriate and adapted' (or 'proportionate') to that reason.⁴⁸

In his Honour's decision, Gleeson CJ affirmed that:⁴⁹

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.

When the Court considered whether a person serving a sentence of three years or more could be restricted from voting, it stated that:⁵⁰

"...such a criterion does distinguish between serious lawlessness and less serious but still reprehensible conduct. It reflects the primacy of the electoral cycle for which the Constitution itself provides..."

The High Court's decision in *Roach* was then a significant victory for representative democracy, accountable government and fundamental human rights. But we believe the Australian Parliament should now go further.

iii. The disenfranchisement of people in prison is discriminatory

The disenfranchisement of people in prison indirectly discriminates against Aboriginal and Torres Strait Islander people. As noted above, estimates suggest 0.6% of Aboriginal people in Australia are disenfranchised by restrictions on voting from prison, compared to 0.075% of non-Aboriginal people.⁵¹

The Victorian Aboriginal Legal Service (**VALS**) note in their submission to this inquiry that a person who is removed from the electoral roll because of their imprisonment may seek to re-enroll once they are released, meaning that the number of Aboriginal and Torres Strait Islander people not enrolled to vote due to a term of imprisonment may be higher.⁵²

This disproportionate impact on Aboriginal and Torres Strait Islander people may amount to racial discrimination under international human rights law.⁵³ As noted above, Article 25 of the ICCPR provides that every citizen shall have the right to vote 'without any distinctions mentioned in Article 2'. Those distinctions include race and colour (among others).

Similarly, Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* requires states to guarantee, without distinction as to race "[p]olitical rights, in particular the rights to participate in elections –to vote and to stand for election –on the basis of universal and equal suffrage". The Convention also requires signatories to amend,

⁴⁷ *Roach* at 7.

⁴⁸ *Roach* at 95

⁴⁹ *Roach* at 174

⁵⁰ *Roach* at 102

⁵¹ Victorian Aboriginal Legal Service, *Submission to the Inquiry into the 2022 Federal Election*, September 2022, at 3

⁵² Victorian Aboriginal Legal Service, *Submission to the Inquiry into the 2022 Federal Election*, September 2022, at 3

⁵³ Jerome Davidson in Current Issues Brief No. 12 2003-04 'Inside Outcasts: Prisoners and the right to vote in Australia' (Webpage, 24 May 2004) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cibo304/04cib12#Pris>.

rescind or nullify laws that have the effect of creating or perpetuating racial discrimination or racial division.⁵⁴

Given the over-targeting of Aboriginal and Torres Strait Islander people by the criminal legal system, any restrictions on the right of people in prison to vote will exclude a disproportionate number of Aboriginal and Torres Strait Islander people from voting⁵⁵ and could be in breach of Australia's international obligations under the Conventions.

iv. The disenfranchisement of people in prison impacts their rehabilitation

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* provide a universally acknowledged set of minimum standards and principles for the treatment of people in prison.

Rule 4 states that:

- 1. The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.*
- 2. To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available...*

Rule 5 states that:

- 1. The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.*

Similarly, Article 10(3) of the ICCPR provides that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

International human rights law prioritises the rehabilitation and social integration of people in prison, although for many people in prison this is not their experience. As VALS state in their submission to this inquiry: “Disenfranchisement... contributes to a sense of broader social disenfranchisement which obstructs rehabilitation and stigmatises people who have been in prison.”⁵⁶

The disenfranchisement of people in prison is based on an antiquated legal concept of attainder and civil death (the loss of civil and political rights due to being ‘tainted’ by a conviction). These concepts resulting in the loss of civil and political rights are at odds with a corrections system that should encourage people to identify with their community rather than be separated from it.

In *Roach*, the High Court stated that:⁵⁷

Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.

⁵⁴ Article 2

⁵⁵ M. Ridley-Smith and R. Redman, *Prisoners and the Right to Vote*, in D. Brown and M. Wilkie (eds), *Prisoners as Citizens* (Federation Press NSW, 2002) 293.

⁵⁶ Victorian Aboriginal Legal Service, *Submission to the Inquiry into the 2022 Federal Election*, September 2022, at 3

⁵⁷ *Roach* at 84-85

Indeed, upon one view, the Constitution envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned following completion of their sentence.

All Australian governments should be strengthening programs that reintegrate people in prison back into their communities, as required by the *Standard Minimum Rules for the Treatment of Prisoners* and article 10(3) of the ICCPR.

All Australian governments should be making sure that people in prison are fully franchised and that they receive proactive, targeted, and culturally appropriate electoral education about elections and voting in the lead up to and during an election.

v. The disenfranchisement of people in prison is arbitrary and inconsistent

Disenfranchising people in prison is arbitrary and inconsistent across all jurisdictions. The electoral cycle impacts on the number of elections that a person in prison is disenfranchised for. A person serving a sentence of 5 years could be disenfranchised for either one or two elections, depending on the timing of an election and their imprisonment. Whereas a person serving a sentence of 3 years may still be able to vote in consecutive elections.

There are also inconsistencies in the application of the disenfranchisement depending on the state in which a person is imprisoned as different sentencing and parole criteria apply across the states and territories.

Recommendation 20: The Committee recommend that all restrictions on the right of people in prison to vote in federal elections and referendums should be removed.

Recommendation 21: The Committee recommend that people in prison are given proactive, targeted, culturally appropriate, and properly resourced voter education and enrolment measures in the lead up to, and during an election or referendum.

Recommendation 22: The Committee recommend that the Australian Electoral Commission, where practicable and possible, should prioritise mobile polling teams to attend prisons and other places of detention.

(d) 16 and 17 year olds should have the right to vote

The Human Rights Law Centre recommends that voting rights be extended to 16 and 17 year olds ahead of the next federal election. A minimum voting age of 16 years would appropriately meet Australia's obligations under international law and it is necessary to:

1. reflect contemporary understanding of the cognitive development and maturity of young people;
2. promote democratic inclusion; and
3. support greater civic engagement among Australians from a young age.

As referenced above, the obligation to protect and promote the right of every citizen to universal and equal suffrage is recognised in Article 25 of the ICCPR.⁵⁸ While this right to vote may be subject to reasonable restrictions,⁵⁹ it is worth noting that 16 year olds are able to vote in many overseas jurisdictions, including Austria, Scotland and Brazil.⁶⁰ Setting the minimum voting age at 16 years is a reasonable and proportionate restriction that Australia may impose on the right to vote, while allowing due weight and recognition to be given to the views of 16 and 17 year olds.

i. Young people's cognitive development and maturity

Human beings' intellectual and emotional maturity develop at different ages.⁶¹ Psychological and neurological evidence indicates that the type of decision-making engaged in deciding who to vote for in elections (referred to as 'cold cognition') is mature by age 16, even though our decision-making in high pressure or emotional contexts takes longer to mature.⁶²

As a society, we have already accepted that 16 year olds have capacity for a high level of autonomy. The law recognises that by age 16, people have the necessary cognition and maturity for significant responsibilities, including to drive, work and pay income tax, enlist in the military, consent to sexual intercourse and consent to most medical treatments. With these rights and responsibilities, should come the right to be represented in parliament, and a say in the matters that affect them⁶³.

ii. Democratic inclusion

Suffrage has evolved over time in Australia to include people who did not own land, women, non-Europeans, Aboriginal and Torres Strait Islander people and 18 to 21 year olds. Each of these developments was an advance in Australian democracy, and the political equality of Australians.⁶⁴ In response to a survey released by the Human Rights Law Centre in partnership

⁵⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See also *Human Rights Act 2004* (ACT) s 17 and *Charter of Rights and Responsibilities Act 2006* (Vic) s 18 for corresponding right in domestic state and territory legislation.

⁵⁹ Human Rights Committee, General Comment No 25: General Comments under article 40, paragraph 4 of the International Covenant on Civil and Political Rights, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) para [4] and [10].

⁶⁰ The voting age is 16 years in Argentina, Estonia (in local elections), Cuba, Ecuador, Malta, Nicaragua and Wales. The minimum voting age is 17 years in Bosnia, East Timor, Greece, Israel (in local elections) and Indonesia. See Jan Eichhord and Johannes Bergh, 'Lowering the Voting Age to 16 in Practice: Processes and Outcomes Compared', *Parliamentary Affairs* (2021) 74, 507-521.

⁶¹ Laurence Steinberg, "Let science decide the voting age", *New Scientist*, 14 October 2014, <<https://www.newscientist.com/article/mg22429900-200-let-science-decide-the-voting-age/>>.

⁶² Laurence Steinberg, Grace Icenogle, Elizabeth Shulman et al, 'Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation' (2018) 21(2) *Developmental Science*. See also, Sara B. Johnson, Robert W. Blum and Jay N. Giedd, 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy' (2009) 45(3) *Journal of Adolescent Health* 216–221.

⁶³ Committee on the Rights of the Child, General Comment No 12 (2009) on the right of the child to be heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [20].

⁶⁴ See Australian Capital Territory Legislative Assembly Standing Committee on Education, Training and Young People, *Inquiry into the Eligible Voting Age*, September 2007, <[Microsoft Word - 05educVotingAge.doc \(act.gov.au\)](#)> [4.4].

with youth organisation RunForIt, one young person explained that young “people are being left out of the democratic process”.⁶⁵ The expansion of the right to vote to 16 and 17 year olds is a pivotal next step in the development of democratic inclusion.

All previously successful efforts to expand voting rights in Australia were met with similar objections. It was argued that those who did not own land did not have enough of a stake or interest in government policy to be entitled to vote. Assertions were made that women, non-Europeans, Aboriginal and Torres Strait Islander people and 18 to 21 year olds, lacked the capacity to form reasoned judgment to be able to vote. These objections are clearly wrong, and it is inconceivable that these groups would be denied democratic equality today.

Young people are most likely to benefit from or be burdened by the long-term consequences of today’s political decisions.⁶⁶ One young person explained that “[y]oung people inherit the consequences of every political choice made today. We should be able to have a say in who the government [is that makes] those choices that define our lives and futures”.⁶⁷ Another young person explained that “it is our future that is being determined, especially with climate change and global warming decisions that are made today impact things that will happen in 10 years’ time”.⁶⁸

Young people now have extraordinary access to information, and are more engaged than ever before on issues that affect them and the world that they live in. Recently, issues such as climate change and same sex marriage have seen young people in Australia engage in public deliberation, political activism (such as the School Strikes 4 Climate⁶⁹) and express frustration in not being able to have their views recognised through a vote. One young person said “we are fighting for OUR future, yet we are not allowed to vote for it because of our age.”⁷⁰ Another young person said:

We are a demographic consistently advocating for change, seen through movements such as the School Strike for Climate, but our voices are treated as inconsequential and undeserving of a federal voice.

18 is a time of disruption and change in the lives of many teenagers, when they are removed from the institutional support of school - by enabling 16 and 17 year olds to vote for the first time with the support of teachers and advisors, they will have the support they need to be encouraged and mentored to make wise and educated

⁶⁵ ‘Lowering the voting age survey’, *Human Rights Law Centre and RunForIt* (Survey, 23 September 2022).

⁶⁶ Commissioner for Children and Young People (South Australia), Reducing the voting age, <[CCYP Reducing-the-Voting-age.pdf](#)>.

⁶⁷ ‘Lowering the voting age survey’, *Human Rights Law Centre and RunForIt* (Survey, 23 September 2022).

⁶⁸ ‘Lowering the voting age survey’, *Human Rights Law Centre and RunForIt* (Survey, 23 September 2022).

⁶⁹ See BBC, ‘School Strike 4 Climate: Thousands join Australia protest’ (Webpage, 21 May 2021) <[School Strike 4 Climate: Thousands join Australia protest - BBC News](#)>.

⁷⁰ ‘Lowering the voting age survey’, *Human Rights Law Centre and RunForIt* (Survey, 23 September 2022).

*decisions, with a full knowledge of the role they play within the democratic system of Australia.*⁷¹

Enfranchising 16 and 17 year olds has political value: it is an indicator that these Australians matter and that they deserve a say in their future. As one young person emphasised, “[our] **voices are of equal value and importance**”.⁷²

iii. Political participation

Granting suffrage to 16 and 17 year olds is expected to increase the political participation and engagement of young people. This is because it provides a practical foundation for an interest in politics and a willingness to vote, which in turn increases feelings of empowerment and ameliorates a lack of interest in political matters.⁷³ Research supports that when 16 and 17 year olds are able to vote, they are more likely to show other pro-civic attitudes (for example, institutional trust).⁷⁴ Engagement from a younger age, with the benefit of formal civic education at school, will help establish greater and enduring civic engagement.

iv. Compulsory or voluntary voting

There are differing views on whether the vote should be compulsory or voluntary for 16 and 17 year olds.

Some commentators are concerned that voluntary voting for 16 and 17 year olds would not properly capture the views of this demographic. Other commentators argue that allowing voluntary voting for one cohort would erode the bedrock of compulsory voting in Australia.⁷⁵ On the other hand, the voluntary inclusion of 16 and 17 year olds would serve as a good introduction to voting in our democracy, which could be complimented by civics education at school. Voluntary voting would provide the opportunity for young people who want to vote to participate in our democracy. The voluntary approach has precedence in Brazil where compulsory voting is only enforced for voters over 18 years old.⁷⁶

Our principal concern is that 16 and 17 year olds are entitled to vote, but that failure to vote not incur a significant fine. The HRLC considers that if voting for 16 and 17 year olds is compulsory, there should be no penalty imposed for a failure to vote. This would encourage political participation while also recognising the burden that a penalty would have on this demographic.⁷⁷

⁷¹ ‘Lowering the voting age survey’, above n 15.

⁷² *Ibid.*

⁷³ Australian Capital Territory Legislative Assembly Standing Committee on Education, Training and Young People, above n 13, 6.

⁷⁴ See Jan Eichhord and Johannes Bergh, ‘Lowering the Voting Age to 16 in Practice: Processes and Outcomes Compared (2021) 74 *Parliamentary Affairs* 507-521.

⁷⁵ Australian Capital Territory Legislative Assembly Standing Committee on Education, Training and Young People, 36.

⁷⁶ International Institute for Democracy and Electoral Assistance (International IDEA), ‘What is compulsory voting?’ *International IDEA* (Webpage) <[Compulsory Voting | International IDEA](#)>.

⁷⁷ Alternatively, the Committee could consider introducing a means test for the penalty for failing to vote as suggested by Judith Bessant et al., ‘Submission to the Inquiry into the Electoral Amendment Bill 2021 by the Standing Committee on Justice and Community Safety Committee in the Legislative

We urge the Committee to recommend that s 93(1)(a) of the Electoral Act be amended to allow all persons who have attained 16 years of age the right to vote ahead of the next federal election. Enfranchising 16 and 17 year olds would appropriately meet Australia's obligations under international law, reflect contemporary understandings of cognitive development and support enduring and inclusive civic engagement.

Recommendation 23: The committee recommend that s 93(1)(a) of the Commonwealth Electoral Act 1918 be amended to allow all persons who have attained 16 years of age the right to vote ahead of the next federal election.

(e) Permanent residents and New Zealand citizens residing in Australia should have the right to vote

A fundamental principle of democracy is that members of a community should have a say in the decisions that affect them. Australians place great value on electoral participation, as evidenced by our system of compulsory voting and our high rates of voter turnout.

There has been a clear historical trend towards expanding the franchise to more accurately reflect membership of the Australian community, such as through removing property qualifications for voting, extending the vote to women, extending the vote to Aboriginal and Torres Strait Islander people and lowering the voting age from 21 to 18.⁷⁸

We now have an opportunity to achieve a broader, more inclusive level of electoral participation by extending the right to vote to all permanent residents.

i. Permanent residents are a part of our community

Australian law recognises that people who are permanent residents are entitled to remain in Australia indefinitely, and it generally does not distinguish between the civil, social, and political rights of people who are permanent residents and those who are citizens. The most significant distinctions between citizens and those who are permanent residents relate to their rights and obligations to engage in the political process.

As of 2021, there were over 1.7 million permanent residents in Australia; hundreds of thousands of whom are here strengthening our communities, contributing taxes and working to fill gaps in our national skills and labour shortages around the country.⁷⁹

The High Court has previously considered who can be said to be part of the Australian body politic. In *Pochi v Macphee*⁸⁰ the High Court held that a person could be outside the

Assembly' (Submission, 2 February 2022) <[Submission-06-Professor-Judith-Bessant-and-29-others.pdf \(act.gov.au\)](#)>.

⁷⁸ Alexander Reilly and Tiziana Torresi, 'Voting Rights of Permanent Residents' (2016) 39(1) *UNSW Law Journal*, 401, 407

⁷⁹ Department of Home Affairs, 'FOI Release: Permanent Visa Holders as at 23/01/2021 by client location', 21 January 2021, (Web page) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210200044-document-released.PDF>>

⁸⁰ (1982) 151 CLR 101

immigration power (and not able to be deported under this power) in the Constitution if they had been ‘absorbed’ into the Australian community.⁸¹

As a result of *Pochi*, the Parliament amended the Migration Act to generally prevent the deportation of an alien (someone foreign to the Australian political community) who had been a permanent resident if they had lived in Australia for 10 years. In the second reading speech of the *Migration Amendment Act 1983* (Cth) the Minister stated:

*the overwhelming majority of non-citizens who have settled in Australia and have contributed to the development of this country have a right to expect, after 10 years of lawful residence, that they will not be expelled.*⁸²

In considering the aliens power of the constitution, Edelman J in *Alexander v Minister for Home Affairs*⁸³ stated that there is a need for Courts to modernise the concept of who constitutes a member of the Australian body politic, and precisely when ‘absorption’ into the community occurs.⁸⁴

ii. *Administrative delays in visa and citizenship applications are impacting voting*

While the rates of permanent residents taking up citizenship in Australia are quite high, reported to be around 70-80%⁸⁵, this option is not possible for all permanent residents.

Some permanent residents are from countries that do not allow dual-citizenship and if they wished to vote in Australia, they would be forced to renounce the citizenship of their country of birth, severing connections to homelands, family, and communities. These people, who may wish to vote in Australia, are effectively disenfranchised due to another country being unable to recognise dual citizenship.

Administrative delays in processing citizenship applications also act as a barrier to voting. As of 20 September 2022, the Department of Home Affairs reported that there were 115,737 Australian citizenship by conferral applications on-hand, and that 13,020 applications were received in the month of August 2022 alone.⁸⁶ Figures by the Department of Home Affairs also show that processing times are increasing, going from 3 months to 17 months from an application being received.⁸⁷

⁸¹ In *Pochi*, the High Court was considering whether, Mr Luigi Pochi who was born in Italy and had emigrated to Australia and lived in Australia for 20 years could be deported. Mr Pochi argued that since he had been absorbed into the Australian community he could not be deported under the immigration power in s 51 (xxvii) of the Constitution. The Court found that despite someone being absorbed into the Australian community, they remained an alien and still subject to the aliens power in s 51 (xix)

⁸² Australian Senate, Parliamentary Debates (Hansard), 7 September 1983 at 374.

⁸³ [2022] HCA 19

⁸⁴ *Alexander v Minister for Home Affairs* [2022] HCA 19 from 216

⁸⁵ See, Alexander Reilly and Tiziana Torresi, ‘Voting Rights of Permanent Residents’ (2016) 39(1) *UNSW Law Journal*, 401, 405

⁸⁶ Department of Home Affairs, ‘Citizenship Processing Times’, 20 September 2021, (Web page) <https://immi.homeaffairs.gov.au/citizenship/citizenship-processing-times>

⁸⁷ Department of Home Affairs, ‘Citizenship Processing Times’, 20 September 2021, (Web page) <https://immi.homeaffairs.gov.au/citizenship/citizenship-processing-times>

These delays indirectly prohibit the voting rights of members of the community who would otherwise be eligible to vote.

iii. We already allow non-citizens to vote

Australia already allows foreign citizens to vote in federal and local government elections as well as referendums. Existing law extends the franchise to British subjects (defined as a citizen of a Commonwealth country) who were enrolled in a federal electoral division in Australia before 26 January 1984.⁸⁸

Voting rights for non-citizens are also recognised in other areas of government. Permanent residents are able to vote in Victorian, Tasmanian, and South Australian local government elections.⁸⁹

The Parliament has the power to determine the composition of the franchise by making laws regarding the qualification of electors under ss 8 and 30 of the Constitution. This power is limited by the requirement in ss 7 and 24 of the Constitution that parliament be directly chosen by the people of the Commonwealth. It is open to the Parliament to extend the franchise to long term permanent residents as, due to their contribution to our communities and their connection to Australia, they can be considered ‘people of the Commonwealth’ for the purposes of voting.

Recommendation 24: The Committee recommend that long term permanent residents be able to enrol and vote in federal elections.

iv. We should offer reciprocal voting rights to New Zealanders in Australia

Many of the considerations relating to permanent residents also relate to New Zealand citizens who live in Australia but are not permanent residents. This is due to the unique treatment of New Zealand citizens under Australian law.

The Trans-Tasman Travel Arrangement allows New Zealand citizens to live, work, and study in Australia indefinitely, but does not provide clear and accessible pathways for them to acquire permanent residence and Australian.

New Zealand grants the franchise to permanent residents if they are 18 years old or older and have lived continuously in New Zealand for one year or more.⁹⁰ Meaning that Australian citizens can and do vote in New Zealand elections despite not being New Zealand citizens.

⁸⁸ *Commonwealth Electoral Act 1918* s 93. Section 4 of the *Referendum (Machinery Provisions) Act 1984* also provides that electors who are entitled to vote at an election are entitled to vote at a referendum.

⁸⁹ *Local Government (Elections) Act 1999* (SA) s 14(1)(ab)(i); *Local Government Act 1993* (Tas) s 254(2); *Local Government Act 1989* (Vic) ss 11, 13

⁹⁰ Electoral Commission of New Zealand Te Kaitiaki Take Kowhiri, ‘Are you eligible to vote’, (Web page) <<https://vote.nz/enrolling/get-ready-to-enrol/are-you-eligible-to-enrol-and-vote/>>

In the interest of reciprocity and fairness, New Zealand citizens who reside in Australia for 12 months or more should be entitled to vote in Australian federal elections.

Extending voting rights to long term permanent residents and New Zealand permanent residents could develop and strengthen a culture of political, civic and social engagement among these members of our community who despite contributing to our society are currently excluded from political participation. Particularly as the New Zealand experience of expanding voting rights to permanent residents has been credited with creating a ‘uniquely inclusive political community’⁹¹.

Recommendation 25: The Committee recommend that New Zealand citizens who have resided in Australia continuously for 12 months should be eligible to vote.

We look forward to speaking further to this submission before the Committee next week.

Sincerely



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⁹¹ Alexander Reilly and Tiziana Torresi, ‘Voting Rights of Permanent Residents’ (2016) 39(1) *UNSW Law Journal*, 401, 401