



**Law Council**  
OF AUSTRALIA

# **Inquiry into the 2022 federal election**

**Joint Standing Committee on Electoral Matters**

**25 October 2022**

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# About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au).

## Acknowledgements

The Law Council acknowledges the assistance of the Law Society of New South Wales, the New South Wales Bar Association and the Law Council's Indigenous Legal Issues Committee in the preparation of this submission.

## Introduction

1. The Law Council welcomes the opportunity to provide a submission to the Joint Standing Committee on Electoral Matters (**Committee**) as part of its inquiry into the 2022 federal election (**Inquiry**).
2. The scope of this submission is limited to the following Terms of Reference:
  - (b) potential reforms to funding of elections, particularly regarding electoral expenditure caps and public funding of parties and candidates;
  - (d) encouraging increased electoral participation and lifting enfranchisement of First Nations People; and
  - (f) encouraging increased electoral participation and supporting enfranchisement generally, and specifically in relation to:
    - i. accessibility of enrolment and voting for persons with a disability;
    - ii. voting rights of Australians abroad;
    - iii. Australian permanent residents and new Australian citizens; and
    - iv. New Zealand residents residing in Australia.

## Potential reforms to funding of elections

3. The Law Council is aware that considerable influence on the outcome of an election, and therefore on the integrity of democracy in general, can be exerted by individuals with the financial means to do so.
4. It regrets that it has been unable to consider these issues in depth with respect to their application at the federal level. However, it has received information from the Law Society of New South Wales (**LSNSW**) about the current NSW legislative model for election funding, as provided for by the *Electoral Funding Act 2018* (NSW) (**NSW Act**), and the NSW Electoral Commission's approach to enforcement, that may be useful in the context of the current inquiry. The LSNSW advises that:
  - The framework in New South Wales (**NSW**) provides a regime for reporting political donations valued at \$1000 or more to the NSW Electoral Commission under the *Electoral Funding Act 2018* (NSW). This includes multiple donations made by the same donor to the same recipient that, in aggregate, are valued at \$1000 or more in one financial year.<sup>1</sup> This includes donations made to political parties, associated entities, groups, and third-party campaigners in certain circumstances.
  - Political donations can only be made by individuals on the electoral roll, or otherwise identified to the NSW Electoral Commission, or a company with an Australian business number (**ABN**).<sup>2</sup> Political donations are also capped at publicly-identified levels per year, and disclosure requirements apply for donors.<sup>3</sup>

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<sup>1</sup> NSW Electoral Commission, Types of political donations (Web Page, 30 August 2022) <<https://www.elections.nsw.gov.au/Funding-and-disclosure/Political-donations/Types-of-political-donations#reportablepoliticaldonations>>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

- Certain political donations are unlawful,<sup>4</sup> including anonymous donations over \$1000, indirect donations of more than \$1000 in value (including in-kind donations) as well as donations from property developers, tobacco businesses and liquor or gambling licensees or their close associates.<sup>5</sup> This ban was ruled constitutional by the High Court of Australia in 2015.<sup>6</sup>
  - Caps on electoral expenditure also apply, and vary depending on the entity. Electoral expenditure is reportable, by way of a requirement to maintain campaign accounts and yearly reporting.<sup>7</sup>
  - The provision of a cap for third-party campaigners was held to be invalid by the High Court in 2019, finding that this was an impermissible burden on the implied freedom of political communication.<sup>8</sup> The Law Council understands that legislation designed to respond to these findings has recently passed through the NSW parliament.<sup>9</sup>
5. The LSNSW further acknowledges that the NSW Electoral Commission is considered 'atypical' in Australia due to its robust enforcement of breaches of funding and disclosure laws, such as in respect of issuing fines for not using campaign accounts, withholding public funding for breaching expenditure caps, and issuing fines for unlawful donations. However, it considers that this approach to enforcement, in addition to the election funding framework under the NSW Act, may provide a useful starting point for consideration of potential reforms at the federal level.

## Encouraging increased electoral participation and lifting enfranchisement of First Nations People

6. The Law Council is concerned by low voter turnout of First Nations peoples in recent federal elections.<sup>10</sup> It was also troubled by media reports, during the 2022 federal election, that some remote communities in the Northern Territory were afforded only several hours to cast their ballot and did not have adequate access to interpreters.<sup>11</sup>
7. The Law Council accordingly supports the Committee's investigation into encouraging increased electoral participation and lifting enfranchisement of First Nations peoples. The AEC plays a critical role in achieving this goal, in particular through the Indigenous

<sup>4</sup> NSW Electoral Commission, Unlawful political donations (Web Page, 30 August 2022) <<https://www.elections.nsw.gov.au/Funding-and-disclosure/Political-donations/Unlawful-political-donations>>.

<sup>5</sup> NSW Electoral Commission, Prohibited donors (Web Page, 2022) <<https://www.elections.nsw.gov.au/Funding-and-disclosure/Political-donations/Unlawful-political-donations/Prohibited-donors>>.

<sup>6</sup> *McCloy v NSW* (2015) 257 CLR 178.

<sup>7</sup> NSW Electoral Commission, Annual electoral expenditure disclosure (Web Page, 14 December 2021) <<https://www.elections.nsw.gov.au/Funding-and-disclosure/Disclosures/Annual-electoral-expenditure-disclosure>>.

<sup>8</sup> *Unions NSW v New South Wales* [2019] 264 CLR 595.

<sup>9</sup> Electoral Legislation Amendment Bill 2022 (NSW).

<sup>10</sup> Felicity James, 'Low Indigenous voter turn-out at NT election threatening democracy, electoral commissioner says', *Australian Broadcasting Corporation* (online, 21 August 2020) <<https://www.abc.net.au/news/2020-08-21/poor-indigenous-voter-turnout-at-nt-election/12580688>>; see also Aaron Bunch, 'PM promises review of low NT voter turnout', *Katherine Times*, (online, 8 June 2022) <<https://www.katherine-times.com.au/story/7772899/pm-promises-review-of-low-nt-voter-turnout/>>.

<sup>11</sup> Roxanne Fitzgerald and Liz Trevaskis, 'Lack of interpreters and 'unprecedented' challenges leave some remote NT voters in the lurch this election', *Australian Broadcasting Corporation* (online, 21 May 2022) <<https://www.abc.net.au/news/2022-05-21/aec-no-interpreters-small-time-window-aboriginal-vote-election/101083240>>.

Electoral Participation Program, which has the mandate to ‘deliver effective, culturally appropriate services to Indigenous Australians’.<sup>12</sup>

## Enrolment rates

8. The AEC estimates the enrolment rate of First Nations peoples using self-identification data ‘made available to the AEC by the Department of Human Services, combined with population data from the Australian Bureau of Statistics (**ABS**) and compared with the electoral Roll data’.<sup>13</sup>
9. According to AEC estimates, the enrolment rates of First Nations peoples have steadily increased nationally from 74.7 per cent in 2017 to 81.7 per cent in 2022.<sup>14</sup> Notwithstanding those increases, the rate of enrolment of First Nations peoples still sits well below that of all eligible Australians enrolled to vote, which was 97.1 per cent on 30 June 2022.<sup>15</sup>
10. The Law Council notes that the enrolment rates of First Nations peoples in states and territories with a larger number of remote communities are lower still, with the Northern Territory at 74.1 per cent and Western Australia at 70.5 per cent in 2022, although these rates have also been increasing since 2017.<sup>16</sup>
11. While the growth in the enrolment rates of First Nations peoples is encouraging, consideration must be given to what more can be done, either within the current legislative regime or through legislative reform.
12. The Law Council’s Justice Project highlighted some key features of effective community legal education (**CLE**) for First Nations peoples. While developed in respect of interaction with the legal system rather than the political and electoral systems, the Law Council considers these features may be relevant in this context.<sup>17</sup> These principles included that CLE delivery must be culturally competent, and informed by the different cultural experiences of communities and individuals. By incorporating elders and community leaders into its design and delivery, and two-way learning, CLE—and, by analogy, electoral reform—is most likely to overcome distrust of the system, engage people more effectively, and provide information in the language of stakeholders.<sup>18</sup>

## Automatic enrolments

13. The Law Council notes that, traditionally, a voter has been required to take proactive steps to nominate for the electoral roll.
14. In 2012, section 103B was inserted into the Commonwealth Electoral Act. That provision allows the AEC to use information from other Government sources to

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<sup>12</sup> AEC, Indigenous Electoral Participation Program (Web Page, 24 November 2020) <<https://www.aec.gov.au/indigenous/iepp.htm#:~:text=The%20AEC%20established%20the%20Indigenous,Indigenous%20disadvantage%20in%20electoral%20participation.&text=The%20objectives%20of%20the%20program,Islander%20people%20in%20Australian%20elections>>.

<sup>13</sup> AEC, Indigenous enrolment rate (Web Page, 30 June 2022) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/performance/indigenous-enrolment-rate.htm](https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm)>.

<sup>14</sup> Ibid.

<sup>15</sup> AEC, Enrolment statistics (Web Page, 30 June 2022) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/](https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/)>.

<sup>16</sup> AEC, Indigenous enrolment rate (Web Page, 30 June 2022) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/performance/indigenous-enrolment-rate.htm](https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm)>.

<sup>17</sup> Law Council of Australia, The Justice Project, People: Building Legal Capability and Awareness (Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/webpdf/Justice%20Project/Final%20Report/People%20Building%20Legal%20Capability%20and%20Awareness%20%28Part%202%29.pdf>>.

<sup>18</sup> Ibid 21-3.

automatically enrol persons whom they believe are eligible. Eligibility is assessed by taking into account an individual's age, residence at an address in the 'relevant Subdivision', and other criteria. The Law Council notes that no proactive steps are required of that individual for them to be enrolled.

15. The AEC is required to provide notice in writing to any person automatically enrolled pursuant to subsection 103B(6) of the Commonwealth Electoral Act. However, the Law Council understands that the AEC takes a conservative approach to the automatic enrolment power, and has chosen not to use automatic enrolments in 'mail exclusion areas' (where mail is delivered to a single community address rather than individual street addresses).<sup>19</sup> This is due to the AEC's concern that the required written notification may not be sufficiently timely or direct in those areas.<sup>20</sup>
16. The Law Council considers that the AEC's reluctance to use automatic enrolments in mail exclusion areas is likely to disproportionately impact First Nations communities in remote locations. Accordingly, policy reform is vital to increase the uptake of automatic enrolments in regional and remote communities, and for First Nations peoples more broadly.
17. The Law Council suggests that, rather than refraining from the use of automatic enrolment in remote locations, the AEC should be encouraged to embrace this process and be supported by strategies to provide effective and reliable notice to affected electors so they are aware of their enrolment and subsequent obligation to vote.
18. Such strategies should include notice of automatic enrolment being provided in relevant languages, and explanations of how to vote, noting that there are more than 250 First Nations languages spoken in Australia.<sup>21</sup> The Law Council notes that, in remote communities, many people speak a First Nations language as their first language, and English may be their second, third or fourth language.<sup>22</sup>
19. Without such strategies, automatic enrolment processes may be of limited practical benefit and may unfairly expose individuals to penalties for failing to vote.

## Opportunity to Vote

20. The Law Council notes that, in addition to low electoral enrolment rates, the voter turnout rate for First Nations people is also estimated to be lower than the national average. According to published estimates from the AEC, the turnout among the Indigenous population was estimated at 52 percent in the 2016 election, compared to a national turnout rate of 91 per cent.<sup>23</sup> Care should be taken when considering that estimated figure, noting that the 'absence of an Indigenous Identifier on the Roll necessitate[d] indirect estimation of Indigenous franchise metrics, making findings indicative only'.<sup>24</sup>

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<sup>19</sup> Will Sanders, *Electoral Administration and Aboriginal Voting Power in the Northern Territory: Reality and the Potential Viewed from the 2019 Federal Election* (Working Paper, 2019, Centre for Aboriginal Economic Policy Research, Australian National University) <[https://caepr.cass.anu.edu.au/sites/default/files/docs/2020/1/CAEPR\\_WP\\_132\\_2019\\_Sanders.pdf](https://caepr.cass.anu.edu.au/sites/default/files/docs/2020/1/CAEPR_WP_132_2019_Sanders.pdf)>.

<sup>20</sup> *Ibid.*

<sup>21</sup> See The Australian Institute of Aboriginal and Torres Strait Islander Studies, *Living Languages* (Web Page, 15 June 2022) <<https://aiatsis.gov.au/explore/living-languages>>.

<sup>22</sup> Diana Eades, 'Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations' (2015) 126 *Precedent* 44, 45.

<sup>23</sup> AEC, *Voter Turnout: 2016 House of Representatives and Senate Elections* (Report, 2017), <[https://www.aec.gov.au/about\\_aec/research/files/voter-turnout-2016.pdf](https://www.aec.gov.au/about_aec/research/files/voter-turnout-2016.pdf)>, 15.

<sup>24</sup> *Ibid.* The Law Council could not locate similar AEC-produced 'voter turnout' reports for the 2019 and 2022 elections.



21. The Law Council notes the AEC has a statutory function to promote public awareness of election and ballot matters, and Parliamentary matters, by conducting education and information programs.<sup>25</sup> The AEC's functions also include conducting and promoting research into election and ballot matters and other relevant matters,<sup>26</sup> and publishing material on matters that relate to its functions.<sup>27</sup>
22. The AEC's public awareness function is reflected in 'Key Activity 3' of its recent Annual Report (2020–2021), which is to 'engage with our stakeholders through education and public awareness activities'.<sup>28</sup> The activities listed in relation to this engagement include the AEC's work to increase electoral participation for Aboriginal and Torres Strait Islander people through the Indigenous Electoral Participation Program.
23. The Law Council understands that one of the aims of the Indigenous Electoral Participation Program, established in 2010, is 'to increase... voter turnout'.<sup>29</sup> Within that Program:
- services are stated to include 'the delivery of electoral information sessions, tailored materials for Indigenous voters, partnerships with government and non-government agencies, and a range of other community outreach activities';<sup>30</sup> and
  - the resources and materials to help promote Indigenous electoral participation, are stated to include:
    - posters, brochures, and materials promoting enrolment and voting;
    - culturally appropriate videos, images, and audio files;
    - publications on the history of the Indigenous vote and electoral milestones; and
    - specific materials on elections and referendums.<sup>31</sup>
24. The AEC publishes instructional videos in language, factsheets, easy-read guides, and social media tools, produced through this program, on the AEC website.<sup>32</sup>
25. In its Annual Report, the AEC states that it meets its performance goal of enabling Australians to participate in electoral events and to understand electoral matters. It says that it does this in several ways, including by using 'tracking research to understand if information related to key objectives... can be met'.<sup>33</sup>
26. It is difficult to form a definitive view about the efficacy of the AEC's programs relating to First Nations peoples in the absence of detailed, publicly available information about

<sup>25</sup> *Commonwealth Electoral Act 1918* (Cth), s7(c)

<sup>26</sup> *Ibid* para 7(e).

<sup>27</sup> *Ibid* para 7(f).

<sup>28</sup> AEC, *Australian Electoral Commission Annual Report 2020-2021*, (Report) <<https://www.transparency.gov.au/annual-reports/australian-electoral-commission/reporting-year/2020-21-7>>

<sup>29</sup> AEC, Indigenous Electoral Participation Program (Web Page, 24 November 2020) <<https://www.aec.gov.au/indigenous/iepp.htm#:~:text=The%20AEC%20established%20the%20Indigenous,Indigenous%20disadvantage%20in%20electoral%20participation.&text=The%20objectives%20of%20the%20program,Islander%20people%20in%20Australian%20elections>>.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> AEC, Indigenous Australians (Web Page, 17 March 2022), <<https://www.aec.gov.au/Indigenous/>>.

<sup>33</sup> AEC, *Australian Electoral Commission Annual Report 2020-2021*, (Report) <<https://www.transparency.gov.au/annual-reports/australian-electoral-commission/reporting-year/2020-21-7>>.

the voter turnout of First Nations peoples in federal elections and how the AEC actively engages with First Nations peoples to design and deliver its programs.

27. There were reports from the 2022 federal election that '[r]emote voting teams visited communities for just a few hours, and in some cases with no interpreter'.<sup>34</sup> Other reported issues include First Nations peoples experiencing their names being taken off the roll, and being unclear as to why.<sup>35</sup>
28. Some indication of voter turnout rates among First Nations peoples in more remote locations may be indirectly drawn from voter turnout data in the Division of Lingiari. The Division of Lingiari effectively covers all the majority of the Northern Territory, with the exception of the Darwin Municipality and most of the Palmerston Municipality.<sup>36</sup> According to ABS data, 40.3 per cent of voters in Lingiari identify as an Aboriginal and/or Torres Strait Islander person.<sup>37</sup> Voter turnout in Lingiari was 66.83 per cent in the 2022 election—the lowest of any Division in the country by almost 13 percent, and well below the national average of 89.82 per cent.<sup>38</sup> This is down from a 72.85 per cent turnout in Lingiari in 2019,<sup>39</sup> 73.70 per cent turnout in Lingiari in 2016,<sup>40</sup> and 75.42 per cent in Lingiari in 2013.<sup>41</sup>
29. The Law Council has previously considered the engagement of First Nations peoples in voting processes in the context of its submission to the Indigenous Voice Co-Design Process.<sup>42</sup> In its submission, the Law Council noted that remote First Nations communities should be provided with tailored voting assistance and mobile polling services, having regard to their advice about their specific needs.<sup>43</sup>
30. The Law Council emphasises that engaging in First Nations electoral participation will also be highly relevant to the referendum on a First Nations Voice to Parliament, given electors are entitled to vote at a referendum<sup>44</sup> and the AEC is responsible for the machinery of the referendum.<sup>45</sup> The particular relevance of the Voice referendum to First Nations peoples means that it is critical for government to focus its attention on how it can comprehensively engage with those communities, in a culturally appropriate way, prior to the referendum vote.
31. The Law Council considers that any policy reforms in relation to the above matters should be integrated into broader ongoing work, led by First Nations peoples, to inform

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<sup>34</sup> Roxanne Fitzgerald, Liz Trevaskis, 'Lack of interpreters and 'unprecedented' challenges leave some remote NT voters in the lurch this election', *Australian Broadcasting Corporation* (online, 21 May 2022) <<https://www.abc.net.au/news/2022-05-21/aec-no-interpreters-small-time-window-aboriginal-vote-election/101083240>>.

<sup>35</sup> Special Broadcasting Service (SBS), 'New Northern Territory MP flags electoral reform', (online, 31 May 2022), <<https://www.sbs.com.au/nitv/the-point/article/new-northern-territory-mp-flags-electoral-reform/fe8v7vpvo>>.

<sup>36</sup> AEC, 'Profile of the electoral division of Lingiari (NT)' (webpage, accessed on 12 October 2022), <<https://www.aec.gov.au/profiles/nt/lingiari.htm>>.

<sup>37</sup> Australian Bureau of Statistics, 'Lingiari – 2021 Census All persons QuickStats' (webpage, accessed on 17 October 2022, <<https://www.abs.gov.au/census/find-census-data/quickstats/2021/CED701>>.

<sup>38</sup> AEC, 'Turnout by division – 2022 Federal Election', (webpage, accessed on 12 October 2022), <<https://results.aec.gov.au/27966/Website/HouseTurnoutByDivision-27966-NAT.htm>>.

<sup>39</sup> AEC, 'Turnout by division – 2019 Federal Election', (webpage, accessed on 12 October 2022), <<https://results.aec.gov.au/24310/Website/HouseTurnoutByDivision-24310-NAT.htm>>.

<sup>40</sup> AEC, 'Turnout by division – 2016 Federal Election', (webpage, accessed on 12 October 2022), <<https://results.aec.gov.au/20499/Website/HouseTurnoutByDivision-20499-NAT.htm>>.

<sup>41</sup> AEC, 'Turnout by division – 2013 Federal Election', (webpage, accessed on 12 October 2022), <<https://results.aec.gov.au/17496/Website/HouseTurnoutByDivision-17496-NAT.htm>>.

<sup>42</sup> Law Council of Australia, Submission to the National Indigenous Australians Agency, Indigenous Voice Co-Design Process (30 April 2021) <<https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>>.

<sup>43</sup> *Ibid* [92].

<sup>44</sup> *Referendum (Machinery Provisions) Act 1984* (Cth), s 4.

<sup>45</sup> AEC, Referendums (Web Page, 31 August 2022) <<https://www.aec.gov.au/elections/referendums/>>.

and educate First Nations communities about electoral processes, with the aim being to increase awareness and participation once enrolled.

## Availability of data about the participation of First Nations peoples in elections

32. It appears that data provided by the AEC about the enrolment and turnout of First Nations peoples in federal elections is based on estimates and is, in part, derived from other sources.<sup>46</sup>
33. The Law Council notes that the ABS produces comparatively detailed data relating to First Nations peoples, collected through the Census and other surveys.<sup>47</sup> The Law Council understands the ABS has multiple key initiatives supporting engagement with First Nations Australians. These include:
- (a) the Centre of Aboriginal and Torres Strait Islander Statistics, which leads and coordinates national statistical activity about Aboriginal and Torres Strait Islander peoples and works to 'ensure that broad consultation with the Aboriginal and Torres Strait Islander community remains a priority in the coordination and development of national statistics whilst providing cultural security in all interactions with First Nations peoples';<sup>48</sup>
  - (b) the Aboriginal and Torres Strait Islander Engagement Management Unit, which has staff based in ABS State and Territory offices throughout Australia and engages with communities through collaborative partnerships; and
  - (c) the Roundtable on Aboriginal and Torres Strait Islander Statistics, an advisory group of Aboriginal and/or Torres Strait Islander people, established by the ABS, to improve data quality and engagement with Aboriginal and Torres Strait Islander peoples.<sup>49</sup>
34. Consideration may be given as to whether these initiatives can be leveraged to produce better data relating to the participation in elections of First Nations peoples.

## Encouraging increased electoral participation and supporting enfranchisement generally

### Accessibility of enrolment and voting for persons with a disability

35. The Law Council considers that the ability of voters to attend a polling place on election day, and vote in person, is vital to the public acceptance of the integrity of elections. As such, the ability of electors to cast a vote independently and in secret is fundamental to Australia's electoral process.

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<sup>46</sup> See, AEC, Indigenous enrolment rate (Web Page, 30 June 2022)

<[https://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/performance/indigenous-enrolment-rate.htm](https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm)>.

<sup>47</sup> Australian Bureau of Statistics (ABS), 'Aboriginal and Torres Strait Islander Peoples' (web page, accessed on 17 October 2022), <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples#:~:text=Estimates%20of%20Aboriginal%20and%20Torres,of%20the%20total%20Australian%20population>>.

<sup>48</sup> ABS, 'Aboriginal and Torres Strait Islander engagement' (Web page, accessed on 17 October 2022) <<https://www.abs.gov.au/about/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-engagement>>.

<sup>49</sup> Ibid.

36. In this context, the Law Council is particularly conscious of article 29(a) of the United Nations Convention on the Rights of Persons with Disabilities<sup>50</sup> (**CRPD**), which provides that people living with disability must be afforded the right and opportunity to vote on an equal basis with others. This includes:

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

37. These rights of full participation should be supported by effective access to polling places and the physical materials involved in the voting process.

38. The Law Council is of the view that alternative arrangements, such as pre-polling and online voting, should not replace means to encourage voters with diverse abilities to vote in person on election day. Voting otherwise than at polling places on election day risks depriving voters of the full sense of participation in the national activity of that day, where the public and shared nature of that attendance reinforces public confidence in the democratic process.

#### **AEC information about accessibility at polling places**

39. The Law Council is concerned that the information published on the AEC website regarding accessibility is somewhat limited and based on unwarranted assumptions about the nature of accessibility needs that polling services should meet. Specifically, the AEC's assessment of accessibility of polling places is limited to the following criteria:

- wheelchair accessible;
- assisted wheelchair access; or
- not wheelchair accessible.<sup>51</sup>

40. The Law Council recommends that the AEC develop a set of minimum standards for the provision of accessible polling places within each electorate. These standards should take into account the accessibility of the venue by public transport and private vehicle, as well as accessibility within the venue.

41. The Law Council notes that published AEC guidance about obtaining assistance to vote at polling places does not contemplate that assistance may be needed *before* arrival at the polling place. The material appears to assume that non-ambulant voters, or voters with restricted mobility, will be able to be driven by another person to a location close enough to the polling place for someone to attract the attention of the relevant AEC worker. In this respect, the Law Council notes the following statement from the AEC website:

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<sup>50</sup> Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).

<sup>51</sup> AEC, Information for people with disability or mobility restrictions (Web Page, 27 July 2022) <<https://aec.gov.au/assistance/>>.

*If you cannot get out of the car and the polling official in charge is satisfied that you cannot enter the polling place, someone may bring the ballot papers to you.<sup>52</sup>*

42. The Law Council suggests consideration should be given to the following:

- information about accessibility of local polling places should be distributed to the electoral officers of local members and candidates;
- staff should be located at the entrance of polling venues to direct voters and to provide information and assistance, including about accessible parking, seating, and toilet facilities; and
- these staff should be provided with a means of enabling ready contact with polling supervisors to arrange for ballot papers or other assistance.

### **Vision impairment**

43. The Law Council understands that the AEC provides telephonic voting and vote-at-home options, which may be of assistance to some voters.

44. However, the AEC should provide more detailed guidance on how voters with vision impairment can attend a polling place and vote in person if they so choose, including by ordering braille or large print ballot papers. The Law Council considers that all voters should have access to an independent and secret voting process.

### **Hearing impairment**

45. The Law Council also recommends that the AEC adopt minimum standards to support voters with hearing impairment, including:

- the provision of Auslan access by video, hearing loop systems and other supports;
- measures to address background noise and poor acoustic qualities of some venues, such as a quiet space within the polling place for communications with AEC workers to occur; and
- clear signposting of available assistance for voters with hearing impairment.

### **Cognitive impairment**

46. Paragraph 93(8)(a) of the Commonwealth Electoral Act prevents individuals from voting who are deemed incapable of understanding the nature and significance of enrolment and voting, by reason of “unsound mind”. This may be achieved by way of any person submitting an objection to enrolment,<sup>53</sup> which must be accompanied by a certificate from a medical practitioner stating that, in the opinion of the medical practitioner, the elector is incapable of understanding the nature and significance of enrolment and voting because of unsoundness of mind.<sup>54</sup>

47. If a medical certificate is provided in accordance with subsection 118(4) of the Commonwealth Electoral Act, the Electoral Commissioner must give notice of an objection to the “challenged elector”.<sup>55</sup> The matter is then required to be determined by the Electoral Commissioner as soon as practicable after:

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<sup>52</sup> Ibid.

<sup>53</sup> Commonwealth Electoral Act 1918 (Cth) s 115.

<sup>54</sup> Ibid ss 116(4), 118(4).

<sup>55</sup> Ibid s 116(1).

- the receipt by the Electoral Commissioner of the challenged elector's response; or
- the end of 20 days after giving notice of the objection.<sup>56</sup>

If the Electoral Commissioner is satisfied that the elector is of unsound mind, that elector will be removed from the electoral roll.

48. The Law Council considers that removing the right to vote is a most serious step that should not be undertaken lightly. The Law Council notes that, in 2014, the Australian Law Reform Commission (**ALRC**) recommended that subsections 93(8) and 118(4) of the Commonwealth Electoral Act be repealed.<sup>57</sup> It further recommended that, while there should be no new threshold test for enrolment or voting, there should be a new exemption from compulsory voting for those who lack decision-making ability relating to voting.<sup>58</sup>
49. The Law Council notes that removing any restriction on eligibility for enrolment connected to capability would be consistent with Australia's international legal obligations under Article 29 of the CRPD, which, as noted above, provides that people living with disability must be afforded the right and opportunity to vote on an equal basis with others.
50. Consistent with the broader approach recommended by the ALRC, the Law Council recommends greater support be provided to voters with cognitive impairment and their families and/or carers with respect to exercising the right to vote, noting that the AEC provides easy read guides for people who have difficulty reading and understanding written information.<sup>59</sup> Resources should also be provided to the AEC to facilitate expert advice about a range of relevant cognitive effects of diverse developmental conditions, injuries, and illnesses.
51. Should subsection 118(4) of the Commonwealth Electoral Act be retained, the Law Council also recommends additional practical measures in relation to determining objections under it, such as:
- the notice period of 20 days should be extended to 120 days, with two reminder notices during that period;
  - written notice should, where appropriate, be supplemented by personal contact with the elector; and
  - the decision to issue a fine to an elector who is enrolled, but did not vote, should take into account whether an objection notice has been filed that was not resolved prior to polling day.

### Neurodiversity

52. The Law Council notes that limited support is available to voters with neurodiversity to exercise their right to vote, and believes that this is a matter on which the AEC should be resourced to obtain expert advice.

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<sup>56</sup> Ibid 118(1).

<sup>57</sup> Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (Report 124, August 2014) 262, recs 9-1, 9-2 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_124\\_whole\\_pdf\\_file.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf)>.

<sup>58</sup> Ibid, [9.26].

<sup>59</sup> AEC, Information for people with disability or mobility restrictions (Web Page, 27 July 2022) <<https://www.aec.gov.au/assistance/>>.

53. An example of a potential measure to support neurodiverse voters would be the provision of a quiet room, or a room without fluorescent lighting. The Law Council recognises that these are relevant supports for some aspects of neurodiversity only.

### Other measures

54. The Law Council recommends consideration be given to the following practical measures to support voting for persons with accessibility needs:

- **Accessible seating and toilets:** Accessible seating should be provided inside and outside the polling place. Accessible toilets should be provided and clearly signposted.
- **Exploring options for electronic voting:** Electronic voting systems may enhance accessibility for some voters, particularly:
  - voters with vision impairments;
  - silent electors (individuals whose safety may be at risk if their enrolment details are published);
  - voters who live more than 20 kilometres from any polling place; and
  - voters who cannot attend a polling place due to a disability.

That said, the Law Council acknowledges the challenges of providing electronic voting, including the problems with the *iVote* system in NSW,<sup>60</sup> and is not proposing any broader expansion of voting by electronic means due to the known risk to the integrity of the electoral process.

- **Temporary illness or disability:** The Law Council suggests that provision be made for telephonic voting by voters with temporary illness or disability who have not been able to arrange pre-polling, subject to provision of medical certification of the extenuating circumstances.
- **Rural and remote voting:** The Law Council notes media reports of reduction in polling support to rural and remote voters during the 2022 federal election due to worker shortages.<sup>61</sup> If these reports are accurate, this also impacts on voters with accessibility needs. While acknowledging that such shortages may have been unique to the COVID-19 pandemic, the Law Council encourages necessary resourcing of the AEC to ensure rural and remote communities are not disadvantaged in accessing polling places.
- **Overseas voting:** The closure of overseas polling places and restriction of overseas voting was widely reported in the media as adversely affecting voters in the 2022 election.<sup>62</sup> Such restrictions also affect voters with accessibility needs. The Law Council encourages the restoration of resourcing of the AEC to support overseas voting.

### Engaging directly with voters with disability

55. The Law Council considers that the most important support that the AEC can provide would be to acknowledge the diversity of accessibility needs by seeking the views of voters themselves. This could be done by clearly advertising a helpline service (which

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<sup>60</sup> See *NSW Electoral Commissioner v Kempsey Shire Council* (No 2) [2022] NSWSC 282.

<sup>61</sup> See Sarah Collard, 'Voter suppression' concerns if worker shortages force polling stations to close', *NITV News* (online, 18 May 2022) <<https://www.sbs.com.au/nitv/article/voter-suppression-concerns-if-worker-shortages-force-polling-stations-to-close/54bqv16gc>>.

<sup>62</sup> See Widia Jalal, 'These Australian expats tried to vote at the federal election but couldn't. And they might not be the only ones', *Australian Broadcasting Corporation* (online, 8 July 2022) <<https://www.abc.net.au/news/2022-07-08/overseas-voters-impacted-by-postal-vote-delays/101112912>>.

includes video-telephonic Auslan interpreters) for voters to ask for the specific help they need to vote.

56. Such service could be staffed by AEC officers who have been trained in disability support, and appropriately resourced to provide information and to arrange accessibility measures requested in order to provide real and effective solutions for individual voters.

## Accessibility of voting for persons in emergency situations

57. The Law Council considers that the different and various emergency events that have occurred in recent years, such as bushfires, the COVID-19 pandemic and flooding have highlighted the importance of ensuring that voters are not inadvertently disenfranchised by a lack of accessibility to polling places. This is particularly important in circumstances when voters did not avail themselves of the early voting options because the need did not arise until polling day (or close to it).<sup>63</sup>
58. The Law Council notes that some work has already been conducted in this regard by the Committee in its 2021 inquiry on the future conduct of elections operating during times of emergency situations.<sup>64</sup>
59. However, the Committee's recommendations in its report contemplate only those methods of alternative voting that can be carried out prior to voting in person, such as early postal voting and pre-poll voting. The report does not grapple with issues presented by remoteness of locations and the challenges highlighted by the Northern Territory Electoral Commission in relation to the unreliability of postal services, as well as digital infrastructure.<sup>65</sup> The 2021 inquiry report also does not address situations where, for example, individuals contracted COVID-19 (or were informed they were a close contact of a positive case) and were required to self-isolate on election day.
60. The Law Council recognises that the Committee has previously considered online voting, with its 2014 report noting that:

*This Committee has previously rejected the development of a universal online voting portal stating that the proposal raised: ... significant questions over the capacity of an electronic voting solution to be both cost-effective and protect the security and sanctity of the ballot in the Australian context [and concluded that] there can be no widespread introduction of electronic voting in the near term without massive costs and unacceptable security risks.*<sup>66</sup>

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<sup>63</sup> See Tamsin Rose, "Washed away": residents angry as one polling booth opens in flood-hit Lismore', *The Guardian* (online, 12 May 2022) <<https://www.theguardian.com/australia-news/2022/may/12/washed-away-residents-angry-as-one-polling-booth-opens-in-flood-hit-lismore>>.

<sup>64</sup> Joint Standing Committee on Electoral Matters, Report on the inquiry on the future conduct of elections operating during times of emergency situations (June 2021) <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc\\_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergency situations.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergency situations.pdf;fileType=application%2Fpdf)>.

<sup>65</sup> *Ibid* [2.57]-[2.61].

<sup>66</sup> Joint Standing Committee on Electoral Matters, Second interim report on the inquiry into the conduct of the 2013 Federal election: An assessment of electronic voting options (November 2014) 2 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/2013\\_General\\_Election/Second\\_Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2013_General_Election/Second_Interim_Report)>.



61. The Committee's 2021 inquiry report observes that the above risks have not yet been resolved.<sup>67</sup> The Law Council agrees that these security concerns, particularly in respect of foreign interference, remain very real.
62. However, the Law Council submits that there should be more robust contingency planning to ensure there is no recurrence of the issues that reportedly arose for individuals who were subject to pandemic isolation requirements on the day of the 2022 federal election, or who for some other reason found themselves unable to access a polling place, such as those unexpectedly admitted to hospital.<sup>68</sup>
63. The Law Council considers that there may be a need to expand, for example, the availability of telephone voting or, in certain situations, more extensive use of mobile voting settings (like those employed in residential aged care facilities and hospitals).

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<sup>67</sup> Joint Standing Committee on Electoral Matters, Report on the inquiry on the future conduct of Elections operating during times of emergency situations (June 2021) [3.31] <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc\\_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergencysituations.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergencysituations.pdf;fileType=application%2Fpdf)>.

<sup>68</sup> Christopher Knaus, "Caught unawares': Covid is preventing Australians in hospital from voting", *The Guardian* (online, 21 May 2022) <<https://www.theguardian.com/australia-news/2022/may/21/caught-unawares-covid-is-preventing-australians-in-hospital-from-voting>>.