



Voter ID laws: an unnecessary risk to Queenslanders' right to vote

Submission to Queensland Parliament's Legal Affairs and
Community Safety Committee on the Electoral Reform
Amendment Bill 2013

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Executive Summary

The Human Rights Law Centre (the **HRLC**) welcomes the opportunity to provide submissions on the Electoral Reform Amendment Bill 2013 (the **Bill**) to the Legal Affairs and Community Safety Committee (the **Committee**).

The HRLC works to protect the right to vote in Australian law through litigation and advocacy. We have been involved in two landmark cases in the High Court that have strengthened the right to vote in Australian law. In *Roach v Electoral Commissioner* the High Court first recognised that the Australian Constitution protects the right to vote and struck down a blanket ban on prisoners voting. In *Rowe v Electoral Commissioner*, the High Court struck down laws that required to electoral rolls to be closed on the date of the issue of the writs. It is estimated that over 180,000 people were able to vote in the 2013 election as a result of the decision in that case.

This submission is confined to the aspects of the amendments that introduce requirements for voters to show identification when casting a ballot (**voter ID requirements**).

If the Bill is passed, Queensland will be the first Australian state or territory to introduce a voter ID requirement. When Queensland's plans for introducing voter ID requirements were first announced, the HRLC and other community and human rights groups wrote to Queensland's Attorney-General, Jarrod Bleijie.¹ Our concerns were that voter ID laws could disenfranchise up to 40,000 Queenslanders and have a disproportionately harmful impact on the right to vote of Aboriginal and Torres Strait Islander peoples, people experiencing homelessness, young people, old people and people with a disability.

HRLC is pleased to see that the Bill seeks to address some of the harsher aspects often found in voter ID laws overseas. For example, people who do not have their ID at the ballot box are provided an opportunity to cast a vote anyway if they make a declaration as to their identity and that they have not already voted. The Attorney has also announced that a broad range of photographic and non-photographic identification will be accepted as proof of identity.

A healthy, functioning democracy requires broad participation and strong adherence to the integrity of the voting system, including measures to reduce potential for electoral fraud. International human rights law requires the secrecy, security and validity of voting processes as part of the enjoyment of the right to vote of electors. The ability to cast a vote is fundamental, and its value is diminished if the vote is cast a corrupt and coercive electoral system.

Assessing the justification for voter ID requirements involves balancing the benefit to the integrity of the voting process that comes from reducing the risk of fraud against the detriment that may be caused by introducing an additional barrier to casting a vote.

The voter ID requirements create an extra hurdle for voters to overcome in order to cast a vote. In this sense, if passed, the Bill will limit the right to vote.

¹ See letter at <http://www.hrlc.org.au/attorney-general-urged-to-rethink-voting-id-hurdle-that-may-prevent-queenslanders-from-casting-votes>.

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A human rights approach requires that any limitation on the right to vote must be necessary and proportionate. We believe that the voter ID requirement is not a necessary or proportionate limitation for the following reasons:

- There is no evidence of significant voter fraud in Queensland.
- There is a risk that voter ID laws will disproportionately and negatively impact already marginalised and disadvantaged groups in society.
- The voter ID requirements will impose a further barrier to participation in elections at a time when that participation is declining.

For these reasons, the HRLC opposes the introduction of voter ID requirements on the basis that they are an unnecessary infringement on the right to vote. There is simply no need for voter ID requirements to be introduced in Queensland and too great a risk that they will unnecessarily stop people who are eligible to vote from casting their ballot.

Recommendation 1:

The Queensland government should not introduce a requirement for voters to show identification in order to cast a ballot at Queensland elections.

2. Enhancing the right to vote and democracy

2.1 The right to vote

The objectives of the Bill are to ensure the opportunity for full participation in Queensland's electoral process and to enhance voter integrity and voting convenience.² The objectives can be balanced and achieved using a human rights-based framework, which protects the right to vote as well as the integrity of the voting system.

Voting in a parliamentary election is a human right recognised under Australian and international law.

In *Roach v Electoral Commissioner* [2007] HCA 43, Australia's High Court found that the right to vote lies at the heart of Australia's system of representative government. The High Court ruled that Australians' voting rights should not be limited or infringed except where absolutely necessary and then only to the extent that the limitation is proportionate.³

The right to vote is also protected in the International Covenant on Civil and Political Rights (**ICCPR**) to which Australia is a party (art. 25). The provisions of the ICCPR extend to all parts of federal states, including Queensland, without limitation or exception (art. 50).

² Explanatory Notes, Electoral Reform Amendment Bill 2013, p.1.

³ *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007); *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010).

Human rights law does not require a particular electoral system, but to be compatible with the right to vote, an electoral system “must guarantee and give effect to the free expression of the will of the electors.”⁴

Although the right to vote under the ICCPR can be limited, those limitations should be based on objective and reasonable criteria.⁵ For example, it may be reasonable to set a minimum age for voting.⁶

The integrity of the voting system is central to the right to vote. Both the right to vote and representative government are undermined by processes that are marred by fraud and corruption. The voting system should guarantee the secrecy, security and validity of the voting processes in law and also ensure that the right to vote can be freely exercised.⁷

The voter ID requirements create an extra hurdle for voters to overcome in order to cast a ballot. In this sense the law will limit the right to vote. The following section discusses the matters relevant to the consideration of why this limitation is unnecessary and disproportionate, and therefore inconsistent with the right to vote.

3. Voter ID laws: unnecessary and disproportionately restrictive

3.1 No established need for voter ID requirements

Introducing a voter identification requirement in Queensland is unnecessary. The purported aim of the voter ID requirements is to “enhance voting integrity” and “reduce the potential for electoral fraud.”⁸ These are both legitimate aims. However, the government has not provided any evidence that the integrity of the system is being undermined or of any electoral fraud to justify the voter ID requirement.

There is no evidence of significant voter fraud in Queensland or Australia more broadly. The Queensland Government’s own discussion paper stated that there is no specific evidence of electoral fraud that might suggest a need for tighter controls. It warned that voter ID requirements could be considered disproportionate.⁹

⁴ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, 1996 para 21.

⁵ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, 1996.

⁶ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, paragraph 10.

⁷ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, para 22.

⁸ Hon JP Belijie, First Reading Speech, Electoral Reform Amendment Bill, 21 November 2013.

⁹ Queensland Department of Justice and Attorney-General, “Electoral Reform Discussion Paper”, January 2013, p 29.

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The Australian Electoral Commission stated that 1458 people admitted multiple voting at the 2010 Federal election after being identified through AEC's follow-up processes – a national average of just 10 votes per seat.¹⁰ Seats typically have around [100,000] eligible voters.

The limited evidence of voter fraud highlights the lack of justification for introducing an additional barrier to voting.

3.2 Voter ID laws tend to be discriminatory

Voter ID laws tend to disproportionately affect groups of people who are already marginalised or disadvantaged.

Laws regulating voting will be inconsistent with the right to vote if they permit distinctions to be made between citizens on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹

In Australia, strict voter identification requirements would be likely to disproportionately affect particular social groups who are less likely to have identification such as elderly people, young people, people experiencing homelessness and Aboriginal and Torres Strait Islander peoples.¹² Voter identification requirements also discriminate against people with limited mobility such as the elderly and people with disabilities who are less able to return to a polling booth in the event that they forget to bring the required identification.

The HRLC welcomes the Queensland Government's attempt to mitigate some of the discriminatory impact of the voter ID requirements. The Attorney-General stated that the range of ID that will be accepted will be broad, including photographic and non-photographic ID as well as a letter sent to all enrolled voters by the Electoral Commission of Queensland (**ECQ**) when an election is called. The acceptable forms of ID will be set out in regulations.¹³

However, there is still a risk of a discriminatory impact of the voter ID requirements. For example if a letter from ECQ can be used as identification, people must first receive the letter and understand that it can be used in that way. Aboriginal people living in remote areas and people experiencing homelessness may be less likely to receive these letters. People from non-English speaking

¹⁰ Ed Killesteyn, Electoral Commissioner, "AEC does its best to cut voting errors", Financial Review, 8 March 2012, available at: http://www.abc.net.au/mediawatch/transcripts/1331_election.jpg.

¹¹ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7., para 3.

¹² In Queensland, only 38% of Aboriginal and Torres Strait Islander people hold a drivers licence, compared with 90% in the non-Aboriginal community: Skinner and Rumble, "A new approach to addressing driver licensing issues within Indigenous communities across Australia," Austroads, December 2012, p 2, available at http://acrs.org.au/wp-content/uploads/15_Robinson-N-PR.pdf. It is also estimated that thousands of Aboriginal and Torres Strait Islander people in Australia do not have birth certificates: See Paula Gerber, "Aboriginal people are still denied full citizenship", The Drum, 1 November 2012.

¹³ Hon JP Beljije, First Reading Speech, Electoral Reform Amendment Bill, 21 November 2013.

backgrounds may also not be aware that the letter from the Electoral Commission of Queensland serves as a form of ID.¹⁴

3.3 Voter ID laws impose an unjustified barrier to electoral participation

Whilst the government has sought to enhance participation by allowing a broad range of ID to be eligible and by allowing declaration votes to be cast, the voter ID requirement will limit the right to vote.¹⁵

The voter ID requirement will impose a barrier to participation and, if anything, discourage participation in elections. For example, it is impossible to quantify the extent to which the ID requirement will deter or prevent people from voting. The Queensland Department of Justice was concerned that introducing such a requirement could confuse voters.¹⁶ Confusion about whether ID is required or which ID is accepted could discourage people from attending a polling station. This would mean that they do not have the opportunity to take advantage of the declaration voting provisions.

Participation in Australian elections is diminishing. The AEC reports that 20% of eligible voters did not cast a ballot in the 2010 federal election and that 25% of young voters (400,000 people aged 18 to 24) failed to enrol in time to vote in the 2013 election.¹⁷ Informal voting is also on the rise. Over 5.92% of total votes cast in the 2013 election were informal – comprising both people who deliberately voted informally and those whose ballot was unintentionally filled out wrong. This is the highest proportion of informal votes in 30 years.¹⁸

Reform in this area should aim to make voting easier not introduce more barriers to participation. A human rights-based approach requires states to actively ensure wide participation in elections by adopting positive measure to overcome difficulties some members of the community might face in voting, such as illiteracy, language barriers or freedom of movement.¹⁹

¹⁴ Seats with the highest rates of informal voting at present are usually those with the highest proportions of people from non-English speaking backgrounds: Sally Young, "Informal Voting is on the rise", Election Watch 2013 University of Melbourne, available at <http://2013electionwatch.com.au/analysis/informal-voting-rise>.

¹⁵ The voter ID requirements in the Bill will allow a declaration vote to be made, which must be witnessed by a returning officer (ss 107(7), 112(7) and 121). The voter must declare that they are the person whose name is on the envelope and that they have not already voted in order to be allowed to cast a ballot (s 121(3)). The Government has also stated that the range of ID that will be accepted will be broad, including photographic and non-photographic ID as well as a letter sent to all enrolled voters by ECQ when an election is called. The acceptable forms of ID will be set out in regulations.

¹⁶ Queensland Department of Justice and Attorney-General, "Electoral Reform Discussion Paper", January 2013, p 29.

¹⁷ Catherine McGrath, "Statistics show 25 per cent of young people failed to enroll to vote in September election", ABC, 21 August 2013, available at <http://www.abc.net.au/news/2013-08-21/figures-show-25-per-cent-of-young-people-failed-to-enrol-to-vote/4903292>.

¹⁸ Sally Young, "Informal Voting is on the rise", Election Watch 2013 University of Melbourne, available at <http://2013electionwatch.com.au/analysis/informal-voting-rise>.

¹⁹ Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev1/Add.7, para 12.

3.4 Caution from overseas experience

There is significant debate overseas about the harmful impact of voter ID laws, with calls for more evidence to be obtained about the extent to which the laws suppress the vote.²⁰

Different forms of voter ID laws have recently been introduced in some European states, the United States and Canada.

Some of the available evidence suggests that ID requirements will suppress the vote, even with very broad permissive rules about the forms of ID that will be acceptable. In Northern Ireland which provides free identity cards to anyone without the necessary identification, a survey found that 7% of voters did not have the appropriate form of ID to cast a ballot.²¹ Another study found that one in one hundred electors was turned away from the polls for not possessing proper ID.²²

In 2009, Canada's Chief Electoral Officer reported that Aboriginal peoples, seniors, students, residents of long-term care facilities and the homeless experienced challenges in meeting voter ID requirements. The Canadian Senate Committee on Aboriginal Peoples raised its concerns that First Nations, Inuit and Metis electors, though unintentionally, had been adversely affected in exercising their fundamental right to vote.²³

3.5 Canadian and US case law

Voter ID laws have been considered by US and Canadian courts.

(a) *Canada*

In 2007, Canada introduced laws requiring voters to present a form of identification to the ballot box in order to establish their identity or otherwise to swear an oath as to their identity that is vouched for by another enrolled voter.

In *Henry v Canada*, a judge of the British Columbia Supreme Court found that Canada's law infringed the right to vote but that the limitation was reasonable and proportionate. The Canadian government did not lead evidence of widespread electoral fraud. Instead the court focused on evidence that the impact on electors' voting could be remedied by outreach and education by the electoral authorities.

²⁰ See good discussion in Justin Levitt, "Election Deform: The Pursuit of Unwarranted Electoral Regulation", *Election Law Journal*, Volume 11(1), 2012 and Erikson and Minnite, "Modeling Problems in the Voter Identification-Voter Turnout Debate," *Election Law Journal*, Volume 8(2), 2009.

²¹ See Schaffer and Wang, "Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective", (2009) 3 *Harvard Law and Policy Review* 398, 404-405.

²² See Schaffer and Wang, "Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective", (2009) 3 *Harvard Law and Policy Review* 398, 404-405.

²³ Standing Senate Committee on Aboriginal Peoples, "New Voter Identification Procedures and Related Impacts on Aboriginal Peoples and Communities in Canada", May 2009, p 6.

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The *Henry* decision should be treated with caution. It was decided by a single judge of the British Columbia Supreme Court and is currently on appeal.²⁴ The single judge did not focus on the fact that the government had not proven widespread election fraud.²⁵ Australian courts are likely to be more proactive in requiring governments to provide evidence of the fraud they assert justifies the need for the ID requirements.²⁶

(b) USA

Voter ID laws have proliferated in the United States over the last ten years. Thirty four states now have some form of voter ID law.²⁷ In 2009, in *Crawford v Marion County*, the United States Supreme Court found that Indiana's requirement for voters to show photo identification at the ballot box did not violate the 14th amendment.²⁸

Although the government provided no evidence of actual fraud in Indiana elections, the Supreme Court accepted that the government had a legitimate interest in preventing voter fraud.²⁹ The court relied on the fact that the state provided ID in Indiana.

The *Crawford* decision should also be treated with caution. As stated above, Australian courts are likely to be more proactive in requiring evidence of fraud.

Further, the decision has been discredited by one of the judges responsible for it. Judge Posner, who wrote the majority view of the Court of Appeal's decision which was subsequently upheld by the US Supreme Court, now says that the decision is wrong. He believes that the court did not have the necessary evidence before it to strike the right balance between protecting voters rights and preventing fraud, that voter ID laws are now widely regarded as suppressing the vote rather than preventing fraud and that voter ID laws deny access to the ballot box to people who have a legitimate

²⁴ An appeal in this matter has been heard by the British Columbia Court of Appeal in February 2013, although no decision has been handed down as yet.

²⁵ *Henry v Canada*, 2010 BCSC 610 at [398]

²⁶ In *Rowe*, the government alleged that its reason for limiting voting rights by closing the electoral roll early was to address electoral fraud. Two judges of the High Court did not accept the government's mere assertion of fraud and indicated that the government must lead evidence of fraud if it wished to limit the right to vote on that basis (*Rowe*, [167] (Gummow and Bell JJ)). Another judge also noted that no evidence of fraudulent activity was led, which was relevant to her decision that the early closure of electoral rolls was not necessary or appropriate for protection of the integrity of the roll (See *Rowe* at [382] – [383] (Crennan J)). Under state human rights law, where the Government wishes to pass a law that infringes human rights, at the very minimum it must provide a specific, evidence-based justification for its actions. See section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [144] – [156] (per Warren CJ). The onus of establishing that a limitation is reasonable and demonstrably justified rests on the party seeking to rely on the limitation, which will usually be the government. [1986] 1 SCR 103, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108.

²⁷ See National Conference of State Legislatures available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

²⁸ *Crawford v Marion County Election Board* 553 US 181

²⁹ *Crawford v Marion County Election Board* 553 US 181 at 11-12 (Stevens J).

entitlement to vote. He recognizes that if the court had the evidence before it that exists now, it would have come to a different decision.³⁰

4. Research required on impact

If the Bill is passed, the Queensland Government should empower and resource the ECQ or another independent body to research and report on the impact of the voter ID requirement. The research should assess the level of any confusion created by voter ID requirements, the extent to which people are dissuaded from casting a ballot, the impact on particular vulnerable groups and the usage of the declaration voting process.

The scope and methodology of the research should be developed in consultation with academics and non-government organisations.

Recommendation 2:

If the Bill is passed, the Queensland Government should empower and resource the ECQ or another independent body to research and report on the impact of voter ID requirement. The scope and methodology of the research should be developed in consultation with academics and non-government organisations.

³⁰ John Schwartz, "Judge in Landmark Case Disavows Support for Voter ID," New York Times, 15 October 2014.