Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012

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Contents

Purpose ............................................................................................................................... 2
Background ....................................................................................................................... 3
   Basis of policy commitment ......................................................................................... 4
   Committee consideration .............................................................................................. 4
Policy position of non-government parties/independents ...................................................... 5
Position of major interest groups ...................................................................................... 6
   Democratic Audit of Australia ..................................................................................... 6
   Electoral Reform Australia .......................................................................................... 7
   People with Disability Australia .................................................................................. 7
   Family Voice Australia ............................................................................................... 8
Financial implications ....................................................................................................... 9
Main issues ....................................................................................................................... 9
Key provisions .................................................................................................................. 10
   Schedule 1—Postal voting in elections and referendums ................................................. 10
   Schedule 2—Nominations for election ......................................................................... 12
   Schedule 3—Other amendments .................................................................................. 12
Concluding comments ..................................................................................................... 14
Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012

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House: House of Representatives
Portfolio: Special Minister of State
Commencement: On the day of Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill serves three main purposes:

- to simplify, and facilitate the application of technology to, postal voting arrangements
- to discourage candidates who are not seriously in contention for election by raising nomination fees and the number of supporters required for nomination, thereby reducing the length and complexity of ballot papers, especially for the Senate and
- to modernise and render non-judgemental the provisions under which a person may be disqualified from enrolling and voting.

The amendments in this bill replace the outdated reference to 'unsound mind' with a non-judgemental requirement to obtain a letter or certificate from a 'qualified person' with respect to a person's capacity to vote. The amendments now provide a disqualification from enrolment if in the opinion of a qualified person the potential elector does not understand the nature and significance of enrolment and voting. The inclusion of the words 'unsound mind' in the Commonwealth Electoral Act generates considerable concern in the community. General practitioners advise that they are not qualified to say whether somebody is or is not of 'unsound mind'. Such inappropriate language is both unhelpful and misleading.¹


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These changes implement, among other things, three unanimous recommendations—12, 31 and 32 of the report by the Joint Standing Committee on Electoral Matters (JSCEM) titled *The 2010 Federal Election: Report on the conduct of the election and related matters.*

**Background**

On Thursday 7 July 2011, the Joint Standing Committee on Electoral Matters (JSCEM) tabled its report on the conduct of the 2010 Federal Election and matters related thereto.

Among other things, the Committee made three unanimous recommendations for changes to electoral procedures, namely:

**Recommendation 12**

The Committee recommends that the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* be amended to specifically allow for the automated issuing of postal votes by the Australian Electoral Commission.

**Recommendation 31**

The Committee recommends that subsection 170(3) of the *Commonwealth Electoral Act 1918* be amended to increase the sum to be deposited by or on behalf of a person nominated as a Senator to $2000.

**Recommendation 32**

The Committee recommends that subsection 170(3) of the *Commonwealth Electoral Act 1918* be amended to increase the sum to be deposited by or on behalf of a person nominated as a Member of the House of Representatives to $1000.

The Bill implements the Government response to recommendations 12, 31 and 32 of the JSCEM Report as well as making a number of technical and minor amendments. The effect of Recommendations 31 and 32 is to discourage from contesting elections those candidates and groups whose chances are very slim, thereby avoiding unwieldy ballot papers that tend to be difficult to read and are likely to give rise to higher levels of informality.

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3. Ibid.
4. Ibid.
5. G Gray, op. cit.

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The Minister has declared that the Bill ‘is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011’. The Statement of Compatibility concludes as follows:

The Bill engages Article 25 (right to take part in public affairs and elections) of the International Covenant on Civil and Political Rights (ICCPR). The Bill contributes to the realisation of Article 25 of the ICCPR by facilitating on-line postal vote applications and the use of new technologies over time. The Bill does impose deposit and nominator thresholds that must be met by candidates, but these are reasonable and are balanced against the need to provide a ballot paper that is easy to use and readable.

**Basis of policy commitment**

The Rudd and Gillard Governments have introduced various pieces of legislation directed at changes to a range of election-related matters, including political financing, enrolment and election management processes. The Government has routinely looked to JSCEM for advice on electoral law reform, and the current Bill is consistent with that practice.

Impetus for the development of the Bill includes the fact that the use of postal voting has risen steadily. At the 2010 election the Australian Electoral Commission (AEC) processed over a million postal votes, which was a 17.8 per cent increase in the number processed at the 2007 election. This Bill responds to the increasing demand by streamlining administrative arrangements and protocols within the AEC and making provision for the use of relevant technologies in the handling of postal vote applications and certificates.

The Bill also seeks to modernise the language and concepts articulated in the main Acts.

**Committee consideration**

The Bill was referred to the Joint Standing Committee on Electoral Matters for inquiry and report on 28 June 2012. A reporting date was not set, but submissions were sought by Friday, 13 July 2012. A public hearing was held on 16 July 2012.

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7. Ibid., p. 3.

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The JSCEM tabled its advisory report on the Bill on Thursday 16 August and recommended that:

The House of Representatives and the Senate pass the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, after deleting the changes proposed in Schedule 3 in relation to the ‘unsound mind’ provision and consequential amendments. The term ‘unsound mind’ and the current requirement for a certificate from a medical practitioner should be retained.10

During debate in the House of Representatives upon the tabling of the Committee’s report, the Member for Mackellar (Mrs Bishop) noted that the JSCEM report was ‘unusual … because it is unanimous’.11 During debate on the tabling of the JSCEM report in the Senate, the Australian Greens stated their objection to the proposed provisions to increase nomination fees and the number of nominators required to nominate as a candidate, describing the provisions as ‘undemocratic’ and to the ‘disadvantage (of) small parties and candidates’.12

Policy position of non-government parties/independents

There is general support for the thrust of the Bill to the extent that it is grounded in unanimous recommendations of the JSCEM.

The major parties are strongly of the view that there should be no unintended outcomes of the Bill that would prevent political parties, Members of Parliament and Senators from being involved in facilitating the delivery and receipt of postal vote applications, or from having them returned to a party or an MP’s or Senator’s office in the first instance.13 AEC officials gave that assurance in evidence to the JSCEM on 16 July 2012.14

Senator Ryan: Mr Killesteyn, I appreciate what you just said: that you do not believe that that is possible under this bill. Mr Pirani, I am a bush lawyer at best. Is it a possible interpretation of this bill that such a decision or determination could be made by a future commissioner?
Mr Pirani: The answer to that is no.

CHAIR: Can you take us to the provision?

Mr Pirani: In 2010 we did have an amendment that would have had that effect. That was in the Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010. It was in Schedule 6, and it was item 2 of that Schedule. Item 2 inserted the word ‘directly’ in section 184(2) and 184(3). That is what it would have done, which would have meant that with the PVC [Postal Vote Certificate] resultant from the PVA [Postal Vote Application], when a person filled out the certificate and the envelope and sent it back to us, it had to come to the AEC directly. That amendment was withdrawn by the government in the Senate prior to that legislation going through. So as the act currently stands, with the amendments that are proposed here, it is not possible for the Electoral Commissioner to prevent the political parties sending out the PVAs, receiving them back and then forwarding them on to the AEC. There is no change.

....

Mrs BRONWYN BISHOP: So there would be no attempt to find anything under this current bill, and you would in no way attempt to prevent political parties having the postal vote applications come back to them and then go in to be processed by you.

Mr Killesteyn: There will be no attempt to do that—absolutely.15

The Australian Greens expressed some concern that a rise in nomination fees might inhibit people from low income groups offering themselves as candidates.16 Similar concerns were raised by the Australian Democrats.17

Position of major interest groups

Democratic Audit of Australia

The Democratic Audit of Australia (the Audit) has recommended the repeal of certain sections of the Commonwealth Electoral Act 1918 dealing with the handling of postal vote applications (PVA). In particular the Audit objects to ‘the practice whereby political parties harvest postal vote applications and use the party’s post box as the return address’ for the PVA.18 The Audit considers that this

15. Ibid., pp. 4–5
18. Democratic Audit of Australia, Submission to Joint Standing Committee on Electoral Matters, Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, submission 1, 10 July 2012, p. 1,

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unfairly favours incumbents and offends the principles of non-partisanship in electoral administration. Similar concerns have been raised by the Australian Democrats.

The Audit is ‘in general support’ of the amendments contained in Schedule 2 of the proposed Bill. It also believes that Schedule 3 of the Bill provides for ‘important amendments’—although the Audit raises some questions about the scope and qualifications of those whose opinion is to be relied upon concerning a voter’s capacity to make a voting decision.

Electoral Reform Australia

On the matter of changes to the rules regarding candidate nomination, Electoral Reform Australia (ERA) argues that: ‘Only candidates with genuine support should stand for election. Electoral deposits should be increased to $10,000 per candidate. We see no reason for a distinction between House of Representative candidates and Senate candidates’. ERA argues that the Australian voter ‘deserves to be respected and should be able to look at a ballot paper knowing that every candidate listed actually wants to be elected. Bogus candidates have the potential to distort the results of the election and undermine the integrity of the process’.

However, ERA does not support the requirement to increase the number of nominators for candidates not nominated by a political party: ‘Such a requirement is petty and would not achieve a reduction in the number of candidates standing for election’.

People with Disability Australia

People with Disability Australia (PWD) recognises the goodwill behind the intention, in Schedule 3 of the Bill, to repeal the expression ‘by reason of being of unsound mind’ from paragraph 93(8)(a) of the Commonwealth Electoral Act 1918. However, PWD regards the substitution of this phrase by the words ‘in the opinion of a qualified person’ (as defined by an addition to section 93) to be ‘mere...
semantics, which ‘does not address the discriminatory nature of the paragraph as a whole’. PWD argues that it contravenes the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The Minister has declared that the Bill ‘is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011’. Although the UNCRPD is one of the recognised international instruments listed in section 3, it is not explicitly referred to in the Bill’s human rights compatibility statement.

PWD recommends that paragraph 93(8)(a) be repealed in its entirety:

People with disability have the right to vote on an equal basis with others. As such, all people with disability have the right to be on the electoral role as recognition of their citizenship, inclusion and participation in society. The nature of that right is distinct from whether a person exercises their right to vote on polling day as required by law. If, like any other citizen, a person with disability is unable to vote on polling day then they should also be exempt from penalty if they provide a valid reason. It may be that for a person with a disability the reason provided is related to their disability and the effects it had on their ability to make choices on that specific day. However, democracy requires that this determination be made after the opportunity to vote has been granted and not before.

Family Voice Australia

Family Voice Australia (FVA) believes that ‘some constraints on the nomination procedure may be necessary to avoid manipulation or abuse of the electoral process’. FVA considers that the proposal that, to be grouped, Senate candidates each need 100 unique endorsements, is problematic. FVA argues that groups of between two and four candidates (with each candidate requiring only 100 nominators) enjoy ‘the privilege of a “group voting square”, with much lower endorsement

27. G Gray, op. cit.
30. People with Disability Australia, op. cit., p. 5.
31. Ibid., p. 6.

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requirements than political parties’ who require at least 500 members to achieve registration. On the other hand, a group of six (or more) candidates would be required to deliver 600 (or more) signatures—more than a political party requires. FVA regards this as unfair:

Grouped candidates get the same advantage as registered political parties of an above the line box. Registered political parties need 500 current members. The Bill should be amended to require that any application for grouping on the Senate ballot paper be accompanied by a total of at least 500 unique endorsements regardless of the number of candidates applying to be grouped.34

**Financial implications**

The Explanatory Memorandum states that the costs associated with implementation of the measures contained in the Bill will be absorbed by the Australian Electoral Commission from existing resourcing.35

**Main issues**

The AEC considers that:

it is now appropriate that postal voting provisions be recast to support a more modern, efficient and effective service to voters, while still retaining the key integrity features – such as the requirement to match returned postal votes to an application, initialling of ballot papers by an authorised person and the preliminary scrutiny provisions.36

The AEC believes that amendments that substitute ‘Electoral Commissioner’ for ‘Divisional Returning Officer (DRO)’ as the officer responsible for the receipt and processing of PVAs will generally have the effect of simplifying and providing efficiencies in the administration of postal voting.37 Amendments providing for technological developments reflect the fact that an increasing number of Australians wish to interact with government electronically, rather than attending government offices and completing paper forms.38

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33. Ibid., p. 4.
34. Ibid.
37. Ibid., p. 9.
38. Ibid.

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The AEC concurs with the view that, with respect to nominations by people to be candidates, it is important to strike the right balance between providing the opportunity for all citizens to take part in elections while at the same time putting in place some reasonable thresholds that candidates must meet.\textsuperscript{39} The AEC has stated that the increasingly large number of groups contesting Senate elections poses problems in the printing and production of the ballot paper, and in the complexity in casting a formal below-the-line vote.\textsuperscript{40} The AEC has used an array of data to show that tightening Senate nomination requirements would not seriously compromise the ability of candidates who enjoy a modest level of support in the community to stand for election.\textsuperscript{41}

**Key provisions**

Of the numerous provisions contained in Schedules 1, 2 and 3, many are relatively minor in their effect—such as substitution of ‘person’ for ‘elector’; changes to General Postal Voter registration criteria; and the admission to scrutiny of postal votes received before close of polls where the voter has written an obviously wrong date on the postal vote certificate.

**Schedule 1—Postal voting in elections and referendums**

Part 1 of Schedule 1 to the Bill makes various amendments to the postal voting provisions of the *Commonwealth Electoral Act 1918* (CEA) and the *Referendum (Machinery Provisions) Act 1984* (RMPA). These amendments serve to expedite the processing of postal vote applications and the issuing of postal votes. The growth in postal voting over time is marked and this growth may well continue—although not necessarily at the same rate. The growth may have several sources—perhaps an ageing demographic wherein older voters may be less able to visit a polling booth, or more voters travelling within Australia or overseas.

**Item 2** repeals and replaces section 28 of the CEA, which specifies to whom the Electoral Commissioner may delegate certain powers and which powers may be delegated. Under the proposed provision, the Electoral Commissioner will be able to delegate a broader range of functions (other than those set out at Parts III and IV of the CEA, which relate to redistributions) to a wider range of delegates. The change to the Electoral Commissioner’s delegation powers is necessary as, under a number of later items (for example, items 7-9, item 13 and item 17) references to a ‘DRO’ are replaced by ‘Electoral Commissioner’, to make the Electoral Commissioner primarily responsible for receiving and processing postal votes. Clearly, the Electoral Commissioner would not be able to personally perform all the postal voting-related tasks for which he or she will now have responsibility. The wider powers of delegation under item 2 will ensure that the Electoral Commissioner will have the widest possible discretion to appropriately assign these tasks to other AEC officers.

\textsuperscript{39} Ibid., p. 15.
\textsuperscript{40} Ibid., p. 16.
\textsuperscript{41} Ibid., p. 15.

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Current section 183 of the CEA provides, as relevant, that ‘an elector’ may apply for a postal vote. **Item 5** will repeal and replace section 183 to provide that ‘a person’ may apply for a postal vote. This amendment is designed to simplify AEC administrative requirements. The AEC will not need to check that the applicant is on the electoral roll (that is, is ‘an elector’) before providing the applicant with the postal vote documents. The Explanatory Memorandum to the Bill explains that

> It will not mean that all applicants who return ballot papers will have those ballot papers counted as the person will still have to meet eligibility requirements to have the ballot papers admitted to further scrutiny.\(^42\)

**Item 16** specifies how Postal Vote Certificates (PVCs) and ballot papers are to be numbered and initialled by the issuing officer prior to despatch—**proposed subsection 188(1A)**.

**Item 19** changes the process by which the list of Postal Vote Applications (PVAs) is made available for public inspection. It enables the list to be kept in electronic form, but not copied electronically—**proposed section 189**.

Section 194 of the CEA regulates how postal voting is conducted. **Items 26-34** make various changes amendments to that section that are consequential on the amendments made by **item 3** (which repeals the definition of ‘appropriate DRO’) and **item 5** (which, as set out above allows ‘a person’ rather than ‘an elector’ to apply for a postal vote). As a result of the amendments made by **item 3**, references to ‘appropriate DRO’ need to be removed from the CEA and, as a result of **item 5**, the Act needs to refer to ‘a person’ who seeks to cast a postal vote, rather than ‘an elector’. ‘Elector’ is also replaced by ‘person’ by **items 31-33** and **items 41-51**.

From **item 52** onwards, **Schedule 1** of the Bill amends the RMPA.

Current section 54 of the RMPA provides, as relevant, that ‘an elector’ may apply for a postal vote. **Item 56** will repeal and replace section 54 to provide that ‘a person’ may apply for a postal vote. This amendment is designed to simplify AEC administrative requirements. The AEC will not need to check that the applicant is on the electoral roll (that is, is ‘an elector’) before providing the applicant with the postal vote documents.

Several items substitute ‘Electoral Commissioner’ for ‘DRO’, thereby accommodating streamlined administrative processes and the power of the Electoral Commissioner to delegate the handling of such processes—for example **items 58-60, item 65** and **item 69**.

**Item 70** inserts **proposed subsection 61A** that clarifies how PVAs are to be handled once the application has been made to either the Electoral Commissioner or (in the case of overseas electors) an Assistant Returning Officer.

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**Item 71** substitutes a **proposed section 62** dealing with the inspection of applications, and allows for the list of applications to be kept in electronic form, but the right to inspect the applications does not include the right to electronically copy the records.

Section 138 of the RMPA specifies the nature and extent to which the Electoral Commissioner may delegate his or her powers. **Item 91** substitutes a **proposed section 138** that reflects the new delegation provision inserted into the CEA by **Item 2** of Schedule 1 to the Bill (discussed above) by allowing the Electoral Commissioner to delegate a broader range of functions (to a wider range of delegates. As discussed in relation to **Item 2**, the change to the Electoral Commissioner’s delegation powers is necessary as, under a number of other items (for example, **items 58-60 and Item 62**) references to a ‘DRO’ are replaced by ‘Electoral Commissioner’, to make the Electoral Commissioner primarily responsible for receiving and processing postal votes. Clearly, the Electoral Commissioner would not be able to personally perform all the postal voting-related tasks for which he or she will now have responsibility. The wider powers of delegation under **Item 91** will ensure that the Electoral Commissioner will have the widest possible discretion to appropriately assign these tasks to other AEC officers.

**Items 92-102** substitute the word ‘person’ for ‘elector’, as a result of the amendment made by **Item 56**.

**Schedule 2—Nominations for election**

**Part 1** of **Schedule 2** to the Bill amends the CEA to raises the bar for the requirements for nomination as a candidate in an election, including the cost of nominating.

**Item 1** specifies the forms by which single candidates for election as Senators or Members must nominate. For candidates not preselected by a political party, the nomination form must be signed by not less than 100 electors—up from 50 electors (**proposed subsection 166(1)**).

Section 168 of the CEA allows two or more Senate candidates to request that their names be grouped on the ballot paper. **Proposed subsection 166(1AAAA)** applies in relation to Senate candidates who have made a request to be grouped under **section 168** and provides that if a person signs a nomination form for more than one of those candidates, the person’s signature must not be counted for any of the candidates in the group.

**Item 4** provides that a candidate for the Senate must, upon nomination, arrange for a sum of $2000 (up from $1000) to be deposited on his or her behalf. For a House of Representatives candidate the nomination deposit is proposed to rise from $500 to $1000 (**Item 5**).

**Schedule 3—Other amendments**

Several of the changes proposed by the Bill under **Schedule 3** merely accommodate technical or terminological changes consistent with the somewhat altered responsibilities of the Electoral

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Commissioner. Items 1-40 amend the *Commonwealth Electoral Act 1918* while items 41-46 deal with the *Referendum (Machinery Provisions) Act 1984*.

The most notable changes are effected by items 3, 4, 10 and 11, which amend section 93, paragraph 116(4)(b) and subsection 118(4) of the CEA. Section 93 of the CEA sets out who is, and is not, entitled to vote. One of the limited groups of people who are not entitled to vote are those who ‘by reason of being of unsound mind [are] incapable of understanding the nature and significance of enrolment and voting’ (paragraph 93(8)(a)). The Bill proposes to remove the phrase ‘by reason of being of unsound mind’ and substitute ‘in the opinion of a qualified person’, with the result being that a person may accordingly be designated as incapable of understanding the nature and significance of enrolment and voting.

Subsection 114(3) of the CEA provides that the Electoral Commissioner is not able to object to a person’s enrolment on the electoral roll on the ground set out at paragraph 93(8)(a) – that is, that they are incapable of understanding the nature and significance of enrolment and voting because they are of unsound mind. As a result, such an objection will need to be raised by someone who knows the person. Under subsection 118(4) a person’s name is not to be removed from the electoral roll on the ground specified in paragraph 93(8)(a) unless a certificate has been received from a medical practitioner confirming that the person comes within that paragraph.

The Explanatory Memorandum for the Bill states that the definition of ‘qualified person’ that is proposed to be inserted into the CEA is adopted from the *Freedom of Information Act 1982* ‘and includes a medical practitioner and a social worker’.

In that Act, the relevant definition of a ‘qualified person’ is someone:

> who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and .... includes any of the following: (a) a medical practitioner; (b) a psychiatrist; (c) a psychologist; (d) a counsellor; (e) a social worker.

This definition—modified by the omission of ‘a counsellor’ as a qualified person—is inserted by proposed subsection 93(11). Note that in its report on the Bill, JSCEM recommended that ‘the term ‘unsound mind’ and the current requirement [under subsection 118(4)] for a certificate from a medical practitioner should be retained’.

**Item 15** proposes that the Electoral Commissioner, while obliged to publish an application for—or determination concerning—the registration of a party in newspapers in all states and territories as well as on the Commission’s website, ‘may publish the notice in any other way the Electoral

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Commissioner considers appropriate’. This will accommodate future modes of communication that may emerge should the Commissioner wish to take advantage of them. The proposed change also removes the requirement that the Electoral Commissioner must publish in the Gazette a notice of the application.

Items 20, 23, 26-28 make similar provisions for the notification of changes to the Register of political parties, or of possible de-registration of a party. These complement the mandatory notification of such changes via the AEC website.

Item 38 sets out the procedures for the handling of discarded ballot papers by cancelling them, and sending them in a sealed package to the relevant Divisional Returning Officer. Item 44 sets out an equivalent procedure for discarded referendum ballot papers.

Concluding comments

There is a broad consensus among the parties concerning the proposed changes relating to the handling of postal votes and the adjustments to the requirements and costs associated with nominating as a candidate for election to parliament.

On the matter of proposed changes to the ‘unsound mind’ provisions, the JSCEM considered that ‘the proposed amendments, in their current form, could serve to broaden the disqualification and potentially disenfranchise some electors’ and that in order to support the proposed changes the Committee:

would need to be satisfied as to the extent of the problem necessitating change, and that the approach was not likely to have unintended consequences that may be detrimental to people with cognitive or mental health issues. Restraint should be exercised before making changes to this provision that could serve to disenfranchise potential electors.  

Accordingly, the Committee recommended no change to the existing Act with respect to the provisions related to persons of ‘unsound mind’. The Committee endorsed all other provisions of the Bill.  

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47. See Footnotes 10, 11 and 12 above.