

2014

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT RESPONSE TO THE
REPORT OF THE SELECT COMMITTEE ON AMENDMENTS TO THE
*ELECTORAL ACT 1992***

**Presented by
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INTRODUCTION

On 20 March 2014, the ACT Legislative Assembly established a *Select Committee on Amendments to the Electoral Act 1992* to consider a number of matters related to electoral reform in the ACT as follows:

SELECT COMMITTEE ON AMENDMENTS TO THE ELECTORAL ACT 1992

That this Assembly:

(1) notes:

- a) the public position of the Labor Government and the Liberal Opposition that the membership of the Legislative Assembly be expanded to 25 members at the 2016 election;
- b) certain provisions of the *Electoral Act 1992* will require amendment as a result of this change;
- c) the recent High Court decision, *Unions NSW & Ors v NSW*, and that this decision also has implications for the operation of the *Electoral Act 1992*; and
- d) the Elections ACT's *Report on the ACT Legislative Assembly Election 2012* contains a number of recommendations pertaining to the *Electoral Act 1992*; and

(2) resolves:

- a) that a Select Committee be established to inquire into the above matters and any related issues;
- b) that the committee will be comprised of one member of the Government, one member of the Opposition and one member representing the ACT Greens with proposed members to be nominated to the Speaker by 6pm this sitting day; and
- c) the committee report by the last day of June 2014.

Outcomes of the Inquiry

On 30 June 2014, the Committee released its report - *Voting Matters* (the Report).

In addition to considering the three key areas set out in the Terms of Reference and a number of other relevant matters, the Report includes a useful overview of the key elements of the ACT's electoral system.

The Report makes 18 recommendations in relation to:

- future reviews of the size of the Legislative Assembly (recommendation 1);
- electoral funding and expenditure and management of financial accounts (recommendations 2 to 4, 7, 9);

- donations and gifts (recommendation 5, 6, 8);
- appointment of reporting agents (recommendation 10);
- technical amendments to clarify terminology, instructions on ballot papers and limits on private unpaid commentary made on social media (recommendations 11 to 13, 17);
- penalties for failing to vote (recommendations 14 and 15);
- limits around polling booths (recommendation 16);
- publication of address details of an individual donor (recommendation 18).

Electoral reform is a complex issue and one in which there are many different views. In particular, the regulation of electoral funding requires a careful balancing of various interests across the community.

The Committee identifies the following five, sometime competing, goals for consideration in relation to electoral funding:

- “preventing corruption;
- promoting equality between competitors for votes;
- ensuring adequate funding to provide voters with information they need to make an informed choice;
- promoting public participation in the political process; and
- protecting the freedom to advocate and participate in the election process.”¹

The Government’s response to the Committee’s recommendation is underpinned by a commitment to establishing a strong regulatory framework that supports transparent and accountable electoral expenditure and minimises the incentive and opportunity for corruption and undue influence. As set out below, the Government will take a triangulated approach to this – a strong reporting framework together with an increase in public expenditure and the retention of expenditure caps.

The integrity of our electoral system is the cornerstone of a robust democracy and a society in which citizens can truly participate. I thank the Committee for its careful consideration of the issues raised and thoughtful recommendations.

The Government is generally supportive of the recommendations. In summary, the Government:

- supports 11 recommendations (2-4, 6, 8-13 and 18);

¹ ACT Legislative Assembly, Select Committee on Amendments to the Electoral Act 1992, *Voting matters*, 30 June 2014, Report number 1, pp. 21-22 (viewed at http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/610628/Select-Committee-final-report-30-June-2014.pdf)

- supports in principle 2 recommendations (1 and 7);
- notes 1 recommendation (5); and
- does not support 4 recommendations (14 - 17).

Recommendations not being supported are those about increases in penalties for not voting, limits on canvassing around polling booths and amendments to instructions on ballot papers.

In addition, the Government does not agree with the Commission’s position that amendment is not required to sections 205F to 205G of the Act.

GOVERNMENT RESPONSE TO RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that the Government review and report on the appropriate number of representatives in the Legislative Assembly when the ACT population reaches 425,000, and subsequently after every increase in population of 50,000.

The Government supports this recommendation in principle. The Government supports democratic representation and will act to ensure ACT citizens are not disadvantaged by a lower level of representation.

RECOMMENDATION 2

The Committee recommends that the electoral expenditure cap be calculated on the basis of \$40,000 per candidate to a maximum of five candidates per five member electorate, indexed annually.

The Government supports this recommendation, in relation to the expenditure cap being calculated on the basis of \$40,000 per candidate.

The Government’s view is that the expenditure cap should be up to a maximum of \$1 million for a party. With the number of members increasing to 25, imposing an expenditure cap on a party of \$1 million will prevent a significant increase in campaign expenditure by the larger parties, which in turn will assist in preventing disadvantage to independent candidates.

RECOMMENDATION 3

The Committee recommends that s 205I(4) of the Electoral Act be repealed.

The Government supports this recommendation.

Section 205I(4) of the Electoral Act provides that a relevant entity “must not accept a gift from a person who is not an individual enrolled to vote in the ACT unless the gift is paid into a federal election account.”

In its recent decision in *Unions NSW & Ors v NSW*, the High Court found that the

equivalent provision in NSW legislation was invalid on the basis that it impermissibly burdened the implied freedom of political communication. Based on the High Court decision, it is likely that the equivalent ACT provision is also invalid and should be repealed.

RECOMMENDATION 4

The Committee recommends that the prescribed amount payable for each eligible vote (first preference vote) be increased to \$8.00, indexed annually.

The Government supports this recommendation.

The Electoral Act currently provides for public funding to registered political parties and independent candidates who receive at least 4% of the total number of formal first preference votes in an electorate. The prescribed amount in 2012 was \$2.00 per eligible vote.

The Government agrees with the Committee that full public funding of elections would not be appropriate and would not achieve the purpose for which it is intended – that is to remove any undue influence through large donations.

However, as part of the Government's overall strategy to minimise any incentives for corruption and undue influence, the Government agrees that public funding should be raised to \$8.00 per eligible vote.

RECOMMENDATION 5

The Committee recommends that the Assembly debate the merits of the \$10,000 limit on donations from a person (including a natural person, an unincorporated association and a corporation) in a financial year.

The Government notes this recommendation.

The Government believes that the \$10,000 limit creates an unintended incentive to seek to circumvent any controls on electoral funding.

As part of the Government's approach to strengthening transparency and accountability of electoral funding in the ACT, and to remove this perverse incentive, the Government is proposing to remove the limit on donations, as set out in s 205I (2) of the Electoral Act.

Removing this limit will remove incentives to circumvent the electoral funding laws. Maintaining robust reporting requirements on public donations and electoral expenditure will mitigate against excessive expenditure on election campaigns and support accountability and transparency of funding.

RECOMMENDATION 6

The Committee recommends that the lodgement of returns of gifts should be by quarterly reporting up to and including the quarter ending 30 June in an election year. From then until election day, returns of gifts should be required to be lodged within seven days.

The Government supports this recommendation.

The current reporting requirements are onerous and, as noted by the Committee, do not align with usual business reporting requirements.

However, the Government notes that the requirement as recommended by the Committee could lead to an anomaly in an election year. Gifts received between 1 April and 30 June in an election year would only need to be reported by 30 July. However, gifts received on 1 July would need to be reported by 8 July.

To address this, the Government proposes that the return for the April to June quarter in an election year be required to be lodged within 7 days of the end of the quarter.

Establishing quarterly reporting, with a lodgment period of 30 days from the end of the quarter, together with more frequent reporting requirements in the lead up to an election ensures transparency and accountability without imposing an unnecessary and unjustified administrative burden.

RECOMMENDATION 7

The Committee recommends that references to an ACT election account be removed from the Electoral Act and replaced with references to a separately identified account or sub-account from which funds may not be used for an ACT election purpose, or in the case of administrative expenditure funding, for an ACT, federal, state or local government election purpose.

The Government supports this recommendation in principle.

As noted above in relation to recommendation 5, the Government proposes to remove the \$10,000 limit on donations. If there is no longer a limit on donations, it is no longer necessary to maintain an ACT election account, or another separately identified account or sub-account.

RECOMMENDATION 8

The Committee recommends that the definition of ‘small anonymous gift’ in s 216 and the Dictionary of the Electoral Act be removed and other references to small anonymous gifts in ss 216A, 220 and 222 be changed to ‘anonymous gifts’, with the result that anonymous gifts of up to \$1,000 each may be received to a total of \$25,000 in a financial year.

The Government supports this recommendation.

The Government agrees that the term ‘anonymous gifts’ is the better terminology within the Electoral Act. The Government supports consistency of treatment for anonymous gifts.

RECOMMENDATION 9

The Committee recommends that s 201(1)(c) and the definition of third party campaigner in s 198 be amended in line with the ACT Electoral Commission’s recommendations 10-12.

The Government supports this recommendation.

This is a technical amendment that will address a number of anomalies in the current Electoral Act.

RECOMMENDATION 10

The Committee recommends that if a party, MLA or candidate appoints a reporting agent:

- only one reporting agent is able to be appointed;
- an appointment cancels the appointment of any previous reporting agent; and
- the reporting agent is responsible for all disclosure returns required under the Electoral Act.

The Government supports this recommendation.

This recommendation will improve the clarity of reporting responsibilities and reduce any risk of non-compliance.

RECOMMENDATION 11

The Committee recommends that to avoid doubt, s 215G(1)(b) be amended to refer to ‘local government election’ rather than ‘local election’.

The Government supports this recommendation.

This amendment will remove any ambiguity from the scope of the term ‘local election’.

RECOMMENDATION 12

The Committee recommends that the Electoral Commission's proposed amendments to clauses 7(3)(c) and 8(2) of Schedule 4 be made so as to maximise fairness in the counting of votes where two or more candidates are tied.

The Government supports this recommendation.

This is a technical amendment will address a number of anomalies in the current Electoral Act.

RECOMMENDATION 13

The Committee recommends that s 292 be amended to exempt private unpaid commentary on social media from the authorisation requirements and that the Attorney-General consider the legislation and findings of other jurisdictions when re-drafting the provision.

The Government supports this recommendation.

The Government is aware of the need for electoral laws to keep pace with current technologies and of supporting an individual's right to freedom of expression and the right to take part in public life. In addition, this amendment will address difficulties in complying with the existing authorisation requirements in the current Electoral Act.

RECOMMENDATION 14

The Committee recommends that the penalty for failing to vote by way of default notice issued by the ACT Electoral Commissioner under s 161 be increased to \$40.

The Government does not support this recommendation.

The Government does not agree with the recommendation to increase the penalty for failing to vote. The current penalty for failing to vote in the ACT is in line with the penalty applied by the Commonwealth.

There is no evidence to suggest that increasing the penalty to \$40 will change community behavior.

RECOMMENDATION 15

The Committee recommends that the penalty in s 129 for failing to vote where the matter is determined in court be increased from one half to one penalty unit.

The Government does not support this recommendation.

The Government does not agree with the recommendation to increase for the fee for failure to vote. There is no evidence to suggest that increasing the penalty will change community behavior.

RECOMMENDATION 16

The Committee recommends that the limit in s 303 on canvassing around polling places be increased from 100 metres to 250 metres.

The Government does not support this recommendation.

This recommendation seeks to address problems of congestion and other disruptions to the areas around polling booths on polling day. The Committee considered that increased 'policing' of the area would not be effective, particularly given the increase in pre-polling. Increasing the exclusion area on polling day is, however likely to add to the confusion rather than alleviate any existing problems. For example, if the limit is extended to 250 meters, the perimeter of the exclusion zone would capture an additional 20 shopping areas, either completely or partially, including Belconnen Mall, Tuggeranong Hyperdome and Gungahlin Marketplace.

The effectiveness of increasing the limit around polling places on election day is not clear from the Committee's report and may, in fact, increase confusion. In addition, the number of breaches of the rule in the 2012 election was 12 less than in 2008 (18 compared to 30). The Government's position is therefore to retain the 100 metre exclusion zone.

RECOMMENDATION 17

The Committee recommends that instructions on the ballot paper be amended to read: 'Write numbers from 1 onwards, up to as many numbers as you wish. Use numbers only and use each number only once.'

The Government does not support this recommendation.

The Government does not agree with the recommendation to amend the instructions in the ballot paper based on advice from the Electoral Commission that the current instructions are clear and that the proposed amendments are likely to cause confusion.

RECOMMENDATION 18

The Committee recommends that s 243A be amended to provide that the ACT Electoral Commissioner should not publish on the internet the full private address details of an individual who has made a donation but that the person's name and suburb, or a post office box if provided, is sufficient.

The Government supports this recommendation.

The Government notes that the Committee qualified this recommendation by stating "The Committee considers that it is important to accountability that donors' addresses are recorded and provided to the Electoral Commissioner and that those details are available for public inspection at the Commissioner's office if requested."

The Government supports this recommendation on this basis. The Government considers it to be important for transparency for the addresses of donors to be accessible to researchers at the Electoral Commissioner's office. If this is not done, confusion may arise where a person's name and an imprecise address are not sufficient to identify an individual, where necessary. For example, an occasion may arise where a person with the same name as a donor is erroneously identified as a donor. In such a case, providing for more limited access to address details would serve to demonstrate the correct identity of the donor.

OTHER MATTERS

AGGREGATION OF EXPENDITURE

The Committee considered the question of whether, in light of the *Unions NSW* case, sections 205F to 205H of the Electoral Act are valid.

In *Unions NSW*, the High Court considered the validity of s 95G (6) of the *NSW Election Funding, Expenditure and Disclosures Act 1981*. Section 95G (6) aggregated the electoral communication expenditure incurred by a party with that of an affiliated organisation (such as an industrial organisation) for the purpose of limiting campaign expenditure to the applicable caps in the legislation. The High Court found that s 95G (6) was invalid, on the basis that it impermissibly burdened the freedom of political communication implicit in the Commonwealth Constitution.

The comparable provisions under ACT law are sections 205F-205H.

The Government acknowledges that there are conflicting views about the applicability of the High Court's decision in *Unions NSW* in relation to s 95G (6), based on the definition of an 'associated organisation'.

To avoid any uncertainty about the validity of sections 205F to 205H, the ACT Government amend sections 205F and 205G so that they provide expenditure caps of \$40,000 for individuals, third party campaigners and associated entities and up to \$1 million for party or non-MLA groupings. Section 205H will be repealed.

