

STANDING COMMITTEE ON LEGAL AFFAIRS

Changing the term of Assembly Members from three years to four years

OCTOBER 2003

Report 7

Committee membership

Mr Bill Stefaniak MLA (Chair)

Mr John Hargreaves MLA (Deputy Chair)

Ms Kerrie Tucker MLA

Secretary: Ms Judith Henderson

Administration: Mrs Judy Moutia

Resolution of appointment

On 11 December 2001 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing committee, called the Standing Committee on Legal Affairs:

to perform the duties of a scrutiny of bills and subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.¹

Terms of reference

Inquire into and report on the matter of changing the term of office for Members of the ACT Legislative Assembly from three years to four years.

Conduct of the inquiry

The inquiry was advertised in local newspapers in the week commencing 6 September 2003. Letters inviting submissions were sent to over 40 individuals and organisations expected to have an interest in the inquiry. In addition there was considerable media coverage at the beginning of the inquiry. In response, the committee received 13 submissions and heard from 8 people at public hearings. The committee thanks those who participated in the inquiry.

¹ Legislative Assembly for the ACT, *Minutes of Proceedings No 2*, 11 December 2001.

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Summary of recommendations

RECOMMENDATION 1

5.6. The committee, by a majority, recommends that the length of the term of Members of the ACT Legislative Assembly be extended from three years to four years.

RECOMMENDATION 2

5.10. The committee, by a majority, recommends that the Assembly make the decision on extending the length of the term of Members of the ACT Legislative Assembly by amending the *Electoral Act 1992*.

RECOMMENDATION 3

5.11. The committee, by a majority, recommends that the *Electoral Act 1992* be amended as follows (with the amendments to commence after the 16 October 2004 election has been held):

- section 100(1) – ‘3rd year’ be changed to ‘4th year’;
- section 201(2)(a) – ‘4 years’ be changed to ‘5 years’;
- section 236(6) – ‘3 years’ be changed to ‘4 years’;
- section 239(1) – ‘3 years’ be changed to ‘4 years’; and
- section 239(2) ‘3 years’ be changed to ‘4 years’.

1. Introduction

The position in the ACT

1.1. With the exception of the Fourth Assembly, since the introduction of self government in the ACT in 1989, the term of Members has been three years. The Fourth Assembly extended to three years and eight months as a result of an amendment to the *Electoral Act 1992* which changed the date of the election from February 2001 to October 2001.

1.2. The ACT, unlike many other Australian jurisdictions has a fixed term of three years. The only provision for the dissolution of the Assembly and a new election to be called during this fixed period of three years is if the Assembly is deemed to be incapable of performing its functions or is acting in a grossly improper manner. Section 16 of the *Australian Capital Territory (Self Government) Act 1988* states:

(1) If, in the opinion of the Governor-General, the Assembly:

- (a) is incapable of effectively performing its functions; or
- (b) is conducting its affairs in a grossly improper manner;

the Governor-General may dissolve the Assembly.

(2) Where the Assembly is dissolved:

(a) the Governor-General:

(i) shall appoint a Commissioner for the purposes of this section; and

(ii) may, at any time, give directions to the Commissioner about the exercise of the powers of the Executive; and

(b) a general election shall be held on a day specified by the Commonwealth Minister by notice published in the *Commonwealth Gazette*, being not earlier than 36 days, nor later than 90 days, after the dissolution of the Assembly.

Previous reports

1.3. Several recent reports have commented on the term of Members of the Legislative Assembly.

1.4. In November 1997 a joint working party, chaired by Professor Pettit, was established to review the governance of the ACT. The review, which became known as the Pettit review, released its report *Review of Governance of the Australian Capital Territory* in April 1998. One of its recommendations was to extend the fixed term of Members of the Assembly from three years to four years. In making this recommendation the working party said:

While no one sought a change to the fixed term arrangement, a majority of those who addressed the issue suggested that, as in the majority of comparable Australian jurisdictions, the term could be extended with benefit to four years. We agree. A four-year term would mean a saving in electoral costs; it would enable new MLAs to learn the ways of the Assembly and make their mark before facing an election; and it would make it possible for the Executive to take a longer-term view in forming their policies. While there is a greater possibility of a change in government in the course of a four-year period, as was suggested to us, we believe that this is not so serious a danger as to undermine the case for extending the period.²

1.5. Subsequently, a select committee of the Assembly was established to review the Pettit report. This committee reported in June 1999 and took a different view. It recommended that the fixed term of the Assembly remain at three years.³

1.6. The select committee had mixed views on extending the length of the term of Members. The Liberal Government of the time supported extending the term to four years. It considered that the Pettit review indicated that there was sufficient community support to increase the length of the term.

1.7. However the Labor Opposition at the time and the cross bench Member on the committee considered that the fixed term provision made it unnecessary to increase the term to four years. They also put the view that three years terms make governments more accountable for their electoral promises as well as breaches of these promises. The Labor Party has since changed its view to one of support for four-year terms.

1.8. In 2002, the Standing Committee on Legal Affairs conducted an inquiry into the appropriateness of the size of the Legislative Assembly. As part of that inquiry the committee by a majority (Liberal and Labor members) recommended that consideration be given to extending the term of Members from three to four years. The rationale for this recommendation was that longer terms would partially offset the additional cost of an increase in the number of Members in the Assembly. The third Member of the committee, Ms Tucker, dissented from this recommendation as she believed that the issue had not been adequately considered by the inquiry, which was focussed on the size of the Assembly.⁴

² Pettit Philip, Keady Tim, Blick Bill, *Review of Governance of the Australian Capital Territory*, ACT Government Printer, Canberra, April 1998, p 36.

³ Select Committee on the Report on the Review of Governance, *Report*, p 9.

⁴ Standing Committee on Legal Affairs, *Report on the appropriateness of the size of the Legislative Assembly*, p 34.

Process for changing the length of Members' terms

1.9. The length of Members' terms can be changed by an amendment to section 100 (1) of the *Electoral Act 1992*. Section 100 states:

100 Ordinary elections

(1) A general election under this Act must be held on the 3rd Saturday in October in the 3rd year after the year when the last ordinary election was held.

1.10. A simple majority of the Assembly is required.

2. Why consider changing the length of Members' terms?

2.1. Over the years a number of arguments have been advanced in jurisdictions that have three-year terms as to the benefits of four-year terms. These arguments are as follows:

- the majority of lower houses in Australia have four-year terms;
- four-year terms result in better policies;
- four-year terms facilitate longer-term planning and implementation of policies by Government;
- longer terms enhance business confidence;
- longer terms would enhance the standard of political debate; and
- longer terms result in cost savings due to fewer elections.

Terms in Australian jurisdictions

2.2. While the majority of lower houses of state parliaments and the Northern Territory have four-year terms, the ACT, Queensland and the Commonwealth still retain three-year terms - see table 1.

Table 1- Parliamentary terms

Parliament	Term	Date of change to 4 years	Fixed election date?	Reserve power to dissolve the parliament?
Commonwealth	3 years	N/A	No	Yes
NSW	4 years	1981	Yes	Yes
Victoria	4 years	1984	Yes*	Yes
Queensland	3 years	N/A	No	Yes
Western Australia	4 years	1987	No	Yes
South Australia	4 years	1985	Yes**	Yes

Parliament	Term	Date of change to 4 years	Fixed election date?	Reserve power to dissolve the parliament?
Tasmania	4 years	1972	No	Yes
ACT	3 years	N/A	Yes	Yes – but only if deemed incapable of effectively performing its functions – is acting in a grossly improper manner
Northern Territory	4 years	Always 4 years	No	Yes

* Came into effect on 8 April 2003.

** Similar change to Victoria introduced in 2003.

Source: Adapted from: Bennett Scott, *Four Year Terms for the House of Representatives* (September 2003), Department of the Parliamentary Library, Research Paper 2, 2003-04, p 5.

2.3. There are differences between the jurisdictions in the manner in which four-year terms are provided. In Tasmania, Western Australia and the Northern Territory, a government can decide to hold an election at anytime during the four years.

2.4. In New South Wales, South Australia and Victoria an early election cannot be held during the four years unless certain prescribed circumstances arise such as a vote of no confidence in the government. Like the ACT these states now have a set date for elections.

Better policy making

2.5. Bennett reported that many claim that longer terms encourage governments to introduce policies that are long-term rather than politically expedient. The commonly held view of three-year terms is that governments

...tend to spend their first year settling in; begin taking tough and far-sighted decisions in the second year; and then effectively shut up shop in the third year because it is getting too close to the next election.⁵

2.6. In relation to the development and implementation of a government's budget, the Queensland Constitutional Review Committee when examining the issue of the duration of the parliamentary term stated:

It has been said that under a three-year term, the first budget is devoted to paying off the promises made at the previous election and the third in anticipating the promises to be made at the forthcoming election. Consequently only one budget out of three, the second, is likely to address important, long-term policies without the contamination of short-term political considerations.⁶

2.7. Others have said that three-year terms leave little time to engage in good governance as the electorate is too often in electoral mode with the consequent preoccupation with political manoeuvring at the expense of attention to policy issues.⁷

2.8. In dealing with complex and difficult economic and social issues time is often an important factor in planning the best approach. A four-year term provides further time for the implementation of policies as well as an opportunity for the government to assess the success of their implementation.⁸

2.9. Participants in this inquiry also argued that a four-year term would encourage better policy making.⁹ The Woden Valley Community Council Inc asserted that a four-year term would enable ACT governments to introduce policies that were not calibrated with an eye on the next election.¹⁰

⁵ Business Council of Australia, *Toward a Longer Term for Federal Parliament*, p10 as quoted in Bennett Scott, *Four Year Terms for the House of Representatives (September 2003)*, Department of the Parliamentary Library, Research Paper 2, 2003-04, p 11.

⁶ Queensland Constitutional Review Commission, *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland constitution*, February 2000, pp 39-40.

⁷ Bennett Scott, *Four Year Terms for the House of Representatives (September 2003)* Department of the Parliamentary Library, Research Paper 2, 2003-04, p 11. Submission 3, Woden Valley Community Council Inc, p 2. Submission 4, Leader of the Opposition, p 2. Submission 10, ALP ACT Branch, p 2. Professor Warhurst, Uncorrected Proof Transcript, 7 October 2003, p 20.

⁸ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission's recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 14.

⁹ For example, Submission 2, Steve Pratt MLA. Submission 3, Woden Community Council Inc, p 1. Submission 4, Leader of the Opposition. ALP ACT Branch, Branch conference resolution 2003.

¹⁰ Submission 3, Woden Valley Community Council Inc, p 1.

Business confidence

2.10. In other jurisdictions where the length of the term of parliamentarians has been debated, it has been argued that the business sector and the economy in general stand to benefit from the improved stability and greater certainty resulting from longer terms.

2.11. For example, in its submission to the 'Review of the Queensland Constitutional Review Commission's recommendation for four-year parliamentary terms' conducted by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament, the Queensland Chamber of Commerce and Industry stated:

Business relies upon consistency and/or predictability in government policy and decision making processes to plan for future business paths and activities. The business sector requires a long-term perspective to be developed and implemented. Given this, QCCI supports the implementation of a four year term in Queensland. The Chamber believes this move would lengthen the period in which the State Government was not in election mode and so able to primarily 'govern' rather than primarily 'politic'.¹¹

2.12. Similar arguments were presented to this inquiry.¹² The Canberra Property Owner's Association Ltd told the committee that land development and planning management in the ACT are frustrated by the current three-year terms – a four-year term would offer more certainty in the building and development industry. With three-year terms the planning process is truncated to two years, as six to nine months out from an election, the bureaucracy goes into caretaker mode and it takes at least three months after the election for the planning committee to become conversant with the planning laws. As an example Draft Variation 202 has taken two and a half Assemblies so far and there is still another round of consultations to be held. Draft Variation 202 – the Jamison Master Plan – a project worth \$250 to \$300 million was put on hold nine months before the 2001 election, it then took the Association six to nine months after the election to it back on the agenda.¹³

The standard of political debate

2.13. Some have argued that longer periods between elections would raise the standard of political debate and enhance the effectiveness of politicians and hence the parliament. It could be argued that longer terms create more opportunity for genuinely bipartisan discussion of a wider range of issues than is normally the case.¹⁴

¹¹ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission's recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 15.

¹² For example, Submission 3, Woden Valley Community Council Inc p 2. Submission 4, Leader of the Opposition, p 2. Submission 10, ACT Branch Australian Labor Party, p 3. Submission 9 Canberra Property owner's Association Ltd. ALP ACT Branch, Branch conference resolution 2003.

¹³ Uncorrected Proof Transcript, 7 October 2003, p 2.

¹⁴ Bennett Scott, *Four Year Terms for the House of Representatives (September 2003)*, Department of the Parliamentary Library, Research Paper 2, 2003-04, p 13.

2.14. It could also be argued that a longer term enables Members ‘to become more familiar with, and hence more effective in their roles, and to build better, more stable working relationships with individuals and organisations in the community’.¹⁵

2.15. The Queensland Legal, Constitutional and Administrative Review Committee asserted that a four-year term enhances scrutiny of the executive government as well as the legislative process by providing further time for parliamentary committees to investigate and report on a wide range of important issues.¹⁶

2.16. A similar argument has been proposed in this inquiry.¹⁷ The committee system of the ACT Legislative Assembly is quite strong in comparison to some other parliaments. Some committees have significant statutory responsibilities that can affect business in the ACT. For example the Standing Committee on Planning and Environment is required to review all draft variations of the Territory Plan. The Canberra Property Owner’s Association Ltd told this committee that three-year terms are causing significant and costly delays with development applications as the work of Planning and Environment Committee is put on hold during the lead up to and immediately after an election.¹⁸

Accountability

2.17. An argument against increasing the term of Members in other jurisdictions is that there may be community concern about a perceived reduction in democratic accountability. As the ACT Government noted in its submission:

The possible perception that by extending the term of the Legislative Assembly, there would be a reduction in the Assembly’s accountability to the electorate is certainly diminished in the ACT by the fact that in the ACT there is little prospect of a single party holding an overall majority. Consequently, the government of the day would continue to be accountable to the Assembly and is dependent upon the support of either the cross-bench or the Opposition.¹⁹

2.18. In relation to committees, an additional year would give them more time to investigate issues and importantly, more time to examine the action taken by the Government in relation to a committee’s report and recommendations. Such an

¹⁵ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission’s recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 15. Submission 2, Steve Pratt MLA. Submission 4, Leader of the Opposition, p 4. Submission 10, ACT Branch Australian Labor Party, p 3.

¹⁶ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission’s recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 16.

¹⁷ For example, ALP ACT Branch, Branch conference resolution 2003. Submission 13, ACT Government. Mr Hird, Uncorrected Proof Transcript 30 September 2003, p 16-17. Professor Warhurst, Uncorrected Proof Transcript, 7 October 2003, p 22.

¹⁸ Uncorrected Proof Transcript

¹⁹ Submission 13, ACT Government, p 4.

increase in committee tenure would also the Government's accountability to the Assembly.²⁰

Convergence of ACT and Federal elections

2.19. In 2001 the ACT and Federal elections were held within a couple of months of each other. A similar situation is likely in 2004. The convergence of these two elections can result in confusion among voters.

2.20. The ACT Electoral Commissioner and Associate Professor Mackerras agreed with the committee that moving to four-year terms would dramatically reduce the likelihood of the ACT election being held at a similar time to a Federal election. In fact Associate Professor Mackerras acknowledged that avoiding convergence with the Federal election is an argument in favour of four-year terms.²¹

Cost savings

2.21. The introduction of four-year terms would result in a cost saving in conducting elections with three elections every 12 years compared with the current four.²² The ACT Electoral Commission estimates the savings to the Commission to be on average \$125,000 per year.²³

2.22. Several submissions asserted that such cost savings are an important consideration in deciding on the length of Members' terms.²⁴

²⁰ Submission 13, ACT Government, p 4.

²¹ Uncorrected Proof Transcript 30 September 2003, p 8. Uncorrected Proof Transcript 7 October 2003 p 10.

²² Submission 3, Woden Valley Community Council Inc, p 1.

²³ Submission 5, ACT Electoral Commission, p 6.

²⁴ For example Submission 3, Woden Valley Community Council, p 1. Submission 4, Leader of the Opposition, p 3. Submission 6, Mr Harold Hird. Submission 13, ACT Government.

3. Arguments against lengthening the term of Members

Arguments presented by the Queensland Legal, Constitutional and Administrative Review Committee

3.1. The Queensland Legal, Constitutional and Administrative Review Committee presented the following arguments for not lengthening Members' terms in Queensland:

- loss of voter sovereignty;
- inappropriate for a unicameral parliament;
- insufficient safeguards for the parliamentary process;
- poorer decision making; and
- does not facilitate long-term government planning.

Loss of voter sovereignty

3.2. The Queensland committee asserted that the primary argument against extending the parliamentary term to four years is

that the electorate must wait a longer period to register its approval or disapproval of the government. ...An extension to four years may also fuel community cynicism about politicians acting in their own interests.²⁵

Inappropriate for a unicameral parliament

3.3. The fact that the Queensland parliament is unicameral was used as argument against four-year terms on the basis that an upper house fulfils an important review role which cannot be replaced by the enhanced committee system in the Queensland parliament.

3.4. While those states that have four-year terms also have a bi-cameral system, it is important to note that the Northern Territory has had a unicameral system and four-year terms since its establishment.

Insufficient safeguards for the parliamentary process

3.5. Some participants to the Queensland committee argued that the extension to a four-year term in a unicameral system should be accompanied by other safeguards to

²⁵ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission's recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 16

reinforce the role of parliament and democracy. One suggestion was the introduction of citizen-initiated referendum.

Long-term government planning and improved policy making

3.6. While proponents of four-year terms argue that longer terms result in an improvement in long-term planning and policy formulation by governments, the opposite can also be argued. The Queensland Committee noted that a number of other factors may affect government planning, often with little warning such as overseas markets, exchange rates and Commonwealth Government policies.

3.7. The Clerk of the Senate in his submission to the Queensland Committee stated:

First, the alleged advantage is often put in terms of allowing governments more scope to make unpopular or difficult decisions, or decisions which may involve short-term disadvantages for the electorate in return for long-term advantages. It should be noted that implicit in this argument is an assumption that the electorate is generally incapable of taking a longer term view and of appreciating the advantages to be gained by policies which have short-term disadvantages. Also implicit in the argument is an assumption that governments are incapable of persuading the electorate to take a longer term view and that the kinds of policies in question are worth pursuing for the longer term advantages. I do not believe that the electorate or governments actually suffer from these serious deficiencies; if they did, we would have a very strong argument against democracy as such. Do the proponents of longer parliamentary terms really believe that the electorate and governments suffer from these fatal deficiencies? Is that why they believe that governments should be freer of electoral sanction, that is, that the quantum of accountability should be reduced? They should be invited to be explicit on this point.

Secondly, the argument cannot be that the longer the parliamentary term the better the quality of government decision-making. It is a matter of finding an optimum. As the parliamentary term is expanded a point must be reached at which the supposed advantage of government being able to implement policies more freely is lost, or is completely cancelled out by the loss of accountability. As the salutary check of accountability to the electorate is weakened the government is more able to disregard the public interest and turn its attention to its own interests, at least for a time. A consideration of parliamentary terms should include a consideration of where that point lies. It may well lie short of four years.²⁶

²⁶ Legal, Constitutional and Administrative Review Committee, Report No 27, *Review of the Queensland Constitutional and Review Commission's recommendation for four year terms*, Legislative Assembly of Queensland, July 2000, p 21.

Arguments made to this committee

3.8. Arguments opposing a change to four-year terms presented to this committee included:

- there is little evidence that changing the term will improve governance;
- frequent elections enhance the interaction between governments and the community;
- the ACT does not have the same level of checks and balances as other legislatures; and
- the debate about the frequency of elections should not be framed in terms of cost.

Where is the evidence that lengthening the term will improve governance?

3.9. The Australian Democrats (ACT Division) and Associate Professor Mackerras asserted that there are no arguments for extending the term of Members. In an article published in *The Australian* newspaper Associate Professor Mackerras wrote:

There are no arguments to extend the parliamentary term from three years to four; there are merely people who want that change. Why? Simple really. In the interests of 'good government' these reformers - editorial writers and the business community - want to make it easier for politicians to break their promises. And it is easier if the term be extended.²⁷

3.10. The ACT Equality Party questioned the argument that three-year terms are insufficient for a government to deliver on its policies. In their view no matter how long a term a government has it will always argue that it has had insufficient time to deliver on those policies.²⁸

3.11. The Australian Democrats (ACT Division) and Associate Professor Mackerras also rejected the argument that the term should be extended because the majority of Australia's other lower houses have four-year terms. In the article in *The Australian*, quoted above, Associate Professor Mackerras asks the question 'Is Queensland more badly governed than the other states?'²⁹

3.12. In their submission the Democrats stated:

The length of Parliamentary terms is not some sort of 'race to the bottom' in which jurisdictions compete to see which can extend their Parliamentary terms to the greatest extent. In terms of accountability, dynamism, and system of governance, the voters of the ACT should choose the

²⁷ Mackerras Malcolm, 'Keep the bastards honest oftener', *The Australian*, 11 April 2002.

²⁸ Uncorrected Proof Transcript, 30 September 2003, p 24.

²⁹ Mackerras Malcolm, 'Keep the bastards honest oftener', *The Australian*, 11 April 2002

Parliamentary term that best suits the Territory's specific needs and circumstances The ACT Democrats believe the best period is three years.³⁰

3.13. While not holding particularly strong views on the matter of lengthening the terms of Members, The Proportional Representation Society of Australia (ACT Branch) submitted that there is a good deal of scope for the Assembly to improve governance by addressing the growing imbalance of resources and information between the Executive and ordinary MLAs.³¹

Elections and the community

3.14. The Australian Democrats (ACT Division) argued strongly for maintaining the three-year term on the basis of the importance of keeping the public engaged in the process of governance. In their view:

frequent elections keep the public engaged in the process of governance, whereas less frequent elections will tend to fuel disengagement with the political landscape. Moreover, the shorter the period between elections, the greater the recollection of past debates and government actions – there will be enhanced continuity between elections.³²

3.15. The Democrats also asserted that because of the size of the ACT and the efficiency of the ACT system of government, governments may not require the same length of terms that other jurisdictions would require to have the same level of effectiveness.³³

3.16. Associate Professor Mackerras is of the view that to extend the parliamentary term to four years is to dilute the power of ordinary citizens by reducing their opportunities to throw out those they are not satisfied with.³⁴

ACT system of government offers fewer checks and balances

3.17. The Australian Democrats (ACT Branch) claimed that because the ACT has no upper house, no local government and no Vice Regal assent for legislation, the ACT Government has greater ability to govern unchallenged than governments in other jurisdictions. Therefore reducing the number of elections a government has to face further reduces opposition to government decisions.³⁵

Size of the Assembly

3.18. The ACT Greens reported that it does not favour lengthening the term of Members while the size of the Assembly is 17 Members. It considers that in a well-functioning parliament, four-year terms would be an improvement over the current

³⁰ Submission 11, Australian Democrats (ACT Division).

³¹ Submission 7, Proportional Representation Society of Australia (ACT Branch).

³² Submission 11, Australian Democrats (ACT Division).

³³ Submission 11, Australian Democrats (ACT Division).

³⁴ Submission 1, Associate Professor Malcolm Mackerras.

³⁵ Submission 11, Australian Democrats (ACT Division).

three-year term, but the size of the current Assembly is too small to function effectively.³⁶

Cost of elections

3.19. The savings generated by having fewer elections was rejected as a valid argument for increasing the length of Members' terms by the Democrats.³⁷

³⁶ Submission 12, ACT Greens.

³⁷ Submission 11, Australian Democrats (ACT Division)

4. Process for changing the length of Members' terms

Legislative background

4.1. The legislative background relating to the frequency of elections in the ACT resides in the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) and the *Electoral Act 1992*. The following information was provided by the ACT Electoral Commission in relation to these Acts.

Australian Capital Territory (Self-Government) Act 1988

4.2. Section 67B(a) of the Commonwealth *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) provides that an enactment of the ACT Legislative Assembly is to provide for the times of general elections of the Assembly.

4.3. The Self-Government Act does not provide any further guidance as to the length of the term of the Assembly, except in section 67B(d) which provides that:

An electoral enactment is to provide, among other things: ... if the electoral enactment provides for the distribution of the Territory into electorates — that a redistribution of the Territory into electorates is to commence not later than 6 years after the previous distribution or redistribution.³⁸

4.4. As the Electoral Commission stated, Section 67B(d) could be taken to imply that elections should be held at least every six years. However, given that three-year terms were the norm when section 67B(d) was enacted, it is more likely that the intention behind the requirement to conduct a redistribution every six years was that this would require a redistribution to be conducted at a minimum after every second election. (By comparison, under the *Commonwealth Electoral Act 1918*, a redistribution in a State or Territory must be held at least every seven years.)

4.5. As the ACT's Electoral Act requires a redistribution to be held automatically after every general election, moving to four-year terms would not be in conflict with section 67B(d) of the Self-Government Act.

4.6. However, moving to four- year terms would prevent the ACT from conducting redistributions after every second election (as has been suggested in the past during the redistribution process) unless the Self-Government Act was amended to allow redistributions to be conducted up to eight years apart.

4.7. Notwithstanding the requirement to conduct a redistribution every six years, on the face of it the Self-Government Act does not place any limit on the length of the

³⁸ *Australian Capital Territory Self Government Act 1988* (Cwlth), section 67B (d)

term of the Legislative Assembly, and without any reservation gives the power to determine the length of the term to a simple majority of the Assembly.³⁹

Electoral Act 1992

4.8. The length of the term of the Legislative Assembly is currently prescribed in section 100 of the Electoral Act, which states in full:

100 Ordinary elections

(1) A general election under this Act must be held on the 3rd Saturday in October in the 3rd year after the year when the last ordinary election was held.

(2) If, apart from this subsection, an election in accordance with subsection (1) would be held on the day an election of Senators, or a general election of members of the House of Representatives, would be held, the election shall be held on the 1st Saturday in December in the year when it would, apart from this subsection, be held.

(3) If an extraordinary general election has been held in the 6 months before the day when an election in accordance with subsection (1) or (2) would, apart from this subsection, have been held—

(a) the election shall not be held; and

(b) this section applies in relation to subsequent ordinary elections as if the election had been held.

4.9. The last general election was held on 20 October 2001. The next election is scheduled to be held on 16 October 2004.

4.10. In order to introduce four-year terms for the Legislative Assembly, the only amendment necessary would be to change ‘3rd year’ to ‘4th year’ in section 100(1). The ACT Electoral Commission suggested that it would be appropriate to provide that this amendment not commence until after the scheduled 2004 election, so that the first four year term would commence after that election.⁴⁰

4.11. The ACT Electoral Commission also pointed out that, should the special circumstances referred to in sections 100(2) and 100(3) occur, the term of a particular Assembly may be greater than four years. For example, if a federal election is called for a day scheduled as the polling day for an ACT election, the term of that Assembly would be extended by six or seven weeks to the first Saturday in December. Similarly, if an extraordinary general election has been held in the six months before the day when an election was scheduled to be held, the scheduled election would not be held and the next election would be held up to four years and six months after the extraordinary election.⁴¹

³⁹ Submission 5, ACT Electoral Commission, p 3.

⁴⁰ Submission 5, ACT Electoral Commission, p 3.

⁴¹ Submission 5, ACT Electoral Commission., p 4.

4.12. The circumstances for the holding of extraordinary elections are set out in section 101 of the Electoral Act. In brief, an extraordinary election can be called under the Self-Government Act if the Governor-General dissolves the Assembly or if the Assembly passes a resolution of no-confidence in the Chief Minister and fails to elect a new Chief Minister within 30 days. Under the Electoral Act, an extraordinary election can be held if an election fails to elect a sufficient number of candidates or if the Court of Disputed Elections declares an election void and requires a new election to be held.

4.13. The probability of an extraordinary election being called is low, and therefore the possibility that an Assembly's term could extend up to four years and six months should not be a cause of concern.

Amendments to the Electoral Act

Section 100

4.14. As discussed above, the length of Members' terms can be changed by an amendment to section 100 (1) of the *Electoral Act 1992*. Section 100 states:

100 Ordinary elections

(1) A general election under this Act must be held on the 3rd Saturday in October in the 3rd year after the year when the last ordinary election was held.

4.15. It would simply be a matter of deleting '3rd' and inserting '4th'. A simple majority of the Assembly is required.

4.16. The ACT Electoral Commission recommended that such an amendment commence after the 16 October 2004 election has been held.

4.17. However the Electoral Commission pointed out a number of other amendments to the Act that should be made as a consequence of the increase in term.

Section 201(2)

4.18. As noted by the Electoral Commission, for the purposes of the disclosure provisions, section 201(2)(a) of the Electoral Act sets out the disclosure period applicable to candidates contesting two general elections in a row. It states that—for a candidate in the current election who was a candidate in an election the polling day for which was within four years before polling day for the current election – the disclosure period begins on the 31st day after polling day for the last election. The '4 years' specified in section 201(2) is intended to cover the possibility that an extraordinary election might have extended the term of the Assembly to greater than three years, as well as the more likely possibility that two polling days may be a week or so longer than three years apart.⁴²

⁴² Submission 5, ACT Electoral Commission.

4.19. The Electoral Commission recommended that, if four year terms are introduced, the ‘4 years’ specified in section 201(2)(a) be extended to ‘5 years’ to cover the same possibilities under four year terms.

Sections 236 and 239

4.20. Section 236(6) of the Electoral Act states that a prosecution in relation to an offence of failing to give the Electoral Commissioner a disclosure return may be begun at any time within three years after the offence was committed. This three-year period allows the Commissioner to conduct audits of disclosure returns once every three-year election cycle and to launch prosecutions if necessary up to three years after the date of the offence. The Electoral Commission is of the view that if four-year terms are introduced, it would be appropriate to increase this period to four years also, to allow the Commissioner the ability to align disclosure audits with the parliamentary term.⁴³

4.21. Section 239(1) of the Electoral Act provides that persons who are or could be required to provide disclosure returns in relation to an election are required to keep records related to such disclosure returns for not less than three years after polling day for the election. Section 239(2) of the Electoral Act provides that parties, ballot groups, associated entities and MLAs are required to keep records related to disclosure returns for not less than three years after the last day on which such returns are due to be provided. These requirements are related to the ability to initiate prosecutions in relation to disclosure returns under section 236(6) up to three years after the date of the offence. The view of the ACT Electoral Commission is that, to enable audits of disclosure returns to be aligned to the parliamentary term, these requirements should be extended to be four years, if four-year terms are introduced.⁴⁴

4.22. The Electoral Commission noted that while it would be appropriate to increase the audit timetable to bring it into line with the election term and allow audits and prosecutions up to four years after the relevant date, the Assembly may wish to consider increasing this timetable to seven years thus bringing the audit provisions into line with similar audit standards applied, for example, to taxation audits.⁴⁵

Should a referendum be held on the issue?

4.23. Four submissions argued for a referendum on the issue to coincide with the 2004 election.⁴⁶

Voting should not be diminished without clear public consent

4.24. The Democrats and the ACT Equality Party argued that because the proposal to increase the term of Members of the Assembly is a significant change to the structure of governance, the ability of voters to elect their representatives should not be

⁴³ Submission 5, ACT Electoral Commission, p 5.

⁴⁴ Submission 5, ACT Electoral Commission, p 5.

⁴⁵ Submission 5, ACT Electoral Commission, p 5.

⁴⁶ Submission 1, Associate Professor Malcolm Mackerras. Submission 8 ACT Equality Party. Submission 11 Australian Democrats (ACT Division),. Submission 12 ACT Greens.

diminished without the clear consent of the people of the ACT. Allowing the people to determine the issue reinforces the concept of open and transparent government and instils confidence with the people that they retain ultimate control.⁴⁷

4.25. Associate Professor Mackerras presented strong views in support of not reducing the power of the people without their consent. He suggested that not to take the issue to a referendum would be proof that the ACT politicians knew the people would vote against their wishes and therefore decided not to ask the people for their opinion.⁴⁸

Perception of self interest

4.26. Another reason in support of a referendum is to avoid any perception of self-interest on the part of Members. Some expressed the view that issues that affect the working conditions of Assembly Members themselves should not be decided by the Assembly itself, as doing so constitutes a form of conflict of interest.⁴⁹

Entrenchment of maximum term of office

4.27. In addition to calling for a referendum on the issue, the Australian Democrats (ACT Division) suggested that if such a referendum were held it could also entrench a maximum limit on the length of Members' terms. This would ensure that future Assemblies would not act again to further extend the term.

A referendum is unnecessary

4.28. A number of arguments were proposed against the idea of holding a referendum.⁵⁰

Four-year terms introduced by enactment in other jurisdictions

4.29. There are six Australian jurisdictions that have a four-year term. Only one of those, New South Wales, held a referendum on the issue before introducing four-year terms. The other states, Tasmania, South Australia, Victoria and Western Australia introduced four-year terms by amending the relevant legislation. The Northern Territory has had four-year terms since the inception of self government in 1978.⁵¹

4.30. Further, since the introduction of four-year terms in the jurisdictions above, three, New South Wales, Victoria and South Australia have since moved to four-year fixed terms without going to a referendum.

⁴⁷ Submission 11, Australian Democrats (ACT Division).

⁴⁸ Submission 1, Associate Professor Mackerras, p 5. Uncorrected Proof Transcript, 30 September 2003, p 3.

⁴⁹ Submission 11 Australian Democrats (ACT Division). Submission 12, ACT Greens. ACT Equality Party, Uncorrected Proof Transcript, 30 September 2003, p 31.

⁵⁰ Uncorrected Proof Transcript, ACT Electoral Commissioner, 7 October 2003, p 9, p 12. Uncorrected Proof Transcript, 7 October 2003, p 2, Canberra Property Owners Association Ltd. Uncorrected Proof Transcript, 7 October 2003, p 25, Professor Warhurst.

⁵¹ Uncorrected Proof Transcript, ACT Electoral Commissioner, 7 October 2003, p 12.

Business confidence

4.31. The Canberra Property Owners Association argued that to delay the implementation of four-year terms by holding a referendum would have a negative impact on development – something the ACT cannot afford.⁵²

Cost

4.32. The Electoral Commissioner advised that the cost of a single question referendum would be in the vicinity of \$230,000.⁵³

Lack of community interest in the matter

4.33. The committee notes a lack of broad community interest in the question of the length of Members' terms. According to Professor Warhurst it is unlikely that a referendum would raise people's level of interest in the matter.⁵⁴

⁵² Uncorrected Proof Transcript, 7 October 2003, p 2.

⁵³ Uncorrected Proof Transcript, 7 October 2003, p 9.

⁵⁴ Uncorrected Proof Transcript, 7 October 2003, p 25.

5. Conclusion and recommendations

5.1. The issue of lengthening the term of Members of the Legislative Assembly has been canvassed many times since the commencement of self government. Some inquiries have recommended lengthening the term and one has not.

5.2. In considering the issue, two competing interests have been identified: the democratic process and the governmental/representational process.

5.3. Some have argued that the democratic process would be better served by retaining three-year terms in the interests of allowing voters the opportunity to pass judgement on their elected representatives more frequently than if the term were extended.

5.4. Others have argued that the governmental/representational process would be better served by having fewer elections and thus allowing more time for planning and implementing government programs. It has also been argued the electorate would be better served with fewer elections as Members would have more time to concentrate on representative duties.

5.5. The committee has reviewed the evidence and on balance considers there has been sufficient community consultation on the matter and it is time to make a decision. Given that most of the submissions support an extension of the term the majority of the committee considers that the term of Members of the ACT Legislative Assembly should be extended to four years.

Recommendation 1

5.6. The committee, by a majority, recommends that the length of the term of Members of the ACT Legislative Assembly be extended from three years to four years.

5.7. The other major issue for consideration raised during the inquiry is whether the decision should be made by the Assembly or by referendum.

5.8. Four submissions argued for a referendum citing the need for the clear consent of the people.⁵⁵

5.9. However a majority of the committee is not convinced that a referendum is required. The Assembly already has the power to amend the Electoral Act to facilitate the change. Further, the community has over the years, had many opportunities for public consultation on the matter. The committee has carefully considered the issue of a perception of conflict of interest if the Assembly itself amends the Electoral Act without going to the people and a majority does not accept arguments such as Members would be ‘feathering their own nests’ by doing so. If the term of four years

⁵⁵ Submissions 1, 8, 11 and 12.

commences at the 2004 election the voting public will take into account any perceived conflict of interest when considering their vote.

Recommendation 2

5.10. The committee, by a majority, recommends that the Assembly make the decision on extending the length of the term of Members of the ACT Legislative Assembly by amending the *Electoral Act 1992*.

Recommendation 3

5.11. The committee, by a majority, recommends that the *Electoral Act 1992* be amended as follows (with the amendments to commence after the 16 October 2004 election has been held):

- section 100(1) – ‘3rd year’ be changed to ‘4th year’;
- section 201(2)(a) – ‘4 years’ be changed to ‘5 years’;
- section 236(6) – ‘3 years’ be changed to ‘4 years’;
- section 239(1) – ‘3 years’ be changed to ‘4 years’; and
- section 239(2) ‘3 years’ be changed to ‘4 years’.

Bill Stefaniak MLA
Chair
14 October 2003

Appendix 1 – Submissions received

1. Associate Professor Malcolm Mackerras
2. Mr Steve Pratt MLA
3. Mr Warwick Pearson, Woden Valley Community Council Inc
4. Mr Brendan Smyth MLA, Leader of the Opposition
5. Mr Phillip Green, ACT Electoral Commission
6. Mr Harold Hird
7. Mr Bogey Musidlak, Proportional Representation Society of Australia
8. Mr Jonathon Reynolds, ACT Equality Party
- 8A Mr Jonathon Reynolds, ACT Equality Party
9. Mr Peter Conway, Canberra Property Owners Association
10. Mr Matthew Cossey, Australian Labor Party
11. Ms Lynne Grimsey, President Australian Democrats (ACT Division)
12. Dr Miko Kirschbaum, ACT Greens
13. ACT Government

Appendix 2 – Witnesses at public hearings

30 September 2003

As a private citizen

Associate Professor Malcolm Mackerras

As a private citizen

Mr Harold Hird

For the ACT Equality Party

Mr Jonathan Reynolds, President

For the Australian Democrats (ACT Division)

Mr Llewellyn Reynnders, Division Executive Member

Ms Lynne Grimsey, President ACT Branch

7 October 2003

For the Canberra Property Owners Association

Mr Peter Conway, Executive Director

For the ACT Electoral Commission

Mr Phillip Green, Commissioner

As a private citizen

Professor John Warhurst

Appendix 3 – Dissenting report Ms Kerrie Tucker MLA

The main arguments put for extending the term of Assembly members are related to efficiency and effectiveness. It is claimed that four year terms better facilitate longer term planning and implementation of policies and that money will be saved by having less elections. The counter argument is that the democratic system will suffer as there will be a reduction in accountability to the electorate.

The claim that four year terms will facilitate long term planning was not supported by any evidence presented to the inquiry. It is my view that the electoral cycle is a very strong influence in determining government policy and the difference of one year is of little consequence in this. In the social area it is recognised that it takes at least 15 years to see results from forward thinking policy and environmental policy can take much longer to show results. It will take more than increasing the term by one year to bring about this shift in thinking.

The question of the accountability of government to the electorate is very important. Having more frequent elections gives the community greater opportunity to register its approval or disapproval of the performance of its elected leaders. However the electoral system itself is also very important in ensuring accountability, particularly in a unicameral system. While the ACT is fortunate to have the Hare Clark electoral system, the current configuration of 3 electorates - 5, 5 and 7 - most often results in Molonglo, with 7 members, being the only electorate where the system allows voter preference between the major parties to be expressed. Even though there can be a significant difference in the vote between the major parties in 5 member electorates, the result can be an equal number of seats.

It is also possible that with the current configuration we could see a majority government. Extending the term of members in this environment does have worrying implications for voter sovereignty.

There has been considerable debate about the need to increase the number of members in the ACT Legislative Assembly, and I have supported an increase to 21 members with 3 electorates of 7 members. This would allow a reasonable diversity of voices in the Assembly and empower all electorates to equally express their preference between the major parties. Three electorates with seven members is also less likely to result in a majority government and thus would ensure a check on the power of the Executive, which is particularly important in a unicameral system.

If there is to be an extension of the term of members it must be accompanied by a more accountable Assembly, and so my support for the extension is dependent on the above reforms being implemented.

Also under debate is the question of whether there should be a referendum. While I do not usually support referenda, apart from on Constitutional matters, this is a question which arguably should go to the people. It is not healthy in a

democracy for a Parliament to be able to, at whim, increase the length of the term of members. Even if such an extension does not occur until the current term has finished, there is an obvious conflict of interest for the politicians concerned and such decisions do have implications for our democratic system.

In conclusion, I do not believe that the evidence given to this Committee is sufficient to support changing the term to four years and neither have there been convincing arguments as to why a referendum would not be appropriate. I also see a strong relationship between the capacity of the Assembly to keep the Executive accountable, through having diverse voices allowed through the electoral system, and the question of extending the term of members. If voters are to give up some of their right to respond to the performance of a government they have to at least be confident that the Assembly elected closely reflects their preference, and can keep the Executive in check.

Kerrie Tucker MLA