

2018

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

**GOVERNMENT RESPONSE TO THE SELECT COMMITTEE ON THE 2016 ELECTION AND
ELECTORAL ACT REPORT, INQUIRY INTO THE 2016 ACT ELECTION AND ELECTORAL ACT**

**Presented by
Mr Gordon Ramsay MLA
Attorney-General**

Introduction

The Government welcomes the Select Committee on the 2016 ACT Election and Electoral Act's report *Inquiry into the 2016 ACT Election and Electoral Act*. The Government is proud of the ACT's robust democracy. Reflection on, and critical engagement with, elections protects and strengthens our democracy.

The Committee received 30 submissions and had 30 witnesses appear during the public hearings. The Committee also held 11 private meetings during the Inquiry. The Government would like to thank everyone who took the time to contribute to this important process.

The Committee made 23 official recommendations. The Government recognises the importance of a transparent and fair electoral legislation. The Committee's report incorporates information from the ACT Electoral Commission's and ACT Auditor-General's reports on the 2016 election. Taken together, these pieces of work demonstrate that the Government's reforms to the *Electoral Act 1992* during the Eighth Assembly have largely achieved their purposes of increasing the transparency and fairness of the ACT's electoral system.

The Government will be developing reforms in response to the Select Committee's report that build on the successes of last term, and that are aimed at the following objectives:

- Maximising the ability of voters in the ACT to participate fully in choosing their representatives
- Clarifying party and individual obligations in relation to elections and election funding that minimise the burdens of compliance while maximising transparency of campaigning and campaign funding
- Ensuring that parties and candidates are accountable for campaign activities and fundraising
- Introducing technical changes to ensure that the existing legislation continues to serve its purpose.

The Government views the Select Committee's inquiry as a foundation to consider ways to improve the Electoral Act beyond just those identified in the Committee's recommendations. Submissions to the Committee, the transcripts of evidence heard by the Committee, and the recommendations of the Electoral Commission and Auditor-General will be examined with a view to identifying ways to make elections in the ACT more fair, more inclusive, and more transparent.

The Government will develop legislation and bring it before the Legislative Assembly for consideration over the next two years. Further policy development and engagement with the ACT Electoral Commission will occur throughout 2018 and the Government will update the Assembly on outcomes as appropriate.

ACT Electoral Commission Report

The Committee also commented on the recommendations of the ACT Electoral Commission report on the 2016 ACT Election. The Government's response to the ACT Electoral

Commission report noted the ongoing work of the Select Committee. In the interests of providing a consistent and comprehensive policy response to the 2016 election, the Government chose to refer the Commission's report to the Select Committee for consideration rather than respond to each recommendation.

The Government notes the Committee's agreement to the following recommendations from the Electoral Commission report and will give them further policy consideration in response:

- amending the Electoral Act to require the full given name and surname of a person be shown in an authorisation statement and to require the name of an entity to be shown in an authorisation statement
- amending the Electoral Act to provide that vote values calculated by multiplying ballot paper totals by fractional transfer values should be rounded down to six decimal places rather than the nearest whole number
- amending the Electoral Act to increase the expenditure cap that applies to third-party campaigners
- amending the Electoral Act to change the reference from 'information about a gift made by an individual' to 'information about an amount received from an individual'.

The Government also notes that the Select Committee did not support changes to the expenditure cap for ungrouped candidates. The Government notes the Committee's view that the available evidence does not support a change to address the issue raised by the Commission at this time.

ACT Auditor-General's Report on the 2016 Election

The ACT Auditor-General's Report No. 2 of 2017 on the 2016 Election made many similar recommendations to those in the ACT Electoral Commission's report. The Government also chose to refer the Auditor-General's report to the Select Committee for consideration. The Committee commented on the Auditor-General's recommendations about pre-poll declarations and penalty levels, which aligned with the Electoral Commission's recommendations. The Government's responses to these recommendations are detailed below at recommendations 4 and 21.

The content of both the Electoral Commission's and the Auditor-General's reports will inform the Government's legislation and policy responses to the Select Committee. The Government acknowledges the work of the Commission and the Auditor-General and legislative amendments will be informed by the evidence base about the 2016 election that they have developed.

Government responses to the Select Committee's recommendations

Recommendation 1

The Committee recommends, that in addition to the current notification around elections, the ACT Electoral Commission include an optional SMS scheme for electors who did not cast a vote in previous elections, which provides the elector with reminders about voting.

Government response

Agreed in principle.

The Government supports innovative ways of encouraging voter engagement, and notes that it is at its core a recommendation to the ACT Electoral Commission. The Committee's report highlights the exceptionally high turnout and the very high proportion of eligible voters enrolled in 2016. Measures to increase voter participation in addition to the Electoral Commission's existing plans are welcome, however they always constitute a decision about the use of the Commission's resources. The Government will continue to welcome suggestions about how to improve voter turnout.

Recommendation 2

The Committee recommends that social media profile pages of political parties and candidates are to be authorised. However, the Committee also recommends that individual posts, including images, need not be authorised.

Government response

Agreed in principle.

The Government notes that Recommendation 2 aligns with the current administration of the Electoral Act by Elections ACT. Elections ACT has stated that it will provide clear guidance material on its website before the 2020 election so all parties and candidates understand their obligations. Strict requirements for authorisation of campaign materials ensures accountability, and promotes responsible behaviour during campaigns.

The Government notes that the Electoral Commission made recommendations for amendments to the Electoral Act regarding authorisations in its submission to the Select Committee. The Government will consider those recommendations as part of its legislative response to the Select Committee's report.

Recommendation 3

The Committee recommends that section 198AA of the ACT Electoral Act 1992 be amended to include fundraising contributions, in relation to a single fundraising event that is \$250 or less be included in the definition of 'gift'.

Government response

Agreed.

The Government is committed to increasing transparency for political contributions. However, more consideration of this issue is required. The current definition of 'gift' in section 198AA of the Electoral Act sets a threshold amount of \$250 or more for annual subscriptions for party membership and for fundraising contributions in relation to a single fundraising event. The Government's response will focus on fundraising events, as they are readily distinguishable from mandatory and routine charges like membership fees.

The relevance of addressing fundraising events is to ensure that the \$1000 disclosure threshold set in Division 14.4 of the Electoral Act is maintained. Disclosure of donations provides very high degree of transparency about candidates and parties, and allows for voters to make informed judgments about campaigns. Including the first \$250 raised in the definition of a 'gift' under section will ensure that the exemption for fundraising events cannot be used to evade the ACT's existing disclosure obligations.

Recommendation 4

The Committee recommends that the ACT Electoral Act 1992 be amended to set the prescribed penalty for failing to vote at one half of a penalty unit, which is defined in the Legislation Act 2001, rounded to the nearest \$5.00.

Government response

Noted.

The Government notes the Committee's concerns about the ability of a lower level fine to influence behaviour. The current fine is \$20. If the fine is represented in penalty units, half of a penalty unit would be \$75, and that fine would increase any time the generally applicable penalties for offences in the ACT are increased. The one quarter of a penalty unit recommended by the Electoral Commission would be \$37.50 (rounded to the nearest \$5 this would be \$35). Having an automatic method of increasing penalties over time maintains the relative value of a fine, however it is important to carefully analyse the impact. The purpose of this fine is to ensure public participation in elections, not to deter offending against members of the community and the Government's approach to the fine will be viewed through that lens.

Careful analysis of the impact on vulnerable members of the community of any change to the penalty structures is required. Promoting civic participation and fulfilling the obligation to vote is important and the Government supports measures to increase voter turnout. Any

penalties imposed should be imposed in a way that is fair, and that does not unintentionally and disproportionately burden the most vulnerable people in the community.

Recommendation 5

The Committee recommends that the ACT retain the current minimum voting age of 18.

Government response

Agreed.

The Government agrees that engaging young people in the political process is important. It is also important that young people are able to express their views and engage in the political process. For the reasons outlined in the Report the Government believes these aims are not best served by lowering the minimum voting age at present.

In its Report, the Committee observed that the Canberra community's views on lowering the voting age were unclear, and that there were practical issues regarding current legislative requirements. For example, *the Australian Capital Territory (Self-Government) Act 1988* (Cwlth) and Hare-Clark system require compulsory voting, meaning that lowering the voting age would make it compulsory for 16 and 17 year olds to vote. However, the Youth Coalition of the ACT expressed support for lowering the voting age on a voluntary basis. Having a differential approach to compulsory voting based on age presents numerous human rights and practical issues.

Recommendation 6

The Committee recommends a review of current legislation, regulation and practices to recognise the separate and overlapping functions of MLA, member of the Executive, political candidate and private citizen, with a view to improve demarcation and transparency of definitions.

Government response

Agreed.

The Discretionary Office Allowance was abolished in 2014 as it had become in practice unworkable. Following the abolition of the Discretionary Office Allowance, a Remuneration Tribunal Determination in 2014 provided a Communications Allowance of \$15,000 per year. The Communications Allowance was then rolled into MLA salaries in Determination 7 of 2016. This was designed to give effect to the original intent of the allowance whereby it was to be spent on communication by MLAs with their constituents in a public capacity, rather than political, and would therefore fall outside of the definition of political expenditure. However, numerous challenges have arisen in practice with the administration of this change within the electoral reporting framework.

Section 230(7) of the Electoral Act excludes from MLAs' annual returns the "disclosure of funds provided by the Legislative Assembly to assist MLAs in the exercise of their functions as an MLA." However, because the Communications Allowance is paid to MLAs directly as a component of salary, the Electoral Commissioner has formed the view that it is not covered by the exclusion in section 230(7). Funds for MLAs to communicate with their constituents are appropriately not covered under the same rules as campaign material because constituents should be regularly informed about how public funds which support the Legislative Assembly are being used. A review of how communications funding is provided to MLAs and managed under all applicable regulations and legislation will assist in resolving the challenges outlined in the Select Committee's report with the communications allowance.

A review of policies and practices around gifts and donations will support a more streamlined approach, eliminate duplication and enhance clarity of the rules that apply to the overlapping functions of MLAs. The Government will examine the issue and develop legislative amendments to clarify the status of funds used to support communication by MLAs as Members, as opposed to campaign funds used for political purposes.

Recommendation 7

The Committee recommends a review and update of all rules and regulations for the use of MLA's office, staffing and Communications Allowance to ensure MLAs are able to adequately carry out their functions, including during an election period.

Government response

Agreed.

Gift-reporting and disclosure obligations under the Electoral Act should be focused on campaign and political activities. The purpose of the Government's reforms in this area will be to ensure that the Assembly's rules and regulations and the Electoral Legislation clearly delineate between an MLA's public functions, and campaign activities which are political and more appropriately governed by the Electoral Act.

The Government will review the existing rules and regulations to develop proposals for reform that ensure disclosure and reporting obligations for campaign activities in the Electoral Act do not unintentionally or needlessly impose burdens on public functions, both Executive and Non-Executive.

Recommendation 8

The Committee recommends that political donations from property developers be banned in the ACT.

Government response

Agreed.

Maintaining public confidence in the electoral system requires an awareness of electoral reforms in other jurisdictions. Perceived influence by property developers on Government decisions is a serious concern, and evidence to support that concern was outlined in the August 2016 NSW Independent Commission Against Corruption Report on the *Investigation in NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters*¹. Planning and development involve frequent decisions by Government that can have enormous consequences for the value and profits of private land developers. The public has a strong interest in being certain that elections are not influenced by the private wealth that results from those decisions.

The Government notes issues highlighted around the definition of a property developer in the Select Committee's report. The Government will examine the NSW *Election Funding and Disclosures Act 1981* in developing ACT specific legislation, and will take into account the operational needs of the Electoral Commission in enforcing a ban in its policy work.

The Government has committed to banning donations from property developers in the Parliamentary Agreement, and will be undertaking an evaluation of the NSW legislation and Parliamentary reports cited in the Select Committee's report to develop legislation to implement that commitment.

Recommendation 9

The Committee recommends that the ACT maintain its current donation reporting timeframe model, where parties and candidates must disclose all gifts and loans totalling \$1,000 or more, within seven days from 1 July through to polling day in an election year.

Government response

Agreed in principle.

The Government will examine the timeframe for reporting in line with the evidence presented from the Electoral Commission Queensland, where the 7 day requirement operates throughout the year rather than from a specific date. The Government agrees with the fundamental model of reporting within 7 days, but will examine whether adopting reporting throughout the year would improve the ACT's framework.

The Government supports reporting as quickly as is feasible, so that the public remain informed as donations are received. The Government will consider legislation to align the ACT's reporting rules with those in Queensland. As part of its work on donation reporting,

¹ The NSW ICAC Report is available online at:

<http://www.icac.nsw.gov.au/documents/investigations/reports/4865-investigation-into-nsw-liberal-party-electoral-funding-for-the-2011-state-election-campaign-and-other-matters-operation-spicer/file>

the Government will also consider more broadly whether improvements can be made to annual returns by parties in the ACT, to ensure timely and accurate disclosures.

Recommendation 10

The Committee recommends that the Minister for Education and Early Childhood Development, in consultation with the Education Directorate, develop and include civics and citizenship education as part of the ACT year 11 and 12 curriculum.

Government response

Noted.

Civics and citizenship education is already present throughout year 11 and 12 courses such as English, Australian and Global Politics, Geography, Legal Studies, Sociology and History. It is also implicit in the general capabilities, which include Critical and Creating Thinking, Personal and Social Capability, Ethical Behaviour and Intercultural Understanding. A decision to make a particular senior secondary course compulsory is significant and would require deeper consideration and community consultation.

Recommendation 11

The Committee recommends that the ACT Electoral Commission or other appropriate body provide a detailed proposal, including costs of setting up and maintaining a website, mobile app and printed material, with details of candidates at Legislative Assembly Elections, starting with the 2020 ACT election.

Government response

Agreed in principle.

The recommendation is for Elections ACT around its operations, however the Government supports measures to ensure that voters are informed about the mechanics of each election. The issues raised by the Committee around parties' and candidates' views about their information being provided online require serious consideration and detailed consultation.

Recommendation 12

The Committee recommends that the Public Unleased Land Act 2013 be amended to allow an authorised person to remove a non-compliant electoral advertising sign from public unleased land without providing the seven day direction requesting compliance.

Government response

Agreed.

This amendment would provide more efficient regulation of non-compliant electoral advertising. Removing the requirement for a seven day direction would mean that an authorised person could take immediate compliance action without any delay, including addressing safety concerns.

Recommendation 13

The Committee recommends that the ACT Electoral Act 1992 be amended to allow electoral material displayed on private property, inside the defined polling area, to remain throughout the polling period.

Government response

Not supported.

The Government is concerned that the suggested amendment would undermine the purpose of the existing 100 metre rule. The Government recognises the importance of private rights, however the Electoral Act is designed to balance those rights with the public interest in a fair and transparent campaign.

The Government notes the evidence presented in the Select Committee's report about experience in Tasmania and different options around the enforcement of the 100 metre rule. The Government's view is that ensuring a level playing field for all parties and candidates and ensuring a consistent application of the rule around all polling sites is key to delivering the intent of the rule.

Recommendation 14

The Committee recommends that the ACT Electoral Commission continue to consider a limited electronic voting option for electors who are overseas.

Government response

Agreed in principle.

The Government notes that this recommendation is for the ACT Electoral Commission, however it supports measures that will expand voter inclusion and will consider ways that it can support options for voters to participate in the election.

Recommendation 15

The Committee recommends, as part of consideration of electronic voting, blind and visually impaired voters be given the opportunity to cast a secret vote.

Government response

Agreed in principle.

The Government notes that this recommendation is for the Electoral Commission, and that the Electoral Commission has expressed its efforts and sensitivity to support voting by people with disabilities including people who are blind and visually impaired.

Recommendation 16

The Committee recommends the ACT Electoral Commissioner investigate and report on the possible use of Australian Consular and diplomatic posts overseas, as an alternative voting option for electors who are overseas.

Government response

Agreed in principle.

The Government notes that this recommendation is for the ACT Electoral Commissioner, and that electronic and online voting have the potential to mitigate any effect of a Canberra voter being posted overseas as part of their employment. The Government welcomes further efforts by the Electoral Commission to review and report on potential solutions.

Recommendation 17

The Committee recommends that the ACT Electoral Commissioner report to the Assembly, by the last sitting day in June 2018, the results of the investigation into the provision of both a limited electronic voting option for electors who are overseas and a similar electronic voting option for blind and visually impaired electors.

Government response

Agreed in principle.

This recommendation is for the ACT Electoral Commissioner. The Government notes its relationship to recommendations about online and electronic voting more broadly, and welcomes further input from the Electoral Commission on the options.

Recommendation 18

The Committee recommends that a 100-metre canvassing exclusion zone around a polling booth be maintained.

Government response

Noted.

The administration of the 100 metre rule has caused some challenges and reforms to exclusions zones are suggested as part of the Select Committee's report.

This recommendation is related to recommendation 13, and the Government recognises the importance of an effective and fair rule that is applicable to all polling zones. This recommendation will be considered with a view to ensuring that there is a level playing field for all parties and candidates, and that all polling places are treated equally.

Recommendation 19

The Committee recommends that the ACT Electoral Commission conduct a survey of the community to determine whether the canvassing exclusion zone be reduced, maintained or increased.

Government response

Noted.

The Government notes that this recommendation is addressed to the ACT Electoral Commissioner, and that it may offer further information to support a re-examination of the Select Committee's Recommendation 18. The Government will consider any further information developed by the Electoral Commission in its legislation reforms in response to this report.

Recommendation 20

The Committee recommends that section 303(2) and 70(b) of the ACT Electoral Act 1992 be removed to ensure consistency in the measuring of a defined polling area.

Government response

Agreed in principle.

Section 303(2) of the Electoral Act provides that if the building where a polling place is located is situated on grounds within an enclosure, the commissioner may, by written notice, specify the boundary of that enclosure for the purposes of the definition of 'defined polling area' in s303(7)(b).

Section 70 of the Electoral Act provides for joint roll arrangements with the Commonwealth. From the context of the recommendation in the Report, which is part of a discussion of the defined polling area, the Government believes that the reference to s70(b) is an editorial error and that the Committee intended to refer to s303(7)(b) of the Act.

The Government will conduct further policy consideration of this issue to investigate the potential effect of removing the power of the Electoral Commissioner to specify the boundary of the defined polling area where a polling place is situated on grounds within an enclosure. This work will require further consultation with Elections ACT.

Recommendation 21

The Committee Recommends that the Electoral Act 1992 be amended so that an elector may vote at a pre-poll voting centre without the requirement to declare that they are unable to attend a polling place on polling day.

Government response

Noted.

The Government notes the importance of exemptions for voters with work, family or travel responsibilities on polling day to ensure they can participate in the electoral process. The Government also notes the operational advantages outlined by the ACT Electoral Commission its report on the election.

Ensuring informed participation and supporting the ability of parties and candidates to communicate their policies prior to the poll is also an important part of the electoral system. The ACT's election period provides time for parties and candidates to inform voters about their policies. Pre-poll voting, while necessary in some circumstances to allow for participation in the vote, has the potential to limit the effectiveness of the election period in providing opportunities for campaigning and for voters to be informed by that campaigning prior to making a decision.

The Government notes the work of the Electoral Commission to review and develop a strategy for increasing electronic voting. The use of technology to support the efficient and fair administration of elections is a welcome development from the Government's perspective. The Government will monitor the Commission's work to review whether changes in voting technology should be accompanied by changes in the locations, facilities and options made available to voters during an election to support voting.

Recommendation 22

The Committee recommends tightening the provisions within the ACT Electoral Act 1992 to mitigate multiple entities being registered for the purposes of circumventing the expenditure cap. This provision should be in place before 1 January 2020.

Government response

Noted.

The question of ensuring the integrity of the ACT's expenditure cap is related to the issues considered in introducing the *Electoral Amendment Bill 2014 (No 2)*. The Government notes that limits on expenditure by legally independent entities does raise issues of the implied freedom of political communication that were considered in by the High Court in its decision, *Unions NSW v NSW [2013] HCA 58*.

The Government recognises the importance of ensuring the integrity of the expenditure cap to preserve fairness in elections, and notes that as outlined in the Committee's report,

entities that overspent the cap were identified and sanctioned through the appropriate process. The Government will consider measures to ensure that expenditure restrictions are effective alongside its work to develop a prohibition on property developer donations.

Recommendation 23

The Committee recommends that the Government engage with the ACT Electoral Commission to determine whether amendment to the ACT Electoral Act 1992 is necessary to allow an increased period of time between the close of nominations and the declaration of nomination to address any potential challenges.

Government response

Not agreed.

The Government will engage with the ACT Electoral Commission to examine the issue of length of time between close of nominations and declaration of nomination from the perspective of ensuring the Electoral Commissioner has adequate time to make a determination on validity. However, the purpose of the engagement will not be with the objective of providing time to consider a challenge. The Electoral Act has specific procedures for challenging decisions of the Electoral Commissioner.

Challenges to the Electoral Commissioner's acceptance or rejection of a nomination of a candidate are a matter for the Court of Disputed Elections, and are prescribed as one of the circumstances that permit a person to challenge the validity of an election under section 256 of the Electoral Act. An election's validity may only be challenged after the election has occurred. This structure of the Electoral Act means that no practical timeframe between the close of nominations and the declaration of nominations will address the potential for a challenge.