



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into 2020 ACT Election and the Electoral Act

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SUBMISSION TO THE INQUIRY INTO THE 2020 ACT ELECTION AND ELECTORAL ACT



INTRODUCTION

ACT Labor welcomes the opportunity to make a submission regarding the 2020 ACT Election.

ACT Labor's submission will address the following topics:

- Improvement of ACT's reporting and disclosure regime;
- Protection of voter intention from increasing attempts to confuse electors when casting a vote;
- Enforcement of existing regulations when they are not adhered to;
- Review of the election timetable to protect the electoral process;
- Increasing public transparency to maintain public confidence; and
- Reviewing the regulation of corflutes.

We have also provided a response to the recommendations provided by Elections ACT in their *Report on the ACT Legislative Assembly Election 2020*.

IMPROVE REPORTING AND DISCLOSURE

PREVENT DOUBLE REPORTING OF GIFTS

Currently, when an MLA receives a gift of any value, they must report it in both their own MLA Annual Return, and to the office of the party to which they belong so that the party can report it in their own returns to Elections ACT.

This results in every gift an MLA receives being reported twice.

If an MLA receives a box of chocolates as a thank you for attending a community event in their role as a local Member of Parliament, this is not a gift to the party to which that MLA belongs, nor does that party derive any benefit from it.

ACT Labor believes that to ensure gifts are reported in such a way that is transparent and depicts an accurate account of events, gifts received by MLAs in their capacity as an MLA or Minister (i.e., not as candidates representing a political party) should only be reported once. This would mean such gifts would only be reported in each MLAs own Annual Return (as they are now) and would not be double reported in each party's return.

This appears to be a simple case of an oversight in the drafting of the Electoral Act, as ACT Labor do not believe it was the intention for gifts to be counted twice in the publicly published figures.

SHIFT PAST YEAR AUDITS TO AFTER 7-DAY REPORTING

The ACT Labor Government introduced into the ACT one of the most rigorous legislative compliance regimes in the country. To ensure that audits are able to be undertaken in a timely manner, with the full attention and resources they deserve, ACT Labor believes that audits for past years should not be conducted during the 7-day reporting period and should instead be delayed until after this period has concluded.

MLA COMMUNICATIONS ALLOWANCE

ACT Labor believes that the change in 2014 from the Discretionary Office Allowance (DOA) to a sum of money paid into MLAs salaries for the purposes of communication with constituents has had significant unintended consequences and requires further consideration by the Assembly.

The former DOA was unworkable because it did not include all MLAs and excluded Members of the Executive who were left unable to perform part of their role as a local Member. Additionally, the guidelines had not kept up with changing methods of communication and lacked clear processes and criteria for determining what constituted appropriate material. Oversight of the DOA was delegated to staff of the Legislative Assembly which was not only inappropriate, it lacked any real ability to enforce the guidelines.

As such in 2014 the Assembly moved to remove the DOA and the remuneration tribunal introduced a communications allowance of \$15,000 to replace it. This is now paid to MLAs in their salary.

While this solution was a simple method of ensuring all MLAs had available the funds to communicate with their constituents, it has created additional problems which are detailed below:

- A lack of public transparency around the actual use of these funds for their intended purpose. MLAs that choose not to use the additional salary for communicating with their constituents are able to utilise this money as personal income. This is clearly not the intent of the allowance and it is in the public interest that a high bar be set when it comes to the regulation and reporting of public funds intended for use by public office holders.
- MLAs have been left unable to perform a basic function of their elected role as MLA to communicate with their constituents for the entire final calendar year of their term. Under the current system, whenever an MLA communicates with their constituents in the final calendar year of their term, that communication is counted as part of their electoral expenditure cap. For example, if during the final calendar year of a term an MLA sends their constituents a letter informing them of upcoming roadworks in their area, the cost of this letter would count towards that MLA's (or their party's) expenditure cap. This situation leaves MLAs forced to choose between fulfilling their role as an MLA or fulfilling their role as a candidate if they are recontesting the election. In the Electoral Act there is a clause that exempts publications of the Legislative Assembly from being counted towards an expenditure cap. Prior to the communications allowance being paid into MLAs salaries, this clause would come into effect under the old DOA because it was administered by the Legislative Assembly. Under this model MLAs were able to fulfil both roles, as is clearly the intention of the Act.
- Having the allowance paid to MLAs as part of their salary has also inadvertently increased administration for both MLAs and political parties.

Whenever an MLA spends money communicating with their constituents, this expenditure has been deemed to not simply be them performing their role as an elected Member of Parliament, it is now also considered a donation to their party to which they belong. To follow the same example in the previous point, if an MLA sends their constituents a letter informing them of upcoming roadworks in their area, this letter must also be declared as a donation from the MLA to their party. It is ACT Labor's belief that any reasonable member of the public would not think of this as a donation and as such this unintended consequence of the current system undermines the public confidence in the reported donation data. Additionally, this system has not only created additional administration for MLAs, it has also created the same for parties who are required to monitor, record and report expenditure by MLAs - a function previously performed by the Legislative Assembly.

ACT Labor recommends that the current system for enabling MLAs to communicate with their constituents be reviewed and that options be explored to address the problems experienced under the current scheme.

REGISTRATION OF NAMES THAT AIM TO CONFUSE VOTERS

ACT Labor is concerned by the increasing trend of new parties attempting to register names with the express aim to confusing voters. These parties aim to drive a particular outcome not by being elected but by artificially shifting votes away from another party in such a way that the outcome is contrary to voter intention.

While the Electoral Act does provide some grounds for rejecting the registration of names, these are very narrow and have previously been interpreted as such in other jurisdictions. We believe some parties are using this narrow interpretation to circumvent the intent of the legislation and skirt as close as they possibly can to the limits of what is permitted.

We can see this in the recent example where a party is attempting to register the name "New Liberals" with the AEC. The ACT is not immune to this and sees a similar problem with the registration of parties such as the Democratic Labour Party who appeared on the ballot paper as "Labour - DLP" in a clear attempt to confuse voters.

Electoral legislation should at its core aim to ensure that the outcome of an election is a true and accurate reflection of voters' intention. We should vigorously oppose any attempt to prevent this conclusion. We make the following recommendations to address this in the ACT:

- Providing a more rigorous test for party name registration with a clear focus on the intent of preventing voter confusion; and
- Introducing party logos on ballot papers to help provide voters a second visual indicator when locating the party grouping they intend to vote for. This should also be accompanied by a rigorous test for logo registration with a clear focus on the intent of preventing voter confusion. This initiative

additionally provides support to voters for whom English is not their first language as well as voters with lower levels of literacy.

ENFORCEMENT OF REGULATIONS

ACT Labor believes the current system of enforcement for those rules that govern restrictions on campaigning outside of polling places is inadequate. During the election ACT Labor made many reports of illegal campaigning activity such as:

- mobile signage being continually driven within the 100m boundary around polling places;
- corflutes being placed unattended within the 100m boundary and left there for significant periods of time; and
- volunteers deliberately ignoring instructions from polling place officials to cease handing out material within the 100m boundary.

While Elections ACT made attempts to rectify these, in many instances they appeared to not be empowered by the legislation to take direct action. For example, polling officials were unable to remove offending corflutes within the 100m boundary. Additionally, some of the offending participants were not sufficiently discouraged from undertaking prohibited activity. For example, the drivers of mobile signage continued to undertake this activity within the 100m boundary even after being warned by Elections ACT, and it can only be assumed that this was because there were either no real consequences for their activity or the consequences were not substantial enough to deter it.

ACT Labor recommends that changes to the legislation be explored that would further empower Elections ACT to take direct action to rectify breaches, as well as provide a greater deterrent to potential offenders.

REVIEW OF ELECTION TIMETABLE

REVIEW OF POLLING DATES

ACT Labor recommends that the period for early voting be reduced from three to two weeks. A long-term trend of increased early voting has led to a situation where there are a significant number of voters casting their vote before those contesting the election have had the opportunity to communicate their policies. This continues to increase the risk that voters have not had the opportunity to become fully informed before voting.

The ACT has high voter turnout and this is something we should vigorously defend. ACT Labor recommends, to ensure that a reduction in the early voting period does not negatively impact voter turnout, that consideration be given to ensuring there are an appropriate number of early voting locations that are open for an appropriate amount of time.

REVIEW OF PRE-ELECTION AND CARETAKER PERIOD

ACT Labor also recommends that the election timetable be adjusted by one week to account for the reduction in the polling period. This would result in the pre-election period and start of the caretaker period moving at least one week closer to the date of the election.

INCREASE PUBLIC TRANSPARENCY

PUBLIC ACCESS TO SOURCE CODE

ACT Labor understands there was a change in the internal practice of Elections ACT which, for the 2020 Election, required anyone wanting access to the source code of eVACS to sign a non-disclosure agreement. We understand this was done with the intention of ensuring any errors found through external analysis could be considered by Elections ACT prior to them being made public. While we understand the need to ensure confidence in the eVACS system is not undermined unnecessarily, we believe that putting up barriers to access and implementing restrictions on public discussion do not best serve this interest. ACT Labor recommends that the previous practice of making the source code freely and publicly available be reverted to and that this be enshrined as a requirement in legislation.

INCLUDE ELECTORATE OF ALL ELECTORS ON ROLL EXTRACTS

Section 59(d) of the Electoral Act 1992 outlines the information provided in an extract of the role which is made available to the public, MLAs and political parties. There exists an inconsistency with the Federal legislation whereby the AEC provides the electorate of every enrolled elector, but the ACT does not provide the electorate for people whose address is suppressed, are an eligible overseas elector or are an Antarctic elector. This leads to a situation where people are able to check an elector's Federal electorate, but not their ACT electorate. To bring consistency to this data and to ensure that MLAs are able to see the full list of their constituents, we recommend that our Electoral Act be brought in line with the Federal legislation to provide the registered electorate of all electors.

CORFLUTES

ACT Labor supports a reducing the number of corflutes on public land as part of efforts to reduce their environmental impact, while also balancing the need to keep voters informed of the election.

ACT Labor supports banning the unrestricted use of corflutes on all public land.

ACT Labor recommends that the Government consider a range of models which may achieve this, including approaches such as:

- Further excluding certain areas from permitted use;
- Only permitting use in certain areas; and
- Limiting the number of corflutes each candidate can place in certain areas.

ACT Labor would not support a ban on corflutes extending to private residential property. Being able to publicly participate in elections is an important part of our democratic process. ACT Labor would support the introduction of regulation that protects this right and ensures it is made clear to ACT residents.

RECOMMENDATIONS FROM ELECTION ACT

Elections ACT has made 24 recommendations in its report on the 2020 ACT Election. ACT Labor has provided a number of responses to notable recommendations below.

ELECTIONS ACT RECOMMENDATION 1

ACT Labor **supports** this recommendation and believes this is an important step in ensuring that registered political parties are genuine member-based organisations.

ELECTIONS ACT RECOMMENDATION 2

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 3

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 4

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 5

ACT Labor **supports** the principle of this recommendation, but additionally believes that the period of early voting should be reduced by 1 week as per our recommendation in “Review of Polling Dates” above.

ELECTIONS ACT RECOMMENDATION 6

ACT Labor **does not support** this recommendation. This resource has clearly been embraced by many voters with almost 1 in 11 voters accessing the site. We do not believe the ACT should rely on third parties to fulfil the role of a single central point for voters looking to access information from candidates.

ELECTIONS ACT RECOMMENDATION 7

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 8

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 9

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 10

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 11

ACT Labor **supports** this recommendation and would further support the active encouragement of overseas voters to use this service.

ELECTIONS ACT RECOMMENDATION 12

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 13

ACT Labor would **support** this recommendation if the early voting period were reduced by 1 week as per our recommendation in “Review of Polling Dates”. This would help ensure that voters are more likely to be informed before casting their vote.

ELECTIONS ACT RECOMMENDATION 14

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 15

ACT Labor **supports** this recommendation. We believe the current approach taken by the Commission in lieu of clarity from the legislation which is outlined in the Commission’s report has been appropriate and would support this approach being the one that is legislated.

ELECTIONS ACT RECOMMENDATION 16

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 17

ACT Labor **supports** the principle of this recommendation, but not the specifics. The Commission’s recommendation around font colour is too specific to account for variations in print material and would unnecessarily limit design choices for candidates trying to communicate with voters. For example, a piece of material printed on green coloured paper would be unable to meet the requirements without highly specialised commercial printing capable of printing a white background on-top of the green paper. Additionally, the recommendation in relation to a minimum font height to permit ease of reading at a reasonable distance would be unworkable for items such as corflutes which are typically read from the roadside. We instead recommend that the ACT aligns itself with the Federal provision that mandates “a font size that can be read by a person with 20/20 vision without the use of any visual aid”.

ELECTIONS ACT RECOMMENDATION 18

ACT Labor notes this recommendation and notes that there is not currently a more suitable body to oversee this process. Given Elections ACT’s existing primary role is conducting fair and transparent elections we believe they are best placed to facilitate this.

ELECTIONS ACT RECOMMENDATION 19

ACT Labor **supports** this recommendation.

ELECTIONS ACT RECOMMENDATION 20

ACT Labor **supports** this recommendation. While it is our belief that any change to the definition should make clear that the intent is not to prevent Federal MPs from performing their role as a Member of Parliament, we do believe that the current circumstances have led to an abuse of this loophole by one MP in particular. During the election period Senator Zed Seselja conducted polling and ran social media ads directly relating to Territory Government policy. Conversely, ACT Labor actively worked to educate our Federal MPs to ensure they did not cross this line when undertaking their normal communication activities. Furthermore, it is concerning that even though Senator Seselja undertook this activity, he has not disclosed this through a third party return to Elections ACT.

ELECTIONS ACT RECOMMENDATION 21

ACT Labor **does not support** this recommendation. This provision was removed with the introduction of expenditure caps and a new public funding model. Expenditure caps create an even playing field, and public funding reduces undue influence – this is a best practice model. The ACT has one of the most rigorous donation disclosure regimes in Australia that already makes public the name of any organisation or individual donating over \$1,000. This scheme will be further enhanced by even shorter reporting timeframes that come into effect from 1 July 2021. The ACT has already achieved one of the lowest average donation amounts per capita, which indicates the existing system has achieved the goal of removing undue influence. We oppose the introduction of donation caps not only because they are unnecessary with our existing model, but because they fail to recognise that there is a fundamental difference between collective action by a group of people and individual action by a single person. For example, introducing donation caps would place the same limit on a community group, made up of 1000 members, as it would on a wealthy individual. This is an objectively unfair approach. This practice simply leads to more personal donations from wealthy individuals who are often also in a position to donate again via other entities, as has been demonstrated in other jurisdictions. This is not democratic and works to restrict the ability of collective groups to equally participate in the democratic process.

ELECTIONS ACT RECOMMENDATION 22

ACT Labor **supports** this recommendation. The move towards a best practice public funding model by the ACT Labor government was never intended as a means for parties or candidates to make a profit. This appears to have provided a situation in which some parties run with the intent of making a profit, so that they can then funnel this money to other campaigns such as the Federal election or to campaigns in other states. This practice does not meet community expectations.

ELECTIONS ACT RECOMMENDATION 23

ACT Labor **supports** this recommendation. While we believe that voter education is the best method of increasing voter turnout, we note that the current penalty is not linked to an automatically adjusted unit and should be brought in line with best practice legislative drafting practices by linking it to a penalty unit.

ELECTIONS ACT RECOMMENDATION 24

ACT Labor has not formed a view on this recommendation but would support the inquiry investigating whether voters who are taken to court are more likely to vote in the future, or whether this action does not result in any change in behaviour. Compulsory voting is an important feature of Australian democracy and we believe that to best protect this, the focus should be on the outcome achieved, and not the administrative cost.