ACT Government Submission to the

Standing Committee on Justice and Community Safety

Inquiry into *Campaign Finance Reform*

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Foreword

The ACT Government believes that free and fair elections are essential to the good governance of the ACT and has made a significant contribution to the review and updating of the ACT's electoral system over many years.

Committed to an open and transparent electoral system, the Government welcomes the opportunity to articulate its views in a forum which advances the Assembly's and the community's reflections upon values and principles that will continue to enhance the strength of the ACT's mature and vibrant democracy.

The Government is dedicated to—

- best practice in governance and firmly believes that the ACT's electoral scheme operates to promote the accountability and transparency of government and participation in the Territory's democratic system;
- ensuring that all ACT citizens are able to participate fully and freely in political and community life;
- continuous improvement of the electoral system in the ACT (demonstrated by amendments to the Electoral Act in 2008, to reduce the threshold for disclosure of political donations from $1,500 to $1,000).

Although the Government considers that the ACT has an open and transparent system governing campaign funding, the Government continues to maintain its commitment to enhancing the reporting and disclosure regime. In doing so, the Government has regard to evolving values and the importance that the community places upon the balance between rights of privacy and freedom to participate in public life;, for example through political expression and associations, and the need for robust accountability and transparency.

Among the complex issues that the Government's submission considers are those associated with the disclosure of multiple donations, in-kind contributions, the meaning of "gifts" and factors relevant to identifying the most effective thresholds for documentation and disclosure of donations. Through its submission, the Government's contribution to this important Inquiry acknowledges that recommendations for reform should have regard to safeguarding the personal information of individuals, and ensuring that greater regulation is proportionate not only to the capacity of government to fund the implementation of reform, but also to the capacity of individuals and non-government organisations to comply with increased disclosure and other statutory requirements.

I thank the Standing Committee on Justice and Community Safety for the opportunity to present the ACT Government's submission to its Inquiry into Campaign Finance Reform.

Simon Corbell MLA
Attorney General

Contents

1 Overview

1.1 The Terms of Reference of this Inquiry by the Standing Committee on Justice and Community Safety, invite consideration of the following issues:

- regulation and enforcement of donations, and their disclosure;
- regulation and enforcement of political party and third party campaign expenditure, and their disclosure;
- the relationship between private and public campaign funding;
- Commonwealth and ACT electoral law;
- Human Rights, constitutional and other matters.

1.2 This submission presents for the Inquiry's consideration a range of views that have been of particular significance to the Legislative Assembly in recent years.

1.3 This submission is arranged as follows.

- Chapter 2 recites the Terms of Reference and quotes extracts from Hansard during the debate in relation to those Terms.

- Chapter 3 outlines the ACT Government's broad policy position, including in the context of the relationship between the electoral statutory regimes of the Commonwealth and Territory.

- The ACT Government's more particular views and options in relation each of the Terms of Reference are set out in chapter 4.

- Revision of, and regulatory changes made to, disclosure thresholds as part of the most recent comprehensive reviews of the Territory's statutory electoral framework are summarised in chapter 5.

- Chapter 6 discusses the need for balance between the right to participate in political activity and the public benefit of a transparent and accountable electoral system, reflecting not only the rights potentially engaged under the *Human Rights Act 2004*, but also the community's expectation in this respect.

1.4 The submission concludes, in chapter 7, with an expression of confidence in the robustness of the electoral funding and framework as it operates in the ACT, but confirms the Government's commitment to ensuring the community's values and expectations are reflected in any reforms to the statutory regime.

2 Background

2.1 On Thursday, 19 November 2009, the Assembly resolved, on a motion by the Leader of the Opposition, Mr Zed Seselja MLA, as amended by ACT Greens Parliamentary Convenor, Ms Meredith Hunter MLA:

> "That the Standing Committee on Justice and Community Safety inquire into electoral and political party funding in the ACT, including:
>
> 1. regulation of:
>   (a) donation size;
>   (b) political party campaign expenditure; and
>   (c) third party campaign expenditure;
> 2. financial disclosure laws;
> 3. direct and indirect public funding of elections [sic];
> 4. regulation of:
>   (a) donations by private individuals, organisations and other contributors; and corporations, unions,
>   (b) personal candidate funding;
> 5. enforcement of funding and financial disclosure law;
> 6. the relationship between ACT electoral law and Commonwealth electoral law; any Constitutional matters; and any other relevant matter."

2.2 A motion by the Attorney General, Mr Simon Corbell MLA, that the initial words of the Terms of Reference be amended (as underlined below) to read:

> "That the Standing Committee on Justice and Community Safety inquire into electoral and political party funding in the ACT <u>having regard to the Commonwealth Government's Electoral Reform Green Paper *Donations, Funding and Expenditure* (December 2008)</u>, including: ..."

was negatived by the Assembly. The Government then agreed to the motion as amended by Ms Hunter.

2.3 In the course of debate on the Attorney General's motion for amendment of the motion for this inquiry, Mr Seselja said (Hansard, 19 November 2009, p.5350):

> "In relation to Mr Corbell's amendment for reference to the commonwealth's green paper, Mr Corbell did make some good points in relation to the green paper, and I am sure that the committee will reference that green paper in their inquiry. It is an important body of work. But it is not the only body of work. My only concern with referencing one particular paper in this process would be that it would in some way elevate it above all other contributions to the debate.
> This will be a wide-ranging inquiry and I would certainly say, on behalf of the Canberra Liberals, that we would want to see the committee examining this green paper and looking at what is coming out of the commonwealth process—there is no doubt about that—but we do not see a need to actually include that in the formal terms of reference."

2.4 Similarly, Ms Hunter said (Hansard, 19 November 2009, p.5351):

"I acknowledge the points that have been made by Mr Corbell. This is a significant body of work; it is an important body of work. I find it highly unlikely that a committee with the terms of reference that are set out here would not look at that body of work and make it part of its inquiry. Mr Corbell raised some points about the relationship between the ACT electoral law and the commonwealth electoral law—how those systems interact and so forth and the extra costs that might be incurred if different systems were put in place."

2.5 The ACT Government believes that the Commonwealth's Electoral Reform Green Paper is a primary source of information and guidance in relation to this issue. As the Attorney General stated when the motion for this Inquiry was debated, the paper captures most of the information and issues relevant to the motion, and a significant departure from the Commonwealth approach may have adverse financial implications for the ACT. Mr Corbell said (Hansard, 19 November 2009, p.5348):

"Most significant of [the contribution that jurisdictions from around Australia are making] is the commonwealth government's green paper on electoral reform, donations, funding and expenditure, which was released in December 2008, providing substantial background and material to inform the work of the committee."

- ..... it captures the current issues and provides discussion points to examine matters that affect all jurisdictions.
- ..... it provides an examination of the effectiveness of provisions in relation to campaign funding and a comparative examination of approaches in other jurisdictions, including in comparable overseas jurisdictions.
- ..... it sets out fundamental matters such as the rationale for regulation of electoral funding and donation.
- ..... it lays out the principles that inform regulation of electoral funding and disclosure. The committee may wish to consider these principles in its deliberations.
- ..... it includes principles such as integrity, transparency, accountability, enforceability, the right to privacy, participation, freedom of political association and freedom of expression.
- ..... this particular document is perhaps the most complete examination of issues around campaign finance reform that has been done anywhere in Australia. Indeed, it is a report and an options paper that looks at the regulatory structure for campaign finance in each Australian jurisdiction. Much of the work of the committee will be informed by this type of analysis .....

There are distinct advantages in taking into account the desirability or otherwise of consistency between the ACT and the commonwealth in relation to electoral funding laws. To do so would mean that we can continue to maintain a strong level of consistency between both jurisdictions.

This allows for ease of reporting, reduces confusion and the possibility of errors being made by political parties and other participants in the political process when it comes to reporting, and it has a practical implication of potentially reducing the burden on ACT resources in implementing and managing a system that does not hold at least some level of consistency with the commonwealth.

I raise this point simply to say that there are issues around implementation that should always be given regard to. They should not be the driver of the debate; they should not be the primary consideration, but they should be a consideration. In a small jurisdiction with a small electoral commission, an overly onerous, complex, complicated or

divergent scheme from the commonwealth does impose additional costs on the territory and it is something that should be given regard to.

As I have just said, it also opens up the prospect of confusion in the reporting regimes, particularly where people make donations to all three political parties, for example, represented in this place, at both the federal level and at the territory level. Different reporting regimes, if they are widely divergent, can lead to confusion."

2.6 The ACT Government's submission to this Inquiry addresses a number of matters in relation to the Terms of Reference, taking into account the considerable contextual material provided to the Inquiry by the ACT Electoral Commission in its own submission. The Government has considered the ACT Electoral Commission's *Report on the ACT Legislative Assembly Election 2008* and the Commonwealth Government's 2008 Electoral Reform Green Paper.

2.7 The Government's submission also directs the consideration of the Committee towards a number of important considerations in relation to human rights and personal information privacy.

3 Policy Position

3.1. The inaugural *Canberra Plan*, published in 2004, reflected the aspirations of "a city enjoying, at last, the freedom that comes with maturity, and seeking as a society to articulate the kind of place we wanted it to be" (Chief Minister's Foreword, p.5). It set out the ACT Government's guide to growth and change in the ACT. One of the key directions enunciated in the Canberra Plan was "maintaining a free and fair community". In 2009, *The Canberra Plan – Towards our Second Century* set out the ACT Government's guide to growth and change in the ACT. One of the key objectives enunciated in the Plan (at p.25, "A Fair and Safe Community") is:

> "To ensure that all Canberrans enjoy the benefits of living in a community that is safe, socially inclusive and respectful of human rights, that all Canberrans are able to fully participate in community life and that the most vulnerable in our community are respected and supported."

Both of these objective statements have informed the ACT Government's position on campaign finance reform in the ACT.

3.2. Section 17 of the *Human Rights Act 2004* provides:

> **17 Taking part in public life**
>
> Every citizen has the right, and is to have the opportunity, to—
> (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
> (b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
> (c) have access, on general terms of equality, for appointment to the public service and public office.

3.3. The ACT Government maintains that the existence and maintenance of a free and fair society requires that the rules governing elections, particularly in relation to finance, must allow citizens to participate in an open and transparent political system. Individuals also have a right to privacy, balanced against the right of others to participate in political life.

3.4. Equally, to maintain a strong, dynamic economy, reporting requirements for businesses and individuals must be the least burdensome possible, while still allowing for effective administration.

3.5. When the Commonwealth Parliament established self-government for the Australian Capital Territory, it passed a suite of legislation providing its Parliament with plenary power to legislate with respect to the affairs of the Territory, including the advancement of a free and fair community. Successive ACT Governments have progressed laws in pursuit of that objective.

3.6. The provisions regulating funding and disclosure in relation to ACT elections derive from the Commonwealth *Electoral Act 1918*. Since the ACT attained self-government in 1989, the Territory's electoral funding and disclosure

provisions have, by and large, been consistent with the Commonwealth scheme.

3.7. The ACT Government generally favours maintaining consistency with the Commonwealth's reporting requirements in relation to election campaigns, where appropriate and practicable, in the context of ACT Governance. Any reforms to the Commonwealth's Electoral Act are, and will continue to be, closely monitored by the ACT Government, which will periodically consider whether complementary amendments are required to the Territory's electoral funding and disclosure scheme.

3.8. The avoidance of unjustified differences between the ACT's provisions and those of the Commonwealth is a relevant consideration. It is particularly relevant to organisations that are required to report under, and otherwise comply with, the statutory disclosure regimes of each of the Commonwealth, States and Territories in which they make donations during political campaigns and, more generally, to political parties. It may assist to keep the costs of record keeping, compliance and audits to more manageable levels for donors.

3.9. A democratic electoral system must have the capacity to remain dynamic and reflective of the wants and needs of a changing, growing community. Successive ACT Governments have been prepared to be at the forefront of change in many areas of life. There are, however, circumstances in which the ACT should be cautious in diverging in policy and matters of governance.

3.10. Stability and consistency are important for the ACT community. The very small population and economy of ACT require that some systems, such as our electoral system, may be more efficiently and effectively managed if they are substantially consistent with those of the Commonwealth Government.

3.11. For donors, the greater the consistency of rules applicable to donations, disclosure and other compliance requirements, the less the undue burden and compliance risk that should be faced by individuals and organisations that seek to donate to political parties in both Territory and Commonwealth jurisdictions. Records that are kept by donors in one jurisdiction should be similar to those in another, so far as feasible and having regard to particular community values and expectations in the ACT. Fora such as this Inquiry, as well as the views of the ACT Electoral Commission and the community, assist to inform the Government about such values and expectations.

3.12. The ACT Government commends to the Steering Committee its consideration of the Commonwealth Government's response to submissions made to its Electoral Reform Green Paper, as recommended by the ACT Attorney General, Mr Simon Corbell MLA. As quoted in paragraphs 2.3 and 2.4 of this submission, the important body of work represented by the Green Paper has been acknowledged by Mr Zed Seselja MLA and Ms Meredith Hunter MLA, respectively on behalf of the Canberra Liberals and the Greens.

4 Possible Reforms

4.1 This chapter outlines the Government's views with respect to the Terms of Reference for this Inquiry and sets out its proposals for a number of options for reform with reference to those Terms of Reference.

Issue 1: Regulation of:

(a) donation size;

(b) political party campaign expenditure; and

(c) third party campaign expenditure.

4.2 The regulation of campaign donations and expenditure falls within the plenary power of the ACT Legislative Assembly. As recently as 2008, the Assembly has endorsed the view that the practice of donating to election campaigns supports the freedom of ACT citizens to participate in political activity.

4.3 The constitutional framework of the ACT addresses the issue of inappropriate benefits and conflict of interest (see sections 14 and 15 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth)). Some inappropriate payments are prohibited by the general Territory criminal law. It is not suggested that these provisions might be outside the constitutional power of the Territory or the Commonwealth. However, reservations might be held in relation to broader provisions, which otherwise control the level of donations or type of expenditure, especially when these impact upon the implied constitutional right of communication.

4.4 The Government suggests that the Territory may not need to further regulate or restrict donations or expenditure, in advance of changes in other jurisdictions on these issues. While the Territory is able to effect a level of consistency with the Commonwealth system, the Territory cannot bring about harmony between State and Territory systems other than to make its position known and encourage other jurisdictions to initiate change.

4.5 When the Commonwealth Government moved in March 2008 to reduce its disclosure threshold to $1,000, the ACT Government moved to make amendments to ACT legislation to facilitate consistency. The ACT Government believes that this was a proportionate and legally robust legislative change. The ACT Government made its position on disclosure thresholds clear when it moved the 2008 amendments to the Electoral Act. Donations (or loans) above $1,000 are significant; they should be disclosed, and the donor identified.[1]

4.6 The Territory's current inconsistency with the Commonwealth's threshold exists primarily because the Senate's approval of proposed amendments to

[1] Chapter 5 of the ACT Government's submission outlines in more detail the background to disclosure thresholds and the Government's views.

Commonwealth legislation was suspended pending consideration of the Commonwealth's Green Paper.

4.7 On the issue of disclosure of multiple donations in total exceeding $1,000, the ACT Government considers that it may be appropriate to amend the Electoral Act to require their disclosure. The question would require careful consideration, particularly against the possible impact on the minimum threshold for the identification of anonymous donations, and in the context of an overarching objective of achieving a proportionate and affordable response.

4.8 Any such amendment would need to take into account whether multiple donation disclosure obligations would be confined to the total donation of each separate legal entity, or whether donations by associated legal entities would be disclosed (for example, to enable the summing of a $900 donation by a natural person and a $900 donation by a company of which the natural person is a director).

4.9 Any revision of disclosure obligations, both in terms of individual and multiple thresholds, may also benefit from consideration of the extent to which in-kind contributions could feasibly be drawn into a regulatory regime, the basis on which valuations could be attributed to non-monetary contributions, and who would bear the onus, and cost, of providing verification of values.

4.10 The Government notes that the ACT Electoral Commission has raised concerns about the lack of vertical and horizontal consistency among jurisdictions in relation to disclosure of political donations.

4.11 On the subject of third party campaign expenditure, the Government makes no particular recommendation. However, it acknowledges it as an aspect that merits consideration in the quest for enhanced transparency of the electoral system, and that regard should be had to developments in other jurisdictions.

Issue 2: Financial disclosure laws

4.12 The Government acknowledges that all parties conduct a wide range of events and activities to raise funds to enable resourcing of numerous requirements for electoral and non-electoral functions including with respect to day-to-day administration and governance associated with parties' operations. Donors too, seek to provide financial or in-kind services or other assistance, according to their available means and having regard to their own governance obligations.

4.13 The passage of the *Electoral Legislation Amendment Act 2008* followed a comprehensive debate in the Legislative Assembly, which included debate about financial disclosure. Nonetheless, the ACT Government supports greater transparency in this area, and recommends that consideration be given to whether the current definition of "gift" provides for an appropriate level of transparency.

4.14 Consideration could be given to a change that would require parties to disclose the particulars of all donations by a person or organisation when those donations amount in total to $1,000 or more in any reporting period. Donations in these circumstances are currently not required to be disclosed by parties, even though donors are required to lodge a return disclosing them.

4.15 In relation to anonymous donations, the Government notes that a party may retain any donation of less than $1,000, even though multiple donations below that threshold may have been made by the same person. While recognising the difficulty in improving transparency in this area, the Government would support reasonable measures to ensure that large amounts of money cannot be anonymously donated in order to avoid disclosure or forfeiture.

4.16 The Government recommends careful consideration of the need to achieve a balance between the right to participate and the right to privacy.

4.17 Opinion on what amount should be the threshold for public disclosure varies widely. Because the rationale for disclosure is to make information about a political party's sources of campaign support available to the community, it seems reasonable to suggest that there is an amount of donation below which the community would have little interest or concern.

4.18 Given the governance, reporting and audit obligations of corporate legal entities, greater regulation of disclosure by those entities should have regard to the extent to which greater disclosure requirements would impose any additional compliance and other imposts beyond existing statutory obligations.

4.19 Given the relationship of individual privacy as well as corporate regulation between the Territory's and the Commonwealth's statutory regimes, this is another area in which developments in the Commonwealth will be of interest.

4.20 In the meantime, reforms in the Territory will need to balance the objective of enhancing transparency, which the ACT Government supports, with potential intrusions upon privacy, and any adverse impositions and costs borne by donors.

Issue 3: Direct and indirect public funding of election campaigns[2]

4.21 Whether or not an electoral system in which the public purse assumes a greater responsibility for the funding of election campaigns is desirable or appropriate, a fiscally prudent government in the current financial climate would not draw on consolidated revenue except to address matters of demonstrated and pressing need.

4.22 The Government's position is that there is no demonstrated need to transfer funding to this area at this difficult economic time.

[2] The Terms of Reference referred to "direct and indirect funding of elections". This submission presumes that the intention was to refer to election campaigns of political parties.

4.23 Consequently, the ACT Government believes that there must be capacity for private entities to make political donations. Further, consideration might be given to the potential implications for public participation in political activity of increasing the public funding of election campaigns.

Issue 4: Regulation of:

(a) donations by private individuals, organisations and other contributors; and corporations, unions;

(b) personal candidate funding.

4.24 Greater regulation of donations by private individuals should have regard to rights to privacy of individuals under the *Human Rights Act 2004* and the Commonwealth's *Privacy Act 1988*. Moreover, rights to which individuals are entitled in the ACT with respect to freedom of peaceful assembly and association, are also relevant to issues of regulation.

4.25 A corollary of the Government's opposition to funding ACT election campaigns (see Issue 3 above) from the public purse, is that the Government believes that there must be some capacity for private entities to make political donations. Increased regulation of organisations other than individuals should be considered in the context of what level of regulation is reasonably warranted having regard to legal, financial and governance obligations currently imposed upon bodies corporate, and the benefits and costs associated with adding to their compliance obligations.

4.26 While a higher level of public funding might be arguable at some later stage, the ACT Government does not see a cogent policy reason for limiting private donations (other than where this intrudes on broader social or criminal policy objectives, such as the minimisation of conflict or corruption).

4.27 The Government does not support the banning or capping of donations (or the banning of advertising). The ACT Electoral Commission's submission to this Inquiry observed that there are no caps on donations in place in Australia, with the exception that Victoria prohibits donations to a registered political party by holders of casino and gambling licences, including related companies, of more than $50,000 in a financial year. The Government understands that there are no caps on expenditure in any jurisdiction other than Tasmania (in relation to Legislative Council elections).

4.28 At a practical level, capping and banning political donations, or capping expenditure on campaigning, may (as Professor Twomey suggested) merely force political parties to find other means of conducting their campaigns.

4.29 Discouraging campaigning activity in this way may only serve to reduce the availability and quality of election information available to members of the community. The fairest and most effective way to regulate election campaigning is to have in place an appropriate system for disclosure of campaign financing, as is the case in the ACT at this time.

Issue 5: Enforcement of funding and financial disclosure law

4.30 The funding of ACT Government agencies to undertake statutory functions is an important matter for the Government to consider, having regard to the need to address wider whole-of-government issues, within a Budget context.

4.31 The Government considers that the present level of funding is sufficient to provide for desk audits of returns and a formal book audit once in the life time of each parliament, and draws the attention of members of the Standing Committee to the negative ramifications of the discovery of fraudulent or corrupt behaviour through such processes.

4.32 Depending on the nature of a breach, implications might include the disqualification of a member from the Legislative Assembly (section 14 of the *Australian Capital Territory (Self-Government) Act 1988*) or prosecution for breach of the criminal law. Not only would any member found transgressing the existing legislative scheme face serious consequences, but the member's party would attract the odium of association with corrupt practices.

Issue 6: The relationship between ACT electoral law and Commonwealth electoral law; any Constitutional matters; and any other relevant matter.

4.33 This submission has earlier made the point about the desirability of remaining substantially in step with Commonwealth electoral legislation. Any reforms to the Commonwealth's Electoral Act warrant monitoring so that amendments relevant to the Territory's electoral scheme are considered.

4.34 A relevant consideration will be the extent to which the Territory wishes to promote consistency of any compliance regime for organisations that donate in both ACT and Commonwealth electoral campaigns, to minimise confusion about the statutory obligations with which organisations must comply, regardless of the governing jurisdiction.

4.35 Attorney General Simon Corbell put to the Assembly, during the debate on 19 November 2009 with respect to the Terms of Reference, that benefits of examining the Green Paper include that it enables the ACT to consider the advantages of consistency between the ACT and the Commonwealth in relation to electoral funding laws. Those advantages include ease of reporting, reducing confusion and minimising errors. Consistency may also minimise costs associated with compliance under different legislative regimes.

4.36 This submission has noted the plenary power of the ACT Assembly.

4.37 The Government considers that the rights to privacy of individuals must be maintained, when considering impacts upon those rights which further regulation of the Territory's current donation disclosure regime may cause. Circumstances in which personal information may be published will clearly require consideration in the context of the rights to privacy under both the ACT's *Human Rights Act 2004* and the Commonwealth's *Privacy Act 1988*.

4.38 Human rights under ACT law with respect to freedom of peaceful assembly and association, as well as constitutional issues associated with implied rights of political communication, merit the Standing Committee's particular reflection. These are addressed in more detail in chapter 6 of this submission.

5 Disclosure Thresholds

5.1 Several revisions of, and amendments to, the *Electoral Act 1992* (ACT) have addressed the issue of appropriate disclosure thresholds. In highlighting key amendments since 2006, particularly in relation to those thresholds, this chapter outlines the considerations which the Territory has given to this important issue in comparatively recent times.[3]

2006 – Commonwealth change to disclosure threshold

5.2 In June 2006 the Commonwealth Parliament amended the *Electoral Act 1918* (Cwlth) to raise its disclosure threshold from $1,500 to $10,000. The Territory did not amend its legislation to reflect that change.

5.3 Under Territory law, political parties registered under both the Territory and Commonwealth statutory regimes could satisfy the Territory's disclosure requirements by providing the ACT Electoral Commission with a copy of their Commonwealth annual disclosure return. As stated in the ACT Electoral Commission's submission (p.10):

> "In reducing the ACT thresholds to $1,000, the ACT government was aware that the newly elected (in 2007) Australian government had foreshadowed further changes to the Commonwealth scheme to reduce their disclosure thresholds to $1,000. Accordingly, the 2008 amendments made to the ACT Electoral Act included that foreshadowed Commonwealth amendment. As it transpired, the Commonwealth amendments were put on hold pending the outcome of wider ranging electoral reform discussions being led by the Commonwealth through its Green Paper process. Acknowledging that the Commonwealth amendments would not be made immediately, the ACT amendments also included the removal of the facility for political parties to use their Commonwealth disclosure returns for the purpose of meeting their ACT disclosure obligations."

5.4 Adoption of the $10,000 threshold in the ACT would have resulted result in little meaningful disclosure of the identity of donors. The Government sought, therefore, to retain disclosure threshold at $1,500 rather than automatically adopting the Commonwealth's change. The Government also sought to minimise opportunities for avoiding disclosure, to make publication of disclosure details more timely, to extend disclosure requirements to online news publications, and to reduce some of the complexity and inconsistencies in the electoral scheme.

2008 – Changes in the ACT

5.5 The *Electoral Legislation Amendment Act 2008* made a range of amendments to the *Electoral Act 1992*, the *Referendum (Machinery Provisions) Act 1994* and the *Electoral Regulation 1993*. The amendments addressed issues raised by the ACT Electoral Commission after the conduct of the 2004 ACT Legislative Assembly election and other electoral issues that had arisen since that election.

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[3] For a comprehensive account of the origins of campaign funding and disclosure under the *Electoral Act 1992* (ACT), see pages 8-10 of the submission to the Inquiry by the ACT Electoral Commission.

5.6 Committee members would be aware that changes recommended by the ACT Electoral Commission after the 2004 election, which appeared as amendments in the Electoral Legislation Amendment Bill 2007, included:

- simplifying the requirements for authorisation of published electoral material;
- clarifying the application of the authorisation rules to electronic publications;
- removing the provision for non-party groups to be listed on ballot papers;
- providing that an application for registration of a political party that includes the name of a person in the party's name must include a statement signed by that person indicating their consent to the party name;
- repealing the offence of defamation of a candidate, so candidates must instead rely on civil law defamation procedures; and
- making it an offence to take a photo of a person's marked ballot paper so as to violate the secrecy of the ballot.

5.7 The above list provides a reminder of the comprehensive review undertaken by the ACT Electoral Commission quite recently. The Government carefully considered each of the matters dealt with in the report following the 2004 election. Two amendments suggested by the Commission not supported by the Government and which did not appear in the amending Bill, were a review of the 100-metre ban on canvassing outside polling places and the removal of the requirement to show the town or suburb address of letters to the editor. The Government considered that the existing requirements for both the 100-metre ban and letters to the editor were (and remain) reasonable and should not be changed.

5.8 Government amendments to the Electoral Legislation Amendment Bill 2007 removed all the substantive finance disclosure scheme amendments in the Bill except for the following:

- providing that all disclosure thresholds would be reduced to $1,000;
- providing that political parties and associated entities registered at both the ACT and Commonwealth levels would not be able to satisfy their disclosure obligations by submitting a copy of their Commonwealth disclosure returns to the ACT Electoral Commissioner;
- requiring that associated entities disclose the identity of people who make payments to the entity of any amount, and the total amount paid by each such person, except that associated entities would not be required to disclose the identities of clients who pay the associated entity for normal business services rendered; and
- requiring associated entities to notify donors of their disclosure obligations.

5.9 A technical amendment clarified that an MLA is not to be required to disclose expenditure made using funds provided by the Legislative Assembly to assist the MLA in exercising his or her functions as an MLA.

5.10 Since the commencement of the ACT's Electoral Act in December 1992, successive ACT Governments have, with the benefit of advice and assistance from the ACT Electoral Commission, kept the Territory's electoral funding and disclosure scheme current and effective.

5.11 The only significant departure from consistency with the Commonwealth Government's electoral funding and disclosure scheme has been the reduction, in 2008, of the disclosure threshold from $1,500 to $1,000. A similar amendment to the Commonwealth Act was proposed, but did not proceed due to the timing of the 2007 federal election. The Commonwealth now awaits responses to the Green Paper before deciding whether to proceed with the amendment.

2010 – Options with respect to disclosure thresholds

5.12 The ACT now has 2 options. The first is to maintain automatic consistency with the Commonwealth by raising the disclosure threshold from $1,000 to $10,000. The second is to leave the threshold at $1,000, having already lowered it from $1,500.

5.13 The Commonwealth may, following consideration of the Green Paper, decide to reduce its threshold. The threshold of $1,000 had been previously proposed federally. Should the Territory raise its disclosure threshold it may subsequently find that it again needs to lower it to remain in step with the Commonwealth. This could lead to uncertainty in the community.

5.14 The ACT Government is satisfied that $1,000 is an appropriate level for the disclosure threshold, as evidenced by the amendments it made to the Electoral Act in 2008. In the absence of a good reason to raise the threshold, and bearing in mind the possibility that the Commonwealth will lower its disclosure threshold, and the ACT Electoral Commission's comments in relation to people avoiding disclosure at the $1,000 level, the Government proposes not to raise the threshold for the sole purpose of maintaining consistency with the Commonwealth. However, as discussed elsewhere in this submission, there should be some examination of possible amendments to the Electoral Act to require disclosure of multiple donations that in total exceed the $1,000 per donor threshold.

6 Human Rights and other principles

6.1 This Inquiry presents an opportunity to consider the implications for the regulation of election campaign funding under the ACT Human Rights Act 2004 (Human Rights Act). In addition, the Government believes that the Inquiry should have regard to High Court authority on constitutional freedoms.

6.2 The ACT Government submits that the Human Rights Act and international human rights jurisprudence identify a number of rights[4] relevant to the Terms of Reference. In particular, provisions with respect to rights to privacy, and to freedom of peaceful assembly, are relevant to a discussion about campaign funding and the disclosure of donations made by individuals.

6.3 When these rights are engaged, particularly in matters involving political parties, the proportionality test will be more strictly applied to any proposed limitation.

6.4 The principle of proportionality is expressed at section 28 of the Human Rights Act. Under section 28, the rights set out in the Act may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. Proportionality governs the legality of an interference with the democratic and participatory rights of individuals. The test of proportionality will determine whether an interference with a right, which is aimed at promoting a legitimate public policy, is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals.

6.5 Section 12 of the Human Rights Act states (relevantly) that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.[5]

6.6 In the case of an individual making a significant donation to a political party, there may be a reasonable expectation that, in the interests of transparency and fairness, the details of that donation should be disclosed. The same may not be true in relation to a small donation. The need for a fair and open donation disclosure system should thoughtfully be weighed against the proposition that personal information should not be published unless a significant public good is served.

6.7 The rights to freedom of peaceful assembly and association, and to take part in public life, at sections 15 and 17, respectively, of the Human Rights Act are built around the notion of a natural right to participate in the democratic process.

[4] Only individuals have human rights: s 6, Human Rights Act.

[5] Section 12 reflects the expression and protection of a person's right, under the *Privacy Act 1988* (Cwlth), to have his or her personal information kept private in most circumstances.

6.8 Section 15 gives statutory effect to Article 20 of the *Universal Declaration of Human Rights* and Article 11 of the *European Convention on Human Rights*. The right to peaceful assembly is interpreted broadly, and includes the right to hold private meetings and meetings in public.[6] Political parties are a form of association essential to the proper functioning of democracy and are the prime entities which fall within the scope of this provision.

6.9 Because of its democratic significance, freedom of peaceful assembly and association may only be limited in a manner prescribed by law, and necessary in a democratic society, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

6.10 In the controversial case of *Ahmed v United Kingdom*[7], the European Court of Human Rights held that interference with civil servants' rights to engage in political activity was justified as pursuing the legitimate aim of the proper functioning of political democracy. In *United Communist Party of Turkey v* Turkey[8], the Court observed that, where political parties are concerned, justifications for limitation must be construed strictly, and only convincing and compelling reasons could justify any restrictions on such parties' freedom of association.

6.11 Section 17(a) of the Human Rights Act states that every citizen has the right, and is to have the opportunity, to "take part in the conduct of public affairs, directly or through freely chosen representatives".

6.12 The right to take part in public life is similar to Article 3 of the First Protocol of the *European Convention on Human Rights*, which expresses the right to free elections. The right enshrines the central principle of an effective political democracy. In European jurisprudence, this right is interpreted similarly to the right to peaceful assembly and freedom of association, expressed at section 15 of the Human Rights Act – justifications for limitation must be strongly made out.

6.13 Arguably, the right to engage in political activity finds some support in *The Constitution*. Sydney University Associate Professor Ann Twomey, warned the ACT against radical electoral reforms such as banning political donations or advertisements, saying the changes may be unconstitutional (p.21, transcript of evidence, 3 March 2010)." She indicated to the Inquiry that the Constitution provides "an implied right to freedom of political communication, which could prevent the ACT from banning donations and capping campaign funding".

6.14 Professor Twomey has suggested that the High Court would accept "more reasonable" limits, such as banning individuals from donating more than $1,000 to a party or banning all political donations. She also warned that "extreme" restrictions would be unlikely to work.

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[6] *Rassamblement Jurassien Unite Jurassienne v Switzerland* 17 DR 93 (1979) E Com HR
[7] *Ahmed v United Kingdom,* Application 22954/93: (1998) 29 EHRR 1, ECtHR
[8] *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, ECtHR

6.15 The High Court has developed a doctrine of the implied constitutional guarantee of freedom of communication on political matters. The right is not absolute, but has in the past resulted in Commonwealth legislation being found to be invalid.

6.16 The doctrine can extend to communications at any level of government. Accordingly, there remains a risk that an ACT law which limits or bans political donations or expenditure on political advertising will be invalid.

6.17 That risk is significantly diminished if it can be seen that the measure is a proportionate response to policy challenges within the electoral system (such as measures to limit fraudulent or hidden benefits), or enhances representative democracy. The ACT Government's position is that there should be a balance between transparency and the right to participate in the political process.

6.18 The implied constitutional guarantee is founded on the principle that the freedom of communication on matters of government and politics is an indispensable incident of the system of representative government created by the Australian constitution. It was held in the case of *Lange v Australian Broadcasting Corporation*[9] (at p.560) that "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation".

6.19 The validity of laws to limit donations to political campaigns may depend upon an assessment of whether they are reasonably appropriate, and adapted to serve a legitimate end compatible with the constitutionally prescribed system of representative and responsible government – whether they are a proportionate response to serve a legitimate end, compatible with the system of representative and responsible government.

6.20 The Government's position is that any proposal to change the requirements relating to disclosure thresholds, or to the manner or extent of publication of the details of donors, must carefully consider whether the loss of privacy resulting from the requirement for disclosure and publication is proportionate to the benefits that flow to the citizens of the Territory, and whether the change is required to safeguard the rights of those citizens to free association and participation in public life through engaging in political activity.

[9] (1997) 189 CLR 520

7 Conclusion

7.1 On balance, the Government considers that the ACT electoral system is a fair, modern, efficient and robust one. The ACT Government has made a significant contribution to the review of legislation relating to the funding of political campaigns.

7.2 On the basis of the evidence that the Government currently has, it does not appear to the Government that there is a presence of influence brought to bear on any of the political parties functioning in the ACT attributable to private donations to election campaigns. That is not to say that the absence of any such evidence should suggest there is no need to improve the ACT's electoral system, or that there is no potential for abuse. Indeed, the ACT Government continues to regard a fair and transparent electoral system as being critically important to maintaining the ACT's strong democracy.

7.3 The existing disclosure threshold of $1,000 in the ACT is appropriately low compared with other Australian jurisdictions, and the Government considers it is appropriate to leave that threshold in place at this time. However, the Government suggests that consideration be given to requiring the disclosure of multiple donations from donors when the total of donations exceeds $1,000, and to the related issue of whether the current definition of "gift" in the ACT allows sufficient transparency and certainty. These latter views have also been expressed by the ACT Electoral Commission.

7.4 The ACT Government wishes to express its confidence in the manner in which the ACT Electoral Commissioner oversees and manages the ACT electoral system. The Government acknowledges the full and frank advice of the Commission, and its suggestions for change to this Inquiry.

7.5 The Government is also conscious of its responsibility to weigh the cost of any improvement against the benefit received by the community, and to ensure that any electoral reform can be supported and implemented through adequate budget appropriation. Moreover, in the Government's view, the principles for consideration set out in the Commonwealth Green Paper will also be of importance to the Inquiry's deliberations.

7.6 The ACT Government looks forward to the progress of the work of the Steering Committee in this important Inquiry and welcomes the opportunity to discuss the views and issues advanced in its submission.