



# LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

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**SELECT COMMITTEE ON THE 2016 ACT ELECTION AND ELECTORAL ACT**

Ms Bec Cody MLA (Chair), Mr James Milligan MLA (Deputy Chair)

Ms Tara Cheyne MLA, Ms Caroline Le Couteur MLA, Mr Andrew Wall MLA,

## Submission 26

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**ACT**  
Government

Justice and Community Safety

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Select Committee on the 2016 ACT Election and Electoral Act  
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Dear Ms Cody

### **Justice and Community Safety Directorate submission to the Select Committee on the 2016 ACT Election and Electoral Act**

Thank you for the opportunity to provide a submission to the above Inquiry. I write to provide some information on the legal frameworks the Select Committee may wish to consider when considering the terms of reference.

#### Freedom of political communication

The implied freedom of political communication in the Australian Constitution protects freedom of communication about government and political matters. The freedom of political communication in the Constitution is not a personal right that can be claimed. Rather this right acts as a restraint on the ability of Parliament to limit political communication. The freedom operates as a 'restriction upon the legislative powers of the Commonwealth, the States and Territories'.<sup>1</sup>

Political communication cannot be limited unless that limitation is appropriate and adapted to suit a legitimate purpose such as preventing discrimination, or that is compatible with our representative system of government.<sup>2</sup>

The freedom prevents Governments from enacting legislation that would restrict voters from communicating about politics as this prevents voters from making a fully informed choice at elections.

The High Court considered the impact of the implied freedom of political communication on electoral legislation in two cases: *Unions NSW & Orrs v NSW* and *McCloy v NSW*.

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<sup>1</sup> *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 559; *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 49 [90] per McHugh J, 77 [195] per Gummow and Hayne JJ cited by *Wotton v Queensland* [2012] HCA 2 29 February 2012 [76].

<sup>2</sup> *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 567.

The *Unions NSW* case found that two provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (New South Wales (NSW)) were invalid because they burdened the implied freedom of political communication. The provisions restricted donations from entities other than individuals who were on electoral rolls for state federal or local Government elections.

The impact of this aspect of the case on the *Electoral Act 1992* was considered by the previous Legislative Assembly Select Committee on amendments to the *Electoral Act 1992*. The Government subsequently removed four provisions of the Electoral Act to remove any doubt as to their validity.

In *McCloy v NSW*, the High Court considered NSW laws banning donations from property developers. The High Court found that the laws did not ‘impermissibly burden the implied freedom of political communication on government and political matters contrary to the Constitution.’<sup>3</sup> The High Court noted that ‘the provisions do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect. By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident, these are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.’<sup>4</sup>

#### Rights under the Human Rights Act 2004

The Committee may wish to consider the relevant provisions of the *Human Rights Act 2004* when making its recommendations, which are additional to the implied right in the Constitution.

Section 28 of the Human Rights Act establishes that human rights may be limited when the limitation is justifiable where:

- the limit is set by law
- the limit is reasonable
- the limit can be demonstrably justified in a free and democratic society.

In considering what is reasonable, a ‘proportionality’ test must be applied to determine whether the burden on individuals whose rights may be limited by a law is justified by gains to the public or to other right holders.<sup>5</sup> The Human Rights Act requires that ‘all relevant factors must be considered’ and includes a list of five

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<sup>3</sup> *McCloy v New South Wales* [2015] HCA 34 at 94

<sup>4</sup> *McCloy v New South Wales* [2015] HCA 34 at 93

<sup>5</sup> Denise Meyerson, “Why Courts Should Not Balance Rights Against The Public Interest” (2007) 31 *Melbourne University Law Review* 873, 877-878.

factors to guide the process of determining whether a limitation on a right is reasonable and justifiable.<sup>6</sup> The five mandatory factors to be considered are:

*The nature of the right affected;*

The nature of the right is assessed by looking at the wording of the right in the Human Rights Act, examining domestic and international case law and other authoritative materials such as United Nations Human Rights Committee General Comments.

*The importance of the purpose of the limitation;*

The limitation must have a purpose of sufficient importance if it is to be considered justifiable. 'It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important'.<sup>7</sup>

*The nature and extent of the limitation;*

The nature and extent of any limitation set by law must be explicit and precise. When preparing a new bill the nature and scope of the limitation should be accurately identified and clearly worded in the policy proposal. A detailed explanation should accompany any provisions which limit rights in the explanatory statement.

*The relationship between the limitation and its purpose;*

"[T]he measures adopted [which limit rights] must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective".<sup>8</sup> There must be proportionality between the effects of the measures which are responsible for limiting the right and the policy objective which has been identified as of 'sufficient importance'.<sup>9</sup> For example, if the limitation on rights will have severe effects on the welfare or freedom of particular group of individuals, but the policy is not likely to achieve considerable social benefit, the law is likely to be considered unreasonable.

*Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*

A proposed law, if it limits rights, must be suitable to its purpose and likely to achieve its policy objective.

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<sup>6</sup> Human Rights Act 2004 (ACT), s 28.

<sup>7</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [243] citing *R v Oakes* [1986] 1 SCR 103 [69].

<sup>8</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [243] citing *R v Oakes* [1986] 1 SCR 103 [70].

<sup>9</sup> *Ibid*

The law, even if rationally connected to the policy objective, should impair the right in question 'as little as possible'.<sup>10</sup> If there are other ways in which the policy objective could be achieved without limiting rights to the same extent, those options should be preferred.

Rather the law must fall 'within a range of reasonable alternatives',<sup>11</sup> which are reasonably tailored to their objectives.<sup>12</sup> The limit 'must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account'.<sup>13</sup>

Section 40B of the Human Rights Act establishes that public authorities are obliged to act consistently with human rights. Individuals who feel that a public authority has not acted consistently with the Human Rights Act have a 'direct right of action' to start proceedings against the public authority in the ACT Supreme Court.

In this sense, the word 'act' includes any action, proposed action, and a failure to act.<sup>14</sup> If the act is incompatible with human rights it may constitute a contravention of the Human Rights Act.

In relation to decision-making, public authorities are obliged to give proper consideration to relevant human rights. All conduct and administrative decision-making undertaken by public officials in a public capacity will need to be consistent with the Human Rights Act. Actions engaging rights may still be regarded as consistent with the Human Rights Act if the right has been reasonably limited by the law the public authority acts under, so long as the decision-maker gave 'proper consideration to the potential right'.<sup>15</sup>

#### *Taking part in public life*

Section 17 of the Human Rights Act states:

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.

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<sup>10</sup> *Ibid*

<sup>11</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [244] citing *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 [188].

<sup>12</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [244] citing *R v Sharpe* [2001] 1 SCR 45 [96].

<sup>13</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [244] citing *R v Sharpe* [2001] 1 SCR 45 [96].

<sup>14</sup> *Dictionary Human Rights Act 2004*.

<sup>15</sup> *David Harold Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4 (12 January 2010) [83].

Section 17 is based on article 25 of the International Convention on Civil and Political Rights (ICCPR). The United Nations Human Rights Committee has stated that the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies the freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election and to advertise political ideas.

The concept of 'public affairs' relates to the exercise of all arms of governments at all levels.<sup>16</sup> This includes non-government organisations and participation in public debate, such as national policy consultation or local council decisions. Citizens' right to exert influence by participating in public debate and dialogue is supported by upholding freedom of expression, assembly and association. An individual should have access to participate directly in public affairs by, for example, exercising power by holding an executive office, voting in an election or referendum, taking part in consultation bodies or public debate.

Participation may also occur indirectly, where people elect a body to represent their views. The United Nations Human Rights Committee suggests that where citizens participate through representatives, those representatives must exercise governmental power and be accountable through the electoral process for the exercise of that power.<sup>17</sup>

The right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is essential to the rights protected by article 25.

#### *Peaceful assembly and freedom of association*

Section 15 of the Human Rights Act states

- (1) Everyone has the right of peaceful assembly.
- (2) Everyone has the right to freedom of association.

The rights to peaceful assembly and freedom of association are core political rights which protect the right of individuals to hold public protests or demonstrations either by themselves or as part of a group, in order to express their views. The right to freedom of association also aims to respect the freedom of individuals to meet, communicate and engage with any other people they choose. These rights are closely related to the right to freedom of expression, freedom of thought, conscience, religion and belief and the right to freedom of movement.

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<sup>16</sup> UN Human Rights Committee (Fifty-seventh session, 1996) General Comment No. 25 'The right to participate in public affairs, voting rights and the right of equal access to the public service', Un Doc. CCPR/C/21/Rev.1/Add.7, [5].

<sup>17</sup> Ibid, [7].

The rights to peaceful assembly and freedom of association are crucial to the operation of Australia's democratic society because they enable an open, better informed and more participatory public discourse about social, economic and political policies.

*Freedom of expression*

Section 16 of the Human Rights Act states:

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

The right to freedom of expression in the Human Rights Act is a personal freedom which is considered essential for all individuals to achieve full personal development and self-fulfilment through the development and distribution of ideas and opinions. A free flow of ideas is also necessary to encourage the vigorous public debate which is central to the functioning of Australia's liberal democratic system of government.

The rights of freedom of expression and freedom of opinion have also been declared by the United Nations Human Rights Committee to be: 'indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions'.<sup>18</sup>

The right to hold opinions without interference, provided by section 16(1), protects a person from being compelled or prohibited from thinking in a particular way. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.<sup>19</sup>

Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person freely chooses.<sup>20</sup> This right only covers the opinion as held in private. Once the opinion is expressed or communicated to another person, the individual conveying the idea or information is protected by the right to freedom of expression and accordingly, maybe more readily qualified for purposes such as preventing unlawful vilification or the disclosure of confidential information.

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<sup>18</sup> UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [2].

<sup>19</sup> UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [9].

<sup>20</sup> *Ibid*

The right to freedom of expression under section 16(2) extends a general protection to all forms of expression for any purpose, whether political, commercial, artistic or otherwise. Expression is to be interpreted broadly and includes actions whereby an individual seeks, receives or imparts ideas or information in any form by any method. The guarantee of free expression covers any information or idea capable of being communicated, including:

- political discourse
- commentary on one's own and on public affairs
- canvassing
- discussion of human rights
- journalism
- cultural and artistic expression
- teaching
- religious discourse
- It may also include commercial advertising.

Modes or means of expression include spoken, written and sign language and such non-verbal expression as images and objects of art.<sup>21</sup> Particular forms include:

- books
- newspapers
- pamphlets
- posters
- banners
- dress
- legal submissions.

The protection of the rights exists regardless of the method by which they are stored, transmitted or presented such as all forms of audio-visual as well as electronic and internet-based modes of expression.<sup>22</sup>

#### *Recognition and equality before the law*

Section 8 of the Human Rights Act states:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

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<sup>21</sup> UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [12].

<sup>22</sup> *Ibid.*

Examples of distinction or discrimination

Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status

Equality before the law means that public officials and members of the judiciary must not act in a discriminatory way when enforcing the law. The right to equal protection of the law prohibits discrimination in law or in practice in any field regulated by public authorities. The recognition of equality before the law is not limited to the rights protected by the Human Rights Act. When the ACT regulates, for example, the provision of health or education services, it must legislate and deliver those services in a non-discriminatory way.<sup>23</sup>

#### Previous inquiries of the Legislative Assembly

The Legislative assembly has held a number of inquiries into electoral matters and the Committee may wish to consider these when making its recommendations.

#### *Inquiry into the Eligible Voting Age in the ACT*

The Legislative Assembly Standing Committee on Education, Training and Young People conducted an inquiry into the Eligible Voting Age in the ACT in 2007.

The Government response reflected the Government's view that there was no clear support for lowering the voting age.

The Government did support recommendations promoting educations about democratic principles, civic education and the specific characteristics of the ACT system of democracy.

#### *ACT Electoral Commission Report on the Legislative Assembly Election 2008 and Electoral Act amendment Bills 2011*

The Standing Committee on Justice and Community Safety inquired into the Electoral Commission's *Report on the ACT Legislative Assembly Election 2008*, the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Amendment Bill 2011.

The majority of the Committee supported the Electoral (Casual Vacancies) Amendment Bill 2011. Mrs Vikki Dunne MLA dissented as she believed 'that the adoption of the proposed changes to the filling of casual vacancies is contrary to the spirit of the introduction of the Proportional Representation (Hare-Clark) electoral system in the ACT'.<sup>24</sup>

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<sup>23</sup> Human Rights Committee General Comment 18, para 9.

<sup>24</sup> Standing Committee on Justice and Community Safety, *ACT Electoral Commission Report on the Legislative Assembly Election 2008 and Electoral Act amendment Bills 2011*, October 2011, p19 paragraph 2.43

The Committee supported all clauses of the Electoral Legislation Amendment Bill 2011 with the expectation of clauses 7 and 8. The Committee believed that the interaction of these two clauses would have acted to restrict people from seeking election. The Committee was also concerned that these clauses would have contravened s17 of the Human Rights Act (right to take part in public life). The view of the Committee was consistent with the view of the Scrutiny of Bills Committee. The Committee also recommended that pre-poll voting be restricted to two weeks before polling day.

#### *A Review of Campaign Financing Laws in the ACT*

The Standing Committee on Justice and Community Safety inquired into:

- (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;
- (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.

The Committee made 21 recommendations to make substantial changes to the ACT's electoral campaign funding and disclosure laws. If adopted, the recommendations would have capped political donations and political expenditure and to increase the level of public funding provided to parties, MLAs and candidates.

Mr John Hargreaves, Deputy Chair of the Standing Committee, submitted a dissenting comment to the report.

The Government agreed to six recommendations and adopted them in the *Electoral Amendment Act 2012* and the *Electoral Amendment Act 2015*.

#### *Voting Matters*

The Select Committee on amendments to the Electoral Act 1992 considered:

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

made 16 recommendations and the Government supported 11 of these recommendations.

The Committee noted that 'regulation and disclosure of political donations and electoral expenditure are generally working well, and an increased level of transparency in political funding has been the result'.<sup>25</sup> The Committee also noted minor and technical amendments were needed to streamline the legislation.

These inquiries have conducted substantial work on campaign finance, the implied freedom of political communication and the Hare Clark voting system.

#### Banning political donations from property developers

Banning political donations from property developers was an ACT Labor election commitment and is included in the Parliamentary Agreement (10.2). The Electoral Act will need to be amended to implement the ban on these donations (called gifts in the Electoral Act).

Gifts are regulated under part 14 of the Electoral Act. They are required to be registered, and there are caps on the value of anonymous gifts. Gifts and certain loans must be recorded and registered in returns provided to the Electoral Commissioner. The rules currently apply to Members of the Legislative Assembly, party groupings, associated entities and third party campaigners.

No particular people or groups are banned from making gifts under the Electoral Act. In 2015 the High Court upheld the NSW provisions banning donations from property developers *McCloy v NSW*.

NSW is the only Australian jurisdiction that bans political donations from property developers.

#### Previous Referrals

I note the Attorney-General has referred the following matters to the Committee:

#### ACT Auditor-General's report Number 2 of 2017 2016 Election – recommendations referred from Government

##### **Recommendation 3**

The ACT Government should amend the *Electoral Act 1992* 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.

##### **Recommendation 7**

The ACT Government should use penalty units as the basis for a non-voter fine to allow incremental adjustments and determine what penalty is to be established for non-voters (and in so doing increase the current \$20 fine).

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<sup>25</sup> P77 paragraph 7.1

Report of the Electoral Commission on the ACT Legislative Assembly Election 2016 – recommendations referred from Government

**Recommendation 2**

The Commission recommends that the Electoral Act be amended to provide that any elector may vote at a pre-poll voting centre, without the need to declare that they are unable to attend a polling place on polling day.

**Recommendation 3**

The Commission recommends that the Electoral Act be amended to require the full given name and surname of a person be shown in an authorisation statement.

**Recommendation 4**

The Commission recommends that the Electoral Act be amended to require the name of an entity to be shown in an authorisation statement, where electoral matter is published on behalf of an entity.

**Recommendation 6**

The Commission recommends that Schedule 4 of the Electoral Act be amended 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. The Commission further recommends that this amendment should apply to elections for the ACT Legislative Assembly and the Aboriginal and Torres Strait Islander Elected Body.

**Recommendation 7**

The Commission recommends that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to ungrouped candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

**Recommendation 8**

The Commission recommends that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to third-party campaigners to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

**Recommendation 9**

The Commission recommends that section 243(5) of the Electoral Act should be amended to alter the reference to 'information about a gift made by an individual' to 'information about an amount received from an individual'.

**Recommendation 10**

The Commission recommends that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased and linked to a fraction of a penalty unit. The Commission further recommends that the penalty should be set at  $\frac{1}{4}$  of a penalty unit, rounded down to the nearest \$5.

I hope this information assist the Committee in its important work.

Yours sincerely



Alison Playford  
Director-General

so June 2017