

STANDING COMMITTEE ON JUSTICE

AND

COMMUNITY SAFETY

**REPORT INTO THE INQUIRY INTO THE ACT ELECTORAL
COMMISSION REPORT ON THE 2008 ELECTION AND THE
ELECTORAL ACT AMENDMENT BILLS**

RESPONSE BY THE ACT GOVERNMENT

Tabled on 14 Feb 2012

Executive Summary

In 2009, the ACT Electoral Commission published its *Report on the ACT Legislative Assembly Election 2008*. In March 2011, the ACT Government responded by introducing to the Assembly two bills to amend the *Electoral Act 1992* – the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Amendment Bill 2011.

On 27 October 2011, the Chair of the Standing Committee on Justice and Community Safety, Mrs Vicki Dunne MLA tabled a report on the two bills and the Electoral Commission's report.

The Standing Committee report makes 3 recommendations, which support the Electoral (Casual Vacancies) Amendment Bill 2011 and the majority of clauses in the Electoral Legislation Amendment Bill 2011. The Standing Committee has also recommended that pre-poll voting be restricted to a period commencing two weeks before polling day.

This Government Response sets out the Government's position on each of the 3 recommendations:

- The Government agrees in principle to recommendation 1.
- The Government agrees to recommendation 2.
- The Government disagrees with recommendation 3.

Introduction and Background

1. The seventh general election for 17 members of the ACT Legislative Assembly was held on 18 October 2008. After the election, a number of issues were identified by the Electoral Commission that needed to be considered for possible amendment ahead of the upcoming 2012 election. These issues include:
 - a. casual vacancy provisions;
 - b. the number of candidates allowed to be nominated within an electorate;
 - c. lowering the age of entitlement to provisionally enrol to vote; and
 - d. the possibility of implementing automatic enrolment.
2. The ACT Electoral Commission produced a report on the 2008 election, which made several important recommendations that have informed the direction that the Government is taking leading up to the 2012 election.
3. On 16 October 2009, the ACT Electoral Commission presented to the Attorney General, Minister Simon Corbell MLA, the "Report on the ACT Legislative Assembly Election 2008" (the 2008 Election Report), under section 10A of the *Electoral Act 1992*.
4. The report contained a total of 16 recommendations relating to the future conduct of elections in the ACT, and the operation of the *Electoral Act 1992* and the *Electoral Regulation 1993*.
5. The Government agreed with the majority of the Commission's recommendations, and introduced two bills to the Assembly, the Electoral Legislation Amendment Bill 2011 (the Electoral Legislation Bill) and the Electoral (Casual Vacancies) Amendment Bill 2011 (the Casual Vacancies Bill), which were designed to implement a number of the Commission's recommendations.
6. On 31 March 2011, the Attorney General, Simon Corbell MLA, moved a motion in the Legislative Assembly that the Commission's report and the Electoral Act amendment bills be referred to the Standing Committee on Justice and Community Safety (the Standing Committee) for inquiry and report to the Assembly by 22 September 2011.
7. The Assembly passed the motion for referral on 7 April 2011.
8. The terms of reference for the Standing Committee inquiry were as follows:

'In conducting this review the Committee should have regard to a range of issues including but not limited to:

 - 1) the ACT Electoral Commission's Report on the ACT Legislative Assembly Election 2008;
 - 2) the amendments proposed to be made by the Electoral Legislation Amendment Bill 2011;

3) the amendments proposed to be made by the Electoral (Casual Vacancies) Amendment Bill 2011;

4) the application of the Proportional Representation (Hare-Clark) Entrenchment Act 1994 to the Electoral (Casual Vacancies) Amendment Bill 2011; and

5) any other relevant matter.'

9. The Government made a submission to the Standing Committee Inquiry on 28 June 2011, and the Attorney General appeared before the Committee on 10 August 2011.
10. On 22 September 2011, the Chair of the Standing Committee, Mrs Vicki Dunne MLA, successfully moved an amending motion to set a new reporting date for the end of the October 2011 sittings. The report was presented to the Assembly on 27 October 2011.

ACT Government submission to the Inquiry

11. The Government submission to the Inquiry considered a wide range of issues, including:
- a. the Casual Vacancies Bill and the Electoral Legislation Bill;
 - b. pre-poll voting; and
 - c. lowering the age of provisional enrolment.
12. Broadly, the submission concluded that:
- a. the Casual Vacancies Bill is designed to maintain the balance of party representation in the Assembly as determined by the ACT community at the most recent election;
 - b. the Casual Vacancies Bill also prevents the thwarting of the intention of the people of the ACT, which might occur under a count back in limited circumstances;
 - c. the purpose of the Electoral Legislation Bill is to implement a number of the recommendations made by the Electoral Commission in its 2008 Election Report, which will give effect to technical amendments designed to improve efficiency within the electoral process;
 - d. pre-poll voting would significantly alter the nature of ACT elections by effectively providing for a 3-week open period when anyone could vote, rather than requiring most electors to vote on polling day, as presently occurs – early voting also prevents voters from considering last minute developments, such as resignation of candidates or global crises;
 - e. lowering the age of entitlement to provisionally enrol to vote will simply extend the time within which a young person can register their name to vote, which would increase voter awareness and, more importantly, the number of people voting; and

- f. implementation of an automatic enrolment system in the ACT could be costly and labour intensive if it were introduced without complementary changes at the Commonwealth level – however, once implementation is achieved, automatic enrolment would result in a more up-to-date electoral roll that would have the potential to include many people who are not currently on the roll.

The Standing Committee's report

13. The Standing Committee's report was tabled in the Assembly on 27 October 2011.

14. The report contains 3 recommendations, as follows:

- **Recommendation 1:** A majority of the Committee recommends that the Electoral (Casual Vacancies) Bill 2011 be supported.
- **Recommendation 2:** The Committee recommends that all clauses of the Electoral Legislation Amendment Bill 2011 be supported with the exception of clauses 7 and 8.
- **Recommendation 3:** The Committee recommends that pre-poll voting be restricted to a period commencing two weeks before polling day.

Dissenting view - Recommendation 1

15. Mrs Vicki Dunne MLA dissented from the majority of the Standing Committee in relation to the Electoral (Casual Vacancies) Amendment Bill 2011. Mrs Dunne stated that:

"I dissent from the recommendation of the majority of the Committee that the Electoral (Casual Vacancies) Amendment Bill 2011 be supported. On the contrary I believe that the adoption of the proposed changes to the filling of casual vacancies is contrary to the spirit and intent of the introduction of the Proportional Representation (Hare-Clark) electoral system in the ACT... The provisions of the proposed Bill that in certain, admittedly limited, circumstances, would allow political parties to appoint members directly to the Legislative Assembly, contradicts the spirit and practice of the Hare-Clark system as it was proposed for and ultimately entrenched in the ACT. By departing from the established method of filling vacancies – re-examining the ballot papers used to elect the vacating member – and allowing political parties to nominate a successor, the 'influence of party machines' would be enhanced, at the expense of electors... As noted by some contributors to the inquiry, the present ACT system has a number of mechanisms which represent a deliberate attempt to achieve fairness, equity, and voter choice. Modifying the system, in the way proposed in the Bill, would undermine voter choice in particular."

16. Mrs Dunne also referred to opposition to the Casual Vacancies Bill expressed by the Proportional Representative Society (ACT). The Society's view is that the current system for filling casual vacancies should not change:

"This ACT approach has worked without controversy to date and it remains in parties' hands for it to continue to do so in the future. There is no need to be jumping at imagined shadows or to start thinking about allowing party machines or the Assembly to intervene regularly and thereby undermine the equal basis on which elections have been conducted, with all potential MLAs being required to submit themselves to voters' collective assessments at the time of a general election."

17. The Government respectfully disagrees with this opposition to the bill, as the Casual Vacancies Bill is designed to maintain the balance of party representation in the Assembly as determined by the ACT community at the most recent election. The bill also prevents the thwarting of the intention of the people of the ACT, which might occur in particular circumstances under a count back.

Government response to Standing Committee recommendations

Recommendation 1

A majority of the Committee recommends that the Electoral (Casual Vacancies) Bill 2011 be supported.

Government response: AGREE IN PRINCIPLE

18. The Government notes that the majority of the Standing Committee supports the Casual Vacancies Bill. The Chair of the Standing Committee, Mrs Dunne, dissented from the majority view.
19. The Government commends the Standing Committee for expressing support for this important bill, which aims to preserve the representative nature of the Legislative Assembly.
20. It was always the Government's hope that the bill would receive the support of all Assembly members. However, the Chair of the Committee, Mrs Vicki Dunne MLA, dissented from the majority view.
21. As discussed at the Standing Committee inquiry, the Casual Vacancies Bill is subject to the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (the Entrenchment Act). The Entrenchment Act requires that any law that is inconsistent with the principles set out in that Act can only become law through either:
- a special majority in the Assembly – ie. a two thirds majority of members passing that legislation; or

b. a majority of electors at a referendum.

22. The Government received advice on the Entrenchment Act from the Government Solicitor's Office and the Electoral Commissioner, who noted that if the Casual Vacancies Bill was passed by a majority less than a two thirds majority in the Legislative Assembly, the Bill would automatically be referred to the Electoral Commissioner, who would be obliged to put the question to a referendum.
23. The Government advised the Standing Committee at the inquiry that it has no intention to pursue a referendum on this issue. The Attorney General, Mr Simon Corbell MLA, advised the Standing Committee that:
"...It is not the Government's intention to pursue a referendum on this question. So it will depend on what the views of the parties are in the Assembly as to whether or not this bill comes on for debate..."
24. When the Standing Committee's report was tabled in the Assembly on 27 October 2011, the Deputy Chair of the Committee, Mr John Hargreaves MLA, commented on the issue of the two thirds majority:
"The Attorney General indicated to this place very early in the piece that if he could not get, by providing the bill to this chamber, the 66 per cent majority required under the entrenchment provisions, he would not waste the people's time bringing it forward. That is a reasonable position to take. He also explained, and this position was agreed with by the Electoral Commissioner that a referendum is a costly exercise. Why would you do it? This is not something on which the livelihoods of our people out there in the community depend. This is largely an academic exercise around the voting system."
25. Clearly, if the Liberal Party does not support the Casual Vacancies Bill, the Bill will not attain the two thirds majority required for passage.
26. While the Government would prefer that the Casual Vacancies Bill be supported by the majority of the Assembly, it does not consider putting the issue to a referendum as a financially or socially responsible option.

Recommendation 2

The Committee recommends that all clauses of the Electoral Legislation Amendment Bill 2011 be supported with the exception of clauses 7 and 8.

Government response: AGREE

27. The Government notes that the Standing Committee supports the majority of clauses in the Electoral Legislation Bill, but does not support clauses 7 and 8 of the Bill.

28. Clause 7 of the Electoral Legislation Bill concerns the number of candidates to be nominated within an electorate, and seeks to insert a new section, section 105(2A), into the *Electoral Act 1992*, as follows:
- "The registered officer of a registered party must not nominate more people to be candidates for election in an electorate than the number of members of the Assembly to be elected for the electorate."*
29. Clause 8 of the Electoral Legislation Bill concerns invalid candidate nominations, and seeks to substitute the current section 106 of the *Electoral Act 1992* with the following provision:
- "The nomination of a person to be a candidate for election is invalid if, at the hour of nomination for the election –*
- (a) the person is nominated more than once to be a candidate for election in a particular electorate; or*
 - (b) the person is nominated to be a candidate for election in more than 1 electorate; or*
 - (c) the person is a party candidate for election in a particular electorate and the registered officer of the party has nominated more people to be candidates for election in the electorate than the number of members of the Assembly to be elected for the electorate".*

30. These provisions were proposed as consequential amendments to the Casual Vacancies Bill. As the *Electoral Act 1992* currently stands, political parties have the option to field more candidates than available positions in order to provide a number of unsuccessful candidates in the event that there should be a count-back.

31. The Electoral Commission, in its submission to the Standing Committee's Inquiry, suggested that, if the Casual Vacancies Bill giving effect to recommendation 15 of its report on the 2008 election is not supported, then the provisions limiting each party to only being able to nominate up to the number of candidates to be elected in each electorate should be removed from the Electoral Legislation Bill.

32. Recommendation 15 of the report proposed that:

"The Commission recommends that consideration be given to whether it would be desirable to amend the Electoral Act to provide that, where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, then the vacancy would be filled by the appointment method set out in section 195 of the Electoral Act."

33. Under section 195 of the *Electoral Act 1992*, if a vacancy cannot be filled by count-back, there is a mechanism for the Legislative Assembly to appoint a replacement member from the same party of the vacating member, where the

vacating member belonged to a party, or to appoint a candidate with no party affiliation where the vacating member was not elected as a party candidate. This method is similar to the Federal Senate casual vacancy rules which, like the ACT's count-back rules, are designed to preserve the proportionality of multi-member election outcomes.

34. The Government submission to the Inquiry supported clauses 7 and 8 because the Government supports the Casual Vacancies Bill.
35. However, as the Casual Vacancies Bill is unlikely to attract a two thirds majority in the Legislative Assembly, the most appropriate course of action for the Government is to agree with Recommendation 2 of the Standing Committee's report. Opposing clauses 7 and 8 of the Electoral Legislation Bill will ensure that it is still possible for parties to nominate more candidates than there are vacancies in an electorate.
36. The Government notes that if clauses 7 and 8 are not to be progressed, along with the Casual Vacancies Bill, then clause 10 should also be opposed. Clause 10 omits sections 116(3) and 116(4) of the *Electoral Act 1992*, which provide as follows:
- (a) **116(3)** *If there are more than the relevant number of candidates in a group –*
 - (a) *their names shall, so far as practicable, be printed in 2 or more adjacent columns of equal length; and*
 - (b) *the names to be printed in each column shall be determined by the commissioner by lot.*
 - (b) **116(4)** *If the names of the candidates in a particular group are printed in 2 or more adjacent columns, the distinguishing letter referred to in subsection (1) (c) shall be printed once only above those columns.*
37. Clause 10 is part of the consequential changes to reduce the number of candidates who can be nominated by a party and so should not be proceeded with at this time.

Recommendation 3

The Committee recommends that pre-poll voting be restricted to a period commencing two weeks before polling day.

Government response: DISAGREE

38. The Committee Report was unclear as to why it recommended changing the pre-poll period to 2 weeks as there was no discussion.
39. There are 3 different ways of "pre-poll" voting:
- a. in person at an Elections ACT pre-poll voting centre in the ACT;

- b. in person at an approved location outside the ACT, which in practice is usually the head office of each of the other State and Territory Electoral Commissions, but could also be an overseas location, such as an Australian mission; and
 - c. postal voting, which could be used by people in the ACT as well as people interstate or overseas.
- 40. The ACT Government stated in its submission to the Inquiry that the current requirement for voters to attend to vote on polling day should continue, with the facility for pre-poll voting being available only for those who cannot attend a polling place on polling day.
- 41. The Government believes that early voting for all voters would significantly alter the nature of ACT elections by effectively providing for a 3-week open period when anyone can vote, rather than requiring most electors to vote on polling day, as presently occurs. Early voting also prevents voters from considering last minute developments or global crises.
- 42. There is considerable merit in retaining the concept of polling day, being the day on which most electors vote, and the day on which campaigning efforts and media attention are focused.
- 43. However, further discussions with the Electoral Commissioner have highlighted a problem with reducing the 3 week pre-poll voting period. Reducing the period to 2 weeks has the potential to disenfranchise electors, who will be travelling or absent from the ACT and who may only be able to vote during the third week before polling day, for no readily apparent public benefit.
- 44. In particular, the first 2 weeks of October 2012 are short weeks, with 2 successive public holiday Mondays. These first 2 weeks in October are also scheduled to be school holidays, which will reduce the business days available for pre-poll voting from 13 to 9 days during a period when people are likely to be travelling and on holiday. It is not clear whether the people who would otherwise have voted in the third week would be able to vote in the remaining 2 weeks.
- 45. These first 2 weeks in October are also scheduled to be school holidays, so that, if the proposal to reduce the pre-poll period to 2 weeks is adopted, the business days available for pre-poll voting will be reduced from 13 to 9 days during a period when people are likely to be travelling and on holiday.
- 46. It is not clear from the Standing Committee's report whether or not the reduction of access to pre-poll voting only applies to early voting in the ACT, or whether the current 3 week timeline is to be retained for overseas and interstate voting. If it is intended that there be a difference between these pre-poll voting periods, this is likely to create considerable confusion for voters.

47. However, during the Annual Report Hearings the Deputy Chair of the Standing Committee, Mr John Hargreaves MLA, clarified that this recommendation was not intended to cover postal voting. Other members of the Standing Committee did not dispute this statement, so the Government assumes that the 3 week timeline is to be retained for postal voting.
48. This could cause considerable confusion, as voters in the third week out from polling day could cast a postal vote but not a pre-poll vote in person, which they could still apply for in person at an Electoral Commission office if they are in the ACT.
49. Reducing the timing for pre-poll voting by a week would make it considerably more difficult for people overseas or interstate to apply for, receive and return postal votes within the required timeframes.
50. The Government supports the retention of the current 3 week voting period.

Lowering the age to provisionally enrol

51. The Standing Committee noted in its report that the ACT Greens support the proposed lowering of the age to provisionally enrol, from 17 years old to 16 years old.
52. The ACT Greens' submission was quoted by the Standing Committee, as follows:

"With the fast changing conditions in the world, the future is extremely important to young people. It is thus an important principle that young people have greater opportunities to participate in decision making that affects their lives. The goal is for young people to be able to express their needs and aspirations at all levels of government, as well as in their own communities."

53. The Government notes that the Standing Committee did not comment on whether or not it believes that the provisional enrolment age should be lowered. It is assumed that the Standing Committee does not object to this proposal as the report does not express opposition to it.

Conclusion

54. The Government is disappointed that the Casual Vacancies Bill is unlikely to receive the support of a two-thirds majority in the Legislative Assembly. However, the Government is not willing to take the issue to a referendum, as this would be a financially and socially irresponsible option.

55. It is a good result though, that the majority of provisions in the Electoral Legislation Bill have the support of the majority of the Assembly. This bill will make minor and primarily technical adjustments to an already strong electoral system.
56. Recommendation 3 presents difficulties for voters and for the Electoral Commission, as it may reduce the number of people who are able to cast a valid vote and would be unlikely to achieve the aim of getting more people to vote on polling day.
57. The Electoral Commissioner has advised that implementation of the recommendations of this submission is not expected to have any financial impact. Any additional requirements will be absorbed within existing resources.
58. The Government remains committed to maintaining and improving the already robust electoral system in the ACT.