DISCUSSION PAPER

SELECT COMMITTEE ON AMENDMENTS TO THE *ELECTORAL ACT 1992*

MAY 2014

COMMITTEE MEMBERSHIP

Mr Mick Gentleman MLA	Chair
Mr Alistair Coe MLA	Deputy Chair
Mr Shane Rattenbury MLA	

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RESOLUTION OF APPOINTMENT AND TERMS OF REFERENCE

That this Assembly:

(1) notes:

(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*; and

(2) resolves:

(a) that a Select Committee be established to inquire into the above matters and any related issues;

(b) that the committee will be comprised of one member of the Government, one member of the Opposition and one member representing the ACT Greens with proposed members to be nominated to the Speaker by 6pm this sitting day; and

(c) the committee report by the last day of June 2014.

20 March 2014

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ABBREVIATIONS

Commission	ACT Electoral Commission
EFED Act	*Election Funding, Expenditure and Disclosures Act 1981* (NSW)
ERG	Expert Reference Group
MLA	Member of the Legislative Assembly
Self-Government Act	*Australian Capital Territory (Self-Government) Act 1988* (Cth)

ISSUES FOR DISCUSSION

INTRODUCTION

1.1 The Committee's terms of reference have three main themes:

- The future size of the Legislative Assembly;
- Recommendations by Elections ACT in its report on the 2012 ACT election; and
- The implications for the ACT of the High Court decision in *Unions NSW v NSW.*

1.2 An issue related to the second and third points is election campaign funding and expenditure. Each of these is summarised briefly below, with suggested discussion points.

REVIEW OF THE SIZE OF THE LEGISLATIVE ASSEMBLY

1.3 On 13 December 2012 the Chief Minister, Ms Katy Gallagher MLA, commissioned an Expert Reference Group (ERG) to consider and report on options for increasing the size of the Assembly. The five-person group was chaired by the ACT Electoral Commissioner. The ERG presented its report on 28 March 2013.[1]

BACKGROUND

1.4 The Commonwealth *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) currently sets the size of the Legislative Assembly at 17 members (s 8(2)). There are currently two five-member electorates and one seven-member electorate. In March 2013, the Commonwealth Parliament amended the Self-Government Act to give the Legislative Assembly the power to set its own size by enactment passed by at least a two thirds majority of members.

1.5 The Legislative Assembly is unique in that it fulfils the role carried out by two levels of government in other jurisdictions: it is responsible for State/Territory functions, such as health, education and justice, as well as municipal functions, such as rates and roads. Between 1989 and 2012 the ACT's population increased from approximately 275,000 to 375,000 while the size of the Assembly has remained the same.

[1] Expert Reference Group (ERG), *Review into the size of the Legislative Assembly*, 2013.

1.6 Eleven inquiries held between 1974 and 2012 considered the issue of the Assembly's size.[2] Nine of those recommended that the Assembly should be increased, while two recommended the Assembly should remain at its present size of 17 members.

1.7 To be certain of election under the ACT's Hare-Clark electoral system, a candidate has to receive a quota of votes. A quota is a specific number of votes which is calculated using the number of formal votes cast and the number of vacancies. The following formula is used:

$$\frac{\text{total number of valid votes}}{\text{number of vacancies} + 1} \quad \text{plus 1 vote}$$

1.8 The quota in the current two five-member electorates is one-sixth of the valid votes plus one vote, or about 16.67%. The quota in the current seven-member electorate is one-eighth of the valid votes plus one vote, or about 12.5%. If nine-member electorates were introduced, the quota would be one tenth plus one vote, or about 10%.

1.9 The ERG noted that a higher quota in percentage terms could be seen as a barrier to the election of minor party candidates and independents.[3] A lower quota in percentage terms could result in the election of a wider range of candidates representing minority views. The ERG noted:

> ... some will see this as a strength and others will see it as a weakness. ... The ERG sees this as an issue of balance.[4]

1.10 The ERG adopted the following guiding principles in conducting its inquiry:

- each electorate should have at least five members;
- each electorate should have an odd number of members;
- electorates should have the same number of members; and
- the total number of members should be an odd number.[5]

1.11 The ERG concluded that seven member electorates were preferable to either five or nine member electorates 'as a general rule'. However, as the overall size of the Assembly was also a paramount consideration, the ERG accepted that both five member and nine member electorates were viable options to consider.[6]

[2] See ERG, pp. 9, 45-56.
[3] ERG, para 177.
[4] ERG, paras 178, 179.
[5] ERG, para 7.
[6] ERG, para 179.

REVIEW RECOMMENDATIONS

1.12 The ERG recommended that:

- The ACT Legislative Assembly be increased to 25 members at the 2016 election, consisting of five electorates each returning five members; and
- The Assembly be increased to 35 members at the 2020 election, consisting of five electorates each returning seven members.

1.13 The ERG also considered that it would be appropriate to increase the size of the ACT ministry to between seven and nine members. The reasons for the ERG's recommendations are set out in its report at pp. 28-30.

1.14 If the Assembly did not accept those recommendations, the ERG supported an increase to 27 members at the 2016 election, consisting of three electorates each returning nine members, and an increase to 35 members by the 2024 election.

RESPONSE TO THE REVIEW

1.15 As acknowledged in the committee's terms of reference, the public position of both the Government and the Opposition is that the membership of the Legislative Assembly should be expanded to 25 members at the 2016 election.

1.16 In moving that the select committee be established, the Attorney-General, Mr Simon Corbell MLA, foreshadowed that amendments to the Electoral Act to provide for an enlarged Assembly would be presented to the Assembly during the 2014 Budget sitting week in June.[7] He stated that the select committee would look at what provisions of the Electoral Act potentially require amendment to facilitate change.

AMENDMENTS TO THE ELECTORAL ACT

1.17 If the ERG's recommendations are adopted, a number of amendments to the Electoral Act would be required.

DISTRIBUTION OF ELECTORATES

1.18 Part 4 of the Electoral Act contains various provisions that would require amendment. Section 34 provides that there are to be three ACT electorates, with seven members elected from one and five members elected from each of the other two electorates.

[7] Legislative Assembly for the ACT, *Debates: Weekly Hansard*, 20 March 2014, Mr Simon Corbell MLA, p. 664.

1.19 Electorates are to be redistributed by a determination by the 'augmented commission' (s 35) after an investigation under s 52. The augmented commission comprises the ACT Electoral Commission and members of the redistribution committee required by the Act (s 47). Factors relevant to a redistribution are that the augmented commission:

- ensures that the number of electors in an electorate is within the range permitted by the Self-Government Act;
- as far as practicable, endeavours to ensure that the number of electors in an electorate at the time of the next general election is within 5% of the expected quota for the electorate ascertained in accordance with the Self-Government Act;
- duly considers —
  - (i) the community of interests within each proposed electorate, including economic, social and regional interests;
  - (ii) the means of communication and travel within each proposed electorate;
  - (iii) the physical features and area of each proposed electorate;
  - (iv) the boundaries of existing electorates; and
  - (v) the boundaries of divisions and sections fixed under the *Districts Act 2002*.

1.20 The Self-Government Act provides that a distribution or redistribution must not result in any Territory electorate immediately having a number of electors greater than 110% or less than 90% of its quota (s 67D(1)). This requirement reflects the principle of 'one vote, one value'. The quota is ascertained by calculating the number of Territory voters multiplied by the number of electorate members, divided by the number of Territory members (s 67D(2)).

1.21 Schedule 2 to the Electoral Act, which contains the form of the ballot paper, may also require amendment.

A TWO STAGED APPROACH

1.22 The ERG suggested that amendments to increase the size of the Assembly for the 2016 election and to provide for a subsequent increase for the 2020 election should be made at the same time, so that there would be no need for any subsequent legislation to be made (noting that a future parliament could amend the legislation if it chose).[8]

1.23 Are any other amendments to the Electoral Act required if the size of the Assembly is increased?

[8] ERG, para 190.

RECOMMENDATIONS OF ELECTIONS ACT

1.24 The report by Elections ACT (the ACT Electoral Commission, referred to below as 'the Commission') under section 10A of the *Electoral Act 1992* examined the conduct of the 2012 ACT election and the operation of the Electoral Act. The Commission recommended areas for amendment or further consideration by the Legislative Assembly. The recommendations are set out in full at Appendix A.

1.25 Most of the recommendations relate to the 2012 amendments concerning financial matters, including election funding. Many of the recommended amendments are minor, focusing on promoting consistency of language in different provisions and other measures to remove ambiguity. The two final recommendations relate to authorisation of advertising and the penalty for failing to vote. Each of these is discussed below.

1.26 In addition, Recommendation 2 refers to a 'drafting anomaly' in Schedule 4 of the Electoral Act, concerning the situation where two or more candidates who have obtained a surplus of votes are tied with the same number of votes and a decision needs to be made as to which candidate's surplus is to be dealt with first. An amendment was recommended to ensure that scrutiny rules follow accepted Hare-Clark procedures. This amendment is not discussed further in this paper.

FINANCIAL MATTERS

1.27 Significant amendments were made to the Electoral Act in 2012 concerning election funding, expenditure and financial disclosure. These commenced operation on 1 July 2012.

1.28 Campaign funding and expenditure are regulated in several ways:

- limits on the amount of electoral expenditure that may be incurred;
- limits on the amount of gifts that may be received and used to incur electoral expenditure; and
- disclosure of the financial transactions of registered political parties, political party groupings, MLAs, associated entities, candidates, third party campaigners, and broadcasters and publishers.

1.29 In turn, election candidates are eligible to receive a certain amount of public funding if they meet the required criteria.

PROVISIONS RECOMMENDED FOR RE-EXAMINATION

1.30 The Commission recommended that the Legislative Assembly re-examine:

- the requirement for reporting of gifts received of $1000 or more within seven days of their receipt during the expenditure period (Recommendation 3)
- the requirement for a federal election account (Recommendation 4)
- the need for political participants to hold an ACT election account with a financial institution (Recommendation 5).

1.31 The reasons for each recommendation are briefly outlined below.

1.32 One of the legislative changes in 2012 requires returns of gifts of $1,000 or more to be lodged within seven days of receipt during election periods,[9] and 30 days during non-election periods. The Commission noted that parties reported difficulty meeting the seven day deadline because their usual accounting processes are geared to monthly reconciliation of accounts and manual intervention was required each week. In any case, there is a 30 day period of grace to amend errors and the Commission said that this arguably conflicted with the seven day reporting requirement. The Commission recommended that the seven day reporting requirement be re-examined (Recommendation 3).

1.33 Sections 205I-205K impose certain limits on gifts and other payments. Gifts received by a party grouping or non-party candidate from someone other than an ACT elector must be paid into a 'federal election account' (s 205I(4)). The Commission considered that enforcement of this provision is problematic because 'federal election account' is not defined, nor is there any explanation of how funds in such an account may be used. It is an offence to pay for ACT electoral expenditure from other than an ACT election account (s 205C).The Commission recommended the provision be re-examined 'with a view to improving the workability of s 205I(4)' (Recommendation 4).

1.34 Since the Commission made its report, the High Court has found that a provision in NSW legislation which prohibits political donations by anyone other than an individual enrolled on the electoral roll for State, federal or local government elections was unconstitutional because it infringed the implied freedom of political communication and was not connected to any legitimate end (see paragraphs 1.68-1.71 below). While the ACT provision does not go as far as the NSW provision in that it does not impose an outright prohibition on donations from non-ACT electors, there may be concern about its validity.

1.35 Should s 205I(4) concerning gifts from other than ACT electors be amended and if so, how?

[9] From 2016, this period is from 1 January in an election year to polling day.

1.36 Political entities must maintain an ACT election account with a financial institution. The Commission found that this requirement was not known by all third party campaigners, some of whom were only identified after they had incurred electoral expenditure. It was suggested this requirement was unnecessary and could be accommodated better through existing accounting methods such as sub-accounts within party finances, and the Commission recommended this provision be re-examined (Recommendation 5).

PROVISIONS RECOMMENDED FOR AMENDMENT

1.37 The Commission made other recommendations about the funding provisions in the Electoral Act. These are largely technical in nature and are generally aimed at promoting consistency in terminology and removing possible ambiguities in the Act.

ANONYMOUS GIFTS

1.38 The Commission made three recommendations relating to anonymous gifts:

- That either s 222(1) be amended to cap anonymous donations at $250 (instead of $1,000), or s 216 be amended to raise the threshold for small anonymous gifts from $250 to $1,000 (Recommendation 6);
- That the term 'small anonymous donations' be removed from the Electoral Act and replaced with 'anonymous donations' (Recommendation 7);[10] and
- That s 205I(4) be amended to provide that it does not require anonymous donations to be paid into a federal election account (Recommendation 8).

1.39 The Commission pointed to some anomalies in provisions referring to 'small anonymous gifts' of less than $250 (a new definition inserted in s 216 in 2012) and the provisions dealing with 'anonymous gifts' that had already been in the Electoral Act. A party, MLA, non-party candidate or associated entity must not accept gifts of $1,000 or more unless they know the defined details of the gift, or the giver advises the defined details and the receiver has no grounds to believe at the time of receipt that the details are not true (s 222(1)). There is a cap on the total value of small anonymous gifts that may be received ($25,000 in a financial year – s 222(3)), but the Act contains no cap on 'anonymous gifts'. This would seem to indicate that where the value of each anonymous gift is between $250 and $1,000, no cap applies. In addition, the requirement to record details of the giver and the amount of the gift excludes 'small anonymous gifts' but not 'anonymous gifts' (s 216A(2)). The Commission recommended that these provisions be amended as set out above (Recommendation 6).[11]

[10] Recommendations 6 and 7 refer to anonymous 'donations' (a term not used in the Electoral Act) rather than anonymous 'gifts', which they appear to address. Because the two recommendations overlap, they should be considered together.

[11] The Bill originally introduced in 2012 defined 'small anonymous gift' as an anonymous gift of less than $1,000 – see Electoral Amendment Bill 2012, cl 25. This was changed in the Act as passed to mean an anonymous gift of less than $250.

1.40 Should the value of an anonymous gift be set at $250 or $1,000?

1.41 Gifts from other than an ACT elector must be paid into the federal election account (s 205I(4)). The section does not refer to anonymous gifts. The Commission argued that this requirement could apply to anonymous gifts (for example, money collected at party fundraisers), and that this result had not been intended by the 2012 amendments. (See also the Commission's other concern about s 205I(4) discussed at paragraph 1.33 above.)

THIRD PARTY CAMPAIGNERS

1.42 The Commission made three recommendations concerning third party campaigners, none of which appears controversial. The first was that in defining 'disclosure day' in s 201, the reference in s 201(2)(c) to s 220 in relation to third party campaigners should be removed, as s 220 applies only to a subset of all third party campaigners rather than including all of them (Recommendation 9).

1.43 The second and third recommendations relate to the definition of third party campaigner in s 198:

- The term means a person or entity that incurs more than $1,000 in electoral expenditure. Because thresholds in the disclosure scheme generally start at $1,000, The Commission recommended that the reference to 'more than $1,000' be replaced by '$1,000 or more' (Recommendation 10).
- The definition excludes a 'government agency' from the restrictions on third party campaigners. This is defined in the Dictionary to cover only ACT government agencies. The Commission recommended s 198 be extended to exclude agencies from any Australian government (Recommendation 11).

REPORTING AGENTS

1.44 A party, MLA or candidate may appoint a reporting agent (s 203). Reporting agents are responsible for making disclosures of receipts, expenditure and loans on behalf of the appointing entity, and their names are entered in a register kept by the ACT Electoral Commissioner.

1.45 The Commission recommended an amendment to ensure that only one reporting agent can be appointed at any time and that the appointment of an agent automatically cancels the appointment of any previous reporting agent (Recommendation 12). The Commission noted that one registered party had two reporting agents and that it may be difficult to ascertain which agent is responsible if provisions of the Act are not complied with, for example, if disclosure returns are not lodged.

1.46 The Commission also recommended that the Act should provide that reporting agents, if appointed, are responsible for the lodgement of *all* disclosure returns by parties, MLAs and candidates (Recommendation 13). At present, a non-party MLA or candidate is personally

responsible for lodging returns of election expenditure (ss 224(2) and (3)). Returns of gifts received of $1000 or more must be lodged by the 'financial representative' (s 216A) – this is the non-party MLA or candidate (s 198), rather than the reporting agent.

PAYMENTS FOR ADMINISTRATIVE EXPENDITURE

1.47 The Commission argued that s 215G(1)(b), which provides that amounts paid for administrative expenditure should not be used for electoral expenditure 'in an ACT, federal, state or local election', is ambiguous in using the term 'local election' rather than 'local government election'. The Commission argued this term could be interpreted as including a local ballot and recommended it be amended (Recommendation 14). The Supplementary Explanatory Statement for the 2012 amendments makes it clear that local government elections were intended to be covered by this provision.[12]

AUTHORISING ELECTORAL ADVERTISEMENTS

1.48 Electoral matter that is intended or likely to affect voting must carry an authorisation statement setting out the name of the person who has authorised the electoral matter and, if relevant, a statement that the matter is published for or on behalf of a party or candidate (s 292). This does not apply to letters to the editor of news publications (and electronic commentary 'of a similar kind') where the author's name and place of residence are stated, or to certain other items such as cards and letters, T shirts, badges and business cards.

1.49 The Commission noted that technological developments mean that authorisation statements are not always suitable, for example, in social media, user comments on news websites, and internet banner or sidebar advertising. They noted that it is difficult to enforce such provisions in a medium where many authors use pseudonyms, and argued that the need to ensure more formal campaign material is authorised is greater. The Commission recommended that the Electoral Act be amended to remove from the authorisation requirements internet commentary by persons acting in a private capacity (Recommendation 1).

1.50 The Electoral Act's reference to 'electoral matter' in its authorisation provisions is broad. Other jurisdictions have avoided this problem in two ways:

- by restricting the type of material for which authorisation is required (for example, the Commonwealth authorisation provisions are restricted to 'electoral advertisements' rather than the broader 'electoral matter'[13]); or

[12] Assembly Amendments – Electoral Amendment Bill 2012, Supplementary Explanatory Statement, p. 4.

[13] *Commonwealth Electoral Act 1918*, s 328A(1). The authorisation requirement is also expressed not to apply 'if the matter published on the internet forms part of a general commentary on a website' (s 328A(2)).

- by excluding personal views published on the internet for which no payment is made (for example, New Zealand legislation provides that election advertisements do not include personal political views published on the internet or other electronic medium by an individual who does not make or receive a payment in respect of the publication of those views.[14] Western Australian legislation specifically includes paid electoral advertisements on the internet as requiring authorisation, but excludes matter that 'forms part of a general commentary on an internet website'.[15])

1.51 A Victorian parliamentary committee is currently conducting an inquiry into the impact of social media on that state's electoral process, including whether current regulation of the authorisation of political content on social media is appropriate.[16]

1.52 How do other jurisdictions address authorisation requirements in relation to commentary on the internet and other newer media? Have there been any problems in enforcing those provisions? Should an exemption from the authorisation requirements extend beyond internet commentary in a private capacity?

THE PENALTY FOR FAILING TO VOTE

1.53 It is an offence for an enrolled elector to fail to vote at an ACT election without a valid and sufficient reason (s 129). If the person chooses to pay a penalty notice issued by the Electoral Commissioner rather than having the matter proceed to court, the penalty is $20[17] (s 161).

1.54 The number and percentage of apparent non-voters increased in the 2012 election (10.7% or 27,577 electors, compared with 9.6% or 23,452 electors in 2008). Just over a third notified a valid and sufficient reason for failing to vote, had transferred their enrolment to another jurisdiction or had their postal or declaration votes rejected. Of the remainder (19,097) who were sent a 'failure to vote' notice, 4,250 people paid the $20 penalty for failing to vote. This represents a marked increase over the last two elections (3,422 in 2008 and 1,953 in 2004).

1.55 The Commission speculated that the $20 penalty may not be a sufficient incentive to encourage some electors to vote, noting that only WA and the Commonwealth have a similar $20 penalty, with the fine in WA increasing to $50 for repeat instances. The fines in other States and Territories range from $25 to $70, Victoria and South Australia having the highest

[14] *Electoral (Finance Reform and Advance Voting) Amendment Act 2010*, s 5. There is a similar exemption in British Columbia, Canada, where s 228 of the Election Act [RSBC 1996] excludes from the definition of election advertising 'the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views'.

[15] *Electoral Act 1907*, s 187B, inserted in 2006. This exclusion is similar to the Commonwealth's (see above).

[16] Electoral Matters Committee, Parliament of Victoria. Details of the inquiry are at: http://www.parliament.vic.gov.au/emc/inquiries/article/2251.

[17] Or a higher amount prescribed by regulations. No regulation has been made.

fines. The Commission recommended that the penalty notice fine be increased, without specifying a level (Recommendation 15).

1.56 Should the penalty notice fine for failing to vote in an ACT election be increased? If so, what should the penalty be? Will increasing the penalty simply lead to a rise in the number of informal votes (3.5% in 2012)?

ELECTION CAMPAIGN FUNDING AND EXPENDITURE

CAMPAIGN FUNDING

1.57 An issue which has recently attracted attention is publicly funded election campaigns.

1.58 Election funding is currently available under the Electoral Act to registered political parties and non-party candidates if they meet the following criteria:

- A registered political party is eligible for election funding for the votes received by its endorsed candidates who together polled at least 4% of the total number of formal first preference votes in an electorate.
- A non-party candidate is eligible to receive election funding if he or she polls at least 4% of the total number of formal first preference votes cast in the electorate.

1.59 The amount each vote is worth is calculated according to the formula in s 207 of the Electoral Act. For the 2012 election, the rate was 200 cents per eligible vote.

1.60 The Premier of New South Wales has recently stated that he supports public debate and action on the suggestion that political campaigns be fully publicly funded 'as a mechanism to address the corrosive culture of political donations'.[18] The NSW Opposition leader[19] and NSW Greens MP John Kaye[20] have also supported publicly funded election campaigns.

1.61 To what extent should election campaigns be publicly funded?

CAPS ON CAMPAIGN EXPENDITURE

1.62 Since 2012 the amount of money that can be spent on electoral campaign expenditure from an ACT election account has been capped. The cap applies to electoral expenditure incurred

[18] The Hon Mike Baird MP, Premier of NSW, 28 April 2014, referring to the suggestion of counsel assisting the Independent Commission Against Corruption (ICAC) Geoffrey Watson SC, available at https://www.nsw.liberal.org.au/news/state-news/mike-baird-statement-icac, accessed 2 May 2014.

[19] See http://www.smh.com.au/nsw/public-election-funding-needs-bipartisan-approach-says-john-robertson-20140504-zr4bi.html, accessed 5 May 2014.

[20] See http://www.sbs.com.au/news/article/2014/05/05/labor-calls-taxpayer-funded-elections, accessed 6 May 2014.

during the 'capped expenditure period' for an ACT election, that is, from 1 January of an election year until the end of polling day (s 198).

1.63 Electoral expenditure is incurred when the service or product to which the expenditure relates (such as electoral advertising) is provided or delivered. The expenditure cap set out in the Electoral Act (and subject to annual indexing) is:

- for a party grouping: $60,000 multiplied by the number of party candidates contesting the election, to a maximum of 5 in a 5 member electorate and 7 in a 7 member electorate;
- for a non-party candidate grouping: $60,000;
- for a non-party MLA or an associated entity of a non-party MLA: $60,000; and
- for a third party campaigner: $60,000 (ss 205F, 205G).

1.64 A 'party grouping' means the party, an MLA for the party, an associated entity of either the party or the MLA; and party candidates and prospective party candidates (s 198). An 'associated entity' is an entity that is controlled by a party or MLA, or operates, completely or to a significant extent, for the benefit of a party or MLA (s 198). A 'third party campaigner' is a person or entity that incurs more than $1000 in electoral expenditure (s 198).[21]

1.65 The expenditure cap is adjusted annually, commencing on 1 July 2013, and the current rate is $62,530.[22] A penalty applies for breach of the expenditure cap, equal to twice the amount by which the cap is breached and payable as a debt to the Territory.

1.66 The expenditure cap for a party contesting all 17 seats in an ACT election would be $1,063,010 in 2014 terms plus indexation. If the number of members was increased to 25, the cap for a party contesting all seats would be $1,563,250 plus indexation.

1.67 Should the electoral expenditure caps be changed?

[21] Apart from those categories set out above. Broadcasters, news publishers, government agencies and the Legislative Assembly are also excluded from the definition.

[22] Electoral (Expenditure cap for 2014) Declaration 2013, NI2013 — 541.

THE HIGH COURT DECISION IN *UNIONS NSW V NSW*

1.68 In December 2013 the High Court unanimously held that two provisions of NSW election legislation that restricted campaign funding were invalid because they impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.

1.69 Section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act) prohibits political donations to a political party, elected member, group, candidate or third-party campaigner by anyone other than an individual enrolled on the electoral roll for State, federal or local government elections. The EFED Act also caps the total expenditure that political parties, candidates and third-party campaigners can incur for political advertising and related election material. For the purposes of this cap, s 95G(6) aggregates the amount spent on electoral communication by a political party and any affiliated organisation, that is, any body or organisation 'that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)'.

1.70 In reaching its decision the Court emphasised that the Commonwealth Constitution does not protect a personal right or freedom to engage in political communication; rather it restricts legislative power to affect political communication more generally. The Court held that political communication at a State level may have a federal dimension. The Court accepted that the EFED Act had general anti-corruption purposes, noting the defendant's identification of the potential risk to the integrity of the NSW Parliament, the NSW Government and local government bodies arising from undue, corrupt or hidden influences over those institutions, their members or their processes. However, the Court held that ss 96D and 95G(6) were not connected to those purposes or any other legitimate end.

1.71 The Court is said to have hinted that caps on political donation and expenditure, while amounting to burdens on political communication, would be regarded as reasonably appropriate and adapted to achieve the legitimate end of avoiding the risk or perception of corruption and undue influence.[23] However, such laws would need to be 'carefully calibrated' to survive a challenge. The validity of laws that ban certain groups from donating would depend on whether they can be shown to be advancing a legitimate end.[24]

[23] A Twomey, *Unions NSW v State of NSW*, paper given at the Gilbert + Tobin Centre for Public Law's Constitutional Law Conference, 14 February 2014, p. 13, available at http://www.gtcentre.unsw.edu.au/events/papers.

[24] ibid.

1.72 What are the implications of the High Court's decision for the *Electoral Act 1992?* Are there any provisions that are likely to be found invalid on the basis that they restrict the implied freedom of communication on political matters?

COMMENTS SOUGHT

1.73 The Committee has issued this paper to facilitate discussion of the issues covered by the terms of reference for this inquiry. Your comments on the discussion points or any other issue related to the Committee's terms of reference are welcomed. Details of how to make a written submission are on the Committee's website at http://www.parliament.act.gov.au/in-committees/select_committees/select-committee-on-amendments-to-the-electoral-act-1992.

Mick Gentleman MLA
Chair
6 May 2014

Appendix A

Recommendations of the *Report on the ACT Legislative Assembly Election 2012*

Recommendation 1

The Commission **recommends** that the Electoral Act be amended to remove internet commentary by persons acting in a private capacity from the authorisation requirements. (See page 47.)

Recommendation 2

The Commission **recommends** that clause 7(3)(c)(i) and (ii) of Schedule 4 of the Electoral Act be amended to delete the word "all" to ensure that the scrutiny rules follow accepted Hare-Clark procedures. (See page 54.)

Recommendation 3

The Commission **recommends** that the requirement for reporting of gifts received of $1000 or more within 7 days of their receipt during the expenditure period (from 1 January in an election year until polling day from 2016) be re-examined by the Assembly. (See page 63.)

Recommendation 4

The Commission **recommends** that the requirement for a federal election account be re-examined by the Assembly with a view to improving the workability of section 205I(4) of the Electoral Act. (See page 63.)

Recommendation 5

The Commission **recommends** that the need for political participants to hold an ACT election account with a financial institution be re-examined by the Assembly. (See page 64.)

Recommendation 6

The Commission **recommends** that either section 222(1) be amended to cap anonymous donations at $250, instead of $1,000, or section 216 be amended to raise the threshold for small anonymous gifts from $250 to $1,000. (See page 64.)

Recommendation 7

The Commission **recommends** that use of the phrase "small anonymous donations" be removed from the Electoral Act and replaced with the phrase "anonymous donations". (See page 64.)

Recommendation 8

The Commission **recommends** that section 205I(4) of the Electoral Act be amended to provide that it does not require anonymous donations to be paid into a federal election account. (See page 65.)

Recommendation 9

The Commission **recommends** that the reference to section 220 in the definition of "disclosure day" in relation to third-party campaigners in section 201(2)(c) of the Electoral Act be removed. (See page 65.)

Recommendation 10

The Commission **recommends** that the definition of third-party campaigner in section 198 of the Electoral Act be amended to replace the reference to "more than $1,000" with "$1,000 or more". (See page 65.)

Recommendation 11

The Commission **recommends** that the definition of third-party campaigner in section 198 of the Electoral Act be amended to exclude from the definition government agencies from any Australian government. (See page 65.)

Recommendation 12

The Commission **recommends** that section 203 of the Electoral Act be amended to make it clear that only one reporting agent can be appointed at any one time for the same entity, and that the appointment of an agent automatically cancels the appointment of any previously appointed agent. (See page 67.)

Recommendation 13

The Commission **recommends** that the Electoral Act be amended to make reporting agents, where appointed, responsible for the lodgement of all disclosure returns by parties, MLAs and candidates. (See page 67.)

Recommendation 14

The Commission **recommends** that section 215G(1)(b) of the Electoral Act be amended to replace "local election" with "local government election". (See page 67.)

Recommendation 15

The Commission **recommends** that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased. (See page 70.)