

The Chair
Select Committee on Amendments to the Electoral Act 1992
Legislative Assembly for the ACT

Submitted by email to louisew.gell@parliament.act.gov.au on Monday 12 May 2014

Improving representation and disclosure without restricting political communication

The Australian Labor Party welcomes the opportunity to provide input into the Legislative Assembly's Committee on Amendments to the Electoral Act 1992.

This submission focuses on the following issues:

- The need to expand the size of the ACT Legislative Assembly to improve its function and representative effectiveness in line with other jurisdictions.
- The need for ACT legislation to be amended following the recent decision of the NSW High Court to overturn bans on donations from non-electors and improve public disclosure of donations without restricting them in violation of the implied freedom of communication in the Commonwealth Constitution.
- Adjust reporting requirements to Elections ACT to normal MYOB-based accounting methods and practice.
- Reduce campaign expenditure caps in ACT elections to reduce the arms race in campaign expenditure and create a more level electoral contest.
- Improve safety at Polling Booths by reconsidering the 100m rule and its possible extension to discourage unsafe behaviour.
- Improving compliance with electoral and municipal regulations around the placement and size of advertising.
- Improving the public reporting of paid advertisements.

We understand that the terms of reference for this Inquiry cover:

(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;

With regards to (a) and (b) above (a larger Assembly of 25 members), ACT Labor has consistently argued that Canberra requires a larger parliament to ensure better democratic representation in the Assembly as well as improved ministerial and committee oversight that would result from more elected representatives.

I would like to begin by commending the ACT Liberals on their recent member's ballot and policy change with regards to this matter. Good Oppositions, just like good Governments must make tough, sometimes seemingly unpopular, decisions and on this topic they have evolved beyond simplistic arguments against 'more politicians'. It seems the Canberra Liberals may even agree with a point made in a previous Labor submission on this topic: 'Most Canberrans, due to their familiarity and experience with the public service and politics, know that politicians can be like police: you don't realise how important they are until you need one urgently!'

In a submission to the Members of the Expert Reference Group in 2013 ACT Labor reasserted previous arguments for a larger ACT Assembly outlined in relevant submissions also made in 2002. Key points made were:

1. The people of the ACT currently benefit from the smallest and most efficient state or territory government in Australia, as well as the efficiencies derived from a small city-state structure.
2. Our very efficient system of government also delivers a relatively high standard of municipal services.
3. Canberra residents enjoy a closer relationship and better accessibility to municipal services and state/territory services than the vast majority of Australians.
4. Canberra is the most community-minded capital city in Australia. At the centre of that community are our elected representatives and the parliament they occupy, which is the vehicle for the leadership they provide.
5. The ACT Labor Platform states the fundamental role for Government is not confined solely to economic management of a balance sheet. Rather Government must also ensure the full equal participation of all members of the community to achieve equitable outcomes. Labor in the ACT Legislative Assembly is committed to raising the standards of Territory Government to ensure that all members of the ACT community are able to obtain social justice through responsible, responsive and accountable Government.
6. ACT Labor supports the Hare-Clark electoral system and its stated policy is to divide the Territory into a number of multi-member electorates that are small enough to allow effective representation of the community. We require each electorate to be as nearly as practicable the same size, and to elect the same number of representatives.
7. There were four key arguments made for a larger ACT Assembly: the mathematical argument (based on a growing population and relative sizes of parliaments and representation across Australia), improvements to the advocacy made for the 'community of interest' of each electorate, the ideal electorate size (not three or seven, but five representatives per electorate), and finally, the more challenging political argument for more representatives and community advocates. It was noted that even with an Assembly of 25 MLAs our

parliament would still be equal-smallest in Australia. In years ahead the ACT will have an equivalent population to Tasmania. Even with an Assembly of equal size (25 members) the ACT will still have far fewer politicians than Tasmania due to a lack of an upper house, much fewer federal representatives and separate local governments.

Although this Committee is not looking specifically at electorate boundaries for the five proposed electorates, it would be worthwhile for some consideration to be given about amending the Act to reflect existing communities of interest in Canberra and ensuring their proper representation in future elections.

The concept of community of interest is widely applied in democratic processes and vital in electorate-based democracy. In the ACT community of interest arguments are most prevalent during regular electorate redistributions. The current debate regarding Assembly size is a once-in-a-generation opportunity to establish a community-of-interest framework that can have a lasting positive impact on our representative democracy.

Canberra's suburban structure can be defined within a framework of 5-7 local townships with reasonably clear economic, social and regional interests as well as transport and physical features. These distinct local communities would be the best basis for local electorates in a larger ACT Assembly.

The ACT's local communities are based on the down centres developed by the former National Capital Development Commission (NCDC): North and South Canberra is the original Burley Griffin Canberra or what would be called inner city in other cities. Of the new towns Woden was first in the 1960s, followed by Belconnen and Weston Creek in the 1970s, then Tuggeranong in the late 1970s to 1980s. Gungahlin is the most recent dating from the 1990s.

Democratic representation works best when there are strong lines of communication and communities of interest which bind elected representatives to their constituents. Smaller electorates work best for access and direct constituent feedback. The accepted principals of our Hare Clark system make the obvious choice of five representatives per electorate. Evolving to five electorates that more closely resemble the original down centres is more logical and would be popular as well. The current narrow band of 95% to 105% for calculating electorate populations and triggering redistributions should be relaxed slightly (with a review after the next election) to say perhaps 90% to 110%. This will allow some stability in constituencies for the new system as well as allow for boundaries to be drawn with proper consideration of predictable population growth areas such as the Molonglo Valley and Gungahlin. If for example there are electorates based on Central Canberra, an electorate comprising of the inner north and south, Belconnen, Tuggeranong, Gungahlin and Woden/Weston the last two would factor imminent population growth in their local suburbs due to large-scale developments.

With regards to this Committee's terms of reference (c) the recent High Court decision, *Unions NSW & Ors v NSW*, and this decision's implications for the operation of the Electoral Act 1992; ACT Labor will argue the case for improved disclosure without restricting political communication.

The following is a direct excerpt from the judgement summaries referred to in the background documents for this Committee:

In December 2013 the High Court of Australia unanimously held that ss 96D and 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) ("the EFED Act") are invalid because they impermissibly burden the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.

Section 96D of the EFED Act prohibits the making of a political donation to a political party, elected member, group, candidate or third-party campaigner, unless the donor is 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) of the EFED Act aggregates the amount spent on electoral communication by a political party and by any affiliated organisation of that party. An "affiliated organisation" of a party is defined as a 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)".

Each of the plaintiffs intended to make political donations to the Australian Labor Party, the Australian Labor Party (NSW Branch) or other entities, and to incur electoral communication expenditure within the meaning of the EFED Act.

The High Court unanimously held that ss 96D and 95G(6) burdened the implied freedom of communication on governmental and political matters. 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. However, the Court held that the impugned provisions were not connected to those purposes or any other legitimate end.

The strongest implications for the ACT from this legal interpretation must be that no jurisdiction can require that donors are on the electoral roll. It also implies that limits cannot be placed on individual candidates or parties seeking fully-disclosed donations from individuals or organisations for the purposes of political communication, nor can limits be placed on individuals or organisations seeking to donate money to political parties as long as these donations are fully disclosed. This applies to affiliates as well, in the NSW case to unions in particular.

ACT Labor has consistently argued that donation limits do not have the desired effect of improving the fairness of electoral contests. In fact the best path towards improved electoral fairness in campaign expenditure is to limit the actual

expenditure. This has the additional benefit of reducing the need for more donations in each campaign and consequently acts as a disincentive for corruption. The recent publicity about wide-scale political corruption in NSW in relation to attempts by the NSW Liberals to by-pass donation laws demonstrates that donation restrictions cannot and would reduce campaign expenditure as well as expenditure caps.

With regards to (d) the Elections ACT's Report on the ACT Legislative Assembly Election 2012 we would like to make some recommendations, without referring to the specific recommendations made in the Elections ACT Report.

Adjust reporting requirements to normal MYOB accounting methods

Over the past 2 years ACT Labor has worked closely with Elections ACT to comply as fully as possible with very onerous reporting requirements. Whilst the public funds provided to assist with administration go some way to cover the additional costs in time and money of the elevated reporting requirements, there is a good argument to be made that some benefit in improved compliance could be created with slightly relaxed deadlines. As all party records are carefully audited on a regular basis and all parties seem to be making serious efforts to comply, a slightly lengthened reporting timetable could result in better compliance and less errors. Most MYOB-based accounting is done on a monthly basis and reconciliations between bank accounts and MYOB records often take 2-3 months to complete.

There are also many examples of where a temporary absence of an employee or an oversight in correspondence or reporting can result in unintended mistakes. Having an extra few weeks for checking and reconciliation can make the difference between a monthly financial report that is 100% accurate and 90% accurate.

The office staff and Branch Secretary believe extending the current 30 day reporting requirement to 60 or 90 days will improve the accuracy of reporting without reducing the amount of public disclosure.

Reduced campaign expenditure caps

The drop in campaign expenditure by some parties from 2008 to 2012 demonstrates the success of the expenditure cap implemented by the previous Assembly. Once the changes to donation regulations are amended to comply with the principals of freedom of political communication, as reinforced by the recent decision of the High Court, the next priority with regards to reforming campaign finance and disclosure regulations should be reducing the expenditure cap to account for the enlarged Assembly.

At its current level a \$60,000 per seat cap, once accumulated by the three larger parties would create an unwanted incentive for a relatively massive increase in campaign expenditure in comparison to the 2012 election. The significant increase in campaign expenditure from 2001 to 2004 to 2008 was one of the factors which has been of concern in the past. Another significant jump in

expenditure would have a destabilising effect on legislation which has been successful in constraining the arms race of past campaigns.

Recent campaigns in the ACT have seen candidates elected to the Assembly with a local campaign budget in the vicinity of \$10,000-\$20,000. As the \$60,000 per seat expenditure cap from 2012 did not receive any public criticism, it would be reasonable to assume a slightly lower cap in 2016 would be palatable to all parties, as well as independent candidates. A cap of around \$45,000 per seat would still be over double what was needed in past campaigns for successful candidates and it would result in an ACT-wide expenditure cap of \$1,125,000 for the major parties, which could be argued is still high based on 2012 expenditure figures. Independent candidates running in smaller electorates do not require the city-wide television, radio and print advertising of the major parties of government, who are campaigning with 25 candidates and the intention of forming a full ministry as well as electing representatives in every electorate.

Improving Safety at Polling Booths

The current 100m limit creates confusion on Polling Day and encourages attempts to breach it as signs and structures (and volunteers) are placed anywhere from 50m to 100m away from a booth where the line of allowance may be hazy or in dispute. Extending the ban to 200m, 500m or further, or banning election campaign material completely on polling day (as it is effectively banned in Tasmania and New Zealand, without any detrimental effect to the democratic process) should be considered and debated within the Committee and subsequent recommendations made to the Assembly.

There were several incidents of breaches of this 100m rule in 2012 including a hot-air balloon that was inflated and anchored within 100m of a polling booth as well as large signs placed on trucks and trailers parked well within 100m of a polling booth. These creative loopholes cannot be effectively policed by polling officials or the limited number of City Rangers working on polling day.

Extending the ban to 200m or further could have the desired effect of making such campaign techniques less disruptive and dangerous on Polling Day. Instead of focussing on advertising through balloons, posters and decorated vehicles on election booths, candidates and parties will then resort to the less dangerous existing practice of canvassing for votes at community gatherings or by doorknocking.

Improving compliance with Electoral and Municipal Regulations

The stress and administrative workload during Polling Day in 2012 (particularly for ACT Rangers and local Polling Officials) could be greatly reduced with clearer explanations and enforcement (through fines and other penalties) of existing regulations regarding the placement, size and use of electoral campaign material.

It was clear in 2012, based on the size and design of much material that there seemed to be a clear intent to push to the limit the enforcement of electoral and

municipal regulations in several cases where very large signs had been placed close to polling booths.

If it is decided that it is not possible for a small number of city officers to enforce the size limit or 100m rule then that becomes part of an argument to extend the distance to a point (i.e. 200m or more) where it is clear that the breach was intentional and that a harsher fine or other penalty should be awarded.

Better public reporting of paid advertising

During ACT elections, the contest for government is slightly different to the contest for local representation. Local candidates must vie for local support from electors within their electorate. Campaigning outside of their electorate has little benefit for individual candidates. Large parties such as Labor, Liberal and Green (as well as interest groups such as business and unions) tend to focus expenditure on mass media campaigns to vie for support across all the electorates in the ACT. The coverage and advertising through mass media is so important to the final result it serves the public interest to know more about how much and what type of advertising has been paid for by parties, candidates and third parties. This is not suggesting further regulation or restriction, just full disclosure.

Significant funds are expended on mass media without an acceptable level of public scrutiny. During the 2012 campaign this amounted to hundreds of thousands of dollars of paid TV and radio airtime as well as advertisements in newspapers and on websites. The public and Elections ACT should be able to see how much money was expended on different advertisements on different days and what paid advertisements were arranged by candidates and parties. It would not be difficult for this information to be provided by both the commercial media and the candidates or parties as part of their normal reporting obligations.

Conclusion

It is in the public interest that campaigning for a place in the Assembly be rendered as accessible as possible. That necessitates not just a level playing field but reasonable resources by which to participate. Chief amongst those reasonable resources is access to funding from supporters and groups within the community, public funding and freedom to participate and contribute to the political process. It is also essential that reasonable and fair regulations which don't impede participation or freedom of political communication are used to constrain any unfair or deceptive behaviour. We look forward to making further contributions and participating in further community consultation with the objective of ensuring continuing fairness in election contests.

Regards,

Elias Hallaj
Branch Secretary and Campaign Director
On behalf of ACT Labor, May 2014.