



Legislative Assembly for the
Australian Capital Territory

Standing Committee on the Integrity
Commission and Statutory Office
Holders

Submission Cover Sheet

Inquiry into the operation of the 2024 ACT Election and Electoral Act 1992

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Dear Committee and Secretariat,

Thank you for accepting this submission to the Inquiry into the operation of the 2024 ACT Election and Electoral Act 1992.

This submission is made in a private capacity. I am currently on leave from a PhD at the Australian National University where I research the public understanding of law. In 2020, I was a research assistant on the *Smartvote Australia* project: a research project in collaboration with the *Canberra Times* to develop a better understanding of electoral behaviour.

Despite this submission being in my personal capacity, some of this submission is informed by my experiences engaging with the Electoral Commission during the 2020 ACT Election. On 19 March 2021, I received an Investigation Notice from the Electoral Commissioner threatening me with six months jail if I did not produce four years of the University's financial records. While that issue was eventually sorted, it did reveal fundamental issues with the *Electoral Act 1992* (the Act): it has been an extremely long time since there has been a serious review of the Act, and parts of it--especially the definition of 'electoral matter'--are in desperate need of an update.

In summary, this submission argues the following:

1. The definition of 'electoral matter' should be aligned with the Commonwealth definition;
2. The definition of 'third-party campaigner' should be narrowed to those actors who seek a partisan outcome;
3. The definition of 'electoral expenditure' should follow section 287AB of the *Commonwealth Electoral Act 1918* so that it only covers expenditure incurred for the dominant purpose of creating or communicating electoral matter.
4. Section 297A prohibiting misleading electoral advertising should be repealed;
5. Section 110A requiring the Electoral Commission to run a website of electoral advertisements for candidates should be repealed;
6. Decisions under section 237 should be subject to appropriate safeguards by adding it to the list of reviewable decisions in Schedule 5.

I wish to state very clearly that nothing in this submission should be read as a criticism of the Electoral Commission. I enjoyed very warm and constructive interactions with the Deputy Electoral Commissioner, Rohan Spence, during the *Smartvote* project. Even though they threatened me with six months jail on account of them misreading their Act, I think the ACT community is and rightly should be very proud of the Commission. I attribute the error of threatening me with jail entirely to the complexity of the Act, the difficulty in managing the Act with such a small staff, and drafting errors in the Act.

Warm regards,

Mark Fletcher

Section 4 of the Act

Section 4 of the Act—which defines the ‘electoral matter’ that is regulated by the Act—should be amended to be consistent with the definition in the Commonwealth Act. The ACT’s definition is no longer consistent with the implied freedom of political communication and is unlikely to resist a challenge on that basis. It is also complex, difficult for even the Commission to interpret and apply, and results in absurdities.

It is not surprising that this is the case: section 4 has remained largely unchanged since 2001, and yet the leading cases about the implied freedom of political communication and electoral law have occurred since: *McCloy v New South Wales* (2015) 256 CLR 178, *Brown v Tasmania* (2017) 261 CLR 328, and *Unions v New South Wales* (2019) 264 CLR 595.

The relevant part of section 4 currently reads:

- (1) In this Act, ***electoral matter*** is matter, in printed or electronic form, that is intended or likely to affect voting at an election.
- (2) Without limiting subsection (1), matter is taken to be intended or likely to affect voting at an election if it contains an express or implicit reference to, or comment on—
 - (a) the election; or
 - (b) the performance of the Government or Opposition, or a previous Government or Opposition; or
 - (c) the performance of an MLA or former MLA; or
 - (d) the performance of a political party, candidate or group of candidates in the election; or
 - (e) an issue submitted to, or otherwise before, the electors in relation to the election.

Subsection (2) is the source of many difficulties. If read literally, it captures all kinds of activities that have little to do with affecting the outcome of the election.

First, it is extremely difficult to articulate correctly. In previous inquiries into electoral law in the ACT, both the ACT Electoral Commissioner and the Deputy Commissioner have struggled to state and apply the definition correctly (Standing Committee on Justice and Community Safety, Inquiry into the 2020 ACT Election and the Electoral Act, Transcript of Evidence, Wednesday 19 May 2021, p. 15).

The Electoral Commissioner gave evidence that “‘Electoral matter’ is defined as matter that is intended to be likely to affect the outcome of an election’. This is plainly not correct for two reasons.

First, intent only applies to the first element of subsection (1): ‘matter...that is intended... to affect voting...’. But it does not apply to the second element: ‘matter... that is likely... to affect voting...’. If material is likely to affect voting at an election, the intent of the author is irrelevant and it is electoral matter. In fairness, the definition is so complex that it is more plausible the Electoral Commissioner simply did not intend to say what he literally said on this point.

The second reason he was incorrect is more serious and significant: subsection (2) is a *deeming clause*. On a literal reading, certain things are *taken to be* electoral matter, no matter rhyme or reason. It is misunderstanding this provision that resulted in the Electoral Commissioner incorrectly claiming that ‘there is a little bit of latitude that can be applied’. There is no latitude that can be applied; if the Commission is applying some latitude, the provision has become arbitrary and is not being applied correctly.

The ‘little bit of latitude’ is inappropriate for electoral law where individuals and community groups who want to participate in the festival of democracy should be able to assess their legal risk. The definition is so broad that it captures things it plainly shouldn’t.

Something is electoral matter if it ‘contains an express or implicit reference to, or comment, on [...] an issue submitted to, or otherwise before, the electors in relation to the election.’ An ANU researcher with no interest at all in the ACT Election could write an academic article about house prices, gambling policy, the energy efficiency of trams, or arts policy and discover, when reading the template e-mail sent by the Electoral Commissioner, that they might have committed an electoral offence by not properly authorising the material. And if the research was disseminated at a conference or event that cost \$50,000, then the ANU could be fined by the Electoral Commissioner. Clearly, this material is not supposed to be within the scope of the Act and, yet, it is.

And it is not just research materials that are potentially within scope. Art that is otherwise unrelated to the election except that it provides commentary on an issue that might be before the electors in relation to the election can fall within its scope. A local high school performance of Merchant of Venice could be within scope if either justice policy or antisemitism emerge as issues ‘otherwise before’ electors in relation to the election. Or a performance of Gilbert and Sullivan’s *Mikado* could be deemed electoral matter if, as is usual performance practice, the words to ‘As Some Day It May Happen’ were updated to reference Australian political parties, even though there is no serious attempt to influence a person’s vote.

What is perhaps most shocking of all, private communications between individuals could meet the current literal threshold. Subsection (2) of the definition causes a lot of material that is clearly not supposed to be within scope to be defined by the ACT Electoral Commission as ‘electoral matter’. As a policy matter, the threshold for being within the scope of the Act needs to be significantly higher and adapted specifically to the mischief of preventing the irresponsibility of anonymity that interferes with election outcomes.

We currently rely on the discretionary and arbitrary ‘little bit of latitude’ to avoid the Electoral Commissioner going after school plays, but this is bad policy. Should—Heaven forbid—the Commissioner and Deputy Commissioner be replaced with two people who are less wise and discerning as the incumbents, ordinary people are at risk of the massive overreach of section 4.

In response to the same question from the Committee, the Deputy Electoral Commissioner correctly restated the first part of the definition (‘electoral matter

[...] is intended or likely to affect voting at an election'), but then failed to turn his mind to subsection (2) for the remainder of his answer:

One of the submissions was talking about a school putting on a play and saying that that could be considered an electoral matter if it is intended or likely to affect voting at an election. We would consider that unlikely. It is not a relevant example.

But this interpretation of the Act is also incorrect because subsection (2) is a deeming clause. Although every reasonable person would consider it extremely unlikely that a school play would affect voting, the operation of subsection (2) is to deem it electoral matter if it satisfies any of the criteria. Materials are deemed to be electoral matter regardless of how unlikely they are to affect voting.

If I produce an oil painting of a tree and write 'Andrew Barr MLA: Very Adequate' under it, this is deemed to be electoral matter (s 4(2)(c)). If I put up a poster in Garema Place saying 'The Follett Government was not memorable', this is deemed to be electoral matter (s 4(2)(b)). If I get a piece of chalk and write on the pavement the words 'ACT Election 2024' and nothing else, this is deemed to be electoral matter (s 4(2)(a)). As the Deputy Commissioner noted, this is unlikely to affect voting and so the definition is absurd and should be fixed.

On the other end of the spectrum, all the annual reports of the Directorates are also captured by subsection (2). If it were not for some extremely complex carve-outs later in the Act, the Directorates would be third-party campaigners in elections because they produce electoral matter according to section 4. This is clearly broken.

At the 2024 Election, I noted three activities that—should a less wise and discerning Commissioner and Deputy Commissioner be appointed—could be a target for fines or imprisonment.

The Wharf Revue was playing at Canberra Theatre the week after the 2024 Election. There on the billboard, a dozen feet high or more, were the actors of the revue dressed as various Australian politicians. This fits within the scope of section 4 (in particular, the performance of political parties), especially given the nexus between ACT electoral behaviour and Federal electoral behaviour. This is clearly absurd and should be fixed urgently.

As is good, right, and proper, my local polling place had a sausage sizzle. Guiding me to the barbecue were extremely flimsy signs stating 'Democracy Sausages This Way!'. As material that contains an express reference to the election, it fit within the scope of section 4 and the Electoral Commission could have requested full financial disclosures from those running the barbecue, or fined people for not correctly authorising the sign. This is not good, not right, and definitely not proper: it clearly needs to be fixed.

My polling place was a school. I left the school grounds via a different gate where, within 100m of the building in which I had just voted, was a small protest. The issue of the protest really had nothing to do directly with the election. None of the placards referenced the election, although one placard called on the Chief Minister to act on a longstanding issue facing the ACT. None of the placards encouraged people to vote in a particular way, although one minor party did have this issue as

part of their election campaign. Because it called on the Chief Minister to do something, it strictly met section 4(2)(c) and, because it might be construed as an issue before the electorate due to the platform of the minor party, it strictly met section 4(2)(e). Because the definition is broken, we result in these draconian outcomes were broader, legitimate democratic participation is threatened by reliance on the Electoral Commissioner's discretionary and arbitrary use of a 'little bit of latitude'.

The previous Assembly's Standing Committee on Justice and Community Safety inquired into the Electoral and Road Safety Legislation Amendment Bill 2023 and recommended (number 11) that the definition be aligned with the Commonwealth's definition. The Commonwealth uses a 'dominant purpose' test in section 4AA of the *Commonwealth Electoral Act 1918*:

- (1) **Electoral matter** means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (**a federal election**) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:
 - (a) a political entity, to the extent that the matter relates to a federal election; or
 - (b) a member of the House of Representatives or a Senator.

Note: Communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue, are not for the dominant purpose of influencing the way electors vote in an election (as there can be only one dominant purpose for any given communication).
- (2) For the purposes of subsection (1), each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter.
- (3) Without limiting subsection (1), the dominant purpose of the communication or intended communication of matter that expressly promotes or opposes:
 - (a) political entity, to the extent that the matter relates to a federal election; or
 - (b) a member of the House of Representatives or a Senator, to the extent that the matter relates to a federal election;is presumed to be the purpose referred to in subsection (1), unless the contrary is proved.
- (4) Without limiting subsection (1), the following matters must be taken into account in determining the dominant purpose of the communication or intended communication of matter:
 - (a) whether the communication or intended communication is or would be to the public or a section of the public;
 - (b) whether the communication or intended communication is or would be by a political entity or significant third party (within the meaning of Part XX);
 - (c) whether the matter contains an express or implicit comment on a political entity, a member of the House of Representatives or a Senator;
 - (d) whether the communication or intended communication is or would be received by electors near a polling place;
 - (e) how soon a federal election is to be held after the creation or communication of the matter;
 - (f) whether the communication or intended communication is or would be unsolicited.

Exceptions

- (5) Despite subsections (1) and (3), matter is not electoral matter if the communication or intended communication of the matter:

- (a) forms or would form part of the reporting of news, the presenting of current affairs or any genuine editorial content in news media; or
- (b) is or would be by a person for a dominant purpose that is a satirical, academic, educative or artistic purpose, taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person; or
- (c) is or would be a private communication by a person to another person who is known to the first person; or
- (d) is or would be by or to a person who is a Commonwealth public official (within the meaning of the Criminal Code) in that person's capacity as such an official; or
- (e) is or would be a private communication to a political entity (who is not a Commonwealth public official) in relation to public policy or public administration; or
- (f) occurs or would occur in the House of Representatives or the Senate, or is or would be to a parliamentary committee.

Note: A person who wishes to rely on this subsection bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act).

Unlike the ACT definition, there are plenty of opportunities to escape absurdity. In my submission to the inquiry into the 2020 Election, I noted that performances of Gilbert and Sullivan's *Mikado* often replace the offensively racist original lyrics of 'As Some Day It May Happen' with contemporary political references. Under the ACT definition, this would get caught by the deeming provision of subsection (2) even though—as the Deputy Electoral Commissioner correctly noted—it was factually unlikely to affect voting. Under the Commonwealth's definition, the same play would enliven subsection (3) but could take advantage of the qualifying provision: 'unless the contrary is proved'. This would be easily achieved under subsection (5)(b): 'Despite subsections (1) and (3), matter is not electoral matter if the communication or intended communication of the matter [...] is or would be by a person for a dominant purpose that is a satirical, academic, educative or artistic purpose, taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person'. The Commonwealth definition more closely aligns with the Deputy Electoral Commissioner's intuition and, therefore, should be the definition adopted by the ACT.

This would have the very welcome result that parties who are providing non-partisan materials that make reference to social, political, and economic issues would not be caught within the scope of the Act unless it was clearly designed to influence the election result to achieve a particular electoral outcome.

There is no good reason why the definition has not been updated. In its response to the inquiry into the Bill, the Government stated:

The ACT Government notes the recommendation of the Committee but does not consider it appropriate to progress as part of the current Bill, at this time.

The definition of 'electoral matter' is a critical aspect of the Electoral Act and impacts on many different provisions and functions of the Act. Substantial policy consideration would need to be given to how a change in the definition to align with the Commonwealth definition would impact on the broader Act.

For example, the definition of ‘electoral matter’ plays a significant role for the calculation of a political entity’s electoral expenditure cap under the Electoral Act. The ACT Government notes this is not a consideration for the Commonwealth as the Commonwealth does not have expenditure caps.

Amending the definition of ‘electoral matter’ to align with the Commonwealth definition could have the negative unintended consequence of significantly expanding the amount of expenditure a political entity may incur. This would undermine the policy objective of having an expenditure cap as it could result in parties, MLAs and candidates claiming more of their published material falls outside the definition of electoral matter.

As another example, the definition of electoral matter is critical to many of the campaigning offences in the Electoral Act, which carry criminal penalties. Proper policy consideration of how an amended definition could impact on these offences would need to be undertaken, with consideration being given to criminal law and human rights policy.

While the ACT Government may give further consideration to this issue in future, the ACT Government cautions against any amendments until significant policy consideration has been given to the implications of any proposed change.

But this response is confused: it is precisely because it has tendrils into so many different kinds of regulation that fixing the definition is so important. Because the definition is ‘critical to many of the campaigning offences’, the definition should not be so broad as to capture things which should not be considered ‘electoral material’.

Ideally, every State and Territory would have very similar definitions of electoral material in their Act. Given the situation of the ACT and the number of actors who routinely engage both Acts, it would be preferable that the ACT used exactly the same definition of electoral matter as the Commonwealth Act.

Third-Party Campaigners

The definition of third-party campaigners covers significantly more people than is warranted or reasonably intended. It is so broadly defined that it captures all kinds of non-partisan civil society participants, and therefore regulations that affect third-party campaigners can have serious unintended consequences.

The term ‘third-party campaigner’ applies to Division 14 of the Act relating to election funding, expenditure, and financial disclosure. It was introduced into the Act in 2012 in order to clarify who were ‘other participants’ in campaign financing (see *A Review of Campaign Financing Laws in the ACT*, ACT Standing Committee on Justice and Community Safety, September 2011, p. 16). At the time, ACT Labor was particularly concerned about the proliferation in the US of third party organisations such as ‘election funds’, ‘political action committees’, and ‘campaign committees’ that were being used to evade donation laws. As a loose intuition, the Act seeks to regulate the electoral activities of candidates and parties, entities controlled by candidates and parties (‘associated entities’), and entities that are attempting to

get particular candidates and parties elected without being formally linked to those candidates and parties ('third-party campaigners').

So if the policy problem motivating the definition of 'third-party campaigners' is to reduce the likelihood of circumventing donation laws, it is clearly not supposed to apply to, say, universities providing non-partisan information about the candidates in an election. Indeed, it would be frankly bizarre if the decision were made that a university was a third-party campaigner. No reasonable person could imagine this occurring. And, if it did occur, every rational person would agree that the Act should be amended to stop it happening again.

In the 2020 ACT Election, the ACT Electoral Commission formed the view that the Australian National University was a third-party campaigner.

The ANU ran a research project called 'Smartvote', which had been run without incident in the Federal election and was based on a model used in overseas elections. The dominant purpose of the project was to study electoral behaviour and it did that by providing (to the greatest degree possible) information about every candidate running in the election. It was branded as an ANU research project and it was authorised by the ANU Ethics Committee. The project was not communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in the election, and so was not considered 'electoral matter' under section 4AA of the *Commonwealth Electoral Act 1918* when run for the Federal election. It did make explicit reference to the 2020 ACT Election when run for the Territory election, and so was deemed to be electoral matter under s 4(2) of the *ACT Electoral Act 1995*.

The actual definition of 'third-party campaigner' under section 198 of the Act is very broad. If a person or entity spends more than \$1,000 on electoral expenditure, they will be considered a third-party campaigner unless they are exempt.

Consistent with the theme of the Act, the definition of 'electoral expenditure' is broad and confusing. Electoral expenditure 'in relation to an election':

- (a) means expenditure incurred on—
 - (i) broadcasting an electoral advertisement; or
 - (ii) publishing an electoral advertisement; or
 - (iii) displaying an electoral advertisement at a theatre or other place of entertainment; or
 - (iv) producing an electoral advertisement mentioned in subparagraph (i), (ii) or (iii); or
 - (v) producing, broadcasting, publishing, displaying or distributing any electoral matter (other than material mentioned in subparagraph (i), (ii) or (iii))—
 - (A) to which section 292 applies, or would apply but for section 294 (1) (a), (b), (e), (f), (g), (h), (i), or (j); and

- (B) that is not paid for by the Legislative Assembly or the Territory;
or
 - (vi) consultant's or advertising agent's fees in relation to—
 - (A) services relating to electoral matter mentioned in subparagraph (i) to (v); or
 - (B) material relating to electoral matter mentioned in subparagraph (i) to (v); or
 - (vii) carrying out an opinion poll or other research undertaken to support the production of electoral matter mentioned in subparagraph (i) to (vi); but
- (b) does not include administrative expenditure.

'Electoral advertisement' here means an 'advertisement containing electoral matter, whether or not consideration was given for its publication or broadcast'. It is not clear what the distinction is between an electoral advertisement in subparagraphs (i)-(ii) and the electoral matter in subparagraph (v). The only substantive function of 'electoral advertisement' in the Act is for the purposes of section 226: broadcasters and publishers must give a return to the Electoral Commission.

Subparagraph (v) is the real substance of this definition. Electoral expenditure includes expenditure incurred on 'producing, broadcasting, publishing, displaying or distributing any electoral matter:

to which section 292 applies, or would apply but for section 294 (1) (a), (b), (e), (f), (g), (h), (i), or (j)

As already explained in punishing detail above, 'electoral matter' is an extremely broad category. On first reading, one might expect section 292 to narrow the effect of the definition (because this definition only applies to electoral matter to which section 292 applies or would apply), but section 292 applies to all electoral matter unless an exemption applies, so it does not narrow it all that much.

Section 292 is the provision that makes it an offence to disseminate unauthorised electoral matter and therefore has very wide application. So to interpret the subparagraph (v), the reader needs to establish if an exemption applies other than those in subsections 294(1)(a),(b),(e),(f),(g),(h),(i), and (j).

There are three basic exemptions that apply to section 292: section 293, section 293A, and section 295. Section 293 relates to news publications, including reportage or commentary 'if the publication includes a statement to the effect that a person named in the statement has authorised publication of all electoral matter contained in reportage or commentary in the publication' (s 293(1)). Again, good luck to the ordinary reader to interpret what that means. The Bill proposes a new section 293A: an exemption for 'personal views on social media'. This covers electoral matter disseminated on or through social media if the electoral matter is 'disseminated in a private capacity' and 'forms part of the expression of the individual's personal political views'. The person disseminating the views must 'not paid [be] to express

those views’ and must not have created the account for ‘the dominant purpose of disseminating electoral matter’. If the account was created to disseminate information related to ‘an issue submitted to, or otherwise before, the electors in relation to the election’—housing policy, for example, or cycling around the ACT, or legal explainers—it will not be exempt.

Section 295 is an exemption for ‘the dissemination of electoral matter on radio or television by the holder of a licence under the *Broadcasting Services Act 1992* (Cth) that is subject to a condition relating to election advertisements’. If none of those exemptions apply, the reader turns to section 294 other than subsections 294(1)(a),(b),(e),(f),(g),(h),(i), and (j).

Subsections 294(1)(c),(d), and (k) are therefore the only remaining relevant exemptions from section 292 for the purpose of determining electoral expenditure under s 198. As explained earlier, the definition of section 4 is so broad that it includes materials produced by the Directorates, including their annual reports. Here, those materials are excluded from establishing the scope of electoral expenditure: reports under the *Annual Reports (Government Agencies) Act 2004* (s 294(c)) and publications of ‘government agencies’ provided that they include the name of the agency, and the City of Canberra Arms, and any of the phrases ‘Australian Capital Territory’, ‘Australian Capital Territory Legislative Assembly’ (which is surely a subset of documents that include the phrase ‘Australian Capital Territory’), ‘ACT Legislative Assembly’, ‘Australian Capital Territory Government’ (again, a subset of the first group of documents), or ‘ACT Government’ (s 294(d)(i)-(iii)). Subsection 294(1)(k) are items prescribed by regulation, requiring the reader to ‘check the regs’ to establish the scope of electoral expenditure under the Act. Framed differently: if a Directorate publishes a discussion paper and forgets to include the City of Canberra Arms, it has spent money producing electoral matter under s 198 (the Directorate would then rely on yet another carve-out elsewhere in the Act to avoid getting entangled in the Act).

This is impossibly turgid and unnecessarily complex. Categories here contain distinctions without difference, and most are only included because section 4 is so extraordinarily broad in scope. If section 4 were more precise, most of this would be far easier to streamline. It should be obvious that a Directorate’s annual report is not within the scope of the Act, and yet now a provision is required specifically to exclude it from the definition of electoral expenditure.

This process is required to establish what is and what is not ‘electoral expenditure’: electoral expenditure is expenditure on something that contains matter of the kind described by section 4 (unless an exemption applies to the material). This process is complex enough on its own (I think this is about four pages worth of analysis so far, and that was by mercifully truncating a discussion of what counts as ‘administrative expenditure’ under paragraph (d) of the definition of electoral expenditure and by avoiding the regulations entirely), but it is *only the first step* in establishing if a person is a ‘third-party campaigner’. How are ordinary members of the public supposed to navigate this?

Under section 198, a third party campaigner is anybody (unless they are exempt) who spends more than \$1,000 on electoral expenditure ‘in the disclosure period’.

The disclosure period is in section 201 and, for nearly everybody, means from 31 days since the last election until 30 days following the next election. Third-party campaigners are never not in a disclosure period.

There are two kinds of exemption from the definition of a third-party campaigner. The first is for those where there are other rules governing expenditure: 'a party, MLA, associated entity, candidate, prospective candidate, party grouping, non-party candidate grouping or non-party prospective candidate grouping' (paragraph (b)(i) of the definition). The second is for those where there should not be rules governing expenditure: 'a broadcaster; a publisher of a news publication [...]; an Australian government body; the Legislative Assembly' (paragraph (b)(ii)-(v) of the definition). Framed differently: you are a third party campaigner unless you are a different kind of partisan actor, or if you are in a carve-out for broadcasters, publishers of news publications, an Australian government body, or the Legislative Assembly.

There is no general carve-out for non-partisan entities such as church groups, community legal centres, NGOs, other civil society groups, or universities.

For the purposes of the carve-out, a definition of 'Australian government bodies' is also provided in section 198, but it is unnecessarily complex and appears to have drafting errors. The definition provided is

- (a) a government agency; or
- (b) a Commonwealth, State or local government (*another Australian government*); or
- (c) an authority of another Australian government; or
- (d) a corporation in which another Australian government has a controlling interest.

For the definition of 'a government agency', the reader is directed to the Dictionary in the Act. The Dictionary unhelpfully says a government agency is 'the public service, a public sector body, or a territory instrumentality'. The most likely reading of this—given that this is the statutory definition of 'Australian government bodies'—is that this is the public service, a public sector body, or a territory instrumentality of an Australian jurisdiction; but this is not strictly accurate as these terms are all given Territory-specific meanings under the *Legislation Act 2001*. That is, even though this provision was very clearly supposed to be about Australian government bodies, the reader has to wind their way around the Act and somehow know that there are other applicable definitions in the *Legislation Act 2001* in order to work out that this carve-out is far narrower than would be reasonably intended.

The Australian National University is a creature of Commonwealth statute (the *Australian National University Act 1991*) and is, according to the *Public Governance, Performance and Accountability Act 2013* (Cth), a Commonwealth body corporate. We also publish several news publications, such as *New Mandala*, *Advance*, *Margin*, and *ScienceWise*. Despite all of this, the definition is so complex that the ACT Electoral Commission still thought that the ANU was a third-party campaigner.

So unless one of these exemptions apply to the matter produced, broadcast, published, displayed, or distributed and a person spent more than \$1,000 doing so, the person very likely becomes a third-party campaigner under an ordinary reading of the Act.

If a church, school, university, charity, think tank, community legal centre, advocacy group, or similar non-partisan body produces something that meets the very broad definition under section 4, then an ordinary reading of the definition in section 198 makes it is very likely that they will be a third-party campaigner. And this will be regardless of whether they were actually trying to influence the election. A school putting on a production of *The Mikado* (with racist lyrics updated to modern political ones) would probably cost more than \$1,000.

Remember: we are all trying to promote greater engagement in democratic processes and connect with disenfranchised voters. Very complex provisions are a barrier to participation, and you should not require postgraduate law qualifications to work out if you can discuss 'issues before an elector'. The mischief motivating the provisions were third party organisations such as 'election funds', 'political action committees', and 'campaign committees' being used to evade donation laws. We need to make sure that the provisions do not resemble taking a sledgehammer to crack a nut (*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332).

When you read the provisions of the Act that apply to third-party campaigners, do not just think of what was clearly intended to be captured here, but also the wider group entangled in the complexity of the Act. For example, third-party campaigners must disclose gifts of more than \$100. For churches, schools, universities, charities, think tanks, community legal centres, advocacy groups, or similar non-partisan bodies, this now increases administrative burden to ensure compliance.

The fix is simple: amend section 4 of the Act to align with section 4AAA of the Commonwealth Act. Section 4 is the gateway to the complexity; if the gateway were narrower, all these other carve-outs and exemptions would become redundant from the start.

As an added precaution, narrow the definition of 'third-party campaigner' to those actors who seek a partisan outcome. The definition should more clearly match its purpose of preventing people from evading donation and expenditure laws.

Further, the definition of 'electoral expenditure' should follow section 287AB of the Commonwealth Act: 'electoral expenditure' means expenditure incurred for the dominant purpose of creating or communicating electoral matter.

Truth in Political Advertising

I have had the benefit of reading the submissions by A/Prof Yee-Fui Ng and the Australia Institute, both supportive of truth in political advertising laws.

Contrary to their views, I strongly argue that section 297A should be repealed. This is because the provision encourages more sophisticated liars rather than truthful candidates. Further, it places the Electoral Commission in an extremely difficult position to resolve complaints rapidly without any serious opportunities for review.

A/Prof Ng's research involves interviewing political actors and developing a qualitative evidence base to support truth in political advertising laws. Her research design is not really designed to demonstrate whether the laws result in more truthful electoral campaigns or even if electorates with truth in political advertising laws feel candidates are more truthful than electorates that lack truth in political advertising laws. To the best of my knowledge, there is no research that shows that truth in political advertising laws improve the public's confidence in the electoral process or improves trust in democratic processes.

The polling data of which I am aware is of the type done by the Australia Institute. Their polls ask questions such as 'Should Australia pass 'truth in political advertising' laws so that it is illegal for political parties and candidates to publish ads that are inaccurate and misleading?' Unsurprisingly, respondents overwhelmingly support laws against things which are inaccurate and misleading. In the Australia Institute's poll, 84% supported the view that there should be laws against things which are inaccurate and misleading, raising the question of why this result wasn't higher.

When the public are asked more specific questions (such as who should be the arbiter of truth), support is significantly more mixed.

The relevant part of section 297A states:

(1) A person commits an offence if—

- (a) the person disseminates, or authorises the dissemination of, an advertisement containing electoral matter; and
- (b) the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Maximum penalty: 50 penalty units.

The conjunction means that if something is accurate but misleading, it is lawful. The result is political advertising that is technically true but presents a misleading picture of the candidate, and those with the resources to produce and vet this kind of messaging are the major parties.

None of the submissions in support of section 297A raised the problematic case law. *Hanna v Sibbons* [2010] SASC 291 involved Mr Hanna, a Member of the South Australian Parliament who became, during the 2010 South Australian election, the target of political advertising that claimed he was 'soft on crime'. Mr Hanna sued, claiming that the advertising misrepresented his position.

The Supreme Court of South Australia was confronted by a problem of characterisation: were the political advertisements statements of fact that would attract the provisions of the *Electoral Act*, or were they statements of opinion that would not attract those provisions. There is no clear bright line, and the process of determining how to characterise the material was done through reference to defamation law. Even though the fact supporting the opinion were described as 'flimsy', the Court ultimately found that the statements were of opinion and not of fact.

Professional political actors are therefore incentivised to avoid suggesting facts when they can rely instead on opinions and predictions of the future (which are unverifiable). ‘Don’t vote for the other party, for they will do something awful’ is not demonstrably false or misleading.

In the 2024 ACT Election, there was one finding by the ACT Electoral Commission that the provision had been breached. It involved one party making claims based on information provided by *Smartvote* from the 2020 ACT Election. Despite working on that project, I could not easily establish precisely what the breach had been. Further, I understand from the Australia Institute’s submission that it was because a word was missing from the advertisement that was in the original statement. The primary issue here is that there were no clear opportunities to have the decision reviewed within the timeframe of the election. The less obvious—and arguably more important—issue is that there would have been no breach had the party merely phrased their claim as a question: ‘Can you trust [the leader of opposing political party] with your right to an abortion?’

Section 297A does not materially improve the electoral process in the ACT and it taxes the already understaffed resources of the Electoral Commission when they are required to perform other tasks. Section 297A should be abolished.

Section 110A

Section 110A effectively requires the Electoral Commission to run a website of electoral advertisements for candidates.

The Act provides the Electoral Commission with very little discretion in the exercise of this function.

Section 110A(6), however, states that if the Electoral Commission is ‘satisfied on reasonable grounds’ that material provided by a candidate for publication ‘includes content that is obscene, defamatory or otherwise unlawful’ then the Commission ‘must not publish that part’ of the material.

In 2020, this had the effect of changing the meaning of one candidate’s statement. Bruce Paine was an independent candidate for Kurrajong who was campaigning on a transparency and accountability platform. His statement to the Electoral Commission appears to have included material that offended section 110A(6), and his statement was edited to the following:

‘I have the skills and experience to stop [REDACTED], including by hugely increasing rates, then wasting money, and being unduly influenced by the construction sector.’

It is unlikely that Mr Paine was campaigning on a platform to increase rates hugely, then waste money and be unduly influenced by the construction sector, but publishing this appears to have been the effect of how the legislation was applied.

The Electoral Commission appears to be in an awkward position with regard to this function, and the position gets more awkward as the scope for dissemination of electoral information gets narrower.

They effectively become a primary way for candidates to advertise their election platform, but they are not well-resourced to fulfil the function in a meaningful or substantive way. It would be preferable that the Electoral Commission not have the role of publishing partisan content on its website, so it would be preferable to repeal section 110A.

Section 237

Section 237 is the main power for the Electoral Commissioner to investigate compliance with the provisions related to returns under the Act. As this section was used to issue me—a PhD student—with a notice to provide the University’s financial records, there appear to be some defects with the section that should be fixed.

Section 237 is a discretionary power, stating the Electoral Commissioner *may* conduct an investigation. It appears that the Electoral Commissioner might be issuing section 237 notices to everybody who issues a return under the Act. I could not see a rational connection between the purposes of the Act and the Commissioner’s decision to issue me with a notice under this section.

The section introduces yet another term for those who are required to provide a return under the Act: a ‘prescribed person’. The Commissioner is given the power to give an investigation notice ‘in relation to a reporting agent or prescribed person’ to:

- (a) the agent or prescribed person; or
- (b) for the reporting agent of a party—any officer, employee or representative of the party; or
- (c) for a prescribed person that is a corporation—any of its officers or employees; or
- (d) anyone else the commissioner has reasonable grounds for believing can produce a document or anything else, or give evidence, about anyone’s compliance with this part.

This is, necessarily, a broad power and it gives us a great deal of confidence in the integrity of ACT elections. It therefore has some safeguards.

If the Electoral Commissioner is investigating a party, and the investigation notice requires an officer, employee, or representative of the party other than its reporting agent to appear before the Commissioner, then the reporting agent is entitled to attend the investigation or nominate someone else to attend on the reporting agent’s behalf (s 237(6)).

Similar provisions are available to financial controllers of associated entities (s 237(7)) and the reporting agents of MLAs (s 237(8)).

People deemed to be third-party campaigners by the Electoral Commission, on the other hand, have no similar safeguard. If the Electoral Commissioner makes the bizarre decision to consider a university to be a third-party campaigner, then there is nothing stopping the Electoral Commissioner from issuing notices to the

university's janitors, security guards, or PhD students (provided the PhD student was an employee or officer at the time of the notice: I had ceased to be employed under the Smartvote contract by the time the notice was issued to me but I had commenced a sessional teaching contract and, therefore, came within the scope of section 237(3)(c)).

If the definition of 'third-party campaigner' is not going to be fixed, a provision is needed in section 237 to permit the third-party campaigner to substitute somebody more appropriate than the person named in the investigation notice.

Further, the power under subsection 237(4) should be linked more closely to the purpose of the investigation in subsection 237(2). It is quite extraordinary that the Electoral Commissioner can require the recipient of the notice to provide literally anything ('a document, or something else'). As noted earlier, section 237 should be broad; but the power should be constrained to its purpose.

Part 15 of the Act specifies the powers and procedures related to the notification and review of decisions. Under section 247, if the Electoral Commissioner makes an internally reviewable decision, the recipient may apply to the Commission for review of the decision. The Electoral Commission then considers the application under section 249 and, if the recipient is still dissatisfied, they may apply under section 249B to the ACT Civil & Administrative Tribunal for review.

Schedule 5 of the Act lists the internally reviewable decisions. Bafflingly, a decision under section 237A to issue a notice to an associated entity is a reviewable decision but the general power to issue investigation notices under section 237 is not.

This meant that, when the Electoral Commissioner issued me the notice under section 237, I was not able to apply for internal review nor was I on the pathway to review by ACAT. My only options were to convince the Electoral Commissioner to withdraw the notice, or appear to commit an offence and have it sorted out by the Court.

The obvious solutions here are to amend section 237 to provide more appropriate safeguards, and to include section 237 in the list of reviewable decisions in Schedule 5 of the Act.

A previous Committee recommended this, and the Government responded:

If section 237 was to be listed as an internally reviewable decision, it is not clear what decision that has been made should be determined to be internally reviewable, as is the case for the other decisions listed in Schedule 5.

The answer is the decision to issue a notice under subsection (3). This would have immediately ended the absurdity of issuing the notice to a PhD student.

Concluding Remarks

It has been a very long time since there has been a comprehensive review of the *Electoral Act 1992*, and one is very much overdue. Incremental and piecemeal changes to the Act have resulted in an Act that is extremely difficult to read, with

definitions that are convoluted and indecipherable to any who do not have a heavily annotated copy. This is bad for democracy. Electoral legislation should be an expression of the public's will to have well-regulated democratic festivals. Instead, our Act is labyrinthine and presents a significant burden to those who want to participate in democratic life.

The 2024 ACT Election revealed some structural difficulties with our unicameral system of parliament. The combination of Hare-Clarke (which should, in my view, be retained) and unicameralism resulted in a minority government which struggled to populate Cabinet and retain sufficient representation on parliamentary committees.

As a very loose guide, Taagepera's 'cube root law' can be used as a reference to a typical size of a legislature with reference to the electoral population: the number of members of a legislature's lower house is roughly the cube root of the population.

ACT Government numbers suggest that, as at 31 March 2025, the estimated population was 483,767. The cube root of that is about 78.5, somewhat larger than our current 25. The ACT's representation is also relatively low in comparison to other jurisdictions.

There is unlikely to be significant public support for increasing the size of the Assembly. A compromise position might be to convert to a bicameral system with proportional voting that has the entire ACT as a single electorate. By prohibiting upper house members from being members of Cabinet, ACT Parliament would increase its capacity to review Executive action without sacrificing the size of Cabinet.

State/Territory	Population	Cube Root	Current Lower house Size	% of cube root
ACT	483,767	78.5	25	31.8
NSW	8,579,219	204.7	93	45.4
Victoria	7,053,122	191.8	88	45.9
Queensland	5,647,468	178.1	93	52.2
South Australia	1,898,587	123.8	47	38.0
Western Australia	3,030,183	144.7	59	40.8
Tasmania	576,109	83.2	35	42.1
Australia	27,536,874	302.0	150	49.7

Finally, amendments to regulate electoral activity, reduce the influence of money in elections, and limit undue influence in elections have resulted in a narrowing of the democratic space of elections. Even with social media, it is increasingly difficult for political parties to engage electorates on serious issues of politics and policy. Our public spaces are increasingly hostile to community activity—there are no local billboards in shopping centres that advertise local issues, for example. With algorithm-driven social media, it is now easier for the ordinary ACT voter to get information about US politics than about ACT electoral issues.

With democratic backsliding continuing to be an issue around the world—including in former bastions of democratic philosophy—there is a real opportunity for Canberra

to promote itself as a City of Democracy in leading democratic innovations that address serious issues of political participation. This could, for example, include designating a specific portion of the Arts budget towards democratic and political art. It could also involve greater collaboration with Canberra's CALD communities to foster democratic participation in ways that are more meaningful and inclusive. Key to this observation is how to increase participation from typically excluded or disenfranchised groups instead of focusing narrowly on how to exclude particular kinds of influences from the democratic process.