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FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Electoral and Road Safety Legislation Amendment Bill 2023

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Committee Secretary
Standing Committee on Justice and Community Safety
ACT Legislative Assembly

(by e-mail)

Re: Inquiry into Electoral and Road Safety Legislation Amendment Bill

Thank you for the invitation to make a submission to the Inquiry into the Electoral and Road Safety Legislation Amendment Bill 2023.

I am a PhD student at the Australian National University, studying political science and the public understanding of law. My research focus is on complex areas of law, including national security law, defamation law, and electoral law. During the 2020 ACT Election, I worked as a research assistant on the University's *Smartvote Australia* project: a research project in collaboration with the *Canberra Times* to develop a better understanding of electoral behaviour. This submission is in my own capacity as a researcher with an interest in electoral law and not on behalf of the *Smartvote Australia* team (with whom I am not currently employed).

As part of the Inquiry into the 2020 ACT Election and the Electoral Act, I provided a submission outlining several problems with the *Electoral Act 1992* (the Act). Amendments proposed by the Electoral and Road Safety Legislation Amendment Bill 2023 will, in my view, exacerbate existing problems with the Act, particularly as they relate to the extraordinarily wide scope of things captured by the definition of 'electoral matter' in section 4 of the Act. In 2021, the Standing Committee on Justice and Community Safety held its Inquiry into the 2020 ACT Election and the Electoral Act and asked the ACT Electoral Commissioner and the Deputy Electoral Commissioner for their views on amending the definition. Due to the complexity and difficulty of the definition, neither could accurately state the legal definition of 'electoral matter' or apply it in their evidence to the Committee. Indeed, they said things which *should be* true and the definition should be amended to align with their intuitions about how the section operates.

The evidence of the Electoral Commissioner and the Deputy Electoral Commissioner shows what has become a significant problem with the Act: a literal reading of the Act causes ambiguities and absurdities that require significantly advanced statutory interpretation skills to resolve. But this an Act that goes directly to the ability of ordinary people to participate in our democracy; there is no reason why it should not be clearer in its application. Ordinary people should be able to get involved without accidentally tripping over Byzantine accounting provisions. Non-partisan advocacy bodies should not have to hire teams of lawyers just in case the Commission takes an interest in their pamphlets. When the Commission is struggling to apply the Act correctly, there is a serious problem that needs to be fixed.

Part of this submission is informed by my experiences with the ACT Electoral Commission: on 19 March 2021, I received an Investigation Notice from the Electoral Commissioner under section 237 of the Act threatening me with six months jail if I did not produce four years of the Australian National University's financial records. The ACT Electoral Commission had made the unusual (frankly bizarre) decision that the ANU had become a third party campaigner in the 2020 ACT Election. As a mere PhD student, I obviously do not have access to four years of the University's financial records. If I had been any other PhD student, the Commission's misapplication of the Act would have resulted in my incurring significant legal expenses (adding to the absurdity: the notice was issued to me *personally* and not to the University). The Commission also appears to be interpreting some of its discretionary powers (such as the power under section 237) as compulsory powers.

In response to this notice — which was *clearly* legally incorrect — I wrote to the Electoral Commissioner, the Attorney-General, and the Special Minister of State (who has portfolio responsibility for the Act to note the problems with the Act that has resulted in the manifestly absurd outcome.

I was given some assurance by Minister Chris Steel MLA that the problems with the Act would be considered as part of any changes to the Act. This does not appear to have occurred. As a matter of some urgency, there are a number of corrections needed to the Act detailed in this submission.

I do wish to note emphatically and unequivocally that the ACT Electoral Commission is a highly professional and high functioning institution that, very appropriately, enjoys the trust and support of the wider community. It is a very small organisation that is called upon to perform difficult, complex, and large activities. I am firmly of the view that it is under-resourced for the tasks we require it to do.

Nothing I have written in this submission should be interpreted as an unreasonable criticism of the Commission, and 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 was still very proud to speak positively about the ACT Electoral Commission in public fora, and was flattered to see the Deputy Electoral Commissioner in the audience for a presentation of mine on managing electoral fraud.

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.

In this submission, I provide comment on the following:

- Section 4 of the Act
- Third party campaigners
- The exemption for translated materials
- The regulation of foreign gifts.
- The powers of the Electoral Commissioner to issue investigation notices.

I encourage the Committee to consider the following recommendations:

1. Amend Section 4 of the Act to align with section 4AA of the *Commonwealth Electoral Act 1918*.

2. Narrow the definition of 'third-party campaigner' to those actors who seek a partisan outcome.

3. Amend the definition of 'electoral expenditure' to 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. If the definition of 'electoral matter' is not amended, reject the proposed new section 293A as it will capture Territorians who created social media accounts for the dominant purpose of talking about topics of interest (housing policy, cycling around the ACT, legal explainers, &c.).

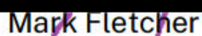
5. Amend the Bill so that the exemption for expenditure on translated materials only applies to electoral materials that have an English equivalent in circulation. A copy of the translated electoral matter and the original electoral matter should be provided to the ACT Electoral Commission in order to attract the exemption and, with caveats, the exemption should be total (instead of only 12.5% of the expenditure cap).

6. Reject the new provisions about foreign donations or amend the proposed offence so that there is a defence related to the dominant purpose of the gift.

7. Amend section 237 to include appropriate safeguards for third-party campaigners similar to subsections 237(6),(7), and (8).

8. Add section 237 to the list of reviewable decisions in Schedule 5.

Warm regards,



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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 section 4 is no longer consistent with the implied freedom of political communication. Section 4 has been 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) causes this definition to be surprisingly broad if read literally, capturing all kinds of activities that have little to do with affecting the outcome of an election.

The evidence of both the ACT Electoral Commissioner and the Deputy Commissioner to the Inquiry into the 2020 ACT Election and the Electoral Act suggests that even they are struggling to understand 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.

Under subsection (2), matter will be deemed to be electoral matter 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.

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.

The submission he mentions here is mine. I wrote:

> 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.

Every reasonable person would consider it extremely unlikely that a school play would affect voting at an election; yet subsection 2 is a *deeming provision*. It states that 'matter *is taken to be* intended or likely to affect voting at an election' if it satisfies certain criteria. Something can be factually unlikely to affect voting at an election and yet the Act still deems it to be likely to affect voting. And so the Deputy Commissioner's correct intuition that it is factually unlikely that the play would affecting voting is immaterial. Merely being about an issue submitted to, or otherwise before, the electors means — under a literal reading of the provision — that it is deemed to be likely to affect voting at an election.

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.

Reports of this Committee would be considered electoral matter if it were not for a specific carve-out in subsection (3): 'However, a publication of the Assembly (including a committee of the Assembly) is not electoral matter.' That should strike every ordinary reader as being particularly odd: why does a publication of an Assembly Committee need a carve-out when it should not be within scope in the first place? The reports of this Committee are not produced for the dominant purpose of influencing the election and, therefore, should not rely upon a bespoke carve-out. Subsection (2) is simply too broad.

The Electoral Commissioner and the Deputy Electoral Commissioner are both very reasonable, sensible people, and *of course* they are not going to start issuing fines to school productions of *The Mikado*, but the public deserves more certainty than this. There is an intuition that seems to be shared by everybody that we know what section 4 is supposed to be covering: materials created for the dominant purpose of influencing the election. The problem is that section 4 does not say this, and so the application of section 4 is being applied according to what the Commission thinks is reasonable, which causes problems at the margins and reduces certainty.

It is a serious problem. The Commissioner noted — absolutely correctly — that '[w]here such statements or electoral matters may not be duly authorised, [they] reach out and engage with the organisations that should have done so and work with them to make sure that they are authorised. It can be a complex task.' But it is not just authorisations at play here. Authorisation is not, as the Deputy Electoral Commissioner said, 'the limit of the requirement'. Instead, it is through this definition in section 4 that the provisions related to electoral expenditure are accessed. This is why greater certainty is needed: if you run a research project during a Commonwealth election with no fuss, you should be permitted to run exactly the same research project during an ACT election without being at risk of six months jail. And if you provide non-partisan information about housing policy during a Commonwealth election, you should be able to do the same during an ACT election without interference from the ACT Electoral Commission. It should not be at the whim of the ACT Electoral Commission.

More importantly, if neither the Electoral Commissioner nor the Deputy Electoral Commissioner can accurately state and apply the definition of electoral matter in section 4 of the Act, the definition is clearly too complex and should be amended.

The definition is also not contingent upon the timing of the election which, combined with the non-specific definition of 'election' in the Dictionary of the Act, creates absurdities in two ways. First, because materials that discuss previous elections are electoral matter (s 4(2)(b)), every research article discussing any past ACT election is strictly electoral material and probably has not been authorised correctly under section 292 of the Act. Articles about the ACT's use of electronic voting, for example, were strictly electoral matter. A Wikipedia article that explains counting single transferable results makes a reference to the ACT and is, strictly, electoral matter (with a caveat about the nexus that I will explain in a moment). It is bizarre.

Second, materials published in the past might be written on topics that will become issues submitted to, or otherwise before, the electors in relation to the election (s 4(2)(e). At the last election, climate change was an issue before the electors. The vast majority of articles published by the Territory's universities on climate change were therefore not section 292 compliant.

The definition is also not contingent upon space. It is my recollection that a former Attorney-General, Mr Bill Stefaniak, had some minor concern that a person standing in Belgium holding up a political sign might fall within this definition. He was strictly incorrect as there needs to be a nexus between the jurisdictional scope of legislation and the person regulated by it. But where he is correct is where online materials produced overseas are downloaded and read in the ACT. In *Dow Jones v Gutnick* (2002) 210 CLR 575, the High Court held that publication for defamatory matter was at the place where it was 'made available in comprehensible form', being the place that it was downloaded. Cases like *Valve v Australian Competition and Consumer Commission* (2017) 258 FCR 190 have extended this principle to other areas of law besides defamation law. It therefore is not a stretch to see the definition of electoral matter extends beyond the ACT's borders where the materials become accessible from the ACT. For example, electoral matter would strictly include Wikipedia pages that explain previous ACT election outcomes, or that explain issues submitted to, or otherwise before, the electors at an ACT election.

Section 4 of the Act should be as narrow as possible in scope to meet its legitimate purpose: preventing the irresponsibility of anonymity that interferes with election outcomes, and regulating the funding and expenditure of partisan campaigns.

The Commonwealth has achieved this by using a 'dominant purpose' test. Here is section 4AA of the *Commonwealth Electoral Act 1918* (the Commonwealth Act):

(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).

Notice that, unlike the ACT definition, there are plenty of opportunities to escape absurdity. In my original submission, 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.

As can be seen from the extraordinary scope of section 4, it is likely that the ACT definition would not satisfy a challenge on the grounds that it breaches the implied freedom of political communication. The *McCloy* test is well-known:

(1) Does the law effectively burden the implied freedom in its terms, operation or effect?

(2) If yes to (1), is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(3) If yes to (2), is the law reasonably appropriate and adapted to advance the legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

By regulating speech during an election, the Act trivially satisfies (1). And the purpose of the law is to regulate the mischief that arises from irresponsible anonymous speech during an election, and to ensure that influence in elections is open and transparent. This trivially satisfies (2). But covering literally every kind of speech act that makes as little as 'implicit reference' to an issue 'submitted to, or otherwise before, the electors in relation to the election' would struggle to satisfy (3). It is not well-adapted narrowly to advance the legitimate object. The Commonwealth definition — with its exemptions for news coverage, academic work, artistic work, and private communications — does and it should be adopted.

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.

Neither the Electoral Commissioner nor the Deputy Electoral Commissioner to the Inquiry into the 2020 ACT Election and the Electoral Act provided any reason to retain the existing definition. The positive comment by the Electoral Commissioner that 'there is a bit of latitude that can be applied' is clearly false (the deeming provision of subsection (2) removes the latitude), and is further evidence that the definition should be amended to include the 'bit of latitude' in the Commonwealth definition.

Finally, section 4 is so broken that amendments proposed in this Bill have unintended negative consequences, as detailed in the rest of this submission.

Third-Party Campaigners

The Bill proposes changes that will affect 'third-party campaigners', but it is important to note that 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. Putting on a production of *The Mikado* 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 Bill 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, it is proposed that third-party campaigners will now need to disclose gifts of more than $100, rather than $1,000. 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.

Exemption for Translated Materials

Section 56 of the Bill proposes a new section 205C to exempt expenditure on translated electoral matter from the expenditure cap. Translated electoral matter is rather confusingly defined as ‘any electoral matter if at least 50% of the matter is broadcast, published, or displayed in a language other than English’, and the exemption applies to expenditure up to a total of not more than 12.5% of the expenditure cap. If the expenditure cap at the next election is $50,000, the exempt expenditure would be a meagre $6,250 (and that’s a big if: in 2023, the expenditure cap was less than this, so the exempt expenditure would be a paltry $5,946).

Normally, we would intuit ‘translated electoral matter’ as being a non-English version of some *existing* electoral matter. A candidate might produce a sign saying ‘Vote for Me’ in English, and then a sign saying ‘Suffragato Mihi’ to attract the vote of any centurions on the ACT electoral roll. The latter sign is a translation of the former sign.

But the proposed definition does not include this idea of ‘the original’ and ‘the translated’. Translated materials under this definition do not need to be a translation of any existing material. The proposed definition instead allows me to publish a leaflet containing the claim that some ACT politician is a clown and then include a copy of the lyrics to Leoncavallo’s *Pagliacci* in order to make this exempt expenditure. At least *Pagliacci* is significantly more text than ‘[Politician] MLA is a clown’. In the example I gave in the previous paragraph, ‘Vote for Me’ is three words long but its translation in Latin is only two. Is this translated electoral matter?

The purpose of the provision is to facilitate greater inclusion of citizens who speak languages other than English at home, and yet some recent political materials were written in languages other than English for the purpose of English-speaking audiences. One anti-racism campaign had the word ‘Welcome’ translated into several different languages incorporated into the image. There is nothing in this provision that prevents a political candidate from cynically using this provision in the same way.

This provision also appears to misunderstand the policy problem. We want to facilitate greater inclusion of our linguistically diverse electorate, but translations are expensive to produce and to police. How do we promote more translated materials in a way that the ACT Electoral Commission can ensure are compliant with the Act (including the provisions of sections 297 and 297A about misleading electoral matter and misleading electoral advertising)?

We also have two different kinds of actor involved in the translation space. We have partisan actors — candidates, parties, third party campaigners, &c., — who want to produce foreign language materials in order to campaign. But we also have non-partisan actors — universities, charities, church groups, &c. — who want to produce material to help citizens participate in democratic processes without attempting to influence the vote. As explained across thirteen pages above, these groups come within in the scope of the Act because of the combination of section 4 and section 198.

Imagine a local CALD religious group hosts an event to help new migrants with basic English proficiency understand the electoral process. They ask all the candidates to provide them with a PDF version of their main campaign document, which they translate in-house, collate, and print. They then hold an event, maybe an afternoon tea, where they get some academics in to explain in English the electoral process. Through thrift, favours, and other cost-cutting, they spend precisely $1,000.

It is extraordinarily difficult to work out how the proposed provisions are supposed to apply. Is the event and the afternoon tea 'relating to' the distribution of the translated electoral matter? There is no clear answer. The academics' explanation of the electoral process will itself be deemed to be electoral matter, but is it more than 50% of the matter broadcast, published, or displayed at the event? It is likely that we should consider them to be separate matters, but then which costs are 'relating to' which electoral matter?

As far as section 198 is concerned, the group is now a third-party campaigner but, for the purposes of the electoral expenditure cap, they might have spent zero dollars.

They will also have tripped into the other provisions for third-party campaigners. For section 224, they will need to provide the electoral commissioner a return stating the details of the expenditure. They must also not borrow the money for the event (s 218A). They will need to consider if section 220 applies to any gifts they have received. This is extremely strange and difficult to navigate for the ordinary reader, all for zero dollars against the expenditure cap.

There are problems down the other end of the spectrum where the costs of translation are significantly higher. Because the ACT Electoral Commission had indicated that they felt the Australian National University might be a third party campaigner in the last election, we abandoned plans to translate some of our materials: the expense would put us significantly outside the expenditure cap. If the proposed provision had been in place, we still would not have been able to provide the service as translation of all the materials would cost significantly more than $6,000.

Again, the problem originates clearly section 4. Any reasonable person would want information about the election disseminated by non-partisan actors to be outside the scope of the expenditure cap. The Commonwealth definition would allow for this. But because section 4 of the ACT Act draws them in, it is now impossible for good Samaritans to make the election more inclusive without bumping into the expenditure cap.

For partisan actors, it is obvious that the exempt expenditure should only apply to electoral materials that have an English equivalent in circulation. This would also have the welcome benefit of preventing parties from applying the exemption to materials in languages other than English that contained electoral matter that was strategically tailored to that community. For parties, a copy of the translated electoral matter and the original electoral matter should be provided to the ACT Electoral Commission in order to attract the exemption and, with caveats, the exemption should be total. 12.5% is manifestly inadequate.

Fundamentally, we want to increase the amount of information that is available to electors in a format that is helpful to them; this provision interferes with that goal.

Regulation of Foreign Gifts

The regulation of political donations is a rapidly expanding area of electoral law. The Act is becoming increasingly complex for candidates outside the major parties to navigate. In some ways, the Bill will make these provisions more complex.

In 2022, the Commonwealth enacted amendments to the Commonwealth Act to ensure, to the extent possible, that only Australians and those with a genuine, legitimate stake in the outcomes of the Australian political process are able to influence those outcomes. There have been concerns that there has been foreign interference with Commonwealth elections and Commonwealth electoral processes. To the very best of my knowledge and as stated in the Explanatory Statement, there has not been serious levels of interference with ACT elections. The Bill is pre-emptive of this problem.

The Commonwealth turned its mind to two different problems. The first was the problem of foreign campaigners. The second was the problem of foreign gifts.

The ACT does not propose to introduce regulations for foreign campaigners. It is, in theory, possible that a third-party campaigner might not be within the ACT. It is not clear to me how that problem would resolve under the Act and the Bill.

For foreign campaigners, section 314AJ of the Commonwealth Act turns its attention to the purpose for which the funding was given: a foreign campaigner contravenes section 314AJ if amounts of electoral expenditure incurred by or with the authority of the foreign campaigner in a financial year total $1,000 or more, or amounts fundraised for the purpose of electoral expenditure being incurred by or with the authority of the foreign campaigner in a financial year total $1,000 or more.

Section 287AB of the Commonwealth Act defines 'electoral expenditure': means expenditure incurred for the dominant purpose of creating or communicating electoral matter. The 'dominant purpose' test narrows the scope of this term, unlike the ACT definition of 'electoral expenditure' in section 198 explained above.

There is nothing similar in the Bill and it is not entirely clear why there is a difference.

The issue of gifts is, due to its ambiguous nature, more difficult to regulate. The Commonwealth regulates foreign gifts through sections 302D and 302E of the Act. In large part, it follows an ordinary intuition about what is to be regulated: a person commits an offence if they receive a gift from a foreign donor. The 'person' subject to the provision covers a range of political actors and, in section 302E, includes third parties.

Under the Commonwealth Act, a gift is:

> any disposition of property made by a person to another person, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include:
>
> (a) a payment under Division 3 (election funding); or
>
> (b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of a political party by a person in respect of the person's membership of the party, branch or division; or
>
> (c) any visit, experience or activity provided for the purposes of a political exchange program.

In the ACT, a gift is defined in section 198AA. It specifies that there are two types of gift:

(a) a disposition of property made by a person to another person without consideration in money or money's worth or with inadequate consideration

(b) the provision of a service (other than volunteer labour) for no consideration or inadequate consideration.

There are carve-outs for:

(a) a disposition of property under a will;

(b) an annual subscription for membership of a party of $250 or less;

(c) if an annual subscription for membership of a party is more than $250 — the first $250 of the subscription;

(d) a gift mentioned in subsection (1) if —

  (i) the gift is given to an individual in a private capacity for the individual's personal use; and

  (ii) the individual does not use the gift solely or substantially for a purpose related to an election;

(e) a payment under division 14.3 (Election funding) or division 14.3A (Administrative expenditure funding).

There are two points to take away from the differences in definition. In the ACT definition, the key provision to watch is paragraph (d) of the carve-outs. For the Commonwealth, gifts given in a private capacity are still gifts. In the ACT, they are not, *provided that* the gift was given for the recipient's personal use *and* the recipient does not use the gift solely or substantially for a purpose related to an election. It is a two-limb test where both elements need to be met in order to exclude it from the definition of a gift. The phrase 'a purpose related to an election' is not defined in the Act.

The second point is the lack of corresponding provision for paragraph (c) of the Commonwealth definition (visits, experiences, or activities provided for the purposes of a political exchange program).

This is where things get strange. In the Commonwealth Act, the gift is regulated if the recipient is a member of the House of Representatives, a Senator, an agent of a political entity (the gift recipient), or a financial controller of a significant third party or an associated entity. In the ACT, gifts to 'political entities' are regulated. If the Bill passes, there will be three definitions of 'political entity' in the Act.

Section 216A will state:

political entity means —

(a) a non-party MLA; or

(b) a party grouping; or

(c) a non-party candidate grouping; or

(d) a non-party prospective candidate grouping; or

(e) an associated entity.

Section 222B will state:

> **political entity** means—
>
> (a) an MLA; or
>
> (b) a party grouping; or
>
> (c) a non-party candidate grouping; or
>
> (ca) a non-party prospective candidate grouping; or
>
> (d) an associated entity.

While section 222M will state:

> **political entity** means—
>
> (a) an MLA; or
>
> (b) a party grouping; or
>
> (c) a non-party candidate grouping; or
>
> (d) a non-party prospective candidate grouping; or
>
> (e) an associated entity.

This is not ideal for readability.

The problem here is 'groupings'. For non-party groupings and non-party candidate groupings, this definition includes 'any other person who has incurred electoral expenditure with the authority of the candidate [or prospective candidate] to support the candidate [or prospective candidate] in contesting the election' (s 198). That is extremely broad and simply cannot be what is intended.

Imagine that Charles Xavier meets the definition of a non-party prospective candidate. He asks his good friend, Erik Lehnsherr, to print some fliers for his campaign. Obviously, Erik has incurred electoral expenditure. The next day is Erik's birthday and his daughter, Wanda Maximoff, who lives in Scotland, has decided to send Erik $250 as a gift.

Depending upon what Erik does with the $250 will determine if Charles, Erik, and Wanda have all now committed offences under the proposed sections 222O and 222Q.

Wanda gave the gift in a personal capacity for Erik's birthday meeting the first limb of paragraph (d) in the definition of a gift, but she has no control over how Erik will use the money. Neither does Charles. But if Erik uses the money—which has become his—for a 'a purpose related to an election', it is no longer exempt from the definition of a gift.

Erik is not required to report moneys spent on 'a purpose related to an election'. He is required to report moneys spent on 'electoral expenditure'. The category of 'purpose related to an election' feels like it is a bigger category than 'electoral expenditure'. Does it include, for example, the things that were excluded from section 292? If he buys a new web camera for the purpose of making very nice legal explainer videos on YouTube, was it electoral expenditure or a purpose related to an election?

The Commonwealth Act resolves this problem by thinking through what each actor is doing and has control over. Subsection 302D(1B) of the Commonwealth Act says that it is not an offence if 'the gift was made in a private capacity to the gift recipient for the gift recipient's personal use'. Wanda, therefore, would not have to rely on Erik's understanding of the Act as she made the gift in a private capacity for Erik's personal use, even if Erik does not indeed use it for his personal use.

Finally, the ACT provision will prevent MLAs and prospective MLAs from enjoying the benefits of candidate training programs that are being funded to improve the quality of democratic participation. Under the Commonwealth Act, gifts do not include 'any visit, experience or activity provided for the purposes of a political exchange program'. There is no similar exemption the ACT. Consider programs like International IDEA's 'Gender Equality and Inclusion in Democracy' initiative which convenes national, regional, and global fora and networks to promote peer-to-peer learning and knowledge sharing on gender equality and inclusion in democracy building. International IDEA is based in Sweden but operates in the Australia-Pacific. If they provide a grant to support female candidates, there is no carve-out in the ACT definition of a gift in the same way that there is a carve-out in the Commonwealth Act.

Given the lack of urgency for these provisions, I would suggest that the Committee recommend the provisions related to foreign gifts be taken out of the Bill. This would provide an opportunity to restructure Part 14 of the Act so that it is clearer and consistent in its definitions. The introduction of Division 14.4A in 2020 to regulate gifts from property developers was done in response to a real problem, but decisions were made at that point about the structure of the provisions that have made it harder to introduce new regulations on gifts. Readers of the Act now need to turn their mind to the identity of the donor in order to find the relevant provisions, instead of working through the parts of the Act that are relevant to them as political actors. That is, a non-party candidate cannot read the Act and easily find all the election funding, expenditure, and financial disclosure rules that apply to them in a logical sequence. They instead have to read other parts, almost at random, to find provisions that might apply.

A new Division 14.4B reduces the readability of an already very complex Act. After all, a new Division 14.4B suggests a future Division 14.4C and so on and so on which focus on the donor not the recipient.

If the decision is made to continue with the regulation of foreign donors, the simplest solution is to amend the definition of 'gift' so that it is more consistent with the Commonwealth definition and to amend the new offence provision so that there is a defence related to the dominant purpose of the gift.

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.

Concluding Remarks

This is a difficult Act to interpret and it is getting more and more difficult with each amendment. The Electoral Commission is a very small organisation and it is called upon to manage this increasing complexity. The fact that it has been so successful is a testament to how efficiently it is run and how well-managed it is.

The Electoral Commissioner and the Deputy Electoral Commissioner have better things to do with their time during an election than to worry about academics running research projects that technically bump into the scope of the Act. Electoral researchers are not trying to campaign for one party to beat another party at an election and, therefore, we should not have had to worry about being within the scope of the Act. Because section 4 is so extremely broken, I had to have fairly regular chats with the Deputy Electoral Commissioner to negotiate the path of least resistance through the Act. We were very happy to put an authorisation on Smartvote even though we should not have been required to. If the project had received Australian Research Council funding, then it would have been very likely that we would spend considerably more than the electoral expenditure cap. This would have been an absurd outcome.

As we have seen at different elections around Australia, Electoral Commissioners have serious things to manage. The Act should make it clearer and easier for the ACT Electoral Commission to do the job that we want it to do.

Throughout my submission, I have referred to the literal meaning of the Act. As a matter of statutory interpretation, many parts of this Act simply cannot mean what it literally says and need to be read down. Case law radically affects how it is to be interpreted and applied. This is why the Electoral Commissioner's decision to issue me with a notice was clearly legally incorrect, but it is an exhausting process of very technical — practically arcane — statutory interpretation to work that out. This is at least manageable for a person doing their PhD in complex areas of law; but this is completely unacceptable for the ordinary person who wants to participate in our vibrant democracy. People deserve clarity. People who are ordinary participants in civil society should not accidentally get entangled in the Act. People should not be 'technically' in breach of the Act; it should be clear that it is only interested in regulating partisan behaviour.

Section 4 is extremely broken.