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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TENTH ASSEMBLY

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY REPORT NO. 19 INQUIRY
INTO ELECTORAL AND ROAD SAFETY LEGISLATION AMENDMENT BILL 2023 –
GOVERNMENT RESPONSE**

**Presented by
Chris Steel MLA
Special Minister of State
October 2023**

Introduction

The Standing Committee on Justice and Community Safety (the Committee) resolved to undertake an inquiry into the Electoral and Road Safety Legislation Amendment Bill (the Bill) on 3 July 2023.

The Bill was introduced into the ACT Legislative Assembly on 29 June 2023 and makes amendments to the *Electoral Act 1992*, the *Public Unleased Land Act 2013* and road transport legislation to deliver on commitments agreed as part of the Parliamentary and Governing Agreement of the 10th Legislative Assembly and to respond to recommendations made by the Committee in its report on the Inquiry into the 2020 ACT Election and Electoral Act.

Submissions closed on 28 July 2023. The Committee received 8 submissions from members of the public, ACT political parties and the ACT Electoral Commission.

The Committee released Report No. 19, *Inquiry into Electoral and Road Safety Legislation Amendment Bill 2023* (the Report) on 24 August 2023. The Report contains 15 recommendations which span across a number of amendments proposed to the Electoral Act and road transport legislation.

The Government Response will discuss the Government's position on each of the Report's recommendations.

ACT Government Response to Recommendations

Recommendation 1

The Committee recommends that the ACT Government amend the Bill to omit reforms to the gifts and donations disclosure scheme, other than those associated with the implementation of 'real time' seven-day reporting, and in particular, to omit the reforms:

- **lowering the threshold amount for disclosure; and**
- **imposing a requirement to report all gifts from an entity after the 12th gift of any amount in a financial year.**

Agreed

The ACT Government acknowledges the Committee's comments that the reduction to a \$100 threshold would likely place an administrative burden on the ACT Electoral Commission and ACT political entities and may not achieve the correct balance in improving transparency of political donations.

The ACT Government also acknowledges the concerns raised by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on the potential limitations this reduction in the threshold may place on the right to freedom of association and the right to take part in public life protected under the *Human Rights Act 2004*. The ACT Government also acknowledges the concerns raised in submissions to the Inquiry that the proposed amendments in the Bill may also impact on the right to privacy as it could require details of party memberships to be published.

The ACT Government agrees with the Committee's recommendation and proposes to move a government amendment to the Bill which introduce real time political donation reporting.

The effect of these government amendments would see the gift disclosure threshold retained at \$1,000 instead of being reduced to \$100. The reforms in the Bill which introduce

a seven-day reporting period will be retained in the Bill. This would mean any gifts from a person would need to be reported within 7 days of reaching \$1,000 in total value. The small donation exemption amendments in the Bill will also be omitted as they are no longer necessary with the threshold amount being retained at \$1,000.

The Bill made consequential amendments to align other thresholds with the new \$100, including disclosure of gifts by non-party candidates (section 217), disclosure of gifts by third-party campaigners (section 220), restriction on acceptance of gifts (section 222) and the threshold amount for annual returns (section 232).

To ensure consistency between all disclosure and reporting thresholds, the proposed government amendments will also omit these reductions to other thresholds, so they are retained at \$1,000 as currently included in the Electoral Act.

Recommendation 2

The Committee recommends that the ACT Government amend the Bill to remove the requirement that gifts to MLAs be reported twice, and instead require that such gifts be reported only in the party's Annual Return.

Noted

The ACT Government notes the recommendation of the Committee to remove the requirement for Members of the Legislative Assembly (MLAs) to report gifts twice as part of an MLA annual return and a party annual return, where the MLA belongs to a registered political party.

The ACT Government acknowledges that small gifts, such as theatre tickets, that an MLA might receive as a local member, may not directly provide their party with a benefit in the same way a direct donation may.

However, the ACT Government notes that party MLA's fall within the definition of 'party grouping' under section 198 of the Electoral Act. As such, gifts received by an MLA are considered gifts that have been received by the party grouping, even if no direct benefit is received. The ACT Government believes full transparency is important for the public interest to be aware of donations that are received by the party grouping, which includes party MLAs.

It is noted that the Committee recommended that gifts received by MLAs should only be disclosed as part of the party's annual return, whereas ACT Labor and the Canberra Liberals recommended these be disclosed only in the MLA's annual return. It is assumed this recommendation should have referred to these gifts only being reported as part of an MLA's annual return, as the Committee's comment adopted the reasoning of ACT Labor and the Canberra Liberals when indicating these should be reported as part of the MLA's annual return.

The ACT Government also notes that this double reporting issue only appears to be in relation to annual returns. MLAs and party's also have obligations to disclose gifts as part of the disclosure requirements which are proposed to be amended to introduce real time political donation reporting.

Irrespective of this, the ACT Government considers that requiring MLAs to only report gifts received as part of either their annual return or the party's annual return could have unintended consequences that could negatively impact on transparency, as it could result in donations of under \$1,000 not being disclosed.

For example, a theatre venue may gift each party MLA a series of theatre tickets over the course of the financial year that totals \$900 in value. Where a party has 10 MLA's, the party grouping will have received gifts from the venue that equates to \$9,000. If this was to only be reported as part of an MLA's annual return, these individual donations to the MLA's would not be reported as part of the gift disclosure scheme for MLAs (as they do not reach the \$1,000 threshold), nor as part of the party's annual return.

The ACT Government does not consider this to be an appropriate outcome and could have negative impacts on the transparency of donations received by MLAs and their political parties. It is in the public interest for the purposes of an election that large donations such as these remain disclosable and in a timely manner as is currently required under the real-time reporting arrangements for gifts of \$1,000 or more.

The ACT Government considers that if MLAs wish to accept gifts of minor value, these should continue to be reported as part of gift disclosures and annual returns.

Recommendation 3

The Committee recommends that the ACT Government amend the Bill to provide for a definition of a foreign donor based on foreign control.

Noted

The ACT Government notes with the Committee's recommendation and does not propose to amend the definition of 'foreign entity' for the purposes of the Bill.

Bans on donations from certain sources risk infringing on the implied freedom of political communication protected under the Australian Constitution. However, similar reforms to ban donations from foreign entities have been introduced in recent years by the Commonwealth, New South Wales, Victoria and Queensland.

No challenge has been brought on the constitutional validity of the reforms in these other jurisdictions as of yet. However, the reforms carry an ongoing risk of being challenged.

To minimise the risks of potential invalidity of these provisions, the definition of foreign entity has been drafted to be similar, but not identical, to the definitions in other jurisdictions. The proposed definition closely resembles the Commonwealth definition of who is considered a foreign entity, particularly for companies and entities, while allowing for a broader cohort of individuals to make donations compared to the Commonwealth laws.

The ACT Government is concerned that any attempt to amend the definition could increase the risk of constitutional invalidity as it may infringe on the right to political communication by broadening the scope of who is considered a foreign entity. If the definition of foreign entity as it applies to individuals is also amended, this also risks potentially being incompatible with the implied right to freedom of political communication, as well as with a number of rights under the *Human Rights Act 2004*.

The ACT Government therefore recommends the definition of foreign entity be retained as it is currently drafted.

Recommendation 4

The Committee recommends that the ACT Government consider further reforms to clarify liability for a failure of a reporting agent to lodge a report, or otherwise omit from the Bill an increase to the permitted number of reporting agents.

Noted

The ACT Government notes the Committee's recommendations and has clarified with the Electoral Commission where liability may rest where a reporting agent breaches their responsibilities under Part 14 of the Electoral Act.

Where two reporting agents are appointed, both reporting agents will be liable for a breach of their obligations under the Electoral Act. It is a matter of investigation and prosecutorial discretion as to whether one or both reporting agents are ultimately fined or prosecuted for an offence under section 236 of the Electoral Act.

The Electoral Commission has investigation powers under section 237 of the Electoral Act to assist in determining which reporting agent may have been responsible for a breach.

It is recommended that parties, MLAs and candidates should establish administrative arrangements where two reporting agents are appointed. This will assist in understanding which reporting agent may be liable in any given situation for a breach.

Recommendation 5

The Committee recommends that the ACT Government comprehensively address the risks associated with online voting systems before proceeding to implement such a system.

Existing Government Policy

The ACT Government notes this is a matter for the ACT Electoral Commission and considers it existing government policy for the Commission.

The ACT Government notes that the Electoral Commissioner is provided with discretionary powers in the Electoral Act to use electronic voting devices for electronic voting at polling places. Electronic ballot papers have been a significant method of voting in ACT elections, with paper ballots still remaining available for use by electors.

The Bill will introduce permanent discretionary powers for the Electoral Commissioner to implement an overseas e-voting system (OSEV).

Section 118B of the Electoral Act requires the Commissioner to take steps to ensure electronic devices and computer programs used in electronic voting (including electronic ballot papers and overseas electronic voting) are kept secure from interference at all times. Section 118B is being amended in the Bill to ensure it applies to the new forms of electronic voting (i.e., overseas e-voting and telephone voting) being introduced in the Bill.

It is implicit within these powers that the Commissioner would only implement these systems when they have been proven to be secure in accordance with the requirement of section 118B of the Electoral Act.

The ACT Government notes the information provided by the Electoral Commission on this recommendation in response to Question on Notice (QON) No. 191¹ from the Inquiry into

¹ Select Committee on Estimates 2023-2024, Answer to Question on Notice No. 191, *Risk assessment on Overseas Internet Voting*, available [here](#).

Appropriation Bill 2023-2024 and Appropriation (Office of the Legislative Assembly) Bill 2023-2024 (Estimates 2023-2024).

The Electoral Commissioner responded to a question by Mr Andrew Braddock MLA when asked whether a risk assessment into overseas internet voting had been conducted and whether any report and/or conclusions of that risk assessment could be provided.

The Electoral Commissioner indicated the Commission has established the Electoral Integrity Advisory Panel (EIAP) to examine the security and integrity of the overseas e-voting system (OSEV) and consists of experts in the field of internet voting and cyber-security. The Commission indicated the EIAP will publicly announce its OSEV deployment decision once it has appropriately considered the EIAP's advice.

Recommendation 6

The Committee recommends that, if an online voting system, is adopted, the ACT Government ensure that overseas electors are able to access telephone voting if the online voting system is suspended.

Noted

The ACT Government notes the Committee's recommendation and understands the desire to ensure overseas electors are not disenfranchised if overseas e-voting is suspended. However, the Government does not recommend overseas voters be eligible for telephone voting.

The ACT's telephone voting system has been specifically designed for use by individuals who are blind or vision impaired and have experience in navigating similar technology.

It is also noted the Bill provides for the resumption of overseas e-voting where overseas e-voting may have been suspended for any reason. This ensures that the Commissioner has the discretion to resume using overseas e-voting once any issues have been resolved that caused the overseas e-voting system to be suspended. Where the electronic overseas voting system is suspended, overseas voters may be able to utilise postal voting, as an alternative or, where available, voting in person through Australian embassies and high commissions.

The ACT Government notes the Electoral Act also includes a safeguard at section 129(2) which provides that being overseas at the time of an ACT election is a valid reason for failing to vote. Overseas voters would not face a fail to vote penalty where overseas e-voting is suspended and they are unable to cast a vote.

The ACT Government is committed to improving the enfranchisement of all individuals who are eligible to vote in an ACT election. The government will continue to work with the ACT Electoral Commission on improving enfranchisement for overseas voters.

Recommendation 7

The Committee recommends that the ACT Government amend the Bill to require that an approved electronic voting system have a voter-verifiable paper record, so that an immutable record of the vote can be verified by the voter independently of the software.

Noted

The ACT Government notes this recommendation as a matter for the Electoral Commission.

The ACT Government notes a similar recommendation was made by the Committee in its report on the Inquiry into the 2020 ACT Election and Electoral Act. In response to this Inquiry report, the ACT Government noted this recommendation, indicating it was a matter for the Electoral Commission and that there would be cost and complexity implications associated with the implementation of such a measure.

The Electoral Commission, in its response to the Committee's recommendation on the 2020 ACT Election inquiry opposed this recommendation for several reasons. The Electoral Commission has also provided information on this recommendation as part of an answer to Question on Notice No. 189 from Estimates 2023-2024.²

Recommendation 8

The Committee recommends that the ACT Government supports the ACT Electoral Commission to publish electronic voting system code and documentation by April 2024.

Existing Government Policy

The ACT Government notes the Committee's recommendation is an existing government policy to support the ACT Electoral Commission.

The ACT Government will support the Commission in publishing the relevant code and documentation by ensuring no legislative changes are made to the provisions governing electronic voting within 12 months of an ACT election.

The ACT Government is committed to ensuring the Bill is passed by late October 2023 to provide the Electoral Commission with 12 months implementation time.

The ACT Government also notes the Electoral Commissioner's public commitment to publish the code and documentation as early as possible. An amendment is not considered necessary to the Bill to legislate a timeframe for the Commission to provide the code. This will ensure the Commission has sufficient flexibility to test and assure its processes for electronic voting ahead of the code and documentation being published.

² Select Committee on Estimates 2023-2024, Answer to Question on Notice No. 189, *Detection of errors in electronic ballot system*, available [here](#).

Recommendation 9

The Committee recommends that, in order to ensure that electoral signage reforms are implemented in time for the Voice referendum, the ACT Government amend the Bill to omit the six-month delayed implementation for the provisions concerning electoral signage.

Not Agreed

The intent of the electoral advertising restrictions is to apply for the duration of the campaign period six weeks prior to the day of voting. Effective implementation of the roadside advertising amendments in particular is dependent on a six-month consultation and notification period following passage of the Bill. As the Commonwealth referendum on the Voice to Parliament (the Voice referendum) was held on 14 October 2023, the restrictions cannot be in effect for the Voice referendum.

The successful implementation of the new offences for vehicular advertising for political or commercial purposes is dependent on the six-month education campaign following notification of the new legislation. The Minister must also declare what is considered an advertisement for the purposes of the offences and which places are designated places where the offences apply. These declarations will be made by disallowable instruments and notifiable instruments respectively prior to commencement of the legislation. The targeted consultation period will allow industry and the community to understand how these declarations will apply and ensure they are fit for purpose prior to commencement.

It is essential that a six-month notice period, awareness campaign and targeted consultation accompany new offences which amend ACT road rules. This policy position forms part of the Bill's justification against section 28 of the Human Rights Act 2004 set out in its explanatory statement, particularly to safeguard against limitations on rights in criminal proceedings. An education campaign will ensure drivers are aware of their obligations and can adjust their business or political practices accordingly prior to the new offences taking effect.

Recommendation 10

The Committee recommends that the ACT Government amend the Bill to double fines for the incursion of minor traffic offences while displaying electoral matter or advertising, rather than imposing a fixed-amount increase.

Agreed in principle

The purpose of the increased penalty amount was to reduce driver distraction from roadside advertising. We agree that greater increase is likely to have an increased deterrent effect.

In response to the recommendation the Government will propose amendments to the Bill to apply an infringement notice to new section 213SA, introduced by the Bill, of \$700. This amount is approximately double the typical penalty notice amount for illegal parking and stopping offences.

In light of the infringement being added to s213A, the Government will propose to remove the more minor \$50 infringement increases from the Bill through amendments.

Recommendation 11

The Committee recommends that the ACT Government amend the Bill to include a revised definition of 'electoral matter' in line with the definition of Commonwealth legislation.

Noted

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.

Recommendation 12

The Committee recommends that the ACT Government amend the Bill to include section 237 of the *Electoral Act 1992* in Schedule 5 of the Act as an internally reviewable decision.

Noted

The ACT Government notes the Committee's recommendations but does not consider section 237 is appropriate to be listed as an internally reviewable decision at this time.

Section 237 provides powers to the Commission to undertake compliance in accordance with Part 14 of the Electoral Act which relates to election funding, expenditure and financial disclosure. This provision is intentionally broad to allow the Commission to undertake a manner of compliance activities.

The provisions which are listed in Schedule 5 as being internally reviewable involve specific circumstances where it is clear that there should be an option for internal review, for example, a notice may be given under section 237A for the purposes of determining whether an entity was an associated entity for the purposes of the Electoral Act).

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.

Recommendation 13

The Committee recommends that the ACT Government amend the Bill to ensure that translation services be exempted from the expenditure cap, rather than the production of translated electoral matter.

Agreed

The ACT Government agrees with the Committee's recommendation that the Bill be amended to ensure that translation services be exempted from the expenditure cap, rather than the production of translated electoral matter.

The ACT Government acknowledges that exempting translation services, rather than the production of translated electoral matter, would be a more equitable approach for all parties and would go further to achieving the objective of improving engagement with Canberra's multicultural community.

The ACT Government proposes to move a government amendment to the Bill which would narrow the definition of what is considered translated electoral matter so that it only relates to the translation of materials, rather than their production.

Recommendation 14

The Committee recommends that the ACT Government amend the Bill to define 'political entity' consistently.

Agreed

The ACT Government acknowledges the need for definitions to be consistent in relevant legislation and will propose to move a minor technical amendment to ensure consistency in the definition of 'political entity'.

However, the ACT Government notes that despite this inconsistency in wording, there is no difference in the effect of these definitions as all three capture the exact same political entities in their definitions.

Recommendation 15

The Committee recommends that, after considering and responding to the recommendations in this report, the Assembly pass the Electoral and Road Safety Legislation Amendment Bill 2023.

Noted

The ACT Government welcomes the Committee's recommendation the Bill be passed by the Assembly.

Conclusion

The ACT Government thanks the Committee for its Report on the Bill. The ACT Government recognises the importance of the Bill and ensuring the ACT community have ongoing confidence that the ACT electoral system is transparent, democratic and robust.