

2018

AUSTRALIAN CAPITAL TERRITORY
ELECTORAL COMMISSION

**ACT Electoral Commission Response to the ACT Legislative Assembly Select Committee on
the 2016 ACT Election and Electoral Act Report of November 2017 *Inquiry into the 2016
ACT Election and the Electoral Act.***



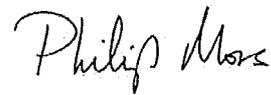
Dawn Casey
Chairperson

25 May 2018



Damian Cantwell AM
Electoral Commissioner

25 May 2018



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Member

25 May 2018

Introduction

This document outlines the response of the ACT Electoral Commission ('the Commission') to the Select Committee ('the Committee') Inquiry Report into the 2016 ACT Election and Electoral Act. The Commission acknowledges and welcomes the extensive engagement by the Committee across the ACT and broader community in this important Inquiry. The Commission fully supports the Inquiry's intent of reviewing, protecting and strengthening our robust democracy.

Key Observations

The Committee made 23 official recommendations which will be addressed in the next section. The Commission notes that the Committee agreed with seven of the ten recommendations in the Commission's *Report on the ACT Legislative Assembly Election 2016*, and disagreed or offered comment on the other three recommendations.

The following recommendations drawn from the Commission's Report were not listed within the official recommendations by the Committee, but were contained within the body of the Inquiry Report. The Commission recommends the Government review the inclusion of these items in its consideration of any amendments to the *Electoral Act 1992*.

- **(Committee agreed)** amending the Electoral Act to require the full given name and surname of a person be shown in an authorisation statement and to require the name of an entity to be shown in an authorisation statement (para 3.12 Inquiry Report);
- **(Committee agreed)** amending the Electoral Act to provide that vote values calculated by multiplying ballot paper totals by fractional transfer values should be rounded down to six decimal places rather than the nearest whole number (para 3.20 Inquiry Report);
- **(Committee agreed)** amending the Electoral Act to change the reference from 'information about a gift made by an individual' to 'information about an amount received from an individual' (para 3.26 Inquiry Report); and
- **(Committee did not agree)** amending the Electoral Act to increase the expenditure cap applied to ungrouped candidates or third party campaigners to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution (paras 3.22 and 3.24 Inquiry Report).

The following Inquiry recommendations are noteworthy for the impact on the Commission or its planning and actions for the 2020 election:

- **Recommendation 21:** the Electoral Act be amended so that an elector may vote at a pre-poll voting centre without the requirement to declare that they are unable to attend a polling place on polling day;
- **Recommendation 8:** political donations from property developers be banned in the ACT;

- **Recommendation 4:** the Electoral Act be amended to set the prescribed penalty for failing to vote at one half of a penalty unit, which is defined in the Legislation Act 2001, rounded to the nearest \$5.00; and
- **Recommendation 11:** the ACT Electoral Commission or other appropriate body provide a detailed proposal, including costs of setting up and maintaining a website, mobile app and printed material, with details of candidates at Legislative Assembly Elections, starting with the 2020 ACT election.

Commission Response to Committee Recommendations

Recommendation 1

The Committee recommends, that in addition to the current notification around elections, the ACT Electoral Commission include an optional SMS scheme for electors who did not cast a vote in previous elections, which provides the elector with reminders about voting.

Commission response

Noted for consideration.

The Commission supports the intent of using innovative ways of encouraging voter engagement but has concerns about the practical impact of this proposal. In particular the electoral roll does not contain the mobile phone numbers of all electors, nor is there any assurance of the currency of such numbers where recorded. There may also be a perception that failure to vote can result in a form of official monitoring through providing private mobile numbers. Conversely, declining to opt into a SMS reminder scheme may also be regarded negatively as drawing further adverse attention to the individual who has failed to vote.

Additionally, there is an inference within this recommendation that a significant proportion of those electors who did not vote at the 2016 election did so due to a failure to remember. While this is a scenario relevant to a proportion of potential electors, the statistics indicate that the vast majority of non-voters did so because of other reasons such as, 'overseas temporarily', 'emergency', 'left ACT permanently' and 'illness'. Those voters who failed to vote in 2016 due to a failure to remember are considered unlikely to remember or have the self-driven impetus to voluntarily opt in to a scheme requiring pre-registration of their mobile phone number. It is the view of the Commission that the current community wide information campaign across the ACT, with an improved social media presence, is likely to have a greater impact in promulgating the upcoming election.

Recommendation 2

The Committee recommends that social media profile pages of political parties and candidates are to be authorised. However, the Committee also recommends that individual posts, including images, need not be authorised.

Commission response

Supported.

The Commission notes that Recommendation 2 aligns with the Commission's current administration of the Electoral Act. The Commission undertakes to provide clear guidance material on its website in the lead-up to the 2020 election, and to engage with all parties and candidates to ensure the authorisation requirements and obligations are understood. The Commission remains available to assist the Assembly in relation to any proposal to strengthen the existing legislation around social media authorisation requirements.

Recommendation 3

The Committee recommends that section 198AA of the ACT *Electoral Act 1992* be amended to include fundraising contributions, in relation to a single fundraising event that is \$250 or less be included in the definition of 'gift'.

Commission response

Supported.

The Commission notes that this recommendation will remove a reporting threshold associated with the disclosure of the first \$250 component of any fundraising contribution to a single fundraising event. This will in effect require the total amount of any fundraising contribution to be included in the calculations of gifts received from an individual or entity when determining whether the \$1,000 threshold for disclosure of gifts has been reached. The Commission notes that this is likely to not only increase the transparency of political contributions but is also likely to reduce the administrative confusion and complexity for parties and candidates when overseeing their disclosure obligations. The Commission can also see benefits for the Commission by removing an element of complexity when it comes to educating political participants on their disclosure obligations.

Recommendation 4

The Committee recommends that the ACT *Electoral Act 1992* be amended to set the prescribed penalty for failing to vote at one half of a penalty unit, which is defined in the *Legislation Act 2001*, rounded to the nearest \$5.00.

Commission response

Not supported.

The Commission reiterates its concerns as expressed at Recommendation 10 in its *Report on the ACT Legislative Assembly Election 2016*.

The Commission acknowledges the committee's intent to influence voter behaviour through a higher fine than the current \$20. However the Commission is concerned that increasing

the fine to one half a penalty unit (equivalent to \$75) is likely to have a detrimental and unfair impact on some sections of ACT community. This would see the ACT applying the second highest penalty for not voting in the nation.

The Commission offers that a prescribed penalty of \$35.00, being a quarter of a penalty unit rounded to the nearest \$5.00, might strike an appropriate balance of incentive to vote and punitive response for non-voting. Further, the Commission would strongly support a review into the current failure to vote enforcement provisions, noting the significant effort required of the Commission, the ACT Magistrates' Court and the Director of Public Prosecutions staffs in enforcing failure to vote penalties once the legislated default notice process (s161) has concluded.

Recommendation 5

The Committee recommends that the ACT retain the current minimum voting age of 18.

Commission response

Supported.

Recommendation 6

The Committee recommends a review of current legislation, regulation and practices to recognise the separate and overlapping functions of MLA, member of the Executive, political candidate and private citizen, with a view to improve demarcation and transparency of definitions.

Commission response

Noted.

The Commission is ready to provide advice and assistance to any review of current legislation and practices where appropriate.

Recommendation 7

The Committee recommends a review and update of all rules and regulations for the use of MLA's office, staffing and Communications Allowance to ensure MLAs are able to adequately carry out their functions, including during an election period.

Commission response

Noted.

The Commission is ready to provide advice and assistance to any review of current legislation and practices where appropriate.

Recommendation 8

The Committee recommends that political donations from property developers be banned in the ACT.

Commission response

Not supported.

The Commission acknowledges the intent of banning donations from property developers, and notes the inclusion of this intent in the Parliamentary Agreement. In responding to this recommendation, the Commission wishes to restate four key concerns as expressed in its first submission to the Select Committee:

- the potential for gifts accepted by a party for federal purposes to be fungible to ACT purposes without a clear breach of legislation;
- the likelihood for complex forensic investigations of potential breaches, noting the experience of the NSW Electoral Commission;
- the risk that such a provision may be legally deemed to exceed the High Court's view of what constitutes a proportionate response to justify limiting the freedom of political communication implied by the Commonwealth Constitution; and
- the considerable and ongoing impact on the budget, staffing and office requirements of Elections ACT in execution of the amendment.

The Commission also wishes to restate a suggestion, and offer a new suggestion, to assist in the administration and enforceability of such a provision if the Assembly is to agree to the need to specifically limit the scope of undue influence of property developers in the ACT.

The Assembly may wish to consider the concept of caps as an alternative to a full ban on donations. Such legislation would have the effect of requiring the regulator to only inquire into a gift, or series of gifts, that reach the determined threshold, eliminating the need to review all gifts received. Arguably, it may also be seen to comply with, to a larger degree, the judgement delivered by the High Court in *Unions NSW & Ors v New South Wales* which ruled that some bans within a funding and disclosure scheme may be invalid because they impermissibly burdened the freedom of political communication implied by the Commonwealth Constitution, while also ruling that it is a legitimate aim [of legislation] to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted.

The Commission also offers the suggestion for the establishment of a register of authorised property developers in ACT, perhaps administered by the Environment, Planning and Sustainable Development Directorate. This would ease the initial burden of investigation into any breaches of the amended legislation.

Recommendation 9

The Committee recommends that the ACT maintain its current donation reporting timeframe model, where parties and candidates must disclose all gifts and loans totalling \$1,000 or more, within seven days from 1 July through to polling day in an election year.

Commission response

Supported.

Recommendation 10

The Committee recommends that the Minister for Education and Early Childhood Development, in consultation with the Education Directorate, develop and include civics and citizenship education as part of the ACT year 11 and 12 curriculum.

Commission response

Noted.

The Commission supports the intent of including civics and citizenship education in the Year 11 and 12 curriculum, however offers that the office of the Electoral Commissioner is likely to require additional resources to enable it to meet the needs of ACT schools in addressing the expanded curricula.

Recommendation 11

The Committee recommends that the ACT Electoral Commission or other appropriate body provide a detailed proposal, including costs of setting up and maintaining a website, mobile app and printed material, with details of candidates at Legislative Assembly Elections, starting with the 2020 ACT election.

Commission response

Not supported.

Whilst acknowledging the utility of a central point of access for voters seeking candidate information, the Commission considers that provision of this is not an appropriate role for the Electoral Commission. The risk of unintended or perceived bias in presentation and accuracy of candidate information would seriously undermine and threaten the independence and impartiality of the Commission.

The Commission wishes to restate that it will continue to host a webpage during the election period, providing links to individual candidate and party webpages and social media accounts, as supplied by each entity at the time of nomination.

Recommendation 12

The Committee recommends that the *Public Unleased Land Act 2013* be amended to allow an authorised person to remove a non-compliant electoral advertising sign from public unleased land without providing the seven day direction requesting compliance.

Commission response

Supported, in the interests of more timely removal of non-compliant signage.

Recommendation 13

The Committee recommends that the *ACT Electoral Act 1992* be amended to allow electoral material displayed on private property, inside the defined polling area, to remain throughout the polling period.

Commission response

Not supported.

The Commission is concerned that such an amendment could introduce the potential for interested candidates and parties entering into a commercial arrangement with private property owners facilitating the display of political material within the 100m exclusion zone.

Recommendation 14

The Committee recommends that the ACT Electoral Commission continue to consider a limited electronic voting option for electors who are overseas.

Commission response

Supported.

This recommendation supports a recommendation made by the Commission in its *Report on the ACT Legislative Assembly election 2016*.

Recommendation 15

The Committee recommends, as part of consideration of electronic voting, blind and visually impaired voters be given the opportunity to cast a secret vote.

Commission response

Supported.

The Commission wishes to highlight the great care it takes and will continue to take, to ensure that the secrecy of the votes of blind and vision impaired voters is upheld.

Recommendation 16

The Committee recommends the ACT Electoral Commissioner investigate and report on the possible use of Australian Consular and diplomatic posts overseas, as an alternative voting option for electors who are overseas.

Commission response

Not supported.

Such a provision has regularly been considered by the Commission between elections and has been viewed as both logistically and practically ineffective and inefficient. The time and costs associated with establishing overseas voting facilities across all of the numerous DFAT overseas posts for the limited number of electors in question must be balanced against existing provisions under postal and pre-poll voting.

Recommendation 17

The Committee recommends that the ACT Electoral Commissioner report to the Assembly, by the last sitting day in June 2018, the results of the investigation into the provision of both a limited electronic voting option for electors who are overseas and a similar electronic voting option for blind and visually impaired electors.

Commission response

Supported.

This recommendation supports a recommendation made by the Commission in its *Report on the ACT Legislative Assembly election 2016*.

Recommendation 18

The Committee recommends that a 100 metre canvassing exclusion zone around a polling booth be maintained.

Commission response

Supported.

Recommendation 19

The Committee recommends that the ACT Electoral Commission conduct a survey of the community to determine whether the canvassing exclusion zone be reduced, maintained or increased.

Commission response

Not supported.

The Commission considers that such conducting a survey may not be an appropriate role for the ACT Electoral Commission, and is in conflict with the Commission's support to maintaining the 100 metre canvassing exclusion zone under Recommendation 18 above.

Recommendation 20

The Committee recommends that section 303(2) and 70(b) of the ACT *Electoral Act 1992* be removed to ensure consistency in the measuring of a defined polling area.

Commission response

Noted. The Commission is ready to provide advice and assistance to a review of the relevant legislation and practices.

The Commission notes that a typographical error appears to have been made referencing section 70 (b) of the Electoral Act. It understood that the correct referenced section is s303(7)(b).

Recommendation 21

The Committee Recommends that the Electoral Act 1992 be amended so that an elector may vote at a pre-poll voting centre without the requirement to declare that they are unable to attend a polling place on polling day.

Commission response

Supported.

This recommendation supports a recommendation made by the Commission in its *Report on the ACT Legislative Assembly Election 2016*. The Commission considers this will further encourage participation in the electoral process.

Recommendation 22

The Committee recommends tightening the provisions within the ACT Electoral Act 1992 to mitigate multiple entities being registered for the purposes of circumventing the expenditure cap. This provision should be in place before 1 January 2020.

Commission response

Supported.

The Commission supports any recommendation aimed at tightening provisions within the Electoral Act to prevent circumventing the ACT's financial disclosure and campaign finance scheme.

The Commission notes the linkage between this recommendation and the issue of expenditure caps and in particular, third party campaigner expenditure caps. Accordingly, the Commission wishes to restate a risk highlighted in its *Report on the ACT Legislative Assembly election 2016*, that it may be possible to argue that an expenditure cap limit of \$40,000 might be said to impermissibly burden the freedom of political communication implied by the Commonwealth Constitution.

Recommendation 23

The Committee recommends that the Government engage with the ACT Electoral Commission to determine whether amendment to the ACT Electoral Act 1992 is necessary to allow an increased period of time between the close of nominations and the declaration of nomination to address any potential challenges.

Commission response

Noted.

The Commission is ready to provide advice and assistance to any review of current legislation and practices where appropriate.

