2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

REPORT INTO THE INQUIRY INTO CAMPAIGN FINANCE REFORM

RESPONSE BY THE ACT GOVERNMENT

PRESENTED BY
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Tabled on 21 Feb 2012

Executive Summary

On 3 December 2009, the Chair of the Standing Committee on Justice and Community Safety, Mrs Vicki Dunne MLA, wrote to MLAs inviting submissions to the *Inquiry into Campaign Finance Reform*. The Inquiry was held during 2010.

On 22 September 2011, Mrs Vicki Dunne MLA presented the Standing Committee's report, *A Review of Campaign Financing Laws in the ACT*, to the Assembly.

The Standing Committee report makes 21 recommendations, all of which propose substantial changes to the ACT's electoral campaign funding and disclosure laws. The primary purpose of the recommendations is to cap political donations and political expenditure and to increase the level of public funding provided to parties, MLAs and candidates.

Mr John Hargreaves MLA, Deputy Chair of the Standing Committee, submitted a dissenting comment to the report.

The Government acknowledges its commitment to support reform of reporting and campaign funding for political parties. However, the Government is concerned with a number of the Committee's recommendations, particularly in relation to the proposed caps on political donations and expenditure.

Although supportive of the principles behind a number of the recommendations, the Government has not committed to them if their implementation involves resources which have not been secured. The Government may consider options to implement them in future budget processes in the context of other budget priorities.

This Government response sets out the Government's position on each of the 21 recommendations.

The Government agrees to 6 recommendations, recommendations 2, 5, 8, 9, 10 and 12.

The Government agrees in principle to 4 recommendations, recommendations 1, 6, 20 and 21.

The Government notes 7 recommendations, recommendations 11, 13, 14, 15, 16, 17 and 19.

The Government does not agree to 5 recommendations, recommendations 2, 3, 4, 7 and18.

Introduction and Background

1. The last ACT election was held in 2008. Following this election, ACT Labor and the ACT Greens entered into a Parliamentary Agreement, which included a commitment to reform legislation on the reporting of campaign funding for political parties. The Agreement specified that all political donations were to be disclosed within one month of receipt, and weekly in an election period.

2. As a result of this commitment, on Thursday 19 November 2009, the Assembly resolved, on a motion by the Leader of the Opposition, Mr Zed Seselja MLA, as amended by ACT Greens Parliamentary Convenor, Ms Meredith Hunter MLA:

   "That the Standing Committee on Justice and Community Safety inquire into electoral and political party funding in the ACT, including:

   1. regulation of:
      (a) donation size;
      (b) political party campaign expenditure; and
      (c) third party campaign expenditure;
   2. financial disclosure laws;
   3. direct and indirect public funding of elections;
   4. regulation of:
      (a) donations by private individuals, organisations and other contributors; and corporations, unions,
      (b) personal candidate funding;
   5. enforcement of funding and financial disclosure law;
   6. the relationship between ACT electoral law and Commonwealth electoral law; any Constitutional matters; and any other relevant matter."

<u>ACT Government submission to the Inquiry</u>

3. The Government submission to the Inquiry considered 6 main issues:
   - the terms of reference for the Inquiry, and the relevance of the Commonwealth Government's Electoral Reform Green Paper Donations, Funding and Expenditure (December 2008);
   - relevant issues raised in the ACT Electoral Commission's 2008 Election Report;
   - recent legislative changes;
   - disclosure thresholds;
   - anonymous donations; and
   - human rights and privacy issues.

4. Broadly, the submission concluded that:
   - any reform to the current electoral system must achieve an appropriate balance between the need for transparency in our system and the right of a person to engage in political activity;

- it would not be appropriate to make changes to the system that result in additional public cost unless there is a demonstrated and pressing need; and
- it would be appropriate to await the outcomes of consideration of the recommendations of the Australian Government's Electoral Reform Green Paper before recommending changes to the ACT's electoral system.

5. The submission also stated the Government's belief that the Standing Committee should regard the Commonwealth's green paper as a primary source of information and guidance in relation to this issue, because it captures most of the relevant information and issues, and a significant departure from the Commonwealth approach may have adverse financial implications for the ACT.

6. The submission noted that:
   - many of the enrolment, candidacy and disclosure provisions of the *Electoral Act 1992* are linked to the *Commonwealth Electoral Act 1918*; and
   - most relevant material, including reports and submissions by the ACT Electoral Commission, make substantial reference to the Commonwealth green paper.

ACT Electoral Commission submission to the Inquiry

7. The ACT Electoral Commission's (the Commission) submission canvassed the fact that electoral matters and campaign finance inevitably concern difficult judgements about the balance between transparency, privacy and freedom of speech and association, as well as practical issues in relation to the administration of any laws, intended to ensure the ACT retains a healthy democracy supported by the community.

8. The Inquiry coincided with consideration of funding and disclosure issues at the Commonwealth level, through the Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*, published in December 2008. One aspect of the Commonwealth's electoral reform agenda is to seek "harmonisation" of Commonwealth, State and Territory electoral laws, particularly disclosure laws.

9. The Commission's submission canvassed the rationale for implementing a political funding and disclosure scheme for the ACT Legislative Assembly. It categorised the objectives of a funding and disclosure scheme as facilitating the conduct of free and fair elections and maintaining voters' confidence in our democracy by:
   - enabling parties and candidates to present their policies to the electorate through the provision of public funding;

- preventing corruption and undue influence by reducing parties' reliance on private funding through the provision of public funding;
- preventing corruption and undue influence through disclosure of the sources of private funding; and
- providing transparency in the finances of political participants to inform the electorate of the sources of political funding.

The Standing Committee's report

10. On 22 September 2011, Mrs Vicki Dunne MLA presented the Standing Committee's report, *A Review of Campaign Financing Laws in the ACT* (the Campaign Finance report), to the Legislative Assembly.

11. The Standing Committee report makes 21 recommendations, all of which propose substantial changes to the ACT's funding and disclosure laws. The primary purpose of the recommendations is to cap political donations and political expenditure and to increase the level of public funding provided to parties, MLAs and candidates.

12. The Government recognises the support across the Assembly and in the community for reforms of this nature and the Government intends to work constructively to ensure the scheme is not unduly oppressive or operationally problematic.

The Electoral (Election Finance Reform) Amendment Bill 2011

13. On 16 November 2011, Mrs Vicki Dunne MLA tabled a private Member's bill, the Electoral (Election Finance Reform) Amendment Bill 2011 (the Election Finance Reform Bill), in the Legislative Assembly.

14. The bill proposes substantial changes to the ACT's funding and disclosure laws, and appears to give effect to most of the recommendations made in the Campaign Finance report.

15. The key changes proposed in the Election Finance Reform Bill include:
    - donations by individuals to political parties and their associated entities, MLAs, candidates or third-party campaigners will be limited to $7 000 in a financial year (not indexed);
    - electoral expenditure by political parties, their candidates and their associated entities will be limited to $60,000 (indexed) per nominated candidate within the capped expenditure period, which shall commence on 1 January in an election year and close at the end of polling day (with an upper limit on electoral expenditure by parties of $60 000 times the number of seats in the Assembly);

- electoral expenditure by non-party candidates will be limited to $120 000 (indexed) per candidate within the capped expenditure period
- electoral expenditure in the ACT by third-party campaigners will be capped at $30 000 (indexed) during the capped expenditure period;
- no political party or candidate will be able to receive a total of $25 000 or more (not indexed) in small anonymous gifts that are less than $1 000 in a financial year;
- parties and candidates will be required to report gifts from a single donor where the gifts meet or exceed the $1 000 threshold within 7 days in an election year, and within 30 days at other times (not indexed);
- the Electoral Commission will be required to publish such records of gifts submitted by parties and candidates as soon as possible;
- the level of public funding provided to eligible candidates and parties per eligible vote will be increased; the rate of funding would be pegged to 85% of the rate provided with respect to the per-eligible-vote amount for the Australian Senate;
- administrative funding will be provided to parties in respect to party MLAs and to non-party MLAs, in the order of $20 000 per Member per year (subject to audit and acquittal); and
- the provisions in the Bill are to take effect from 1 January 2012, in preparation for the October 2012 ACT election.

16. The Election Finance Reform Bill contains many clauses that arguably fail to meet their stated objectives.

17. In particular, the Government has received advice from the Solicitor General that the Bill is in direct contravention of section 65 of the *Australian Capital Territory (Self-Government) Act 1988*, which concerns proposals of money votes.

18. The Government has made the decision to draft its own bill. There is strong evidence to suggest that if this Election Finance Reform Bill were to gain the support of the Legislative Assembly, it could be challenged on a number of legal grounds.

19. The Government responses to each of the Standing Committee's recommendations have been framed with the Electoral (Election Finance Reform) Amendment Bill 2011 in mind.

Detailed Government responses to recommendations

RECOMMENDATION 1
The Committee recommends that donations to political parties, candidates or third parties be limited to $7,000 in a reporting year, which shall be the financial year.

Government response: AGREE IN PRINCIPLE

20. The purpose of recommendation 1 needs to be clarified. It is not clear what it is trying to achieve. The Government assumes that the situation the bill is attempting to avoid is where donations lead to undue influence –$7 000 seems low in this context.

21. The Electoral Commissioner has advised that annual party returns from the last 2 years indicate that most donations fall below $10 000, with the majority of these falling below $7 000. A potential problem for parties is that, of those few donations received over $10 000, a significant number of them are from sitting MLAs and Federal parliamentarians. If these payments are deemed to be gifts, they would be capped by the bill.

22. The report does not make it clear how the term "donation" is to be defined. This is further complicated by the fact that the *Electoral Act 1992* does not currently define the term.

23. In its submission to the Inquiry, the Commission noted that one of the difficulties with the current funding and disclosure scheme is that arguably the definition of "gift" in the *Electoral Act 1992* does not cover a range of fund-raising activities currently used by political entities, particularly "meet the minister" style fund-raisers.

24. The failure to address this problem leaves a major loophole in the scheme for capping donations, as all that would be needed to avoid the caps is to structure the payment so that it amounts to a payment for a service rendered. This is the case with dinners with a guest speaker.

25. In particular, it would be clearer if there were guidance on whether the cap on donations should apply to the following types of transactions:

    (a) payments from members of the entity;
    (b) payments from candidates or sitting MLAs;
    (c) payments from affiliated bodies, such as unions;
    (d) payments from owned assets or businesses or dividends on investments;
    (e) payments from commercial transactions, such as rent payments for properties owned by a party;
    (f) payments from transactions where the payer receives a benefit, such

as attendees at functions like "meet the minister" fund-raisers; and

(g) gifts-in-kind, where value is provided in non-monetary form, including where accommodation or professional labour is provided for no cost or below commercial cost.

26. Following on from the Electoral Commissioner's advice, it is suggested that the term "donation" should not include payments made by members of entities, or payments made in relation to assets owned by political entities. This would have significant impact on the existing income streams of all political parties represented in the ACT.

Interaction with the Election Finance Reform Bill

27. The Election Finance Reform Bill relies on the existing *Electoral Act 1992* definition of "gift" in relation to its caps on donations. As a result, the bill has not rectified identified problems with this definition, particularly in relation to coverage of payments to parties for consideration – such as payments to attend functions or to "meet the Minister".

28. The failure to address this problem would appear to leave a major loophole in the scheme for capping donations, as discussed above.

29. Another complication with the Election Finance Reform Bill is the new term "party grouping". This includes a party, an MLA or candidate of the party, and any associated entity of the party and its MLAs and candidates. As the term "associated entity" has been expanded, this will also include any associated or affiliated unions or businesses.

30. The proposed caps on donations and expenditure apply to monies coming into and going out of party groupings. This means that a range of entities joined in an arguably artificial party grouping will be required to meet caps on donations and expenditure that apply to the grouping as a whole. Breaches of the caps could easily be made by parts of the grouping undertaking activity that was not known to other parts of the grouping.

31. The Bill does not clarify whether the cap on donations from individual sources applies to transactions within party groupings. It is arguable that the bill does not cap payments between entities within a party grouping. Therefore, the bill would not prevent gifts being paid by an associated entity to a party of any amount. Given that one of the publicly stated aims of the bill is to limit such donations, this would appear to be a major flaw.

32. For example, if a political party's interest in a body satisfies the definition of a holding company, a subsidiary, or a subsidiary of a holding company under section 199 of the *Electoral Act 1992*, then the political party and the body would be "related bodies corporate" under section 199. Therefore, any

disposition of property between them would not fall within the definition of "gift" in section 198 of the Electoral Act.

33. The other categories of large receipts over $10 000 received by parties are typically payments from the national branch of the party, payments from trade unions, payments from associated entities, income from investments, and gifts-in-kind from the provision of free labour or provision of free rent. The scheme will need to be clear in its definitions as to whether such types of payments fall within the donations cap.

Government proposal

34. The Government bill will propose that a more appropriate cap on donations would be $10 000 and address the concerns identified with the Election Finance Reform Bill.

RECOMMENDATION 2
The Committee recommends that electoral expenditure by political parties, their candidates and their associated entities should be limited to $60,000 per nominated candidate within the capped expenditure period, which shall commence on 1 January in an election year and close at the end of polling day.

Government response: AGREE

35. The Government agrees that a $60,000 electoral expenditure cap is reasonable and appropriate.

36. However, the Government is concerned that the report does not make it clear how "electoral expenditure" is to be defined.

37. The *Electoral Act 1992* has a defined list of items that constitute "electoral expenditure" for the current disclosure scheme. However, this list is limited to a range of campaign items and is only applied to expenditure related to political campaigning in the 36 days leading up to and including polling day.

38. It should be made clear whether the cap on "electoral expenditure" is meant to cover normal operating expenses of political entities.

Interaction with the Election Finance Reform Bill

39. The Bill includes a revised definition of "electoral expenditure" that includes expenditure on any electoral advertisement and anything else that constitutes "electoral matter". This term is defined so broadly that it includes anything intended to or likely to affect voting at an election, including reference to or comment on the performance of the government or an MLA, the performance of a political party, or an issue submitted to or otherwise before electors in relation to the election.

40. As a result, this definition covers anything published about ACT politics in any form, including news media and many publications of ACT government agencies, including virtually everything published by the ACT Electoral Commission. This would clearly be an unworkable outcome.

41. There are difficulties associated with calculating expenditure caps based on the number of candidates nominated by a party, as currently the number of candidates is not known until the fourth week before polling day. This makes it impossible to calculate the expenditure cap from 1 January in an election year.

42. The cap effectively forces parties to run extra candidates in order to increase their expenditure cap, which would detract from an electoral system that strives to maintain transparency and accountability.

Government proposal

43. The Government bill will set a cap of $60,000 for all candidates, both party-affiliated candidates and independent candidates, as this represents a reasonable and appropriate expenditure level.

44. The Government bill will also define "electoral expenditure" so that this term only applies to campaigning activities, ensuring that Electoral Commission, ACT Government agencies and media outlets do not fall within the definition.

45. The definition will ensure that electoral expenditure (as defined more narrowly) is caught as soon as possible in the financial year in which the election occurs.

RECOMMENDATION 3
The Committee recommends that there be an upper limit on electoral expenditure by parties or groups of $60,000 times the number of seats in the Assembly, during the capped expenditure period.

Government response: DISAGREE

46. With the current size of the Assembly, with 17 MLAs, a party nominating 17 candidates would be able to spend up to $1.02 million. If 21 MLAs were to be elected in future, the cap would be $1.26 million.

47. Expenditure based on the number of seats in the Legislative Assembly is arbitrary, particularly as the expenditure cap relates to parties and groups, both of which will almost always include candidates trying to be elected.

48. The Committee report does not deal with expenditure by non-party or non-group candidates, thereby leaving independent candidates in an unequal position. It would seem that the Committee's view, if it addressed its mind to

this issue, was that such a candidate would not have an expenditure cap on the Committee's model.

Interaction with the Election Finance Reform Bill

49. The Election Finance Reform Bill proposes to cap electoral expenditure at $60 000 per candidate per party grouping, which equates to $1.02 million if a party were to nominate a full slate of 17 candidates.

50. As stated above, the Government does not believe that an expenditure cap should be contingent on the number of seats in the Assembly. This is consistent with the Government's response to recommendation 2, which stresses the need to provide a level playing field and to create administrative simplicity.

Government proposal

51. As discussed in analysis above, a cap based on the number of members in the Assembly is arbitrary.

52. The Government proposes an expenditure cap of $60 000 per candidate, up to the number of candidates eligible to stand in each electorate. For example, in a 5 member electorate, if 6 candidates are put forward, expenditure funding will only be received for 5 candidates. Similarly, if only 4 candidates are put forward, funding will only be received for those 4 candidates.

53. This method will ensure that an excess number of candidates are not nominated in an attempt to secure a higher expenditure cap for each electorate. This creates a fair playing field, and mirrors the arrangements in other jurisdictions.

RECOMMENDATION 4

The Committee recommends that an entity with formal connections with a political party, which empower it to contribute to policy development and/or the selection of candidates, should be included under a single applicable expenditure cap along with the political party, its candidates, and associated entities.

Government response: DISAGREE

54. The recommendation does not clearly define the types of entity to which it refers. As discussed under recommendation 2, the definition of "electoral expenditure" would also need to be carefully drafted so as to have the desired effect in relation to these types of entity.

55. If this provision applies, for example, to trade unions, it may be difficult for the entities concerned to administer it. If the Electoral Commission is required to

audit the expenditure of entities such as trade unions, this would add significantly to the costs of auditing.

Interaction with the Election Finance Reform Bill

56. The Election Finance Reform Bill includes a revised definition of "associated entity" which has significantly broadened the meaning of this term to include entities such as trade unions and employer organisations.

57. It is unclear if this term also includes national (and also possibly State) branches of ACT registered political parties, individual members of parties, and businesses owned by or otherwise significantly associated with any candidate.

58. Associated entities are required to disclose details of all income, with no exceptions or thresholds, other than income from the sale of food, drink or gambling, or membership fees of less than $250. The effect of this change is to require entities such as trade unions, national and interstate political parties, individual members of parties, and businesses owned by candidates to disclose all details of their income, with dates and amounts of each transaction, with no threshold amount. This would include trade unions and political parties being required to list all members who pay them membership fees of more than $250 annually.

Government proposal

59. The Government bill will propose that the current definition of "associated entity", which is working effectively and does not have the problems discussed above, is retained.

RECOMMENDATION 5

The Committee recommends that caps on electoral expenditure by parties, candidates and associated entities be indexed.

Government response: AGREE

60. The Government does not oppose the indexation of expenditure if caps are implemented.

61. The current rate of public funding is indexed by CPI in the *Electoral Act 1992*.

Interaction with the Election Finance Reform Bill

62. The Election Finance Reform Bill proposes that expenditure caps be indexed by CPI, as is currently the case under the *Electoral Act 1992*.

Government proposal

63. The Government bill will adopt this recommendation.

RECOMMENDATION 6
The Committee recommends that there be significant penalties for parties and/or candidates exceeding applicable caps on electoral expenditure.

Government response: AGREE IN PRINCIPLE

64. This recommendation proposes significant penalties for exceeding caps on electoral expenditure, but does not give any guidance as to what penalties should be imposed.

65. If caps were to be implemented in the future, the Government would not oppose penalties as a general concept. However, it would have been helpful had the Standing Committee provided details about possible penalties.

66. Given that a failure to observe caps on electoral expenditure could influence election outcomes, what penalties would be appropriate in a situation where a failure to observe the law could arguably have led to a changed election outcome?

67. According to an ABC news online report:

> *Committee chair Liberal MLA Vicki Dunne says the system would be similar to salary caps in football. She says if the cap is breached inadvertently there should be a modest fine. "If there's an accounting error and someone overshoots the salary cap by a small amount, almost inadvertently, in the NRL there's a fine, it's usually not a very big fine," she said. "But if you go out and deliberately attempt to circumvent the cap then you lose the premiership."* [*www.abc.net.au/news/2011-09-22/act-committee-campaign-finance/2911506?section=act*]

68. An issue that may arise is that of determining whether breaches of the provisions are minor and inadvertent or deliberate and more significant. Enforcement options might change where an entity has obtained a significant benefit by deliberately breaching a donation cap or expenditure cap, or by failing to disclose a transaction within the specified timeframe. However, it may be difficult to determine the exact benefit of a breach.

69. Another issue to consider is whether penalties should be tied to the monetary value for a breach. For example, if a party exceeds its expenditure cap, should the penalty be based on the amount by which the cap is exceeded? Further, if a party receives a donation over the relevant threshold, what should happen to the funds received in excess of the threshold? Should they be returned to the donor, or forfeited to the Territory?

Interaction with the Election Finance Reform Bill

70. The bill provides for very significant penalties for breaching the various caps on electoral expenditure and donations – up to 1 000 penalty units, which equate to $110 000 for an individual and $550 000 for a corporation.

71. However, the penalties only apply to specified officers in the various entities, such as the registered officer of a party, an MLA, a candidate, or the financial controller of a third-party campaigner. As a result, the bill could in some cases impose a severe penalty on a person who may have had no personal responsibility for breaching the law. Conversely, the bill could in other cases provide no mechanism for punishing those actually responsible for breaching its provisions.

72. The bill provides an offence with a penalty of 1 000 penalty units for a party grouping receiving more than $7 000 from a single source in a financial year. Given the expansive definition of party grouping, it would appear to be easy for a party grouping to inadvertently breach this offence, which is deemed to be committed by the registered officer, who may have no knowledge of the breach until after the event.

73. The substantial penalty of 1 000 penalty units for breaching the $7 000 donation cap does not depend on the size of the breach. Legislation in Queensland links the size of the penalty to the size of the breach of the cap. This approach if adopted in this bill would address both making the size of the penalty fit the crime, and the issue of what happens to the money received in excess of the cap.

74. The Bill also does not allow parties or others inadvertently breaching the donations cap to have the opportunity of repaying donations to the donor in order to avoid an inadvertent breach. This is a feature of schemes in other jurisdictions.

75. Another significant issue raised by the proposed penalties is that there is no direction about forfeiting monies received in excess of the donation cap. It is not clear whether the party can retain the excess donation even though it has exceeded the cap, or whether the money would be forfeit under another law.

76. It is suggested that if this bill were to proceed, it should provide that any money received over the donation cap, and not returned within a stated period, be payable to the Territory as a debt.

Government proposal

77. The Government bill will address the limitations of the Election Finance Reform Bill and propose that penalties for breaching donation and

expenditure caps be set at a reasonable and proportionate rate, considering penalties in other jurisdictions.

78. The Government will, in preparing the Government bill, consider how most appropriately to attribute responsibility for offences.

79. The Government bill will also include a mechanism for people responsible for inadvertent breaches to be given the opportunity to return funds.

RECOMMENDATION 7
The Committee recommends that that electoral expenditure in the ACT by third parties be capped at $30,000 during the capped expenditure period, and that this figure be indexed.

Government response: **DISAGREE**

80. Given that the proposed expenditure cap under recommendation 2 is $60,000, it is arguable that the much lower cap on third parties would be contrary to the stated aim of the proposed changes of creating a "level playing field".

81. A side effect of this recommendation might be that it would encourage third parties such as single issue lobbyists to set up political parties and run candidates in elections simply to secure a higher spending cap, which would not be a constructive outcome.

Interaction with the Election Finance Reform Bill

82. The proposed caps on electoral expenditure in an election year arguably introduce a significant inequity. A registered political party standing 17 candidates will be able to spend $1 020 000 in an election year, while a "third-party campaigner" will only be able to spend $30 000.

83. A weakness in the cap on electoral expenditure of $30 000 on third-party campaigners is that it can be easily avoided by an entity associating itself with a candidate or a registered party. A lobby group wishing to increase its spending cap need only put forward its own candidate to increase its spending limit to $120 000. If a lobby group wanted to increase its spending limit to $1 020 000, it could move to form its own political party and stand 17 candidates.

Government proposal

84. The Government bill will propose that the expenditure cap be set at $60,000 for third party campaigners, as with all of the other political players, in order to ensure a level playing field.

RECOMMENDATION 8
The Committee recommends that the Electoral Act 1992 be amended to insert the words 'third party' into the current definition in s 220, so that there is a more explicit definition in the Act.

Government response: AGREE

85. The report notes that third parties are registered with the electoral authorities under the New South Wales and Queensland schemes, but does not recommend that third parties be registered for ACT purposes. However, recommendation 1 would place a cap on donations to third parties, and recommendation 7 would place a limit on electoral expenditure by third parties.

86. Given that the cap on donations is being retained, it is necessary that the definition work effectively. Accordingly, the intent of this recommendation is supported. Whether the precise amendment is made depends on the form in which the recommendations about third parties are adopted.

Interaction with the Election Finance Reform Bill

87. The Election Finance Reform Bill gives effect to this recommendation to the extent that, it creates a new entity, described as a "third party campaigner", which is subject to a $30 000 cap on expenditure.

Government proposal

88. The Government bill will propose that a definition of "third party campaigner" be included to address issues identified with the use of this term in the Election Finance Reform Bill.

RECOMMENDATION 9
The Committee recommends that parties and candidates shall be required to record the personal details of each donor, and the amount of the donation, but shall only be required to report donor details and amounts of donations to the Electoral Commission where donations meet or exceed $1000 within a reporting year.

Government response: AGREE

89. This recommendation mirrors the existing requirements under the *Electoral Act 1992*, in section 217 for candidates and section 232 for parties, that all donations of $1 000 or more must be recorded on a party's annual return, along with the donor's details.

90. It is assumed, therefore, that the Standing Committee is not seeking to change the current disclosure threshold. The Government believes that $1 000 is still an appropriate threshold.

Interaction with the Election Finance Reform Bill

91. The Election Finance Reform Bill gives effect to this recommendation.

Government proposal

92. The Government considers that $1 000 remains an appropriate threshold and no change to the existing provisions are required to give effect to the recommendation.

RECOMMENDATION 10
The Committee recommends that parties and candidates be required to report donations from a single donor where multiple donations from the donor, when summed, meet or exceed the threshold for a reporting year.

Government response: AGREE

93. This recommendation mirrors a proposal previously made by the Electoral Commission. The Commission advises that this would close a potential loophole in the *Electoral Act 1992* and would therefore be beneficial.

Interaction with the Election Finance Reform Bill

94. The Election Finance Reform Bill gives effect to this recommendation, but contains a loophole in that it only applies to individual gifts of $1 000 or more. This may be taken advantage of by giving multiple gifts of $999.

Government proposal

95. The Government bill will give effect to this recommendation in a way that will not be susceptible to the loophole in the Election Finance Reform Bill.

RECOMMENDATION 11
The Committee recommends that no political party or candidate be able to receive a total of $25,000 or more in donations that are under the reporting threshold in a financial year.

Government response: NOTED

96. This recommendation does not make clear what should happen to monies received over the limit. Should the funds be returned to the recipient, or should the funds be forfeited to the Territory as a debt?

97. It is presumed under this recommendation that a donation that could not be received or retained because it was less than the reporting threshold and the party had reached the $25 000 limit, could be retained if the donor was to give an additional sum that brought the total amount donated to greater than the $1 000 reporting threshold. This would arguably not be a logical outcome. This proposal could also be taken as effectively forcing donors to give more than the $1 000 threshold in order for their donation to be received.

98. There is also no clarity in the recommendation as to whether the donations discussed are supposed to be "small anonymous gifts", which would be the logical application of this rule.

Interaction with the Election Finance Reform Bill

99. The Bill provides for a new concept of "small anonymous gift" of under $1 000, and only allows a party or a candidate to accept up to $25 000 in small anonymous gifts in a financial year.

100. However, the Bill does not provide for what is to be done with anonymous donations received in excess of $25 000. Unlike the existing Electoral Act prohibition of anonymous donations in excess of $1 000, which must be paid to the Territory as a debt, the Bill is silent on what to do with receipts in excess of $25 000.

Government proposal

101. While Government does not disagree with this recommendation in principle, its implementation is dependent on funding. This will be considered as part of the ordinary budget process.

102. If funding becomes available, the Government agrees that a $25 000 cap on small anonymous gifts is reasonable and proportionate.

103. The Government bill would include a provision requiring parties to forfeit amounts received over the $25 000 cap as a debt due to the Territory.

RECOMMENDATION 12
The Committee recommends that if Recommendations 9-11 of this report are implemented, then donors be no longer obliged to provide returns to the Electoral Commission.

Government response: AGREE

104. As with recommendation 10, this proposal mirrors a suggestion previously made by the Electoral Commission. The Government agrees with the Commission that such an arrangement would place greater importance on

auditing the books of parties and other entities to ensure that full disclosure had been made.

Interaction with the Election Finance Reform Bill

105. The Election Finance Reform Bill omits the sections of the *Electoral Act 1992* which address donor reporting, namely sections 221-221B. The Bill therefore gives effect to recommendation 12, meaning that donors will no longer be obligated to provide returns.

Government proposal

106. The Government bill will propose that section 221-221B be omitted also, as this will remove an administrative burden on donors and the Electoral Commission.

RECOMMENDATION 13
The Committee recommends that the Electoral Commission be empowered and required to establish an online reporting system, for parties and candidates to report donations and donors.

Government response: NOTED

107. The Commissioner has noted that the reporting of donations and donors could be achieved through the implementation of a reporting system.

Interaction with the Election Finance Reform Bill

108. The Bill provides that the Commissioner will be required to publish details of donations of over $1 000 as soon as possible.

Government proposal

109. While Government is not in principle opposed to this amendment, its implementation would be subject to consideration in the ordinary budget cycle, as it has resource implications.
110. Should funding become available, an amendment to the Government bill will address the issue of an online reporting system.

RECOMMENDATION 14
The Committee recommends that parties and candidates be required to report details of donations and donors, where they meet threshold requirements, on the online reporting system within one month of receipt and within one week during the capped expenditure period. Penalties for non-compliance should be created.

Government response: NOTED

111. The Electoral Commissioner has advised that it should be relatively straightforward to develop a simple online reporting system that will facilitate this recommendation.

112. However, compliance with this system may be difficult for parties and candidates to achieve with such short timeframes, particularly in the lead up to an election.

113. In order for the requirement for frequent disclosure to work effectively, there will need to be effective enforcement. If the only way to enforce failure to declare donations on time is through the courts, it can be expected that enforcement will be difficult to achieve, given the low priority likely to be afforded to this type of offence. There may be scope for using a penalty notice system to enforce "minor" breaches such as failure to declare a donation on time, to avoid the need to take such minor matters to court.

Interaction with the Election Finance Reform Bill

114. The Bill provides frequent disclosure of gifts received over $1 000 by parties, MLAs and candidates. For parties and their associated entities, the disclosure period is within 7 days in an election year, and within 30 days otherwise.

115. For candidates, the requirement is to report within 7 days during the relevant disclosure period, which, for candidates contesting consecutive elections, is a 4 year period. However, as a person does not officially become a candidate until nominations close, this provision may be unworkable.

116. Enforcing these deadlines would be difficult without the conduct of regular and frequent audits by the Electoral Commission. However, the Bill as drafted does not seem to make the failure to submit these disclosures an offence. This would appear to make enforcement of these requirements problematic.

117. It is noted that this section only applies to individual gifts of $1 000 or more, but does not appear to cover amounts of less than $1 000 from the same entity that sum to more than $1 000. Therefore, it would appear that this requirement could be avoided by an entity making 7 consecutive payments of $999. This appears to be a significant loophole.

Government proposal

118. While Government agrees in principle with this recommendation, it requires funding for the online reporting system, and cannot be progressed

unless that funding becomes available. Funding will be considered in the ordinary budget process.

119. The Government bill will address the problem indentified in the Election Finance Reform Bill, which applies an onerous reporting time limit of 7 days on candidates for up to 4 years.

120. The Government bill will contain appropriate penalties, which the Election Finance Reform Bill does not.

RECOMMENDATION 15
The Committee recommends that the Electoral Commission be required to publish details of donations to parties and candidates as soon as practicable after they are disclosed to the Commission.

Government response: NOTED

121. Openness and transparency in government is essential for a robust democracy. The Government is committed to this principle, which has been evidenced by the launch of the Government's Open Government website, the premise of which is that government information should be made freely available to everyone.

122. In order to implement this recommendation, it is assumed that disclosure returns as submitted by parties and candidates would be published on the internet without any significant vetting or auditing by the Electoral Commission.

Interaction with the Election Finance Reform Bill

123. The Bill provides that the Commissioner will be required to publish details of donations of over $1,000 as soon as possible.

Government proposal

124. While Government is not in principle opposed to this recommendation, it should be noted that the implementation of the system will need to be considered within the context of budget considerations. Funding for recommendation 13 could be expected to allow this recommendation to be implemented without further specific funding for this recommendation.

125. The Government bill will propose that the Electoral Commission be required to publish details of these donations as soon as practicable, consistently with the recommendation rather than the Election Finance Reform Bill, in order to provide the Commission with a measure of flexibility.

RECOMMENDATION 16
The Committee recommends that the ACT Government increase the financial resources available to the Electoral Commission to allow it to adequately perform the audit and compliance functions defined under the Electoral Act 1992, and in recognition of the increased responsibilities created by the recommendations of this report.

Government response: NOTED

126. Funding for the Electoral Commission will be considered in the budget process along with other priorities. The Commission has advised the Government that the proposed campaign finance reforms will have resource implications. The Commission has identified a number of resourcing requirements that will be needed to implement this recommendation.

Interaction with the Election Finance Reform Bill

127. The Explanatory Statement for the Election Finance Reform Bill states:

> *"Costs of the Bill would be modest: there would for example be some minor expenditure associated with publishing additional information provided by candidates on larger donations, offset by some savings from no longer having to collect (or pursue) returns from donors."*

Government proposal

128. Government will consider funding for the Electoral Commission as part of the ordinary budget process, taking into account other priorities.

RECOMMENDATION 17
The Committee recommends that the level of public funding provided to eligible candidates and parties per eligible vote be increased. The rate of funding should be pegged to the rate provided with respect to the per-eligible-vote amount for the Australian Senate, and should initially be 75% of that amount, increasing to 85% by 2016.

Government response: NOTED

129. The rate per vote under the ACT's Electoral Act was 160.929 cents per vote as at 1 July 2011. The rate for Senate and House of Representatives elections as at 1 July 2011 was 238.880 cents per vote.

130. Linking the ACT public funding rate to the Senate funding rate would place a legislative funding commitment incumbent upon the ACT budget at the risk of changes made by another jurisdiction. It is noted that the Senate funding rate doubled between the 1993 and 1996 elections.

131. It may be desirable to set a new "starting" rate in line with the proposed linked Senate rates, with appropriate CPI index calculations, rather than provide for an automatic link to the Commonwealth rates, whatever they may be from time to time.

Interaction with the Election Finance Reform Bill

132. The Bill increases the ACT's election funding rate and links to 85% of the Senate rate. It is noted that this links an ACT spending obligation to a rate set by another jurisdiction. This rate was doubled in the 1990s and could well be substantially increased again in future.

Government proposal

133. Although Government is not opposed to this recommendation in principle, its implementation is subject to the ordinary budget process.

134. Should funding be approved, the Government Bill will propose that the rate per vote be set at 200 cents, which is just below 85% of the Senate rate. It would be sensible and administratively simple to set the rate at a rounded figure.

135. Funding would need to be obtained to cover the difference between the current 160.929 cents per vote and 200 cents per vote.

136. The Government proposes to index this through CPI, so the amount would increase over time.

RECOMMENDATION 18
The Committee recommends that the ACT Electoral Commission conduct research on options to create Electoral Participation Grants and Party Development Grants.

Government Response: DISAGREE

137. The Commissioner advises that this recommendation would require the engagement of a consultant to undertake the research, at a cost of approximately $50 000. The Commission does not have in-house expertise to undertake this task.

138. Given the political nature of this issue, it is not suitable for the Electoral Commission to research.

Interaction with the Election Finance Reform Bill

139. The Election Finance Reform Bill does not deal with this issue.

Government proposal

140. The Government does not intend to address this issue in its bill.

RECOMMENDATION 19
The Committee recommends that Administrative Funding be provided to Members elected to the Legislative Assembly at a general election, based on the Election Funding, Expenditure and Disclosures Act 1981 (NSW), Part 6A. All Administrative Funding should be subject to acquittal and audit.

Government response: NOTED

141. This recommendation has a projected budgetary impact of $6.8 million, which equates to $80 000 per MLA per year, as set out under the NSW legislation. The possible adoption of this recommendation would need to be considered as part of the ordinary budget cycle.

142. It is noted that this recommendation would lead to significant audit costs, as funding would be subject to acquittal and audit. In order to facilitate this, the relevant legislation should clearly define costs that can be acquitted under this scheme.

143. However, this discussion will focus primarily on the new amount at play, which is a figure of $20 000 per MLA per year, as proposed under the Election Finance Reform Bill.

Interaction with the Election Finance Reform Bill

144. The Election Finance Reform Bill seeks to implement this recommendation by creating a scheme whereby MLAs and their parties are reimbursed for administrative expenses of up to $20 000 per MLA per year.

145. The implementation of this recommendation in a bill by a non-Government Member of the Legislative Assembly is in direct contravention of section 65 of the *Australian Capital Territory (Self-Government) Act 1988*, which concerns proposals of money votes.

146. Section 65 states:

> *(1) An enactment, vote or resolution* (proposal) *for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.*
> *(2) Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.*

147. This provision is a core element of the doctrine of the financial initiative, which is a critical element of the system of responsible government and it is paramount that it be respected and upheld. Section 65 was enacted because it is not appropriate for anyone other than the government of the day to make laws that have the effect of appropriating public money. The proposed division 14.3A of the Bill creates a liability to pay amounts to political parties that would require an appropriation or if given effect would necessarily and directly increase the amount and description of any existing appropriation of money.

148. The Government understands that the payment of administrative amounts was included in the bill to counteract the additional burden of extra reporting and address concerns about restricting the right to free speech.

Government proposal

149. While Government is not opposed to this recommendation in principle, its implementation would be subject to funding in the ordinary budget process.

150. Should funding be approved, the Government bill will propose that parties are given $20 000 per year per MLA, paid quarterly in arrears.

151. The amount of $20 000 is minor in terms of electoral expenditure and it would be relatively simple for MLAs to demonstrate that they have spent that amount during the year. The proposed acquittal scheme would put MLAs and the Electoral Commission to considerable effort for little demonstrable gain.

152. For these reasons the Government's preferred approach is that there would be no requirement to acquit. This will also provide administrative simplicity.

RECOMMENDATION 20
The Committee recommends that an offence be created so that efforts to donate to other individuals or organisations on the understanding that they will donate to political parties and candidates, so as to evade caps on donations to parties or candidates, shall be unlawful.

Government response: AGREE IN PRINCIPLE

153. The Government understands the rationale for imposing an offence of this nature, and is supportive of efforts to prevent avoidance of the law.

Interaction with the Election Finance Reform Bill

154. As discussed above, the Election Finance Reform Bill proposes significant penalties in relation to breaching donation caps. The Government is opposed

to the penalties in the bill and believes that any penalties must be reasonable and proportionate.

Government proposal

155. The Government bill will propose that penalties for breaching donation and expenditure caps be set at a reasonable and proportionate rate.

RECOMMENDATION 21
The Committee recommends that the reforms outlined in this report should be operational for the 2012 ACT election.

Government response: AGREE IN PRINCIPLE

156. Campaign finance reforms should ideally be in place prior to the 2012 election. This will depend on the passage of legislation in 2012. The Government notes the concerns expressed by the Electoral Commissioner about the implementation timeline.

Government proposal

157. The amendments proposed by the Government bill will be operational in 2012.

Conclusion

158. The Government bill will address the limitations of the Committee Report and Election Finance Bill and also ensure that issues of human rights compatibility are dealt with.

159. The Government is committed to working with the Electoral Commission and the Legislative Assembly to ensure robust campaign finance laws for the ACT.