

**ACT Electoral Commission**  
**Report to the ACT Legislative Assembly**

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Proposed changes to the *Electoral Act 1992*:  
Response to the *Voting Matters* report and  
further campaign finance reform issues:  
2014

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Mrs Vicki Dunne MLA  
Speaker  
Legislative Assembly for the ACT  
London Circuit  
CANBERRA ACT 2601

Dear Madam Speaker

This report on proposed changes to the *Electoral Act 1992*, focussing on the *Voting Matters* report and further campaign finance reform issues, is presented to you under section 10A of the *Electoral Act 1992*.

Section 10A(2) of the Electoral Act requires you to present a copy of this report to the Legislative Assembly on the next sitting day after receiving the report.

Section 10A(3) of the Electoral Act requires the responsible Minister to present a written response to this report to the Legislative Assembly within 3 months after the day the report is present to the Legislative Assembly.

Yours sincerely




Roger Beale AO  
Chairperson

19 September 2014



Phillip Green  
Electoral Commissioner

19 September 2014



Dawn Casey  
Member

19 September 2014



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## Introduction

This special report by the ACT Electoral Commission to the ACT Legislative Assembly under section 10A of the *Electoral Act 1992* addresses the following aspects of electoral administration in the ACT:

- The Commission's response to the **Voting Matters** report of the Legislative Assembly Select Committee on Amendments to the *Electoral Act 1992*; and
- Further issues related to the operation of the ACT's campaign finance reforms following major changes to disclosure laws that commenced on 1 July 2012.

Following its consideration of the above matters, this report makes recommendations for changes to the Electoral Act with a view to preparations for and the conduct of the 2016 ACT Legislative Assembly election.

## Recommendations

The Commission has made the following recommendations in this report.

### *Recommendation 1*

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to ungrouped candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

### *Recommendation 2*

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to third-party campaigners to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

### *Recommendation 3*

The Commission **recommends** that the Electoral Act be amended to provide that the gift return for the June quarter in an election year should be due within 7 days of the end of the quarter, rather than 30 days.

### *Recommendation 4*

The Commission **recommends** that, with regard to the quarterly disclosure requirement recommended by the Select Committee (recommendation no 6), the Electoral Act be amended to provide that this requirement should so far as possible replicate the current scheme, which considers all amounts received during a financial year from donors and requires disclosure whenever the \$1000 threshold per donor is reached.

### *Recommendation 5*

The Commission **recommends** that, in order to give effect to the Select Committee's recommendation no 7, the Electoral Act be amended to remove the concept of an ACT election account and instead provide as follows:

- Where one or more gifts are received by a political entity from a single source in a financial year totalling more than \$10,000, the amount above \$10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose (including payment of a loan used to incur ACT election expenditure);
- Where a payment is made to a party by a related political party in a financial year totalling more than \$10,000, the amount above \$10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose (except in relation to payments of public funding, to which the party is entitled, made by electoral authorities to a related political party, which then pays the party);
- Administrative expenditure funding paid to parties and non-party MLAs under the Electoral Act must be deposited in separately identified account and must not ever be used for an ACT, federal, state or local government election purpose; and
- Include a transition provision to ensure funds falling into the above categories, received since 1 July 2012, are deposited in a separately identified account.



### ***Recommendation 6***

The Commission **recommends** that, in order to give effect to the Select Committee's recommendation no 9, the Electoral Act be amended to provide as follows:

- The reference to section 220 in the definition of "disclosure day" in relation to third-party campaigners in section 201(2)(c) of the Electoral Act be removed;
- The definition of third-party campaigner in section 198 of the Electoral Act be amended to replace the reference to "more than \$1,000" with "\$1,000 or more"; and
- The definition of third-party campaigner in section 198 of the Electoral Act be amended to exclude from the definition government agencies from any Australian government.

### ***Recommendation 7***

The Commission **recommends** that clause 7(3)(c) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied with surplus votes (*contemporary candidates*) and a decision is required to identify which tied candidate's surplus is to be next dealt with during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
  - if a single contemporary candidate has more votes than any of the other tied candidates, that candidate's surplus shall be dealt with;
  - if two or more contemporary candidates remain tied, but one or more contemporary candidates has fewer votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or
- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate's surplus shall be dealt with.

### ***Recommendation 8***

The Commission **recommends** that clause 8(2) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied (*contemporary candidates*) with fewer votes than any other candidates and a decision is required to identify which tied candidate is to be next excluded during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
  - if a single contemporary candidate has fewer votes than any of the other tied candidates, that candidate shall be excluded;
  - if two or more contemporary candidates remain tied, but one or more contemporary candidates has more votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or

- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate shall be excluded.

***Recommendation 9***

The Commission **recommends** that the Select Committee's proposal to alter the instructions on the ballot papers (recommendation no 17) not be supported.

***Recommendation 10***

The Commission **recommends** that the Electoral Act be amended to provide that private donors' addresses are to be provided to the Electoral Commissioner in disclosure returns and that those details are available for public inspection at the Commissioner's office if requested.

***Recommendation 11***

The Commission **recommends** that the Electoral Act be amended to make it clear that gifts given to MLAs in their capacity as Ministers should be treated as gifts for the purposes of the campaign finance reform provisions of the Electoral Act.

***Recommendation 12***

Alternatively, if the above recommendation is not accepted, the Commission **recommends** that section 216A of the Electoral Act be amended to make it consistent with the Solicitor-General's interpretation of section 230(5) of the Electoral Act.

***Recommendation 13***

The Commission **recommends** that the Assembly consider whether some categories of gifts in kind, such as free room hire, should be exempt from disclosure under the Electoral Act.

***Recommendation 14***

The Commission **recommends** that the Electoral Act be amended to require the details of disputed debts with a total amount of \$1,000 or more, held by a registered party, MLA or associated entity at 30 June, to be disclosed as a new category in the entity's annual return for the relevant financial year.

***Recommendation 15***

The Commission **recommends** that the current need for associated entities to disclose the details of all persons and organisations making payments to the entity of any value, with some exemptions, be amended to provide that associated entities do not need to disclose the identities of persons or organisations giving the entity less than \$1,000 in a financial year (retaining the exemptions for income related to supply of food, liquor and gambling).

***Recommendation 16***

The Commission **recommends** that the Assembly consider whether a fee for affiliation with a political party should be treated as a subscription for membership to the party (and therefore should be treated as a gift if the amount is greater than \$250). The Commission further **recommends** that, whatever the outcome of that consideration, the Electoral Act be amended to put the matter beyond doubt.

***Recommendation 17***

The Commission **recommends** that the Electoral Act be amended to clarify whether any part of a compulsory levy imposed by a political party on its elected representatives should be considered a gift to the party, or whether the whole of the levy should be exempt from the definition of gift.

***Recommendation 18***

The Commission **recommends** that the *Magistrates Court (Electoral Infringement Notices) Regulation 2012* be amended to provide that the listed infringement penalties be set at 20% of the offence penalty unit set out in the Electoral Act.

***Recommendation 19***

The Commission **recommends** that the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that where an offence continues beyond the date of payment of a notice, a fresh liability will arise even if the notice is paid, unless the relevant disclosure return or a complete return is lodged, as the case may be.

***Recommendation 20***

The Commission **recommends** that the Assembly reconsider the 31 July deadline for submission of annual returns with a view to determining the effectiveness of the current arrangement. In this context, the Commission **recommends** that the Assembly seek the views and experiences of the parliamentary parties and the associated entities with respect to this issue.

## **Voting Matters: The report of the Legislative Assembly Select Committee on Amendments to the *Electoral Act 1992***

On 20 March 2014 the Legislative Assembly established the Select Committee on Amendments to the *Electoral Act 1992*.

The **Terms of Reference** of the Committee were:

That this Assembly:

- (1) notes:
  - (a) the public position of the Labor Government and the Liberal Opposition that the membership of the Legislative Assembly be expanded to 25 members at the 2016 election;
  - (b) certain provisions of the *Electoral Act 1992* will require amendment as a result of this change;
  - (c) the recent High Court decision, *Unions NSW & Ors v NSW*, and that this decision also has implications for the operation of the *Electoral Act 1992*; and
  - (d) the Elections ACT's Report on the ACT Legislative Assembly Election 2012 contains a number of recommendations pertaining to the *Electoral Act 1992*; and
- (2) resolves:
  - (a) that a Select Committee be established to inquire into the above matters and any related issues;
  - (b) that the committee will be comprised of one member of the Government, one member of the Opposition and one member representing the ACT Greens with proposed members to be nominated to the Speaker by 6 pm this sitting day; and
  - (c) the committee report by the last day of June 2014.

The Commission presented a detailed submission to the Committee. The Electoral Commissioner also appeared as a witness before the Committee on 9 May 2014 and provided written responses to questions taken on notice.

The Committee's report, titled **Voting matters**, was published on 30 June 2014 and presented to the Legislative Assembly on 5 August 2014.

The Committee made 18 recommendations in its report. Many of the Committee's recommendations supported recommendations made by the Electoral Commission in its **Report on the ACT Legislative Assembly election 2012**. The Committee also made further recommendations that had not been canvassed with the Commission in the course of the inquiry. This section of this report to the Assembly provides the Commission's responses to the Committee's recommendations.

The Commission's response to the recommendations contained in the report **Voting matters**, Report Number 1 of the ACT Legislative Assembly Select Committee on Amendments to the *Electoral Act 1992* is set out below.

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### Recommendation 1

- 3.31. The Committee recommends that the Government review and report on the appropriate number of representatives in the Legislative Assembly when the ACT population reaches 425,000, and subsequently after every increase in population of 50,000.

Electoral Commission comment: The Commission has no view on this recommendation.

The Commission notes that this is a matter for the Legislative Assembly to consider.

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### Recommendation 2

- 3.49. The Committee recommends that the electoral expenditure cap be calculated on the basis of \$40,000 per candidate to a maximum of five candidates per five member electorate, indexed annually.

Electoral Commission comment: There are some implications of this recommendation that the Assembly may wish to consider.

The Commission notes that this recommendation is aimed at ensuring that the cap applying to parties fielding as many candidates as there are vacancies (proposed to increase to 25 at the 2016 election) remains at around the \$1 million mark (compared to the cap at the 2012 election: \$60,000 per candidate up to 17 candidates per party, totalling \$1.02 million). However, the Commission also notes that one effect of this change would be to reduce the amount an independent candidate can spend from over \$62,530 indexed currently to \$40,000 at the 2016 election.

It could be argued that this amount is so low as to unreasonably disadvantage an independent candidate, as it could prevent such a candidate from effectively campaigning for an election. It may be possible to argue that such a restriction might be said to impermissibly burden the freedom of political communication implied by the Commonwealth Constitution.

One way to address this might be to apply a lower cap to party candidates and a larger cap to ungrouped/independent candidates.

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to ungrouped candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

A further consideration is the expenditure cap applied to third-party campaigners. The Committee stated at 3.50 that "The Committee does not see any compelling reason to change the expenditure cap for third-party campaigners". This amount is currently set at \$62,530 and is indexed annually. It is assumed that the Committee intends the expenditure cap for third-party campaigners to remain at this higher level.

The Commission notes that the expenditure cap for third-party campaigners is currently tied to the expenditure cap for candidates. Consequently, if the Electoral Act is to be amended to lower the expenditure cap for candidates, a further amendment will be required to provide for a separate cap for third-party campaigners set at the current higher level.

Even if the expenditure cap for third-party campaigners remains at the \$62,530 level (indexed), it could be argued that this amount is still so low as to unreasonably disadvantage a third-party campaigner from participating in an election campaign. The Commission notes that two third-party campaigners inadvertently breached the expenditure cap at the 2012 election with a relatively small amount of newspaper advertising. Again, it may be possible to argue that such a restriction might be said to impermissibly burden the freedom of political communication implied by the Commonwealth Constitution.

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to third-party campaigners to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

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### Recommendation 3

4.24. The Committee recommends that s 205I(4) of the Electoral Act be repealed.

Electoral Commission comment: Supported.

The Commission notes that this proposed amendment would address several issues raised by the Commission related to section 205I(4) of the Electoral Act. Importantly, it would address the risk that this provision could be found to be invalid because it impermissibly burdened the freedom of political communication implied by the Commonwealth Constitution. (See the decision of the High Court in *Unions NSW & Ors v New South Wales* [2013] HCA 58 (18 December 2013)).

One effect of this amendment would be to remove the concept of a “federal election account” from the ACT’s campaign finance reform scheme. This would be a significant simplification of the current scheme.

The Commission notes that the Committee did not support any change to the inclusion of associated entities within the definition of “party grouping” in order to address concerns raised with this inclusion in relation to the *Unions NSW* case. The Commission supports the Committee’s decision not to recommend any such changes for the reasons set out in the Commission’s submission to the Committee.

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### Recommendation 4

4.66. The Committee recommends that the prescribed amount payable for each eligible vote (first preference vote) be increased to \$8.00, indexed annually.

Electoral Commission comment: The Commission has no view on this recommendation.

The Commission notes that this is a matter for the Legislative Assembly to consider.

The Commission further notes that, if this amendment is passed by the Legislative Assembly, the Commission would require additional funding of approximately \$1.3 million at the 2016 election to cover the increased amounts payable.

On a related matter, the Commission notes that the Committee did not make any recommendations in relation to the increase in administrative funding that would be payable to registered political parties in relation to sitting MLAs, in the context of the proposed increase in the size of the Assembly to 25 Members. The Commission notes that making no change to the level of the administrative funding paid to parties per MLA would result in the need for additional funding for the Commission to be paid in the order of \$173,000 per financial year following an increase in the size of the Assembly to 25 Members.

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#### Recommendation 5

- 4.67. The Committee recommends that the Assembly debate the merits of the \$10,000 limit on donations from a person (including a natural person, an unincorporated association and a corporation) in a financial year.

Electoral Commission comment: The Commission has no view on this recommendation. The Commission notes that this is a matter for the Legislative Assembly to consider.

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#### Recommendation 6

- 5.12. The Committee recommends that the lodgement of returns of gifts should be by quarterly reporting up to and including the quarter ending 30 June in an election year. From then until election day, returns of gifts should be required to be lodged within seven days.

Electoral Commission comment: Supported, with the following additional recommendations.

The Committee has recommended that returns for each quarter (other than the period between 1 July and polling day in an election year) should be due within 30 days from the end the quarter. The Commission is satisfied that this would be a simpler system to manage than the current system requiring gifts of \$1000 or more to be notified within 30 days of receipt.

The Commission notes that the requirement to lodge notice of gifts of \$1000 or more received after 1 July in an election year within 7 days is less onerous than the current provision, which requires such disclosure from 1 January in an election year. Nevertheless, the Commission notes that parties may still have difficulty meeting this very strict deadline. The Commission will be working with the political parties to ensure they have processes in place to meet this deadline.

However, the Commission notes that the Committee's recommendation may lead to an anomalous situation in July in an election year. Under the proposal, gifts received from 1 April to 30 June would not be required to be disclosed until 30 July, whereas gifts received on 1 July would be required to be disclosed by 8 July.

To address this apparent anomaly, the Commission **recommends** that the Electoral Act be amended to provide that the gift return for the June quarter in an election year should be due within 7 days of the end of the quarter, rather than 30 days.

With regard to the quarterly disclosure requirement, the Commission **recommends** that the Electoral Act be amended to provide that it should so far as possible replicate the current scheme, which considers all amounts received during a financial year from donors and requires disclosure whenever the \$1000 threshold per donor is reached. Therefore, for example, if a donor was to give \$500 in one quarter in a financial year and then give another \$500 in the next quarter, the recipient should be required to disclose the details of the receipt of amounts totalling the \$1000 threshold per donor in relation to the quarter during which the threshold amount was reached. If this is not done, donors could avoid quarterly disclosure by giving amounts of less than \$1000 in each quarter.

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#### Recommendation 7

- 5.18. The Committee recommends that references to an ACT election account be removed from the Electoral Act and replaced with references to a separately identified account or sub-account from which funds may not be used for an ACT election purpose, or in the case of administrative expenditure funding, for an ACT, federal, state or local government election purpose.

Electoral Commission comment: Supported.

This recommendation supports a recommendation made by the Commission in its submission to the Committee of 5 May 2014. The Commission's recommendation in its submission went into more detail in relation to this issue.

In order to give effect to the Committee's recommendation, the Commission **recommends** that the Electoral Act be amended to remove the concept of an ACT election account and instead provide as follows:

- Where one or more gifts are received by a political entity from a single source in a financial year totalling more than \$10,000, the amount above \$10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose (including payment of a loan used to incur ACT election expenditure);
- Where a payment is made to a party by a related political party in a financial year totalling more than \$10,000, the amount above \$10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose (except in relation to payments of public funding, to which a party is entitled, made by electoral authorities to a related political party, which then pays the party);
- Administrative expenditure funding paid to parties and non-party MLAs under the Electoral Act must be deposited in separately identified account and must not ever be used for an ACT, federal, state or local government election purpose; and
- Include a transition provision to ensure funds falling into the above categories, received since 1 July 2012, are deposited in a separately identified account.



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### Recommendation 8

5.24. The Committee recommends that the definition of 'small anonymous gift' in s 216 and the Dictionary of the Electoral Act be removed and other references to small anonymous gifts in ss 216A, 220 and 222 be changed to 'anonymous gifts', with the result that anonymous gifts of up to \$1,000 each may be received to a total of \$25,000 in a financial year.

Electoral Commission comment: Supported.

This recommendation gives effect to recommendations made by the Commission. It will address a number of anomalies in the current Electoral Act.

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### Recommendation 9

5.28. The Committee recommends that s 201(1)(c) and the definition of third party campaigner in s 198 be amended in line with the ACT Electoral Commission's recommendations 10-12.

Electoral Commission comment: Supported.

The recommendation gives effect to recommendations made by the Commission. It will address a number of anomalies in the current Electoral Act. It appears that the Committee has cited incorrect recommendation numbers in its report (as recommendation 9 refers to third-party campaigners and recommendation 12 does not). The Commission's original recommendations relating to third-party campaigners were:

***Recommendation 9***

The Commission recommends that the reference to section 220 in the definition of "disclosure day" in relation to third-party campaigners in section 201(2)(c) of the Electoral Act be removed.

***Recommendation 10***

The Commission recommends that the definition of third-party campaigner in section 198 of the Electoral Act be amended to replace the reference to "more than \$1,000" with "\$1,000 or more".

***Recommendation 11***

The Commission recommends that the definition of third-party campaigner in section 198 of the Electoral Act be amended to exclude from the definition government agencies from any Australian government.

The Commission **recommends** that, in order to give effect to the Select Committee's recommendation no 9, the Electoral Act be amended as described above.

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### Recommendation 10

5.34. The Committee recommends that if a party, MLA or candidate appoints a reporting agent:

- only one reporting agent is able to be appointed;
- an appointment cancels the appointment of any previous reporting agent; and
- the reporting agent is responsible for all disclosure returns required under the Electoral Act.

Electoral Commission comment: Supported.

This recommendation gives effect to recommendations made by the Commission. It will address a number of anomalies in the current Electoral Act.

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#### Recommendation 11

5.38. The Committee recommends that to avoid doubt, s 215G(1)(b) be amended to refer to 'local government election' rather than 'local election'.

Electoral Commission comment: Supported.

This recommendation gives effect to a recommendation made by the Commission. It will address an anomaly in the current Electoral Act.

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#### Recommendation 12

5.46. The Committee recommends that the Electoral Commission's proposed amendments to clauses 7(3)(c) and 8(2) of Schedule 4 be made so as to maximise fairness in the counting of votes where two or more candidates are tied.

Electoral Commission comment: Supported.

This recommendation gives effect to recommendations made by the Commission. It will address a number of anomalies in the current Electoral Act. The Commission's recommendations in relation to this issue were made in an answer to a question on notice put by the Committee. These recommendations are repeated below.

The Commission **recommends** that clause 7(3)(c) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied with surplus votes (*contemporary candidates*) and a decision is required to identify which tied candidate's surplus is to be next dealt with during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
  - if a single contemporary candidate has more votes than any of the other tied candidates, that candidate's surplus shall be dealt with;
  - if two or more contemporary candidates remain tied, but one or more contemporary candidates has fewer votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or
- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate's surplus shall be dealt with.

The Commission **recommends** that clause 8(2) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied (*contemporary candidates*) with fewer votes than any other candidates and a decision is required to identify which tied candidate is to be next excluded during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
  - if a single contemporary candidate has fewer votes than any of the other tied candidates, that candidate shall be excluded;
  - if two or more contemporary candidates remain tied, but one or more contemporary candidates has more votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or
- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate shall be excluded.

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#### Recommendation 13

- 5.61. The Committee recommends that s 292 be amended to exempt private unpaid commentary on social media from the authorisation requirements and that the Attorney-General consider the legislation and findings of other jurisdictions when re-drafting the provision.

Electoral Commission comment: Supported.

This recommendation gives effect to a recommendation made by the Commission. It will address difficulties in complying with the existing authorisation requirements in the current Electoral Act.

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#### Recommendation 14

- 5.74. The Committee recommends that the penalty for failing to vote by way of default notice issued by the ACT Electoral Commissioner under s 161 be increased to \$40.

Electoral Commission comment: Supported.

This recommendation gives effect to a recommendation made by the Commission. It will help address the issues related to voter turnout raised by the Commission.

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#### Recommendation 15

- 5.75. The Committee recommends that the penalty in s 129 for failing to vote where the matter is determined in court be increased from one half to one penalty unit.

Electoral Commission comment: Supported.

This recommendation gives effect to a recommendation made by the Commission. It will help address the issues related to voter turnout raised by the Commission.

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#### Recommendation 16

- 6.15. The Committee recommends that the limit in s 303 on canvassing around polling places be increased from 100 metres to 250 metres.

Electoral Commission comment: The Commission has no view on this recommendation.

The Commission notes that this is a matter for the Legislative Assembly to consider.

The Electoral Commissioner provided his views to the Committee on a proposal to increase the limit in canvassing to 500 metres in an answer to a question on notice of 19 June 2014. The Commissioner suggested that increasing the canvassing limit to 500 metres would encompass a significant area of the Canberra urban area, and could lead to difficulties in complying with the canvassing ban where the limit extended to shopping centres and main roads. In particular, effectively drawing a 1 kilometre-diameter canvassing exclusion zone around all 80 polling places on polling day would encompass much of the ACT's urban area.

If the Assembly is inclined to consider that the 100 metre ban on canvassing is not sufficient, the Commission accepts that extending the limit to 200 metres or 250 metres would not raise the same difficulties as the proposed extension to 500 metres. Nevertheless, the Commission suggests that the Assembly consider the implications of extending the canvassing limit for political advertising on roads and in shopping centres in the vicinity of polling places before making the proposed change.


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#### Recommendation 17

- 6.33. The Committee recommends that instructions on the ballot paper be amended to read: 'Write numbers from 1 onwards, up to as many numbers as you wish. Use numbers only and use each number only once.'

Electoral Commission comment: Not supported.

The current ballot paper instructions are shown in the following sample ballot paper:

Ballot Paper		Election of 5 Members 2012		Legislative Assembly for the Australian Capital Territory	
					
<b>Electorate of Brindabella</b>					
<b>Number five boxes from 1 to 5 in the order of your choice</b>					
<b>You may then show as many further preferences as you wish by writing numbers from 6 onwards in other boxes</b>					
<b>A CANBERRA LIBERALS</b>  <input type="checkbox"/> Andrew WALL  <input type="checkbox"/> Zed SESELJA  <input type="checkbox"/> Val JEFFERY  <input type="checkbox"/> Nicole LAWDER  <input type="checkbox"/> Brendan SMYTH	<b>B THE ACT GREENS</b>  <input type="checkbox"/> Johnathan DAVIS  <input type="checkbox"/> Ben MURPHY  <input type="checkbox"/> Amanda BRESNAN	<b>C ACT LABOR</b>  <input type="checkbox"/> Joy BURCH  <input type="checkbox"/> Rebecca CODY  <input type="checkbox"/> Karl MAFTOUM  <input type="checkbox"/> Mick GENTLEMAN  <input type="checkbox"/> Mike KINNIBURGH	<b>D BULLET TRAIN FOR CANBERRA</b>  <input type="checkbox"/> Mark ERWOOD  <input type="checkbox"/> Adam HENSCHKE	<b>E AUSTRALIAN MOTORIST PARTY</b>  <input type="checkbox"/> Kieran JONES-ELLIS  <input type="checkbox"/> Burl DOBLE	<b>UNGROUPED</b>  <input type="checkbox"/> Michael LINDFIELD INDEPENDENT  <input type="checkbox"/> Calvin PEARCE INDEPENDENT  <input type="checkbox"/> Mark GIBBONS
<b>Remember, number at least five boxes from 1 to 5 in the order of your choice</b>					
1					1

The Committee indicated that it made this recommendation as it is concerned that the current instructions on the ballot papers may be encouraging voters to only show as many preferences as there are vacancies in an electorate. It appears that the Committee is concerned that the instructions are discouraging voters from showing more than the stated minimum number of preferences.

The Commission is concerned that the recommended alternative words on the ballot papers may inadvertently have the opposite effect of leading large number of voters to show fewer preferences than the number of vacancies. In particular, the Commission is concerned that the words used may lead to the risk that large numbers of voters may show only a single first preference.

The Commission is also concerned that the language used in the proposed ballot paper instructions is complex and potentially confusing. For example, the word "number" or "numbers" is used four times in slightly different ways. Unlike the current instructions, the proposed instructions do not tell voters where to place the numbers (in the boxes). The Commission is concerned that voters with low literacy or with a first language other than English will have great difficulty understanding these instructions.

Further, the proposed words "Use numbers only and use each number only once" would appear to be intended to address a concern that significant numbers of voters are incorrectly failing to use numbers or are mistakenly repeating numbers on their ballot papers. The use of repeated numbers does not render a vote informal but means that it truncates the preferences from the point of the duplication. The surveys of ballot paper marking behaviour conducted by the Commission indicate that relatively small numbers of voters attempting to cast formal votes are failing to mark their ballot papers in these ways. For example, in 2012 only 780 voters who cast formal votes repeated numbers on their ballot papers.

The Commission suggests that this is an issue that can be better addressed by its information/education campaign. In 2012, the Commission implemented posters in every voting compartment to inform electors not to repeat numbers and to use an unbroken sequence of numbers. The Commission is proposing to add to this strategy at the 2016 election by introducing a video to be screened in all polling places, highlighting the ability to number every square on the ballot paper.

It is useful to consider the thinking behind the current ACT ballot paper instructions.

When the ACT adopted Hare-Clark before the 1995 election, the system was modelled on the Tasmanian Hare-Clark system. Tasmania requires voters to record a preference for at least 5 candidates, by numbering boxes 1, 2, 3, 4 and 5 (in a 5 member electorate). A voter who fails to show all 5 preferences, or a voter who repeats or misses out one of these numbers, will have their votes classed as informal.

In the ACT, the Assembly decided to instruct voters to show at least 5 preferences (in a 5 member electorate), but also to allow voters who failed to follow these instructions to still have their votes classed as formal provided they showed at least a single first preference. Section 132 of the Electoral Act provides that each elector shall place consecutive numbers starting at "1" up to the number of candidates to be elected, and may place further consecutive numbers so as to indicate additional preferences. This requirement is reflected in the form of the ballot paper set out in Schedule 1 of the Electoral Act.

The intention in the ACT to provide for ballot paper instructions that instruct voters to cast more preferences than are required to cast a formal ballot is a deliberate strategy designed to ensure the great majority of voters cast a range of preferences. The provision that permits votes to be formal where a single first preference is shown but the instructions have not been followed to the letter (section 180 of the Electoral Act) is intended to be seen as a savings measure (to save ballots from being informal where the voter's intentions are clear), and not as something intended to be communicated to voters in the ballot instructions.

The reason both Tasmania and the ACT instruct voters to show at least as many preferences as there are vacancies in an electorate is the need to ensure that voters show a range of preferences that can be distributed beyond the voter's first choice if that candidate is elected or excluded. This in turn is intended to ensure that election results are proportional to voters' intentions.

If large numbers of voters were to only number a single first preference and no other preferences, there would be a risk that this would lead to unrepresentative outcomes. For example, major party leaders typically receive more than a quota's worth of first preference votes – in some cases more than two quotas. If the ballot paper instructions were changed in such a way as to encourage voters to only show a single first preference, and at a future election a popular candidate receives a large surplus of votes over the quota with most ballot papers showing only a single first preference, the election outcome could fail to reflect the intentions of voters. Such an outcome would be contrary to the intent of the Hare-Clark system.

In order to encourage voters to cast at least as many preferences as there are vacancies in an electorate, the ACT's instructions on the ballot paper highlight the instruction to "Number five boxes from 1 to 5 in the order of your choice" and on the next line "You may then show as many further preferences as you wish by writing numbers from 6 onwards in other boxes". At the bottom of the ballot paper the instructions reinforce the message "Remember, number at least five boxes from 1 to 5 in the order of your choice".

This is a simple message and is intended to be clear and unambiguous.

Ballot paper surveys indicate that these instructions are successful in ensuring that over 98% of voters number at least as many candidates as there are vacancies. Around 69%-75% of voters cast exactly as many preferences as there are vacancies. Around 30% of voters show more preferences than the number of vacancies.

Given the above discussion, the Commission is of the view that there is no compelling reason to alter the current ballot paper instructions. Further, the Commission suggests that the proposed alternative wording could be confusing for electors who have low literacy skills and could lead to the risk that many ballot papers could be marked with fewer preferences than the number of vacancies, leading to unrepresentative outcomes and failing to meet the statutory requirements of the Electoral Act.

Accordingly, the Commission **recommends** that the Committee's proposal to alter the instructions on the ballot papers not be supported.

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#### Recommendation 18

- 6.66. The Committee recommends that s 243A be amended to provide that the ACT Electoral Commissioner should not publish on the internet the full private address details of an individual who has made a donation but that the person's name and suburb, or a post office box if provided, is sufficient.

Electoral Commission comment: Supported with the qualification set out below.

The Commission notes that the Committee qualified this recommendation by stating "The Committee considers that it is important to accountability that donors' addresses are recorded and provided to the Electoral Commissioner and that those details are available for public inspection at the Commissioner's office if requested."

The Commission supports this recommendation on this basis. The Commission considers it to be important for transparency for the addresses of donors to be accessible to researchers at the Commissioner's office. If this is not done, confusion may arise where a person's name and an imprecise address is not sufficient to identify an individual where this may be necessary. For example, it can be envisaged that occasions will arise where a person with the same name as a donor may be erroneously identified as a donor. In such a case, providing for more limited access to address details would serve to demonstrate the correct identity of the donor.

Accordingly, the Commission **recommends** that the Electoral Act be amended to provide that private donors' addresses are to be provided to the Electoral Commissioner in disclosure returns and that those details are available for public inspection at the Commissioner's office if requested.

## **Further recommendations for changes to the campaign finance reform provisions of the Electoral Act**

In its submission to the Select Committee on Amendments to the *Electoral Act 1992*, the Commission made a number of observations and recommendations that were not addressed by the Committee. In its report, the Committee noted that, in the short time available for its inquiry, it did not have time to seek submissions on the further recommendations made by the Commission in its submission to the inquiry.

This section of the current report includes some new matters and those suggestions that were not addressed by the Committee for amendments to the Electoral Act arising from issues that have arisen in relation to campaign finance reform matters since the preparation of the Commission's report on the 2012 election.

### ***Disclosure of gifts received by MLAs in their capacity as members of the Executive***

Consideration of issues arising from the 2013/2014 disclosure period has raised questions around the disclosure of gifts received by MLAs acting in their capacity as members of the Executive. In particular, this issue has arisen in the context of the disclosure of gifts of flight upgrades offered by airlines while MLAs were travelling as Ministers.

The ACT Solicitor-General has advised the Electoral Commissioner that, in those limited circumstances where gifts are received by MLAs who are Ministers acting exclusively in their capacity as members of the Executive, Ministers are not required to disclose such gifts in their annual returns submitted under section 230 of the Electoral Act.

This advice pertains to section 230(5) of the Electoral Act, which provides that the only gifts required to be disclosed by MLAs are gifts received by the MLA in his or her capacity as an MLA. The Solicitor-General has advised that a gift received by an MLA solely in his or her capacity as a Minister does not fall within the meaning of a gift received by an MLA in his or her capacity as an MLA.

In giving effect to section 230 of the Electoral Act, the Electoral Commissioner has to date taken the view that gifts given to MLAs acting in their capacity as Ministers have fallen within the meaning of gifts given to MLAs in their capacity as MLAs.

The Commission is concerned that the Solicitor-General's interpretation of section 230 could lead to circumstances where gifts given to Ministers in their capacity as Ministers are not regulated under the Electoral Act. If that were to occur, this would have significant ramifications for the operation of the disclosure provisions. The Commission notes that the caps on donations and expenditure, and the provisions requiring regular and timely reporting of gifts, are designed to minimise opportunities for corruption and to maximise public exposure of political financial transactions. If gifts given to Ministers are easily excluded from these measures, it is arguable that this significantly weakens the efficacy of the ACT campaign finance regulation scheme.

The Commission also notes that section 216A of the Electoral Act provides that the financial representative of a party grouping (the reporting agent of the party) must submit a return to the Electoral Commissioner in relation to any gift or gifts received by a party grouping totalling \$1000 or more from one person. Such returns need to be provided within 7 days of receipt in a capped expenditure period and within 30 days of receipt in any other case.



A party grouping is defined in section 198 to include a party and an MLA for the party, plus others. The meaning of "gift" as applied in section 216A is defined by section 198AA. This definition excludes from the meaning of "gift" a gift given to an individual in a private capacity for the individual's personal use, where that gift is not used for a purpose related to an election. Importantly, this meaning of "gift" does not limit a gift received by an MLA to only those gifts received by an MLA in his or her capacity as an MLA.

It is the Commission's view that section 216A requires the reporting agent of a party to report all gifts received by an MLA from a single source that total \$1000 or more in a financial year within 30 days of receipt – the only exception to this requirement is where a gift is received in a private capacity. This would appear to require the disclosure of all gifts worth \$1000 or more received by a Minister in his or her capacity as a Minister.

If this is the case, then the Commission suggests that there may be an inconsistency between the application of section 230 and section 216A in relation to gifts received by MLAs solely in their capacity as Ministers.

The Commission considers that it is important for the purpose of minimising the possibility of undue or corrupt influence being exerted that gifts given to MLAs in their capacity as Ministers should be regulated by the Electoral Act. Given the advice provided by the Solicitor-General that indicates that in some limited circumstances, gifts given to MLAs in their capacity as Ministers are not required to be disclosed, the Commission suggests that the Electoral Act be amended to put this beyond doubt.

Accordingly, the Commission **recommends** that the Electoral Act be amended to make it clear that gifts given to MLAs in their capacity as Ministers should be treated as gifts for the purposes of the campaign finance reform provisions of the Electoral Act.

Alternatively, if the above recommendation is not accepted, the Commission **recommends** that section 216A of the Electoral Act be amended to make it consistent with the Solicitor-General's interpretation of section 230(5) of the Electoral Act.

### ***Disclosure of free room hire as gifts in kind***

An issue that has arisen since the introduction of section 216A of the Electoral Act (which provides that a party grouping must submit a return to the Electoral Commissioner in relation to any gift or gifts received by a party grouping totalling \$1000 or more from one person within 7 days of receipt in a capped expenditure period and within 30 days of receipt in any other case) relates to the disclosure of the provision of free room hire to political parties.

The Australian Labor Party (ACT Branch) has disclosed the receipt of a significant quantity of room hire provided to the party as gifts in kind by several ACT clubs and hotels. In 2013/2014, the party disclosed the receipt of free room hire valued at over \$30,000 from 3 different entities. It is understood that this room hire was for the purpose of holding meetings of elements of the party.

The Australian Labor Party has indicated that it has had difficulty in meeting the requirement for disclosure of the provision of free room hire within 30 days of the provision of the hire for its party meetings. This difficulty relates to lack of notice of meetings being given to the reporting agent of the party. After discussion with the party, the Electoral Commissioner has agreed to date the receipt of the free gift from the date of issuing of an invoice for the room hire by the supplying entity, provided that such receipts are provided in a timely manner. The party has agreed that this is a workable solution to the issue of apparent late disclosure of these gifts.

While these issues were being worked through, the Electoral Commissioner decided that it would not be appropriate to issue infringement notices for the apparent failure to submit disclosure returns within 30 days of the provision of these instances of free room hire.

It is also noted that no other parties have disclosed the provision of free room hire in their section 216A disclosure returns. The Commissioner wrote to all registered parties in September 2014 asking whether they have been in receipt of free room hire for party meetings. At the time of writing this report, not all parties have replied to this query. Any parties that have received free room hire valued at or above the relevant threshold and not disclosed this, will be asked to submit appropriate disclosure returns.

A question that arises from this issue is whether it is desirable for this type of gift in kind to be disclosed under the Electoral Act. Given the high dollar value ascribed to the disclosures made by the Australian Labor Party, the Commission suggests that it is appropriate that the value of these freely-provided services be disclosed. Nevertheless, the Assembly may wish to consider whether this type of disclosure is appropriate.

Accordingly, the Commission **recommends** that the Assembly consider whether some categories of gifts in kind, such as free room hire, should be exempt from disclosure under the Electoral Act.

### ***Reporting of disputed invoices***

Registered political parties, MLAs and associated entities are required to disclose, in their annual returns, the total amount of outstanding debts and the details of persons and organisations to whom they are indebted, where the debt is \$1,000 or more at the end of a financial year.

An issue arose with respect to a disputed invoice from Australia Post held by the Canberra Liberals at the end of the 2012/2013 financial year. The Canberra Liberals did not disclose this disputed debt in the relevant annual return as the party considered that it was not a debt that was required to be disclosed. The existence of the disputed debt became public knowledge and drew considerable media attention, which focused on whether the party should have disclosed the debt in its annual return.

After detailed consideration of the issues involved, the Electoral Commissioner concluded that only undisputed and quantifiable debts are legally required to be disclosed in an annual return lodged under section 230 of the Electoral Act.

Parties and MLAs are required by section 230 to give the Electoral Commissioner an annual return by 31 July each year. Section 230(4)(c) provides that the annual return must state the outstanding amount, at the end of the financial year, of debts incurred by, or on behalf of, the party together with the particulars required by section 234(1). Section 234(1) requires the return to specify the sum and the defined particulars of all debts that are owed by a party to a particular person or organisation that total \$1,000 or more.

The obligation to disclose debts in a party's return extends only to debts that have been incurred and are owed at 30 June in the reporting period. When viewed in conjunction with the consequential obligation to "specify the sum" of those debts (section 234(1)), the Commissioner considered that only undisputed and quantifiable debts are legally required to be disclosed in an annual return. Provided there is a genuine dispute as to the existence or amount of a debt, the debt does not need to be included in the party's annual return.

Once a disputed debt has been settled between the parties, it would not be necessary to resubmit an annual return for an earlier financial year, as each annual return should include only acknowledged debts as at 30 June. If the acknowledged debt was still outstanding at the following 30 June, it would need to be included in the relevant annual return.

While the law does not (in the Commissioner's view) require parties, MLAs and associated entities to declare disputed debts in their annual returns, the public interest in the above case indicates that it might be appropriate, for transparency purposes, if parties, MLAs and associated entities were required to flag the existence of any disputed debts of \$1,000 or more in their annual returns.

Accordingly, the Commission **recommends** that the Electoral Act be amended to require the details of disputed debts with a total amount of \$1,000 or more, held by a registered party, MLA or associated entity at 30 June, to be disclosed as a new category in the entity's annual return for the relevant financial year.

### ***Reporting of details of receipts of less than \$1,000 by associated entities***

Associated entities are required to lodge annual returns showing, inter alia, details of all persons and organisations from whom any amount has been received, unless the amount is for:

- Supply of liquor or food in accordance with a license held by the entity under the *Liquor Act 2010*, and is not more than is reasonable consideration for the supply;
- An amount received for the playing of gaming machines in accordance with a license held under the *Gaming Machine Act 2004*;
- Membership of the entity if the membership fee is less than \$250 in a financial year; or
- An amount prescribed by regulation (there are currently no amounts prescribed).

The exemption for payment of membership of the entity was included in the Electoral Act when it became clear that the Canberra Labor Club would (in the absence of this amendment) need to disclose the name and address of each of its approximately 55,000 members. Clearly the intent of the requirement for the disclosure of details of persons from whom an associated entity receives any amount was not to capture the details of club members in this way, and there would appear to be no public good served by that disclosure.

In preparing its annual return for 2012/2013, a further issue arose regarding the Canberra Labor Club with respect to the receipt of payments of green fees at its newly acquired bowling club facility. While these fees were for relatively small amounts, the current provisions required the disclosure of the details of every person who paid them. The Commissioner took a pragmatic approach to the situation and decided, for privacy reasons, not to publish the details of amounts received by the Canberra Labor Club of less than \$1,000 on its website; however, these details are available for inspection in the office of the Commission as required by the Electoral Act.

The situation with the receipt of green fees brings into question the intent behind the necessity for an associated entity to disclose the details of persons and organisations from whom any amount is received. Other entities, such as registered political parties and MLAs, need only disclose details of those from whom \$1,000 or more is received (either as gifts or other receipts). Candidates and third-party campaigners need only disclose details of those from whom gifts of \$1,000 or more is received.

The disclosure of the details of those who have made payments of small amounts to an associated entity appears to serve no purpose in the context of transparency, nor any public good, particularly while other political entities enjoy a threshold for disclosure of \$1,000.

Accordingly, the Commission **recommends** that the current need for associated entities to disclose the details of all persons and organisations making payments to the entity of any value, with some exemptions, be amended to provide that associated entities do not need to disclose the identities of persons or organisations giving the entity less than \$1,000 in a financial year (retaining the exemptions for income related to supply of food, liquor and gambling).

#### ***Affiliation fees paid to a political party***

The definition of gift in the Electoral Act includes a provision that the part of an annual membership subscription to a political party that is more than \$250 is considered to be a gift to the party. That part of the annual membership subscription that is less than \$250 is not defined as a gift. The intent of this provision is to ensure that parties are not able to avoid the cap on donations by using payments classed as "membership fees" that might otherwise be in effect gifts.

Until the amendments to the Electoral Act which took effect from 1 July 2012, the definition of gift did not include any amount that related to a membership subscription. As at that time there was no cap on gifts, whether or not such payments were classed as gifts was not an issue of significant import. Now that gifts are capped, considerable significance attaches to whether various receipts are defined as gifts. In particular, following on from the amendment to include consideration of the amount of a membership subscription in the definition of gift, a further issue arises as to the treatment of a fee for affiliation with a political party.

It is not clear to the Commission whether an affiliation fee should be treated as a membership subscription, and therefore whether the amount of the fee that is more than \$250 should be treated as a gift, or whether the whole of the fee should be treated as a receipt that is not a gift. It would be desirable to amend the Electoral Act to put this issue beyond doubt. This is essentially a policy decision for the Assembly.

Accordingly, the Commission **recommends** that the Assembly consider whether a fee for affiliation with a political party should be treated as a subscription for membership to the party (and therefore should be treated as a gift if the amount is greater than \$250). The Commission further **recommends** that, whatever the outcome of that consideration, the Electoral Act be amended to put the matter beyond doubt.

### ***Compulsory party levies placed on elected representatives of the party***

Some registered political parties impose a compulsory levy on their elected representatives, payable to the party. A question arises as to whether the payment of a compulsory levy is akin to a payment of a “special” membership subscription, and therefore whether that amount of the levy paid in a financial year over \$250 is to be considered as a gift to the party.

Prior to 1 January 2014 this issue did not require any consideration, as the definition of gift in section 198AA of the Electoral Act specifically exempted from the definition of gift any payments from one entity within a party grouping to another entity in the grouping. This exemption ended on 1 January 2014.

To date the Commissioner has taken the view that a compulsory levy should not to be treated as a gift or “special” membership subscription as it can be argued that it is not a payment made without consideration within the definition of gift in section 198AA. However, some doubt remains.

Accordingly, the Commission **recommends** that the Electoral Act be amended to clarify whether any part of a compulsory levy imposed by a political party on its elected representatives should be considered a gift to the party, or whether the whole of the levy should be exempt from the definition of gift.

### ***Infringement penalties for late or incomplete disclosure returns***

Prior to 1 July 2012, the only way in which the Electoral Commissioner could enforce the various offences related to the campaign finance provisions of the Electoral Act was by taking prosecution action through the courts.

The campaign finance reforms that commenced on 1 July 2012 included new provisions related to straightforward offences such as failure to provide disclosure returns by the due date. To enable a simpler process for enforcing these offences than court action, a regulation was made under the *Magistrates Court Act 1930* to enable the Commissioner to issue infringement notices.

The Magistrates Court (Electoral Infringement Notices) Regulation became effective from 1 July 2012. It allows the Electoral Commissioner to issue infringement notices for offences against sections 236(1) and 236(2) of the Electoral Act. Section 236(1) provides that it is an offence to not give the Commissioner a disclosure return when required to do so within a stated time, and section 236(2) provides that it is an offence when a person who is required to give a return to the Commissioner does so, but the return is incomplete.

The penalty for an offence against sections 236(1)(a), 236(1)(b) and 236(2) is 50, 20 and 20 penalty units, respectively. The infringement penalty listed in the Regulation is a fixed amount based on 20% of the amount of the penalty for the offence at the time of making the Regulation (\$1,100, \$440 and \$440 respectively). At the time of making the Regulation, a penalty unit was worth \$110. The current value of a penalty unit is \$140, and this amount increases periodically.

As the infringement penalties are not linked to the value of a penalty unit, the relative value of the penalties will decrease over time. The Commission suggests it would be appropriate to amend the Regulation to link the penalties to the value of a penalty unit, to avoid the need to manually adjust the infringement penalty as the value of a penalty unit changes.

Accordingly, the Commission **recommends** that the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that the listed infringement penalties be set at 20% of the offence penalty unit set out in the Electoral Act.

### ***Infringement notices and discharge of liability***

There is potential for uncertainty to arise under the new infringement penalty system introduced by the Magistrates Court (Electoral Infringement Notices) Regulation in relation to whether payment of a penalty discharges the liability to submit the required disclosure return.

The payment of an infringement penalty in many situations will discharge the liability for the offence. For example, payment of a traffic infringement penalty discharges the liability for the offence to which the infringement applies. In the example of a traffic infringement, a further infringement penalty cannot be issued for that same offence where the penalty is paid.

The situation of an offence against sections 236(1) (failure to lodge a disclosure return on time) or 236(2) (failure to lodge a complete return) is different in that even though an infringement penalty may be paid, the offence continues unless a disclosure return is subsequently lodged. While sections 152 (Continuing effect of obligations) and 193 (Continuing offences) of the *Legislation Act 2001* provide some assistance in interpreting situations where obligations and offences are continuing, issuing infringement notices for continuing offences can create uncertainty as to whether payment will discharge liability.

Section 152 of the Legislation Act provides:

#### **152 Continuing effect of obligations**

If, under a provision of an Act or statutory instrument, an act is required to be done, the obligation to do the act continues until the act is done even if—

- (a) the provision required the act to be done within a particular period or before a particular time, and the period has ended or the time has passed; or
- (b) someone has been convicted of an offence in relation to failure to do the act.

Section 193 of the Legislation Act provides:

#### **193 Continuing offences**

(1) This section applies to a requirement to do an act if—

(a) the act is required to be done under an ACT law within a particular period or before a particular time; and

(b) failure to comply with the requirement is an offence against the law.

(2) A person who fails to comply with the requirement commits an offence for each day until the act is done.

(3) A day mentioned in subsection (2) includes any day of conviction for an offence and any later day.

Amending the provisions related to electoral infringement notices in the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation may help to remove any uncertainty.

Accordingly the Commission **recommends** that the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that where an offence continues beyond the date of payment of a notice, a fresh liability will arise even if the notice is paid, unless the relevant disclosure return or a complete return is lodged, as the case may be.

### ***Lodgement of annual returns by 31 July***

Annual disclosure returns from political parties, MLAs and associated entities are required to be submitted to the Commissioner no later than 31 July after the end of each financial year. The Commission must make the returns publicly available at the beginning of September. These requirements commenced with the submission of the 2011/2012 annual returns. The Commission makes the details contained on the returns available through its website, and the original returns are available for viewing at the Commission's office during business hours.

While the disclosure returns for 2011/2012 and 2012/2013 were for the most part received by the due date, it is clear that the requirement to submit returns by 31 July will more than likely lead to a need to submit amended returns, as the 31 July deadline generally falls before a party's accounts have been formally audited.

To meet the 31 July requirement, preparation of party returns generally needs to be undertaken without the party's accounts having been formally audited, and in some cases before bank statement reconciliation for the end of financial year. This situation can, and has, led to errors in the original returns, some of which may not be detected until audits, initiated by the party, MLA, entity or the Commission, have taken place.

The objective for earlier submission of returns was to make disclosures public earlier in the election cycle, particularly in an election year. While this objective has been achieved with the earlier deadline, this must be balanced with the likelihood of errors in the annual returns.

The Commission **recommends** that the Assembly reconsider the 31 July deadline for submission of annual returns with a view to determining the effectiveness of the current arrangement. In this context, the Commission **recommends** that the Assembly seek the views and experiences of the parliamentary parties and the associated entities with respect to this issue.