



ACT Legislative Assembly Election 2004



Review of the *Electoral Act 1992*



 **Elections** ACT



Australian Capital Territory



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Mr Jon Stanhope MLA  
Attorney General  
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London Circuit  
CANBERRA ACT 2601

Dear Attorney General

This report on the review of the operation of the *Electoral Act 1992* in relation to the conduct of the 2004 ACT Legislative Assembly Election is presented to you under section 10A of the Electoral Act.

Subsection 10A(2) of the Electoral Act requires you to cause a copy of this report to be laid before the Legislative Assembly within 6 sitting days of receiving the report.

Yours sincerely



Graham Glenn  
Chairperson

22 July 2005

Phillip Green  
Electoral Commissioner

22 July 2005

Christabel Young  
Member

22 July 2005



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# **ACT Legislative Assembly Election 2004: Review of the *Electoral Act 1992***

## **Executive summary**

This review examines the operation of the *Electoral Act 1992* in relation to the conduct of the ACT Legislative Assembly election held on 16 October 2004.

The 2004 election saw further incremental improvements in the conduct of elections for the ACT Legislative Assembly.

Despite the fact that the federal election was held the weekend before the ACT election, voter turnout for the ACT election was the highest ever, and the informal vote was the lowest ever. Over 11,000 more people voted in the 2004 election compared to the 2001 election. Voter turnout in 2004 was 92.8%, compared to 90.9% in 2001. The informal vote rate was only 2.7%, compared to 4.0% in 2001.

Electronic voting was again used at this election, with over 28,000 electronic votes taken – more than 13% of all voters used electronic voting. Electronic counting, including data entry of paper ballots, was also used, leading to the announcement of the final election result 11 days after polling day.

This review can be read in conjunction with the following reports:

- *The 2004 ACT Legislative Assembly Election: Electronic Voting and Counting System Review*, to be tabled in August 2005;
- *The Elections Statistics* for the election, published in December 2004; and
- The Commission's *Annual Report 2004/2005*, to be published in September 2005.

The issues considered in this review focus on areas where changes had occurred since the 2001 election, or where the Commission considers that changes may be needed to the Electoral Act. A general report on the conduct of the 2004 election will be included in the Commission's Annual Report for 2004/2005.

Specific issues covered by this review are:

- **Legislation changes since the 2001 election** – listing the main changes that were made to the Electoral Act since the previous election.
- **Non-party groups** – questioning the right of candidates to be listed on ballot papers in non-party groups.
- **Party registration** – examining changes made to the party registration scheme after the 2001 election and discussing the need for further change.
- **The 100 metre ban on canvassing at polling places** – examining the operation of the ban and suggesting that it be removed and replaced with the same 6 metre ban that applies to Commonwealth elections.



- **Authorisation of electoral advertisements** – examining the operation of the authorisation requirements and suggesting improvements.
- **Defamation of candidates** – examining the Electoral Act offence of defamation of candidates and suggesting that it be removed.
- **Postal voting** – examining the favourable impact of an earlier deadline for submission of applications for postal votes from overseas implemented after the 2001 election review and the impact of making it illegal to induce a person to complete a postal vote application form and return it to an address other than an address authorised by the Electoral Commissioner.
- **Interstate pre-polling** – suggesting that an apparent mistake in the Electoral Act be corrected to permit interstate polling to commence later than the first possible day of pre-polling.
- **Photos of people voting** – Examining the recent increase in use and popularity of small digital cameras, particularly mobile phone cameras, and suggesting that it be an offence to take a photo of a person’s marked ballot paper.
- **Appointment of scrutineers** – Examining the practice of using partially-completed, photocopied scrutineer appointment forms and suggesting more appropriate methods of appointing scrutineers be examined.

## Summary of recommendations

The Commission **recommends** that the Electoral Act be amended to:

- Remove the ability of candidates to form non-party groups, so that only candidates belonging to registered political parties will be able to be listed in groups on ballot papers. All other candidates should be listed in the “ungrouped” columns on the ballot papers.
- Provide that an application for registration of a political party that includes the name of a person must include a statement signed by that person indicating their consent to the party name – if such a statement is not provided, the Commissioner must refuse the application.
- Remove the 100 metre ban on canvassing at polling places and replace it with the same 6 metre ban that applies to Commonwealth elections.
- Replace the current authorisation scheme contained in sections 292-295 of the Electoral Act with the following scheme:
  - A person must not disseminate electoral matter in printed form (either in hard-copy form or electronically) unless the author’s name or the name of the person or organisation authorising the material is clearly stated so as to indicate that the person or organisation is responsible for the material.
  - A person must not disseminate electoral matter in sound or video form unless the author’s name or the name of the person or organisation authorising the material is clearly stated in spoken or printed form so as to indicate that the person or organisation is responsible for the material.
  - If electoral matter is published for a registered political party or a candidate (including a person who has publicly indicated that he or she intends to be a candidate), the name of the party or candidate must be stated so as to indicate that the party or candidate is responsible for the material.
  - The ACT’s authorisation rules do not apply to radio and television electoral broadcasters, where they are required to authorise electoral matter under the Commonwealth’s *Broadcasting Services Act 1992*.
  - Electoral matter contained in reportage, commentary or letters to the editor in a newspaper, periodical or news-type website does not need to be specifically authorised: responsibility for such electoral matter shall be taken to be assumed either by the managing editor of the publication; or by a person nominated by a statement in the publication indicating that the person has authorised the publication of the electoral matter.
  - Letters to the editor of a newspaper, periodical or news-type website (including internet comments made in the style of letters to the editor) must include the name of the author but do not need to indicate the address of the author.

- Items containing 10 or fewer words (published other than by newspaper, periodical, radio, television or other sound or video format) – including “campaign novelties” such as a car bumper-sticker, flyer, T-shirt, lapel button, lapel badge, pen, pencil or balloon – do not need to identify the name of the person or organisation authorising the material.
- The current requirement stating that government agency publications containing photographs of MLAs published in the 6 months before an election should carry an authorisation statement, should be repealed. The ACT Government may wish to consider whether to limit content of agency publications in the lead up to an election through its government publishing standards.
- Complementary changes will need to be made to other provisions in the Electoral Act that are cross referenced to the authorisation provisions, including sections 223, 230 and 306.
- Complementary changes will need to be made to remove outdated provisions from the *Electoral Regulation 1993*, including regulations 3 and 6.
- Repeal section 300 of the Electoral Act, which provides for the offence of defamation of a candidate (relying instead on civil law defamation procedures).
- Provide that interstate polling can begin no earlier than the third Monday before polling day (rather than no later than the third Monday before polling day), to correct an apparent mistake in section 136C.
- Provide that it is an offence to take a photo of a person’s marked ballot paper either in a polling place, or where a person is casting a postal vote.

The Commission also **recommends** that it consult with candidates and parties to review its forms for appointment of scrutineers to make it easier for candidates to properly appoint scrutineers, and to ensure that partially-completed photocopied appointment forms pre-signed by candidates are not used to allow scrutineers to effectively appoint themselves.

## Legislation changes since the 2001 election

A number of significant changes were made to the Electoral Act after the 2001 election and implemented successfully for the first time before or at the 2004 election.

The *Electoral Amendment Act 2004* gave effect to most of the recommendations made by the Electoral Commission in its report, *The 2001 ACT Legislative Assembly Election: Review of the Electoral Act 1992*. The Act was passed by the Legislative Assembly on 15 May 2004.

Changes made by the Electoral Amendment Act 2004 included:

- Requiring applications to register a party or to change a party's registered name or abbreviation to be lodged by 30 June in an election year;
- Providing that parties must have 100 members at the time that an application is lodged to register the party;
- Removing provisions that allowed independent MLAs to register ballot groups;
- Providing for an offence to induce a person to complete a postal vote application form and return it to an address other than an address authorised by the Electoral Commissioner;
- Changes to postal voting procedures, including an early cut-off for applications for postal votes from overseas;
- Preventing the Electoral Commissioner from taking part in the review by the Electoral Commission of any decision not to conduct a recount of ballot papers; and
- Bringing thresholds for disclosure of political donations and expenditure up to \$1500, to remove inconsistencies in the current disclosure scheme.

## Non-party groups

In its 2001 Electoral Act review, the Commission recommended that the provision of non-party groups should be removed, and that only candidates belonging to registered political parties should be able to be listed in groups on ballot papers – all other candidates should be listed in the “ungrouped” columns on the ballot papers.

This proposal was included in the *Electoral Amendment Act 2004*; however, a majority of Assembly Members voted to reject this proposal in 2004. The Commission considers that it is worth revisiting this issue in the current review.

The number of non-party groups contesting ACT elections has fluctuated from election to election. In both the 1995 and 1998 elections, there were 2 non-party groups across all electorates. In 2001 there were 5 non-party groups, with 3 in Molonglo and 1 in each of Brindabella and Ginninderra. In 2004 there were again only 2 non-party groups across all electorates – 1 in Ginninderra and 1 in Molonglo.

Non-party groups can be formed by 2 or more non-party candidates requesting that their names appear together on the ballot paper. A non-party group is entitled to a column on the ballot paper. This column is identified only by a column letter such as “A”, “B” etc. The position of the non-party group on the ballot paper is determined in the same draw that determines which column a party is to appear in.

Non-party groups were included in the model Hare-Clark system described in the *Referendum Options Description Sheet* that was published at the time of the referendum to choose the electoral system in 1992. Non-party groups were subsequently included in the Hare-Clark system adopted by the Legislative Assembly in 1994.

The legislative history of non-party groups in the ACT can be traced back to the introduction of registration of political parties by the Commonwealth prior to the 1984 Commonwealth elections. At Senate elections prior to the 1984 election (at the 1983 Senate election, for example), all columns of candidates listed on Senate ballot papers did not carry party affiliations. Consequently all columns of grouped candidates appeared as non-party groups do today. When party affiliations were introduced for the 1984 election, groups standing for Senate elections were given the option to stand either as registered party groups or as non-party groups. The model Hare-Clark electoral system proposed for the ACT in 1992 essentially followed the Senate ballot paper layout, insofar as groups of candidates were concerned.

The Commission considers that it is appropriate to review the provision of the opportunity for candidates to be listed on ballot papers in non-party groups.

In its original conception, a non-party group was a collection of like-minded candidates campaigning on a common platform. Before registration of political parties was introduced, non-party groups were commonly all members of the same political party.

It is now arguable that the facility for candidates to stand in non-party groups is most commonly used as a vehicle for 2 or more candidates to distinguish themselves on the ballot paper by being listed in a separate group. There is no requirement or expectation that candidates listed in a non-party group have anything in common other than a desire to be listed together in a separate column. Indeed, it is possible that 1 of the 2 candidates listed in the column may only have agreed to be nominated in order to allow the other candidate to be listed in a non-party group on the ballot paper. Therefore it is apparent that the existence of non-party groups does not assist voters by providing them with any meaningful information about why such candidates are grouped together.

By contrast, candidates who are grouped under a registered party name have gone through a public registration process, which includes a requirement to make party constitutions available for public inspection. Consequently, voters can inform themselves about the policies and ideals of registered political parties and use that information to make judgments about candidates grouped together on the ballot paper in a party group.

The facility that allows 2 candidates to form a non-party group could have significant consequences for the size of Legislative Assembly ballot papers. As each column on the ballot paper increases the width of the ballot paper, a relatively small number of candidates forming several non-party groups with as few as 2 candidates in each group could result in a ballot paper that was unmanageably wide.

Wider ballot papers impose significant costs. They cost more to print, they use more paper, they are more difficult to store and handle, and they are more difficult and time-consuming to count and data-enter. With electronic voting, the more columns listed on the ballot paper, the more difficult it is to list all columns on screen so that they are all visible at a readable point size. If a large number of columns are required on a ballot paper – say more than 20 – it may not be possible to use the existing electronic voting system.

The non-party group facility could be used by a relatively small number of mischievous persons to frustrate the electoral process by causing ballot papers to be over large and difficult to manage, at considerable cost to the public purse. By contrast, persons wishing to run in party columns have to prove a significant level of public support in order to register a political party.

In voting against this proposal in the Assembly in May 2004, Members expressed the view that this proposal was not healthy for democracy. The Commission’s view remains that the provision of non-party groups does not provide voters with any useful information regarding the grouped candidates, unlike a registered party group. The Commission notes that its proposal does not prevent non-party candidates from contesting Assembly elections as ungrouped candidates in the right-hand column of the ballot paper.

For these reasons, the Commission **recommends** that the provision of non-party groups should be removed, and that only candidates belonging to registered political parties should be able to be listed in groups on ballot papers. All other candidates should be listed in the “ungrouped” columns on the ballot papers.

## Party Registration

In May 2004, several amendments were made to the Electoral Act that related to party registration. The amendments:

- Required applications to register a party, or to change a party's registered name or abbreviation, to be lodged by 30 June in an election year;
- Provided that parties must have 100 members at the time that an application is lodged to register the party; and
- Removed provisions that allowed Independent MLAs to register ballot groups.

As there were no ballot groups registered by Independent MLAs in 2004, the change related to such ballot groups had no practical effect. The other changes were all implemented in the lead up to the 2004 election.

The 30 June cut-off for applications to register a party was met by 3 parties that applied for registration after the Electoral Act was amended to introduce the cut-off. The cut-off served to remove the uncertainty experienced in previous election years regarding the effective last date for application for party registration.

The change that required parties to have at least 100 members at the time of lodging their application for party registration also served to remove the uncertainty experienced before this change was made. Previously parties were able to recruit members after they had lodged their application for registration in order to meet the 100 member requirement. This change did not appear to present any difficulty for those parties that applied for registration in 2004.

The Commission considers that there is another change that could be made to the party registration provisions to further improve the process.

Two registered parties that contested the 2004 election contained the names of individual persons in their party names: “Harold Hird Independent Group” and “Helen Cross Independents Group”. Three ballot groups that contested the 2001 election also included a person’s name in their group name. This practice raises the possibility that a party may be formed that includes a person’s name in the party name, but without that person’s consent. For example, a party may be formed that wishes to take advantage of a person’s popularity or fame. If that person did not consent to the inclusion of their name in the party name, the person could feel aggrieved, and the public could be misled into believing that there was a connection between the party and the named person that did not in fact exist.

To ensure that this does not occur, the Commission **recommends** that the Electoral Act be amended to provide that an application for registration of a political party that includes the name of a person must include a statement signed by that person indicating their consent to the party name – if such a statement is not provided, the Commissioner must refuse the application.

## The 100 metre ban on canvassing at polling places

At the 2004 Legislative Assembly election, allegations of breaches of the 100 metre ban on canvassing at polling places constituted the major source of complaints to the Electoral Commission regarding breaches of the Electoral Act on polling day itself. (The greatest source of complaints overall related to the authorisation of electoral advertisements, discussed in the following section.)

Given that allegations of breaches of the 100 metre ban on canvassing at polling places were made about several different parties in 2004 – including both major parties – the Commission considers it worth revisiting the policy intent of the ban.

The 100 metre ban on canvassing at polling places was introduced before the 1998 election. The ban is similar to the ban that applies during polling for the Tasmanian House of Assembly, which also uses the Robson rotation method of printing ballot papers with the Hare-Clark system. Together, the ban on canvassing, Robson rotation and Hare-Clark proportional representation (without party ticket voting) are intended to reduce the influence of party tickets and give voters more power over their choice of elected members.

In practice, the 100 metre ban on canvassing at polling places is intended to ensure that how-to-vote cards are not made available to voters as they vote. However, if all or most parties routinely hand out how-to-vote cards outside the 100 metre limit, it is doubtful if the ban is serving any practical purpose.

Exit polling conducted by the Commission after the last 3 elections has indicated that voter knowledge of the 100 metre ban on canvassing has declined since 1998. In 1998, 81% of voters were aware of the ban; in 2001, 74% of voters were aware of the ban; and in 2004 66% of voters were aware of the ban. This decline in knowledge occurred despite extensive advertising by the Commission that featured the ban.

It is possible that the fact that the 2004 federal election (with its extensive distribution of how-to-vote cards) was held the week before the ACT election may have led more voters to expect that how-to-vote cards would be available at ACT election polling places.

Nevertheless, only 9% of voters polled in 2004 found it a problem that how-to-vote cards were not available (down from 15% in 1998 and 2001). Of those who found it a problem in 2004, 49% disagreed with the ban on principle and 62% said they did not know who to vote for without a how-to-vote card (multiple responses to this question were possible).

If most parties and candidates in ACT elections consider that how-to-vote cards should be made available to ACT voters, and are prepared to hand out how-to-vote cards outside the 100 metre limit, it would appear that the intent of the 100 metre ban on canvassing at polling places is unlikely to achieve its stated aim. Therefore the Commission **recommends** that the 100 metre ban on canvassing at polling places be removed and replaced with the same 6 metre ban that applies to Commonwealth elections. This would see how-to-vote cards handed out to voters approaching polling places but would leave the immediate entrance to the polling place free of canvassers.



## **Authorisation of electoral advertisements**

In the lead up to the 2004 Legislative Assembly election, the issue of authorisation of electoral advertisements and other electoral matter was, as in previous elections, the greatest source of complaints to the Electoral Commission regarding breaches of the Electoral Act.

In all cases, it appeared that the alleged breach of the authorisation requirements was not deliberate, and all cases were dealt with by issuing a warning letter. Several cases dealt with material on websites or electoral matter sent by email. Most of these alleged breaches were at best technical, with the author of the material easily ascertainable on the face of the published matter.

The Commission considers it timely to review the purpose and application of the authorisation provisions to examine whether it may be possible to relax them without compromising their intent.

These issues are discussed in the following subsections.

### ***Description of current authorisation requirements***

Under section 292 of the Electoral Act, electoral matter in printed or electronic form must not be disseminated unless it is authorised – that is, it must include at the end the name and street address of the person who authorised the electoral matter, or its author – unless the material is specifically exempted from this requirement. This is intended to give the material's audience an indication of the source of the material so that it can be judged accordingly.

The definition of electoral matter in section 4 of the Electoral Act includes any matter that is intended or likely to affect the voting in an ACT Legislative Assembly election. This includes, but is not limited to, matter which contains an express or implicit reference to, or comment on:

- the election;
- the performance of the ACT Government, the ACT Opposition, a previous ACT Government or a previous ACT Opposition;
- the performance of an MLA or a former MLA;
- the performance of a political party or a candidate or group of candidates in the election; or
- an issue submitted to, or otherwise before, the electors in relation to an election.

Electoral matter that is printed, published, distributed, produced or broadcast must (unless it falls within one of the exemptions listed under the following subheading) show the name and address of the person who authorised the electoral matter, or its author:

- at the end; and

- in the case of an item containing electoral matter taking up the whole or part of each of 2 opposing pages of a newspaper or periodical—at the foot of the item on the first page; and
- for an item in electronic form (such as an internet web site) — at the foot of each page.

If the matter is published for or on behalf of a registered political party, or a candidate in an election, the authorisation statement must also name the party or candidate.

The address that should be shown cannot be a post office box and must be:

- if the person is acting for or on behalf of a political party—an address of the party; or
- in any case:
  - the address of the person’s principal place of residence; or
  - an address of the person’s place of business.

Failure to include an authorisation statement when required is punishable by a fine of up to 10 penalty units (currently \$1,000).

All types of printing and electronic publishing is included, including internet websites, emails and videos, except that authorisation of radio and television electoral broadcasting is considered to be covered by the Commonwealth’s *Broadcasting Services Act 1992*.

#### *Exemptions from the authorisation provisions*

The requirement to authorise electoral matter does not apply to the dissemination of a letter to the editor of a newspaper or periodical if:

- the name of the author and the locality of the author’s residence appears at the end; and
- the editor of the newspaper or periodical keeps a written record of the address of the author, as stated in the original of the letter sent to the editor or as otherwise ascertained by the editor.

It is sufficient to identify the locality of an author’s residence by reference to:

- the suburb or town of, or nearest to, that residence; and
- in the case of a locality outside the Territory—the State, other Territory or other country of that residence.

The requirement to authorise electoral matter does not apply to electoral matter on any of the following items, unless the item includes a representation of a ballot paper:

- a T-shirt, lapel button, lapel badge, pen, pencil or balloon;
- a business or visiting card that promotes the candidacy of a person in an election;
- a letter or card on which the name and address of the sender appears; and
- a letter or media release published by or on behalf of an MLA that indicates the name of the MLA and an indication that he or she is an MLA.

Note that car stickers do have to be authorised.

The requirement to authorise electoral matter does not apply to electoral matter contained in reportage or commentary in an issue of a newspaper or periodical if the issue contains a statement to the effect that a person whose name and address appears in the statement has authorised the publication of all electoral matter contained in reportage or commentary in that issue.

### ***The rationale for the authorisation requirements***

The purpose of the Electoral Act authorisation provisions is to let voters know who is responsible for publishing material that may impact on voters' minds when they come to cast their votes. This enables voters to make a judgement about the accuracy, balance and fairness of published material.

In particular, the authorisation rules are intended to prevent "irresponsibility through anonymity" – that is, making it unlawful to publish electoral material that does not identify the author, so that voters are unable to judge whether the material is coming from a source with a particular interest in the election. The authorisation rules also mean that people cannot lawfully hide behind anonymity to make irresponsible or defamatory statements about election matters.

The requirement for publication of the name and address of the author or the person responsible for distribution of electoral matter is also intended to facilitate prosecution of persons distributing material that might be found to have constituted another electoral offence. For example, material that may be correctly authorised may still breach the Electoral Act if it is defamatory or if it is misleading or deceptive about the casting of a vote. Section 306 of the Electoral Act provides that a statement that a person had authorised electoral matter was admissible in court as evidence of that fact.

Electoral matter published on websites is required to include an authorisation statement on every separate web page that contains electoral content. This is intended to allow readers of any page to view an authorisation statement without having to go to a different web page to determine who is responsible for the content. This is recognition that web users can jump to any web page using a search engine without necessarily going through a main home page of a website.

### ***The authorisation requirements in practice***

The practical application of the authorisation provisions gives rise to a relatively large number of complaints at every election. In almost all cases, the person or organisation responsible for publishing the material is readily ascertainable from the material. The source of the complaints is usually that the correct form of the authorisation provisions has not been followed. For example, a street address may not be shown, or a website may not include a full authorisation statement on each page. Another common category of complaints relates to material that consists of little more than a slogan, often printed as bumper stickers on vehicles.

In each case complained of in 2004, it appeared that the alleged breach of the authorisation requirements was not deliberate, and each case was dealt with by issuing a warning letter. While this approach can be used to ensure that material printed and distributed after the warning letter is received is properly authorised, it does not provide a remedy for material already distributed.

Matters complained of in 2004 included:

- Promotional material published on candidates' websites that named the candidate but did not include a formal authorisation statement;
- Pamphlets and emails distributed by interest groups that named the organisation but did not include a person's name and/or address;
- A website produced by an interest group that included the organisation's name, a person's name and post office box address but did not include a street address;
- An email distributed by the president of an interest group that constituted an annual report of the organisation, including recommendations about how to vote at the ACT election, which named the president and the organisation but which did not include a formal authorisation statement, particularly an address;
- Bumper stickers produced by candidates and interest groups containing a slogan but no authorisation statement;
- Election commentary published on a media organisation's website that named the organisation but did not contain a formal authorisation statement or statement of editorial responsibility;
- Media releases issued by candidates who were not elected MLAs; and
- Material published by ACT agencies that did not include the coat of arms.

It can be seen that almost all of the complaints related to material that did not fail the "irresponsibility through anonymity" test. Even the bumper stickers containing slogans did not fail this test, as they typically consisted of a slogan readily identified with a known person or group, such as "Save the ridge" or "Vote 1 [candidate name]".

It is arguable that many complaints regarding improperly authorised electoral material are motivated primarily by a desire to inconvenience a political opponent rather than by a desire to ensure electors are properly informed.

Several people contacted about the need to include a street address on electoral matter also expressed the concern that this had or could have exposed them to harassment or worse.

### ***Relaxing the authorisation requirements***

The above survey of the operation of the authorisation provisions in practice indicates that most publications that attract complaints because they do not appear to comply with the strict letter of the authorisation requirements nevertheless do not fail the "irresponsibility through anonymity" test.

The proliferation of websites and emails also impose new challenges on the ways in which the responsible authority for publication of electoral matter can be determined. In most cases, it is relatively straightforward to find contact details for persons and organisations that maintain significant websites – even if this requires following a link to a particular web page. By contrast, the spontaneity of email communication leaves it prone to formalities being omitted, particularly street addresses of authors. The ease with which email can be forwarded also can make it difficult to determine who is the originator of material in an email.

Most people and organisations who publish electoral matter tend to be readily identifiable. Political parties, established interest groups, Government agencies and candidates all tend to be well known and voters can be expected to easily reach a judgement about the motivation behind material published by such groups. In such cases, simply identifying the name of the responsible person or body would be enough to satisfy the public policy goals of the authorisation requirements.

On the other hand, where a person or organisation distributing electoral matter is not well known to the public, publishing a formal authorisation statement including a name and address is probably not going to equip voters with any knowledge that will help them to judge the veracity of the material. Of perhaps more concern, requiring private citizens who express political opinions in print to publish their private address could have the undesirable effect of placing their safety at risk. In this light, it is arguable that the publication of an address does not serve the public interest to a great degree.

This analysis indicates that it may be of considerable benefit to relax the authorisation provisions to simply require that matter containing electoral matter should clearly include the name of the responsible person or organisation. Where the responsible organisation is a registered political party, or the responsible person is a candidate, that should also be clearly stated.

It is also arguable that there is little public benefit in including an authorisation statement on a sticker or flyer that simply includes a slogan, such as “Save the frogs”, “I eat frogs and I vote” or “Vote 1 [candidate name]”. Including an authorisation statement on a sticker or flyer containing a slogan only is unlikely to assist casual observers making a judgement about a simplistic political message.

A precedent for this approach already exists. Section 295 of the Electoral Act currently exempts a range of “small” items from the authorisation requirements: T-shirts, lapel buttons, lapel badges, pens, pencils or balloons. These exemptions include items that are not likely to contain more than a slogan and/or that would be too small to carry a legible authorisation statement.

An approach that would include a wider range of materials that contain slogans might be to exempt an expanded list of items that carry, say, 10 words or fewer. It would be desirable to exclude radio, television, video and newspaper advertisements from the types of items that do not need to be authorised if they contain 10 words or fewer, to ensure that mass media advertisements could not avoid authorisation requirements by limiting the number of words used.

If names and/or addresses are not required to be included on authorisation statements, the question arises as to whether this would make it more difficult to identify and prosecute persons responsible for publishing electoral material that was otherwise in breach of the Electoral Act. In practice this issue has seldom arisen in the ACT. No such cases have ever been prosecuted in relation to an ACT Legislative Assembly election under the current Electoral Act. It is unlikely that a prosecution would proceed where a matter is relatively trivial, particularly where a warning could be issued and offensive material withdrawn.

A few cases regarding apparently intentional illegal electoral material have been referred to the Australian Federal Police from time to time (although not at the most recent 2004 election). In most of these cases these publications were anonymous, as would be expected where a person was deliberately publishing illegal material. As the material was anonymous, no prosecutions have been able to be pursued. This history indicates that the requirement to include an authorisation statement is not a very effective means of preventing or prosecuting illegal electoral publications.

Provided that a requirement remains that substantive electoral matter should identify the person or organisation responsible for publishing it, this could be expected to be sufficient identification for admission as evidence if a matter comes to court.

### ***The “6 months rule” for publications by ACT Government agencies that include a photo of an MLA***

Section 295(2) of the Electoral Act provides that a publication of a Government agency that is published for the first time within the 6 months before a general election is due that includes a picture of an MLA is not exempt from the authorisation provisions. In other words, a publication of a Government agency published within 6 months before a general election that includes a picture of an MLA must contain a statement along the lines “Authorised by [chief executive’s name], [agency name], [agency street address].”

The intent behind this provision was to require agencies to think carefully before producing material in the lead-up to an election that might be taken as promotional material for sitting MLAs. It did not prevent such publication, it merely required agencies to include an authorisation statement on the material.

In the Commission’s view, this requirement is indirectly addressing an issue that could more properly be addressed by Government publishing standards. The Commission considers that a criminal prosecution under the Electoral Act would not be the appropriate way to enforce such standards. It should be noted that the Electoral Act requirement only applies to publications containing electoral matter, so that the 6 months rule would not uniformly apply to all agency publications that contain a picture of an MLA.

Bearing in mind the intent of the authorisation provisions – to inform readers who is responsible for publishing electoral matter – the 6 months rule is not giving readers any additional information where the agency responsible for publication is identified as normal.

For these reasons the Commission considers that the 6 months rule should be repealed. If the Assembly considers that there should be some restrictions placed on Government publications in the lead up to an election, the Commission considers that this issue should be explicitly addressed by Government publishing standards.

### ***Publication of reportage and commentary by news media***

Section 294 of the Electoral Act provides that the authorisation rules do not apply to electoral matter contained in reportage or commentary in an issue of a newspaper or periodical if the issue contains a statement to the effect that a person whose name and address appears in the statement has authorised the publication of all electoral matter contained in reportage or commentary in that issue.

In practice, some newspapers do not routinely carry such a statement.

Given that it is generally clear who the publisher and/or editor of a newspaper is, this exemption could be simplified by providing that the managing editor of a newspaper or periodical (however described) is automatically responsible for reportage or commentary in the publication.

Section 294 was drafted before news media began to publish material on websites and in emails. Several well-known Australian political/electoral websites do not contain such a statement, nor do they include street address details for their editorial location. Examples include Crikey.com.au, Mumble.com.au and Pollbludger.com. It would be desirable to ensure that section 294 also applied to websites and emails published by news media.

### ***Publication of letters to the editor and internet web logs***

Section 293 of the Electoral Act provides that the authorisation requirements do not apply to the dissemination of a letter to the editor of a newspaper or periodical if the name of the author and the locality of the author's residence appears at the end; and the editor of the newspaper or periodical keeps a written record of the address of the author, as stated in the original of the letter sent to the editor or as otherwise ascertained by the editor.

While mainstream printed newspapers are generally scrupulous about meeting this requirement, on-line equivalents on news media websites often do not follow the requirement to publish the name and locality address of correspondents. For example, the Australian Broadcasting Corporation (ABC) website routinely runs an on-line election forum where members of the public submit items that are analogous to letters to the editor. These items often do not name the correspondent and almost never identify the address of the correspondent.

Given that news media websites are essentially the same in content to printed newspapers, it would be reasonable to apply the same authorisation requirements to both.

From the point of view of those writing letters to the editor, requiring private citizens who express political opinions in print to publish their private address could have the undesirable effect of placing their safety at risk. This view has been expressed on several occasions to the Commission.

Therefore it might be appropriate to remove the requirement that letters to the editor must include the locality address of the correspondent.

### ***Sound and vision electoral advertising***

The Commission has taken the view that radio and television broadcasting is regulated by the Commonwealth. Therefore the Commission has considered that the ACT's authorisation rules do not apply to radio and television electoral broadcasters, who are instead required to authorise electoral matter under the Commonwealth's *Broadcasting Services Act 1992*.

In order to put this interpretation beyond doubt, the Commission considers that the Electoral Act should be amended to make this position explicit rather than implicit.

However, there are a range of electronic sound and vision publication methods that do not fall within the definition of radio and television. These include videos, DVDs, CDs, computerised sound and video files, internet broadcasts and cinema shows. In these cases, while the ACT's current authorisation provisions probably apply, the current provisions are aimed primarily at publications containing printed matter, rather than sound or vision.

The Commission considers that the authorisation provisions should be amended to cater for the specific circumstances of sound and vision media. The form of the changes needed will depend on whether the Commission's other recommendations regarding relaxing the authorisation provisions are accepted. It is suggested that sound and/or video publications that include electoral matter should either contain an authorisation statement that complies with the Commonwealth's *Broadcasting Services Act 1992* or contain either a spoken or written authorisation that includes the information required for authorisation of printed matter.

### ***Recommendations for changes to the authorisation scheme***

The Commission recommends that the Electoral Act be amended to replace the current authorisation scheme contained in sections 292-295 of the Electoral Act with the following scheme:

- A person must not disseminate electoral matter in printed form (either in hard-copy form or electronically) unless the author's name or the name of the person or organisation authorising the material is clearly stated so as to indicate that the person or organisation is responsible for the material.
- A person must not disseminate electoral matter in sound or video form unless the author's name or the name of the person or organisation authorising the material is clearly stated in spoken or printed form so as to indicate that the person or organisation is responsible for the material.
- If electoral matter is published for a registered political party or a candidate (including a person who has publicly indicated that he or she intends to be a candidate), the name of the party or candidate must be stated so as to indicate that the party or candidate is responsible for the material.
- The ACT's authorisation rules do not apply to radio and television electoral broadcasters, where they are required to authorise electoral matter under the Commonwealth's *Broadcasting Services Act 1992*.



- Electoral matter contained in reportage, commentary or letters to the editor in a newspaper, periodical or news-type website does not need to be specifically authorised: responsibility for such electoral matter shall be taken to be assumed either by the managing editor of the publication; or by a person nominated by a statement in the publication indicating that the person has authorised the publication of the electoral matter.
- Letters to the editor of a newspaper, periodical or news-type website (including internet comments made in the style of letters to the editor) must include the name of the author but do not need to indicate the address of the author.
- Items containing 10 or fewer words (published other than by newspaper, periodical, radio, television or other sound or video format) – including “campaign novelties” such as a car bumper-sticker, flyer, T-shirt, lapel button, lapel badge, pen, pencil or balloon – do not need to identify the name of the person or organisation authorising the material.
- The current requirement stating that government agency publications containing photographs of MLAs published in the 6 months before an election should carry an authorisation statement, should be repealed. The ACT Government may wish to consider whether to limit content of agency publications in the lead up to an election through its government publishing standards.
- Complementary changes will need to be made to other provisions in the Electoral Act that are cross referenced to the authorisation provisions, including sections 223, 230 and 306.
- Complementary changes will need to be made to remove outdated provisions from the *Electoral Regulation 1993*, including regulations 3 and 6.

## **Defamation of candidates**

Section 300 of the Electoral Act provides that a person shall not make or publish, or authorise to be made or published, a false and defamatory statement about the personal character or conduct of a candidate. This section is based on section 350 of the Commonwealth Electoral Act.

The Commission has taken the view that action to pursue breaches against this section should be pursued by the candidate concerned. No court action has ever been taken under this section. Given recent developments in defamation law generally, the Commission sought the advice of the Department of Justice and Community Safety on the suitability of section 300.

The Department of Justice and Community Safety advised that, for a number of decades, the criminal law has retreated from involvement in defamation actions. While some criminal provisions remain, they tend not to be used, because of the technical complexity of melding what is essentially a civil law action, highly dependant on procedural law, into criminal proceedings.

The Department advises that it is doubtful whether section 300 could be used to secure a conviction. Similarly, it is doubtful whether a candidate would get relief within a relevant period using the injunction provision in subsection 300(4). Both parts of the section overlook the many ordinary defences that exist at common law and in statutory form. Both parts of the section would rely on extensive borrowings from the civil law - in terms of meaning - but the necessary civil infrastructure to litigate the issues that arise in defamation proceedings does not exist within the provision.

Given these concerns, and the fact that there are alternative superior avenues for pursuing defamation action, the Commission **recommends** that section 300 of the Electoral Act be repealed.

## Postal voting

This section reviews changes made to the postal voting system after the 2001 election. As a result of a recommendation made by the Commission in its 2001 election review, the Electoral Act was amended in 2004 to provide for an earlier cut-off for receipt of applications for postal voters from electors overseas. The Assembly also amended the Electoral Act in 2004 to make it an offence to induce a person to complete a postal vote application form and return it to an address other than an address authorised by the Electoral Commissioner.

For the 2001 election, all postal voters could apply for a postal vote up until the Thursday before polling day. For the 2004 election, postal voters who were overseas were required to submit their postal vote applications by no later than the Friday a week before polling day. This change was intended to give overseas postal voters more time in which to receive and return their completed ballot papers. In 2001, none of the postal vote applications received from overseas electors in the last week before polling day resulted in votes being returned in time to be counted.

In the 2001 election, out of a total of 8192 postal vote applications processed, 1106 were made on forms distributed by the Australian Labor Party and 867 were made on forms distributed by the Liberal Party. These party forms included as their return address the address of the party. The parties were then able to make a record of the names of those who had returned postal vote applications to them before passing them on to the Commission. In its 1998 and 2001 election reviews, the Commission expressed the view that this practice gave political parties an inappropriate administrative role in the conduct of an election. The Assembly amended the Electoral Act to make this process illegal before the 2004 election.

Table 1 below shows for the 2001 and 2004 elections the number of postal votes issued, the number returned and admitted to the count, the number of postal vote applicants who instead cast ordinary votes at polling places and pre-poll voting centres, and the various categories of postal votes that were received by the Commission but rejected from the count.

The table indicates that 133 more people applied for a postal vote in 2004 compared to 2001; 122 more postal ballot papers were admitted to the count; 206 more postal vote applicants actually voted at a polling place or pre-poll voting centre; and 80 fewer postal ballot papers were not returned at all to the Commission. Of those postal votes rejected because they were either received too late by voters and marked after polling day, or because they were received after the cut-off for receipt of postal votes (the Friday after polling day), 96 fewer were rejected in 2004 compared to 2001.

In 2001, around 740 postal votes sent to overseas electors were not included in the count, mostly because they were not returned in time to be counted, or not returned at all. In 2004, around 400 postal votes issued to overseas electors were not included in the count, again mostly because they were not returned in time to be counted, or not returned at all.

These results appear to indicate that the earlier cut-off for overseas postal vote applications had the desired effect of reducing the number of overseas postal votes returned too late to be counted.

While it is difficult to ascertain the practical impact of the change to the ability of parties to solicit completed postal vote applications, the fact that more voters applied for postal votes in 2004 compared to 2001 appears to indicate that voters were able to obtain copies of postal vote applications without difficulty. The fall in the number of postal votes being received too late to be counted may also indicate that postal vote applications were more likely to be received by the Commission in a timely manner in 2004 compared to 2001.

**Table 1 – Postal vote outcomes**

<b>Category</b>	<b>2001</b>	<b>2004</b>
Persons issued with a postal vote	8192	8325
Postal vote ballot papers admitted to the count	6410	6532
Postal vote envelopes admitted to the count without ballot papers enclosed	30	2
Persons applying for a postal vote who voted at an ordinary polling place or pre-poll centre	399	605
Postal votes received but not admitted to the count because the voter was not correctly enrolled	62	22
Postal votes received but not admitted to the count because the voter claimed a vote for the wrong electorate	14	20
Postal votes received but not admitted to the count because the voter did not sign the declaration	129	150
Postal votes received but not admitted to the count because the witness did not sign the declaration	15	73
Postal votes received but not admitted to the count because the voter's signature did not match the signature on the application	34	9
Postal votes received but not admitted to the count because the voter marked his or her vote after polling day	121	78
Postal votes received too late to be counted	264	211
Postal votes returned to sender unclaimed	58	52
Postal vote cancelled and ordinary vote not issued	5	0
Total number of postal votes returned to Elections ACT or postal voters who voted at a polling place or pre-poll centre	7541	7754
Total number of postal votes not returned to Elections ACT	651	571

## Interstate pre-polling

The Electoral Act currently states in section 136C that interstate pre-polling has to commence no later than the 19<sup>th</sup> day before polling, unless that day is a public holiday (which it was in 2001). The effect of this requirement is that there is a need to deliver ballot papers to each interstate Electoral Commission on the first Monday of pre-polling. This can be a logistical difficulty, as it can only be met by printing ballot papers on the Sunday and having them sent by airfreight to arrive by the Monday morning. This is an expensive process.

The Commission suspects the use of the phrase “no later than” in section 136C was simply a mistake, and that the intention in this section was to use the phrase “no earlier than”. Making this amendment would avoid the need for the Commission to use expensive airfreight on a Sunday and would in practice see interstate polling commencing on the first Tuesday, rather than the first Monday, of the pre-poll period. The Commission **recommends** that the phrase “no later than” be replaced with the phrase “no earlier than” in section 136C.

## **Photos of people voting**

The recent increase in use and popularity of small digital cameras, particularly mobile phone cameras, has increased the risk that the secrecy of the ballot could be compromised by taking photos of voters' marked ballot papers.

This could cause mischief in two ways. Voters could be photographed without their knowledge, thereby allowing others to mischievously determine how they voted and to publish or distribute photos of their completed ballot papers. Alternatively, voters wishing to sell or otherwise publicise their votes could photograph their own completed ballot papers to use as proof of their votes.

In order to make such practices illegal, the Commission **recommends** that the Electoral Act be amended to provide that it is an offence to take a photo of a person's marked ballot paper either in a polling place, or where a person is casting a postal vote.

This change would not prevent the taking of photos in polling places in general (by the media, for example), provided that those photos did not allow a person to determine how anyone has marked their ballot paper.

## Appointment of scrutineers

Section 122 of the Electoral Act provides that a candidate may appoint scrutineers to represent the candidate during polling and during the scrutiny. An appointment of a scrutineer must be made by giving the Electoral Commissioner a written notice signed by the candidate, specifying the name and address of the scrutineer, and including an undertaking signed by the scrutineer.

A practice that was drawn to the Commission's attention at the 2004 election was the use of photocopied scrutineer appointment forms that included a candidate's name and signature but left the scrutineer's details blank. It appeared that scrutineers were in effect appointing themselves by writing their own details onto these partially-completed forms at polling places and the scrutiny centre.

The Commission is not satisfied that this practice constitutes a lawful form of appointment of a scrutineer. The Commission considers that, to be properly appointed, candidates should sign scrutineer appointment forms with the scrutineer's details completed. If a scrutineer simply completes his or her own details on a pre-signed form, there is no indication that the candidate intended to appoint that person as a scrutineer.

The Commission **recommends** that it consult with candidates and parties to review its forms for appointment of scrutineers to make it easier for candidates to properly appoint scrutineers. For example, an additional scrutineer appointment form could be used where candidates put forward a slate of scrutineers for the election period, with one signature appointing a list of scrutineers. This slate of scrutineers could then be valid at all polling places and counting centres. Each scrutineer would be required to sign the specified undertaking related to conduct during polling and counting.

