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Chair
JACS Committee - Inquiry into the 2020 ACT Election and the Electoral Act
Legislative Assembly for the Australian Capital Territory
Civic Square, London Circuit
CANBERRA ACT 2601

ACT Electoral Commission Response to the Standing Committee on Justice and Community Safety Report of August 2021

Inquiry into the 2020 ACT Election and the Electoral Act

Section 7 of the *Electoral Act 1992* establishes the provision of advice to the Assembly on matters relating to elections as a key function of the ACT Electoral Commission (the Commission).

This document details the Commission's response to the Standing Committee on Justice and Community Safety Report of August 2021 *Inquiry into the 2020 ACT Election and the Electoral Act*. This response should be read in conjunction with the Commission's *Report on the ACT Legislative Assembly Election 2020*, tabled in the ACT Legislative Assembly on 23 April 2021.

The Commission supports or notes most of the Committee's recommendations, recognising that many have drawn on prior recommendations by the Commission.

This response primarily focuses on eight Inquiry Report recommendations, including six recommendations to which the Commission is opposed on the grounds that they would reduce voter access, complicate electoral processes, and increase risks to the integrity of the forthcoming election in 2024. A number of these recommendations do not appear to be based on widespread support from informed stakeholders.

Appendix 1 provides a summary table of the Commission's view of each of the Committee's 52 recommendations, while Appendix 2 provides detailed comment. Appendix 3 highlights recommendations made by the Commission in its election report that were either not addressed or not agreed to by the Committee.

The Commission looks forward to working with the Standing Committee on Justice and Community Safety, the Government and the Assembly to ensure that ACT electoral legislation and processes continue to provide for a trusted, transparent, secure and accessible election.

Any questions or clarifications about this response can be directed in the first instance to Damian Cantwell, ACT Electoral Commissioner.

David W Kalisch
Chairperson

13 December 2021

Damian Cantwell AM CSC
Electoral Commissioner

13 December 2021

Philip Moss AM
Member

13 December 2021

Contents

Contents.....	1
Background	2
Inquiry recommendations considered to be of greatest significance to the 2024 election.....	3
Appendix 1 – Summary of Commission’s Response to each Recommendation by the Committee.....	9
Appendix 2 - Commission’s Response to each Recommendation by the Committee	12
Appendix 3 - Recommendations by the Commission not addressed or agreed to by the Committee.....	27

Background

The ACT Electoral Commission is committed to providing the highest possible level of electoral services to the ACT community. Following the 2020 ACT Legislative Assembly election, the ACT Electoral Commission (the Commission) prepared a report about the conduct of the 2020 election and the operation of the Electoral Act; to note areas for improvement; and to make recommendations for changes to electoral legislation in preparation for the conduct of the 2024 Legislative Assembly elections.

The Commission's *Report on the ACT Legislative Assembly Election 2020* was tabled in the Assembly by the Speaker on 23 April 2021. The report also served as a submission by the Commission to the Justice and Community Safety (JACS) Committee (the Committee) Inquiry into the 2020 ACT Election and the Electoral Act (the Inquiry). A Supplementary Submission by the Commission also addressed the issue of lowering the voting age as a specific topic listed in the *Inquiry Terms of Reference*.

The Commission made 24 recommendations for legislative amendment in its election report, and also highlighted several areas for improvement that did not require legislative change. The Commission believes the recommendations within the election report will improve ACT electoral laws and ensure that the 2024 ACT legislative Assembly election will provide the highest level of accessibility to all eligible electors and deliver a trusted, transparent, and secure result.

In its subsequent response to the Commission's election report, the Government noted the Commission's report and referred all 24 recommendations to the JACS Committee for consideration as part of its inquiry into the conduct of the 2020 ACT election and Electoral Act.

Following public hearings held in May 2021, the Committee released its inquiry report on 5 August 2021. The Commission acknowledges and welcomes the engagement by the Committee with numerous stakeholders and the broader ACT community during the inquiry, with the intent of protecting and strengthening our democracy.

The Committee made 52 official recommendations in its inquiry report which are addressed sequentially at Appendix 1 and 2 to this response. The Commission notes that the Committee agreed, or closely agreed, with 17 of the 24 recommendations made in the Commission's election report, and made four recommendations that addressed several of the non-legislative areas for improvement highlighted by the Commission.

The aim of this response is to detail the Commission's views and advice to the Committee, Assembly and ACT Government on the Committee's election inquiry report recommendations. The response also invites further consideration of recommendations made by the Commission but were either not addressed or not agreed to by the Committee in its report.

The Commission's position and views expressed in this response are based on an understanding of the relevant legal provisions. The Government may wish to seek legal advice on these matters.

Inquiry recommendations considered to be of greatest significance to the 2024 election

The Commission wishes to highlight the following eight inquiry recommendations that it considers to be of greatest importance to preparations for the 2024 election, with particular attention to supporting the integrity and accessibility of the election.

Recommendation 1 (Supported by the Commission)

The Committee recommends that s136B Electoral Act 1992 be amended to provide that any elector may vote during the early voting period without the need to declare they are unable to attend a polling place on election day.

The Commission supports this recommendation as it considers that such a legislative amendment would appropriately recognise and respond to community expectations of contemporary electoral services, and encourage the greatest level of voter accessibility and participation in the electoral process.

The Commission notes that this recommendation aligns with the Commission's election report recommendation 13 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 47-48 'Removing restrictions on early voting').

Recommendation 2 (Opposed by the Commission)

The Committee recommends that s136B Electoral Act 1992 be amended to establish an early voting period of 2 weeks (outside periods of public health emergency).

The Commission opposes this recommendation and a reduction in the period available for early voting from three weeks to two weeks for the following reasons:

- The resultant reduction in voter accessibility to early voting services at a time deemed convenient by the elector.
- Implementation would work directly against well-established and increasing community demands for flexible and accessible early voting services across the historic three week early voting period, with a resultant sense of voter disenfranchisement.
- A compression of early voter load from three to two weeks would likely create queues at early voting facilities, increase risks of voter dissatisfaction, and heighten pressures upon polling and electoral officials.
- The significant negative impact on postal votes and the resultant decreased accessibility to voting by eligible postal voters. The Commission has previously highlighted the decline in international and domestic postal services, regardless of the impacts of the COVID pandemic. During the 2020 election, an average period of 18 days lapsed between issue and return of postal votes (notably a longer period than the period of early voting being proposed). Importantly, of the 251 postal votes returned too late to be admitted to the 2020 election count, 156 of these were issued by the Electoral Commission during the first week of the prevailing three week early voting period. This highlights the risks to voter inclusivity due to postal delays already evident in the existing three week early voting period. To reduce this period to two weeks will exacerbate these risks further and see a significant increase in rejected postal votes, having been received after the cut off seven days after polling day.

The Commission's views in support of early voting are further detailed in the Commission's *Report on the ACT Legislative Assembly Election 2020* pages 47-48 'Removing restrictions on early voting'.

Recommendation 3 (Opposed by the Commission)

The Committee recommends that early voting centres be limited to one per electorate for elections conducted during ordinary circumstances (outside periods of public health emergency).

The Commission opposes this recommendation and a reduction in delivery of early voting services for similar reasons to recommendation 2:

- A reduction in voter accessibility to early voting centres at a time and place deemed convenient by the elector.
- Implementation would work directly against well-established and increasing community demands for flexible and accessible early voting services across the ACT, with a resultant sense of voter disenfranchisement.
- A compression of early voter load to only one early voting centre per electorate would likely create queues, increase risks of voter dissatisfaction, and heighten pressures upon polling and electoral officials.
- The negative impact on capacity of the Commissioner to proactively address predicted turnout pressures in planning and delivering the election.
- Risks of public perceptions of encroachment upon the statutory independence and accountability of the Commissioner, in that section 119 of the Electoral Act provides the Electoral Commissioner with the power to appoint polling place locations and set polling times.

The Commission's views in support of early voting are further detailed in the Commission's *Report on the ACT Legislative Assembly Election 2020* pages 47-48 'Removing restrictions on early voting'.

Recommendation 5 (Opposed by the Commission)

The Committee recommends that the e-voting system incorporate a voter-verifiable paper record, so the voter can check that their vote was recorded as they intended.

The Commission opposes this recommendation for the following reasons:

- There is no evidence that any issue involving the inaccurate recording of votes exists in the ACT electronic voting and counting system. It has proven to be accurate, reliable and secure at all ACT elections since introduction in 2001.
- Assurance of the accuracy of recording of votes as cast, and the integrity of the ACT e-voting system, is best achieved through the existing proven processes of:
 - prior independent certification of the voting and counting source code (as well as independent testing as intended in preparation for the 2024 election); and
 - timely public scrutiny of the open source code;

- The likelihood that some voters will be unable to accurately recall detail of their intended electronic vote already cast when subsequently presented with a paper record, especially when numbering every box, thereby raising mistaken challenges to their vote and introducing a sense of unwarranted mistrust in the electoral system.
- The resultant delays to the voting, counting and scrutiny processes through additional unnecessary electoral and administrative requirements.
- Additional unwarranted costs in staffing and logistics through manual and time intensive processes.
- Unnecessary wastage of significant additional paper-based resources.

Additionally, the Electoral Commission intends to establish an expert Electoral Integrity Advisory Panel ahead of the 2024 election to assure ongoing security and integrity of the ACT electoral systems. Elections ACT will also continue its intensive modernisation, testing and assurance program of these systems as part of its continuous improvement strategy. These measures underline the Commission's highest confidence in the integrity of the existing ACT electronic voting services.

The Commission has previously produced a paper on this subject which concluded that printed receipts are not needed or appropriate in ensuring the integrity of the ACT electoral systems.¹ The Commission understands that the Victorian and NSW electoral commissions have reached the same conclusion in analysing the potential use of voter verifiable paper records within their own electoral systems.

Recommendation 6 (Opposed by the Commission)

The Committee recommends that the Electoral Act be amended to require a public audit of randomly selected paper records of electronic votes, to compare each ballot against its electronic record and check for discrepancies.

The Commission opposes this recommendation as it presumes implementation of paper records of electronic votes (recommendation 5), to which the Commission is opposed (see above reasons).

Additional reasons for the Commission opposing this recommendation are:

- All electronic voting data is already publicly available. The open-source nature of the eVACS software code and the transparent processes established by the Commission already allow observers to confirm 'what goes in is what comes out'.
- The audit of votes, including electronic votes, for the purpose of electoral integrity and transparency is already provided for by the Electoral Act, in that ballot papers are provided to electors; they are accounted for; they are counted according to the legislation; and results, including interim results, are published.

¹ Available at [2004 Election Review Computer Voting.doc \(act.gov.au\)](https://www.elections.act.gov.au/2004-Election-Review-Computer-Voting.doc)

- Section 118B of the Electoral Act also provides that the Electoral Commissioner must keep backup copies of all electronic voting and counting data. The audit trail includes encrypted USBs certified by the Commissioner that could be tendered in a court should an election be disputed. The data on these USBs includes:
 - the certified and audited software code for the eVACS system used at each ACT election;
 - the data used to set up the servers and voting machines; and
 - daily copies of cumulative votes across the voting period.
- The ACT Electoral Commission also retains the physical computers used as servers for the election for the legislated period during which election results may be disputed.

It is the Commission's view that the theoretical and unsubstantiated concerns related to electoral integrity and the accuracy of electronic voting that underpin both recommendations 5 and 6 do not warrant the significant risks, the increased complexity, undeveloped and untested processes, costs and resources required to implement such proposals.

Recommendation 7 (Supported by the Commission)

The Committee recommends that ACT Government assess the benefits and risks of providing an online voting system for overseas voters outside periods of public health emergency, and report to the Assembly by March 2022.

The Commission supports an ACT Government assessment of overseas e-voting for future ACT elections and the reinstatement of enabling relevant legislation, to encourage and facilitate the greatest level of overseas voter accessibility and participation in the electoral process.

This recommendation aligns with the Commission's election report recommendation 11 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 42-43 'Overseas e-voting').

Recommendation 18 (Opposed by the Commission)

The Committee recommends ACT Government investigate the feasibility of allowing people who are already on the ACT electoral roll to notify change of address up to 6pm on polling day.

The Commission opposes this recommendation for the following reasons:

- The abolition of a key electoral integrity provision through the complete removal of a roll close prior to an election.
- The inability for public scrutiny of enrolments made on or just prior to election day, with the resultant admission of votes to the count without the same scrutiny afforded to other enrolments.
- The increased risk to electoral integrity through the potential for fraudulent enrolments, whereby electors may seek to enrol during an active election period and vote in a new electorate with the intent to fraudulently shape election outcomes in that electorate. At its most problematic, 'electorate stacking' on a systematic and wholesale level enabled by enrolment updates during the voting period may impact the overall outcome in an electorate.

- The significant resultant increase in declaration voting at an ACT election, resulting in extended voting queues, additional staffing requirements, an increase in the number of votes being rejected due to errors made on the declaration envelope, and delayed final election results.

The Commission considers that enrol on the day facilities should be viewed as a legislative 'savings provision', whereby those electors who become aware that they are not enrolled when attending a voting location can still participate in the election by casting a declaration vote. This provision should not encourage or facilitate a lack of prior action by an elector to ensure their current ACT enrolment details are correct, thus introducing unnecessary risks of fraudulent voting.

The Commission also highlights the significant public education and compliance efforts undertaken by Elections ACT in the lead up to the election period to ensure an accurate and up to date roll, as part of the Commission's voter information campaign.

Recommendation 42 (Opposed by the Commission)

The Committee recommends the Electoral Act be amended to extend the timeframe for reporting electoral expenditure from seven to 21 days.

The Commission considers this recommendation is based on misunderstandings by both the Liberal Democrats and the Committee regarding the timeframes for reporting of electoral expenditure and the receipt of gifts.

The Commission presumes the intent of Liberal Democrats' submission to the Inquiry, and hence the Committee's recommendation above, is to extend the timeframe for reporting of the receipt of gifts rather than electoral expenditure.

Current legislation requires disclosure to the Commission of electoral expenditure incurred during the capped expenditure period for an election within 60 days of election day.

Current legislation requires disclosure to the Commission of receipt of a gift, or a collection of gifts totalling over \$1,000 from the same individual or organisation over a financial year, within the following timeframes:

- in the period from 36 days before polling day until 30 days after the election is declared (the 'defined period'): within seven days; and
- outside of the defined period: within seven days of the end of the month in which the total amount received from the person reached \$1,000.

Working on the assumption that this recommendation seeks to extend the timeframe for reporting of the receipt of gifts from seven to 21 days, the Commission opposes such action as it considers that the current legislated timeframe of seven days during the defined period is most effective in targeting the period when most gifts and donations are received during an election. To extend the timeframe from seven to 21 days would significantly diminish the transparency of receipt of gifts by political entities during an election, and undermine the effectiveness of an important component of the ACT's funding and disclosure scheme. It should be noted that outside the defined period the current legislation provides for monthly reporting, rather than the proposed timeframe of 21 days in this recommendation.

The Commission also opposes the assertion by the Liberal Democrats that the current seven day disclosure timeframe [for gift disclosures] limits comprehensive reporting. Current legislation requires only the disclosure of:

- the date the gift is received;
- the amount of the gift; and
- the identifying details and address of the donor (if the gift was not an anonymous gift).

Appendixes

Appendix 1: Summary of Commission's Response to each Recommendation by the Committee

Appendix 2: Commission's Response to each Recommendation by the Committee

Appendix 3: Recommendations by the Commission not addressed or agreed to by the Committee

Appendix 1 – Summary of Commission’s Response to each Recommendation by the Committee

Committee Recommendation	Commission Response (Supported/Opposed/Noted)	Commission Response Page Number
1	Supported	10
2	Opposed	10
3	Opposed	10
4	Supported	10
5	Opposed	11
6	Opposed	11
7	Supported	11
8	Supported	11
9	Noted	11
10	Noted	12
11	Noted	12
12	Supported	13
13	Supported	13
14	Noted	13
15	Supported	13
16	Supported	13
17	Noted	14
18	Supported	14
19	Supported	14
20	Supported	15
21	Supported	15
22	Supported	15

Committee Recommendation	Commission Response (Supported/Opposed/Noted)	Commission Response Page Number
23	Noted	15
24	Noted	15
25	Noted	16
26	Supported	16
27	Supported	16
28	Supported	17
29	Supported	17
30	Noted	17
31	Noted	17
32	Supported	18
33	Noted	18
34	Supported	18
35	Supported	19
36	Noted	19
37	Noted	19
38	Supported	20
39	Noted	20
40	Supported	20
41	Noted	20
42	Supported	21
43	Supported	21
44	Noted	21
45	Supported	21
46	Supported	22

Committee Recommendation	Commission Response (Supported/Opposed/Noted)	Commission Response Page Number
47	Supported	22
48	Noted	22
49	Supported	22
50	Supported	23
51	Supported	23
52	Supported	23

Appendix 2 - Commission's Response to each Recommendation by the Committee

Recommendation 1 (Supported by the Commission)

The Committee recommends that s136B Electoral Act 1992 be amended to provide that any elector may vote during the early voting period without the need to declare they are unable to attend a polling place on election day.

The Commission supports this recommendation as such a legislative amendment would appropriately recognise and respond to community expectations of contemporary electoral services, and encourage and facilitate the greatest level of voter accessibility and participation in the electoral process.

This recommendation aligns with the Commission's election report recommendation 13 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 47-48 'Removing restrictions on early voting').

Recommendation 2 (Opposed by the Commission)

The Committee recommends that s136B Electoral Act 1992 be amended to establish an early voting period of 2 weeks (outside periods of public health emergency).

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 3 (Opposed by the Commission)

The Committee recommends that early voting centres be limited to one per electorate for elections conducted during ordinary circumstances (outside periods of public health emergency).

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 4 (Supported by the Commission)

The Committee recommends that any planned/scheduled modifications to the electronic voting system, and any required audits and declarations, be completed before candidate nomination closes.

The Commission agrees that an ideal scenario provides for the availability of the voting code for public inspection at least six months before the election and the completion of integrity audits as early as possible. The Commission routinely strives to achieve such transparency however these timeframes are not always able to be met. Late legislative changes or delays in approval of related funding by the Assembly, as was the case in 2020 with the passing of the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* in July 2020, impact the Commission's timing for the completion of critical electoral ICT development and testing.

Pending any late electoral legislative amendments or related funding requirements, the Commission intends to have the completed source code for the electronic voting and counting system available for public inspection significantly earlier than the close of the candidate nomination process.

Recommendation 5 (Opposed by the Commission)

The Committee recommends that the e-voting system incorporate a voter-verifiable paper record, so the voter can check that their vote was recorded as they intended.

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 6 (Opposed by the Commission)

The Committee recommends that the Electoral Act be amended to require a public audit of randomly selected paper records of electronic votes, to compare each ballot against its electronic record and check for discrepancies.

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 7 (Supported by the Commission)

The Committee recommends that ACT Government assess the benefits and risks of providing an online voting system for overseas voters outside periods of public health emergency, and report to the Assembly by March 2022.

The Commission supports an ACT Government assessment of overseas e-voting for future ACT elections and the reinstatement of enabling relevant legislation, to encourage and facilitate the greatest level of overseas voter accessibility and participation in the electoral process.

This recommendation aligns with the Commission's election report recommendation 11 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 42-43 'Overseas e-voting').

Recommendation 8 (Supported by the Commission)

The Committee recommends that ACT Government provide the Electoral Commission with assurance of funding for continuous modernisation of ICT systems.

The Commission supports this recommendation as it facilitates the continued delivery of accessible, trusted, transparent and secure electoral services to the ACT community.

This recommendation aligns with the Commission's election report (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 81 'Areas for improvement other than legislative changes').

Recommendation 9 (Noted by the Commission)

The Committee recommends that the term of the non-disclosure agreement applied to the release of the electronic voting source code be revised to:

- *Apply the 60-day restriction on publication only if the source code is available at least six months before the election, and*
- *Give explicit assurance that there is no barrier to publication of findings if the conditions of the agreement are met.*

The Commission agrees that an ideal scenario provides for the availability of voting code for public inspection at least six months before the election and the completion of integrity audits as early as possible. The Commission routinely strives to achieve such transparency however these timeframes are not always able to be met. Late legislative changes or delays in approval of related funding by the Assembly, as was the case in 2020 with the passing of the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* in July 2020, impact the Commission's timing for the completion of critical electoral ICT development and testing.

The Commission considers that the legally drafted current non-disclosure agreement provides explicit assurance that there is no barrier to publication of findings if the conditions of the agreement are met. However, the application of the non-disclosure agreement will be reviewed prior to the 2024 election.

Recommendation 10 (Noted by the Commission)

The Committee recommends that the eVACS source code and system documentation be available for inspection at least six months before election day and within seven days of request.

The Commission agrees that an ideal scenario provides for the availability of voting code for public inspection at least six months before the election and the completion of integrity audits as early as possible. The Commission routinely strives to achieve such transparency however these timeframes are not always able to be met. Late legislative changes or delays in approval of related funding by the Assembly, as was the case in 2020 with the passing of the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* in July 2020, impact the Commission's timing for the completion of critical electoral ICT development and testing.

Pending any late electoral legislative amendments or related funding requirements, the Commission intends to have the completed source code for the electronic voting and counting system available for public inspection significantly earlier than the close of the candidate nomination process.

The Commission will continue to balance expediency, security and appropriate due diligence in managing requests for electoral related information, including eVACS source code.

Recommendation 11 (Noted by the Commission)

The Committee recommends that the Electoral Act require public release of the electronic voting code and system documentation, and that the scope of this requirement be defined in an instrument under the Act, following consultation with electronic voting experts.

The Commission notes this recommendation however considers it unnecessary; indeed, it may result in the Commission being in breach of such a proposed instrument if delayed in the intended release of the electronic voting code through circumstances outside of its control, such as late legislative amendments by the Assembly.

The Commission has always publicly released the electronic voting code since its inception in 2001, however the timing of such public release is dependent on there being no related electoral legislative changes after the release of the code. The Commission's report into the 2020 election advised the reputational risks to both Government and the Commission in enacting electoral legislative changes within 12 months of the election. The Commissioner's statements at the Inquiry hearings also highlighted the unintended but necessary delay in release of the code through such late legislative changes and related funding approvals in 2020.

The Commission advises that it is already established as the statutory independent 'electronic voting expert'. The Commission also intends to establish an Electoral Integrity Advisory Panel ahead of the 2024 election to ensure ongoing security and integrity of the ACT electoral systems. The Commission will continue its intensive modernisation, testing and assurance program of these systems as part of its continuous improvement strategy. These measures underline the Commission's highest confidence in the integrity of the existing ACT electronic voting services.

Recommendation 12 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to require party secretaries to supply name and address to the Electoral Commission.

The Commission supports this recommendation as such a legislative amendment provides for enhanced transparency and governance in the appointment of party secretaries.

This recommendation aligns with the Commission's election report recommendation 2 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 23 'Party Secretaries').

Recommendation 13 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to require parties to supply dates of birth and email addresses (where available) for purpose of party membership checks.

The Commission supports this recommendation as such a legislative amendment provides for enhanced transparency and accuracy in membership checks of political parties to determine or confirm eligibility for registration.

This recommendation aligns with the Commission's election report recommendation 3 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 24 'Party membership checks').

Recommendation 14 (Noted by the Commission)

The Committee recommends ACT Government raise with Commonwealth, state and territory counterparts the potential for a more rigorous test for party name registration with the aim of preventing voter confusion.

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

Recommendation 15 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to limit the number of candidates that a registered party can run to five per electorate.

The Commission supports this recommendation as such a legislative amendment provides for decreased complexity of testing of electronic voting systems and processes used by Elections ACT in preparation for the election.

This recommendation aligns with the Commission's election report recommendation 4 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 25 'Party nomination limits').

Recommendation 16 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to provide the Commission an extra 24 hours between formal nomination of candidates and commencement of voting.

The Commission supports this recommendation as such a legislative amendment provides for mitigation of the significant risks to election preparations and the workplace health and safety of Elections ACT staff in undertaking the multitude of election critical tasks in the few days following declaration of candidates and before commencement of voting.

This recommendation aligns with the Commission's election report recommendation 5 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 26 'Election timetable').

Recommendation 17 (Noted by the Commission)

The Committee recommends that commercial premises only be designated as a polling place if the tenancy agreement permits the Electoral Commission to display prominent signage directing people to the venue throughout the voting period.

The Electoral Commission established the following criteria in determining suitability of early voting centre locations for the 2020 election:

- Proximity to key residential/business areas.
- Sufficient space to accommodate the infrastructure necessary to deliver COVID-safe environments.
- Adequate accessibility by all electors.

Application of these criteria places some limits on selection of venues as early voting centres as part of the real estate market scan conducted prior to the election.

The Commission notes that the Committee report commentary in support of this recommendation references 'One submitter expressed concern about the accessibility of, visibility of, and signage directing people to the early voting centre in Bonnor House'² (Woden early voting centre). The Commission also notes that over 22,000 votes were taken at the Woden early voting centre at the 2020 election. However, the Commission will review practices related to selection and signage of polling locations in preparations for the 2024 election.

Recommendation 18 (Opposed by the Commission)

The Committee recommends ACT Government investigate the feasibility of allowing people who are already on the ACT electoral roll to notify change of address up to 6pm on polling day.

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 19 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to expand the definition of 'eligible elector' for purpose of telephone voting to include ACT electors based in Antarctica.

The Commission supports this recommendation as such a legislative amendment provides for the greatest level of accessibility and participation in the electoral process by ACT voters based in Antarctica. It also best provides for secrecy of votes cast by such electors.

This recommendation aligns with the Commission's election report recommendation 9 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 38 'Telephone voting').

Recommendation 20 (Supported by the Commission)

The Committee recommends ACT Government assess whether Schedule 4 of the Electoral Act should be amended to define 'surplus' as 'the candidate's total votes less the quota, if the resulting number of votes is greater than zero'.

The Commission supports this recommendation as such a legislative amendment provides for amendment of what is considered a drafting error.

Under the current definition of surplus, any amount above quota that falls within the parameters of between 0.000001 and 0.999999 of a vote is not considered part of a candidate's surplus, as it is not 'one or greater'. This is an error in drafting of legislation and requires amendment.

² Inquiry into the 2020 ACT Election and the Electoral Act, *Standing Committee on Justice and Community Safety August 2021 Report 2*, page 27 para 6.26

This recommendation aligns with the Commission's election report recommendation 19 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 60 'The definition of surplus').

Recommendation 21 (Supported by the Commission)

The Committee recommends that the current 100 metre exclusion zone for campaigning outside polling locations be retained.

The 100 metre ban on political canvassing, in conjunction with the inclusion of Robson rotation and the Hare-Clark proportional representation system, is an important element of the ACT's electoral system. These provisions when introduced by the Assembly were designed to reduce the influence of party tickets and give voters more power over their own choice of elected members.

Recommendation 22 (Supported by the Commission)

The Committee recommends that the Electoral Act be amended to prohibit campaigning on election day, in line with the legislative framework in Tasmania.

The Commission views this recommendation as consistent with other elements of the ACT's Hare Clark electoral system aimed at empowering the individual voter.

Recommendation 23 (Noted by the Commission)

The Committee recommends that ACT Government review the legislation powers and resources available to enforce rules on campaigning outside polling places.

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

Recommendation 24 (Noted by the Commission)

The Committee recommends that ACT Government prohibit roadside signs for electoral advertising on public land. If Constitutional or human rights considerations present a barrier to this outcome, the Committee recommends that ACT Government consult with the community and report to the Assembly on the nearest alternative options by March 2022.

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

Recommendation 25 (Noted by the Commission)

The Committee recommends that ACT Government prohibit the practice of waving electoral signs at the side of the road to attract attention from passing motorists. If Constitutional or human rights considerations present a barrier to this outcome, the Committee recommends that ACT Government consult with the community and report to the Assembly on the nearest alternative options by March 2022.

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

However, the Commission cautions against implementing any proposed prohibition within specific electoral legislation such as the *Electoral Act 1992*, as road use or traffic matters lie outside the Commission's scope, expertise and responsibilities.

Recommendation 26 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to allow candidate statements to be lodged earlier in time, at the point of nomination.

The Commission supports this recommendation as such a legislative amendment provides for reduced operational risks for Elections ACT in preparing for the election through additional time for the processing and publication of candidate statements.

This recommendation aligns in part with the Commission's election report recommendation 7 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 31-32 'Candidate information').

It should be noted however that the Commission's view remains that the risk of unintended or perceived bias in the presentation and accuracy of candidate information undermines the independence and impartiality of the Commission. As per recommendation 6 of the Commission's election report, the Commission's preferred option is to amend the Electoral Act to remove section 110A which requires the Electoral Commission to be involved in the publication of political campaign canvassing on behalf of candidates and parties.

Recommendation 27 (Supported by the Commission)

The Committee recommends a legislative instrument be established under s292 of the Electoral Act to clarify how an authorisation statement is to appear on printed material.

The Commission supports this recommendation as such a legislative amendment provides for enhanced transparency of political processes and election related information through increased clarity and legibility of printed authorisation statements.

This recommendation aligns with the Commission's election report recommendation 17 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 51-52 'Authorisation of electoral advertisements').

Recommendation 28 (Supported by the Commission)

The Committee recommends a legislative instrument be established under s292 of the Electoral Act to clarify how an authorisation statement is to appear within social media accounts.

The Commission supports this recommendation as such a legislative amendment provides for enhanced transparency of political processes and election related information through clarity in specifying requirements for authorisation statements on social media platforms.

This recommendation aligns with the Commission's election report recommendation 15 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 51-52 'Authorisation of electoral advertisements').

Recommendation 29 (Supported by the Commission)

The Committee recommends that ACT Government explore options for refining the scope of 'personal views on social media' in s239A Electoral Act, to meet the policy intention outlined by the Electoral Commission and avoid unintended consequences; and report to the Assembly by March 2022.

The Commission supports this recommendation as such a legislative amendment provides for enhanced transparency of political processes and election related information through clarity in specifying requirements for authorisation statements on social media platforms.

This recommendation aligns with the Commission's election report recommendation 16 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 51-52 'Authorisation of electoral advertisements').

Recommendation 30 (Noted by the Commission)

The Committee recommends the Electoral Commission provide regulatory guidance on how it interprets the definition of 'electoral matter' in s4 Electoral Act, and how it enforces the offence of 'disseminating unauthorised electoral matter' in s292 Electoral Act, to provide clarity to entities outside the electoral process who may be captured under the provisions.

The Commission continues to provide a range of online and hardcopy reference material related to the issue of authorising electoral matter. The Commission remains ready to provide electoral advice to all stakeholders and the broader community.

Recommendation 31 (Noted by the Commission)

The Committee recommends that ACT Government investigate the feasibility of amending the definition of 'electoral matter' in s4 of the Electoral Act to align with the equivalent Commonwealth provision.

The Commission is of the view that the current definition of 'electoral matter' in the Electoral Act is appropriate. However, it remains ready to provide advice and assistance to any review of current electoral legislation where appropriate.

Recommendation 32 (Supported by the Commission)

The Committee recommends that the Electoral Act be amended to establish the offence of falsely authorising electoral matter, to the extent that such conflict is not already prohibited under section 297.

The Commission supports any recommendation aimed at tightening provisions within the Electoral Act to enhance electoral integrity. However, the Commission notes the inherent difficulty in investigating and ultimately enforcing matters of fraudulent authorisation.

The Commission notes that Recommendation 14 of the Commission's election report raises the issue of fraudulent authorisations in the context of individuals listed as the authorising officer without a match to a verified individual on the Commonwealth electoral roll or the electoral roll of any State or Territory (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 51 'Authorisation of electoral advertisements'). This specific matter has not been discussed by the Committee in the inquiry report and the Commission recommends that this matter also be included as part of any investigation into fraudulent authorisations.

Recommendation 33 (Noted by the Commission)

The Committee recommends that the Electoral Commission provide regulatory guidance to parties and candidates on the interpretation and enforcement of the ban on developer donations under s222I Electoral Act 1992.

Section 222I of the Electoral Act came into full effect from 1 July 2021. Since the inquiry public hearings held in May 2021, the Commission has released considerable regulatory guidance on the interpretation and enforcement of the ban on property developer donations, as well as hosting a stakeholder webinar on the topic in June 2021.

The Electoral Commission will continue to develop detailed regulatory guidance on its donation compliance investigation schedule and enforcement policy.

Recommendation 34 (Supported by the Commission)

The Committee recommends ACT Government use the Development Application database to establish and maintain a public register of property developers as defined in s222C Electoral Act 1992.

The Commission supports this recommendation. However, the current act of lodging a Development Application (DA) does not itself make the applicant a property developer under the new legislation. Section 222B of the Electoral Act states that *make* in relation to a relevant planning application, means make or cause another person to make the application. This currently means that a person or corporation that is captured within the definition of 'property developer' or 'close associate of a property developer' may cause another person to make the relevant application on their behalf. Accordingly, under current legislation it may not be the applicant lodging the DA that is consequently prohibited from donating to ACT political entities. Therefore, a public register of DA applicants will not necessarily assist political parties or the Electoral Commission in administering prohibited donations.

The Commission recommends Government conduct a full review of the DA process and the information required to be lodged to further improve the compliance and enforcement provisions of the ban on property developer donations legislation.

Recommendation 35 (Supported by the Commission)

The Committee recommends that ACT Government explore options for reinstating the \$10,000 cap on political donations, to remove the risk of perception of undue influence of private money in ACT elections; and report to the Assembly by March 2022.

The Commission supports this recommendation as such a legislative amendment provides for reduced potential of undue influence of private money in ACT political processes and elections.

This recommendation aligns with the Commission's election report recommendation 21 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 66-67 'Comparison of public funding received against election campaign expenditure').

Recommendation 36 (Noted by the Commission)

The Committee recommends that ACT Government explore legislative options for banning political donations from foreign sources, consult with the community, and report to the Assembly on preferred options by March 2022.

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

Recommendation 37 (Noted by the Commission)

The Committee recommends that ACT Government explore options for banning donations from tobacco, liquor and gambling entities and associated industry representative bodies.

In noting this recommendation, the Commission wishes to restate four concerns previously expressed by the Commission in relation to prohibited donor legislation:

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

The Commission restates a previous suggestion of caps as an alternative to a full ban on such donations. Such legislation would have the effect of requiring the regulator to only inquire into a gift, or series of gifts, that reach a determined threshold rather than all gifts received. This may comply with the judgement delivered by the High Court in *Unions NSW & Ors v New South Wales* that some bans within a funding and disclosure scheme may be invalid because they impermissibly burden the freedom of political communication implied by the Commonwealth Constitution, while also ruling that it is a legitimate aim of legislation to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted.

Recommendation 38 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to limit the amount of public funding received by a party or candidate to not exceed the amount of electoral expenditure incurred.

The Commission supports this recommendation as such a legislative amendment more appropriately meets the intent of public funding to reduce undue influence of private funding, rather than reimburse political entities more than that incurred as electoral expenses.

This recommendation aligns with the Commission's election report recommendation 22 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 66-67 'Comparison of public funding received against election campaign expenditure').

Recommendation 39 (Noted by the Commission)

The Committee recommends the Legislative Assembly Standing Committee on Administration and Procedure:

- *consult with the Electoral Commission on potential opportunities to streamline and remove duplication in reporting requirements for gifts to MLAs,*
- *pursue any identified amendments to the 'statement of registerable interests' under Continuing Resolution 6 of Standing Orders, and*
- *publicly report any recommendation for amendment to the Electoral Act, for consideration by JAC Committee and ACT Government.*

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

The Commission considers any action intended to streamline financial disclosure provisions must primarily preserve or improve transparency and minimise the possibility of undue or corrupt influence through private money.

Recommendation 40 (Supported by the Commission)

The Committee recommends that provision be made in the Electoral Act to allow for an 'Alternate Reporting Agent', to assist with reporting duties in peak times.

The Commission supports this recommendation to better facilitate timely compliance by political entities with financial disclosure provisions.

Recommendation 41 (Noted by the Commission)

The Committee recommends the Electoral Commission minimise the conduct of past-year audits within the 7-day reporting period leading up to an election.

The Commission notes that limiting the conduct of compliance audits on past year annual returns during the seven-day reporting period facilitates is a preferred practice. The Commission notes that the COVID Safe provisions in 2020 presented a less than ideal environment for compliance audits resulting in necessary delays to the previously scheduled audits.

Recommendation 42 (Opposed by the Commission)

The Committee recommends the Electoral Act be amended to extend the timeframe for reporting electoral expenditure from seven to 21 days.

See detailed comments above under 'Inquiry recommendations considered to be of greatest significance to the 2024 election.'

Recommendation 43 (Supported by the Commission)

The Committee recommends ACT Government consider the feasibility of amending s198 Electoral Act to incorporate 'related political parties' for the purpose of electoral expenditure cap calculations.

The Commission supports this recommendation as such a legislative amendment provides for the intent of electoral expenditure cap provisions and the integrity of the ACT funding and disclosure scheme.

This recommendation aligns with the Commission's election report recommendation 20 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* pages 65-66 'Limits on election campaign expenditure').

Recommendation 44 (Noted by the Commission)

The Committee recommends ACT Government re-establish a legislative prohibition on third party campaigners acting in concert with others, in terms that comply with recent High Court judgements.

The Commission notes this recommendation. The Commission remains ready to provide advice to government on matters related to the ACT funding, expenditure and financial disclosure scheme.

Recommendation 45 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to permanently reintroduce supporting legislation for telephone voting for voters with disability.

The Commission supports this recommendation, in part, as such a legislative amendment provides for increased voter accessibility to electoral services. This recommendation also aligns with the Commission's election report recommendation 8 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 38 'Telephone voting'). It is important to note that recommendation 8 by the Commission relates to provision of telephone voting for electors who are blind or vision impaired.

The Committee's inquiry report on this issue encourages the Electoral Commission to assess whether telephone voting should be made available and promoted to people with other forms of disability to improve their access to the electoral process. The Commission does not support telephone voting eligibility being expanded to include other forms of disability. In fact, the temporary legislation in place for the 2020 ACT election provided telephone voting eligibility to electors with a 'physical disability which makes it difficult for the voter to attend a polling place.' The Commission does not support a re-instatement of this element of the legislation.

Telephone voting is a means for electors who are not able to complete a ballot paper independently, because of vision impairment, to cast an entirely independent and secret ballot. The telephone voting system is designed specifically for electors used to navigating ICT systems without the use of sight. Most other electors, including electors with other types of disability, would find the system difficult or frustrating to use. Such voters already have access to alternative voting methods such as postal voting, which allow for an unassisted valid vote to be cast without the need to travel to a polling location.

As per the Commission's election report recommendation 8, the Commission supports the reintroduction of supporting legislation for telephone voting for electors who are blind or vision impaired.

Recommendation 46 (Supported by the Commission)

The Committee recommends the Electoral Act be amended to allow mobile polling to be conducted at locations across the ACT where people experiencing homeless [sic] gather to access government services and community support.

The Commission supports this recommendation as such a legislative amendment provides for increased voter accessibility to electoral services.

This recommendation aligns with the Commission's election report recommendation 12 (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 45 'Early Morning Centre – voting services for the homeless').

Recommendation 47 (Supported by the Commission)

The Committee recommends that ACT Government investigate options for a process whereby parties and candidates can submit electoral material for distribution to detainees at Alexander Maconochie Centre.

The Commission supports improving access to electoral material to detainees at the Alexander Maconochie Centre. However, the Commission cautions against it becoming involved in distribution of electoral matter under any circumstances, to safeguard the Commission's statutory independence and reputation.

The Commission offers that consideration of this recommendation must include an analysis against current legislation which prohibits political canvassing within 100 metres of a mobile polling institution during the hours of polling.

Recommendation 48 (Noted by the Commission)

The Committee recommends that voting instructions in multiple languages be provided to voters using either electronic voting or paper ballots in future elections.

The Commission will investigate appropriate methods for providing ballot paper instructions in multiple languages for electors voting on traditional ballot paper.

Recommendation 49 (Supported by the Commission)

The Committee recommends that the voting age be retained at age 18 years.

The Commission supports this recommendation as such action provides voter accessibility to electoral services without imposition of legal obligations and penalties related to compulsory enrolment and voting on minors. This approach also aligns with all other Australian electoral jurisdictions.

This recommendation aligns with the Commission's election report recommendation 1 within its Supplementary Submission (see *Supplementary Submission by the ACT Electoral Commission to the ACT Legislative Assembly Inquiry into the 2020 ACT Election and the Electoral Act* page 3).

Recommendation 50 (Supported by the Commission)

The Committee recommends that ACT Government consider increased staffing resources for the Electoral Commission commensurate with the increase in legislative functions in recent years.

The Commission supports this recommendation as it facilitates the continued delivery of accessible, trusted, transparent and secure electoral services to the ACT community by assuring appropriate staff resources for Elections ACT in enacting and enforcing electoral legislation.

This recommendation aligns with the Commission's election report (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 81 'Areas for improvement other than legislative changes').

Recommendation 51 (Supported by the Commission)

The Committee recommends that ACT Government review the accommodation provided to the Electoral Commission to assess suitability for their needs.

The Commission supports this recommendation as it facilitates the continued delivery of accessible, trusted, transparent and secure electoral services to the ACT community by assuring appropriate office space for Elections ACT.

This recommendation aligns with the Commission's election report (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 81 'Areas for improvement other than legislative changes').

Since the inquiry public hearings in May 2021, the Commission has received budget assurance for suitable permanent office accommodation in 2022.

Recommendation 52 (Supported by the Commission)

The Committee recommends that ACT Government review their consultative processes and identify opportunities to engage with the Electoral Commission early in the development of proposed amendments to the Electoral Act 1992.

The Commission supports this recommendation as it facilitates the continued delivery of accessible, trusted, transparent and secure electoral services to the ACT community through the informed development of electoral legislation.

This recommendation aligns with the Commission's election report (see ACT Electoral Commission *Report on the ACT Legislative Assembly Election 2020* page 81 'Areas for improvement other than legislative changes').

Appendix 3 - Recommendations by the Commission not addressed or agreed to by the Committee

Recommendations not addressed by the Committee

While all 24 of the recommendations made by the Electoral Commission in its *Report on the ACT Legislative Assembly Election 2020* were referred to the Committee inquiry by the Government for consideration, the Committee's report does not offer comment on five of the Commission's recommendations.

The Commission requests the Government consider these recommendations for the reasons outlined in the Commission's election report under each respective recommendation.

Recommendation 1 (Report on the ACT Legislative Assembly Election 2020 page 22):

The Commission recommends that the Electoral Act be amended to require parties to provide further details to be included within a political party's constitution as part of the registration process for ACT Legislative Assembly elections. This will provide the Commission with the power to ensure appropriate accountability and good governance within internal party structures.

Recommendation 10 (Report on the ACT Legislative Assembly Election 2020 page 41):

The Electoral Commission recommends that Schedule 3 of the Electoral Act be expanded to allow the use of a secret question and answer, established by the elector at the point of postal vote application, to be used to satisfy an electoral officer that the declaration is that of the elector.

Recommendation 14 (Report on the ACT Legislative Assembly Election 2020 page 51):

The Commission recommends that the Electoral Act be amended to require the individual who authorises or authors electoral matter to be an elector on the Commonwealth electoral roll or the electoral roll of any state or territory.

Recommendation 23 (Report on the ACT Legislative Assembly Election 2020 page 70):

The Commission recommends that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased and linked to a fraction of a penalty unit. The Commission further recommends that the penalty should be set at quarter of a penalty unit, rounded down to the nearest \$5.

Recommendation 24 (Report on the ACT Legislative Assembly Election 2020 page 71):

The Commission recommends that legislation be provided for the imposition of a non-voter infringement notice, linked to a penalty unit or a fraction of a penalty unit, to provide for a graduated increase in the penalty for failing to vote. In lieu of agreement to this recommendation, the Commission recommends that consideration be given to alternative legislative change with the aim of bypassing or significantly reducing the requirement for the involvement of the Magistrates Court in compulsory voting enforcement proceedings.

Recommendations not agreed to by the Committee

The Committee either did not agree with or did not make an official recommendation in relation to two of the Commission's election report recommendations.

The Commission requests the Government consider these recommendations for the reasons outlined in the Commission's election report under each respective recommendation.

Recommendation 6 (Report on the ACT Legislative Assembly Election 2020 page 31):

The Commission recommends amending the Electoral Act to remove section 110A which requires the Electoral Commission to be involved in the publication of political campaign canvassing on behalf of candidates and parties.

Recommendation 18 (Report on the ACT Legislative Assembly Election 2020 pages 54-55):

The Commission recommends identifying and empowering a separate independent body to administer complaints, commence investigations and ultimately lodge prosecutions into matters of misleading electoral advertising.