

2011

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ELECTORAL (ELECTION FINANCE REFORM) AMENDMENT BILL 2011

EXPLANATORY STATEMENT

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Electoral (Election Finance Reform) Amendment Bill 2011

Introduction

This explanatory statement relates to the Electoral (Election Finance Reform) Amendment Bill 2011 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

(1) Statement of Purpose

The Electoral (Election Finance Reform) Amendment Bill 2011 would set in place a new regime for openness and accountability in election funding and donations.

The Bill gives legislative effect to all but one of the recommendations of the report number 7 of the Standing Committee on Justice and Community Safety (“the Committee”): *A Review of Campaign Financing Laws in the ACT* of September 2011¹.

The principal effects of the Bill are to:

- a. Set limits on donations (“gifts”) to political entities;
- b. Set limits on expenditure – by candidates, parties and third-party campaigners;
- c. Strengthen disclosure provisions; and
- d. Refine public-funding provisions, by linking public funding amounts to corresponding Senate provisions, and providing funding for administrative expenditure incurred by political entities (subject to acquittal and audit).

(2) Costs and benefits

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

Public funding for political parties, under the simpler method of calculation proposed in the Committee report, would increase modestly, by about 40c per eligible vote, or approximately \$80,000 every four years².

¹ Recommendation 18 of the report asks the electoral commissioner to conduct research and does not require legislation

² Based on 2008 enrolment figures.

Funding for administrative expenditure is capped at \$20,000 per MLA per annum (subject to acquittal and audit), or a maximum of \$340,000 annually.

(3) National scheme Bills

Although the approach of this Bill is based on those taken by other jurisdictions who have implemented reform in this area, namely NSW and Qld, it forms no part of a national scheme bill.

(4) Human rights consistency

Human rights affected by this Bill, as identified in the *Human Rights Act 2004*, are the right to freedom of expression (s16) and the right to take part in public life (s17).

It could be considered that “the freedom to... *impart* information” (s16(2)) was constrained by limitations on expenditure. On the other hand “the freedom to... *receive* information” (s16(2)) would be enhanced, through the increased capacity of individuals and organisations to participate in the political process – if that is measured by the capacity to receive a greater range of political communications and views, rather than the same views more often, more loudly or in larger print and full colour.

In the ACT political system in particular, political advertising and promotion has been more tightly regulated than other forms of advertising (eg the prohibition of party-political communications in or near polling booths), and this has not been considered an unacceptable constraint on freedom of expression.

Any constraints would however be offset (in line with S28) by an increase, in practice, in the right to take part in public life, in particular

the right... and the opportunity to... be elected at periodic elections, that guarantee the free expression of the will of the electors (s17b), *and*

the right... and the opportunity to have access, *on general terms of equality*, for appointment to... public office (s17b) (*emphasis added*).

(5) Scrutiny Committee

It is not anticipated that any of the provisions of this Bill would cause the Scrutiny Committee any concerns in relation to its terms of reference. The issues of “personal rights and liberties” are however addressed in the foregoing section.

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Detail

Clause 1 – Name of Act

This clause provides that the Act is named the *Electoral (Election Finance Reform) Amendment Act 2011*.

Clause 2 – Commencement

This clause provides for commencement of the Act on 1 January 2012.

Clause 3 – Legislation amended

This clause provides that the Act makes amendments to the *Electoral Act 1992*.

A note indicates that the Bill also amends the *Electoral Regulation 1993* and the *Referendum (Machinery Provisions) Act 1994*.

Clause 4 – Section 3A – Offences against Act – application of Criminal Code etc

This clause identifies sections, created by the Bill, and which are subject to the Criminal Code or other laws. They are s 205C (Offence—exceeding expenditure caps); s 205D (Offence—recklessly exceeding expenditure caps); s 205E (Offence—acting in concert to avoid expenditure caps); s 205F (Certain gifts not to be received); and s 205G (Prohibition on indirect gifts to avoid statutory limit).

Clause 5 – Part 14 Heading

This clause replaces the existing heading with a new heading, “Election funding, expenditure, records and financial disclosure” to describe matters that are introduced to that Part by this Bill, ie matters relating to expenditure and records

Clause 6 – Definitions for pt 14 – Section 198, new definition of *affiliation fee*

This clause inserts a definition for *affiliation fee*, a term introduced by this Bill. Two examples are provided.

Clause 7 – Definitions for Part 14 – Section 198 – Definition of *associated entity*

This clause substitutes a new definition for the existing definition of *associated entity*.

Clause 8 – Section 198 – New definitions

This clause inserts definitions for terms introduced by this Bill, ie, *called* (for an election); *capped expenditure period*; and *electoral expenditure* (for an election).

Clause 9 – Section 198, definition of *gift*, paragraph (b)

This clause substitutes a new paragraph (b) in the definition of *gift* for the existing paragraph. It updates drafting practice for the existing reference contained in the paragraph (division 14.3) and adds a reference to new division 14.3A (Administrative expenditure funding).

Clause 10 – Section 198, definition of *gift*, paragraph (d)

This clause updates the reference to division 14.4 to substitute the new division heading (Gifts and certain loans—records and disclosure) for the existing division heading (Disclosure of donations).

Clause 11 – Section 198, new definitions

This clause inserts a range of new definitions: *non-party candidate grouping* (for a candidate who is not a party candidate); *party grouping* (for a party); *party MLA*; *relevant person* (for a third-party campaigner); and *third-party campaigner*.

Clause 12 – Activities of campaign committees – Section 200 (1)

This clause updates the reference to division 14.4 to substitute the new division heading (Gifts and certain loans—records and disclosure) for the existing division heading (Disclosure of donations).

Clause 13 – Disclosure periods Section 201 (2) (c)

This clause updates the language to include a new, defined term (*third-party campaigner*) and to omit a reference to s 221, which is omitted by a later amendment.

Clause 14 – New section 202A

This clause inserts new section 202A. It provides that, for the purpose of Part 14, a person incurs electoral expenditure when the relevant service or good is delivered. Two examples are provided.

Clause 15 – New divisions 14.2A and 14.2B

This clause inserts two new divisions, division 14.2A (Limitations on election expenditure) and division 14.2B (Limitations on gifts).

New division 14.2A comprises the following sections:

- S 205A Meaning of *expenditure cap* – It sets the expenditure cap for:
 - a party grouping – \$60,000 (or any amount declared under subsection (2)) multiplied by the lesser of the number of seats in the Assembly or the number of party candidates for the party in an election;
 - an MLA who is not a party MLA and an associated entity of the MLA, or a non-party candidate grouping—\$120 000 (or any amount declared under subsection (2)); or
 - a third-party campaigner—\$30 000 (or any amount declared under subsection (2)).

Subsection (2) requires the Commissioner to declare an amount by 1 December each year, which is a CPI-indexed amount, worked out according to Section 205, but which does not apply to the capped expenditure period commencing on 1 January 2012, and subject to an expiry date of 1 January 2016. Subsection (3) requires the declaration to be made by notifiable instrument.

- S 205B Working out expenditure cap indexation – The formula is provided for calculating the indexed expenditure cap. If calculation results in a negative

movement in the cap, then the cap remains the same as for the previous year. It further provides that the indexed figure be rounded to the next whole-dollar multiple of \$5. Definitions are provided for the terms of the calculation formula.

- S 205C Offence—exceeding expenditure caps – This section creates offences and associated maximum penalties for several classes of persons and party groupings, ie, the registered officer of a party; an MLA who is not a party MLA; a candidate who is not a party candidate; or a person who is the relevant person for a third-party campaigner. A maximum penalty of 100 penalty points is provided for each class.

It should be noted that, in the case of an MLA who is not a party MLA, that MLA can be held responsible for a breach by an associated entity of the MLA.

- S 205D Offence—recklessly exceeding expenditure caps – This section sets a maximum penalty of 1,000 penalty units for the classes of persons or party groups identified in section 205C who recklessly exceed the expenditure cap.
- S 205E Offence—acting in concert to avoid expenditure caps – This section sets a maximum penalty of 1,000 penalty units for a relevant person for a third-party campaigner, where the third-party campaigner, acting in concert with another person, incurs electoral expenditure and recklessly exceeds the expenditure cap. A definition of *act in concert* is provided.

New division 14.2B comprises the following sections:

- S 205F Certain gifts not to be received – This section sets a maximum penalty of 1,000 penalty units if the registered officer of a party; an MLA who is not a party MLA; a candidate who is not a party candidate; or a person who is the relevant person for a third-party campaigner receives a gift or gifts totalling more than \$7,000 in a financial year from a person

It should be noted that, in the case of an MLA who is not a party MLA, that MLA can be held responsible for a breach by an associated entity of the MLA.

- S 205G Prohibition on indirect gifts to avoid statutory limit – This section sets a maximum penalty of 1,000 penalty units for a person who seeks to support a party, MLA, candidate or associated entity by giving a gift to another person and directing or requesting the other person to give all or part of the gift to a party, MLA, candidate or associated entity in a financial year and the gift, together with any gift given by the other person, is more than \$7,000.

Clause 16 – Section 207

This clause substitutes a new section 207 for the existing section.

The substitute section provides that 85% of the Senate amount on polling day for an election is payable for each eligible vote cast for a candidate or party in the election. It provides a formula for calculating the amount payable, together with a definition of *Senate amount*.

Clause 17 – New division 14.3A - Administrative expenditure funding

This clause inserts new division 14.3A and comprises the following sub-divisions and sections:

- Subdivision 14.3A.1 Preliminary

- S 215A Meaning of *non-party MLA* – This section provides a signpost definition for *non-party MLA* for the purpose of division 14.3A, referring to S 215E.
- S 215B Meaning of *administrative expenditure* – This section provides a definition for *administrative expenditure* for the purpose of division 14.3A. The section specifies elements that are included in or excluded from the definition.
- Subdivision 14.3A.2 Eligibility for and amount of payment for administrative expenditure
 - S 215C Eligibility of party for payment for administrative expenditure – This section sets out the eligibility criteria for payment to a party for administrative expenditure in a quarter. Subsection (2) prevents a party from receiving an administrative payment until any overdue party returns are lodged with the Commissioner. An example is provided. The section provides, at subsection (3), that a return includes a notice under section 240 (1) (c) or (4) (Inability to complete returns).
 - S 215D Amount of payment for administrative expenditure for eligible parties – This section provides that an eligible party is entitled to receive quarterly administrative payments of the lesser of the actual amount of administrative expenditure incurred by the party during the quarter and \$20,000 per MLA who is a member of the party at the end of the quarter.

An amount other than \$20,000 must be declared by the Commissioner, via notifiable instrument, in accordance with the indexation formula outlined in section 215G. However, the Commissioner must not make a declaration in respect of 2012 and this restriction expires on 1 January 2016.

The section also provides for pro-rata calculations for MLAs who are not members of the party for the whole year. It further provides that any overpayments made to a party must be repaid to the Commissioner.

- S 215E Eligibility of non-party MLAs for payment for administrative expenditure – This section sets out the eligibility criteria for payment to a non-party MLA for administrative expenditure in a quarter. Subsection (2) prevents a non-party MLA from receiving an administrative payment until any overdue returns are lodged with the Commissioner. The section provides, at subsection (3), that a return includes a notice under section 240 (1) (c) or (4) (Inability to complete returns).
- S 215F Amount of payment for administrative expenditure for non-party MLAs – This section provides that an eligible non-party MLA is entitled to receive quarterly administrative payments of the lesser of the actual amount of administrative expenditure incurred during the quarter and \$20,000.

An amount other than \$20,000 must be declared by the Commissioner, via notifiable instrument, in accordance with the indexation formula outlined in section 215G. However, the Commissioner must not make a declaration in respect of 2012 and this restriction expires on 1 January 2016.

The section also provides for pro-rata calculations for non-party MLAs who are not non-party MLAs for the whole year. It further provides that any overpayments made to a non-party MLA must be repaid to the Commissioner.

- S 215G Working out indexation for administrative expenditure – This section provides the formula by which the Commissioner must calculate a declared amount in relation to administrative payments for each year after 2012, using the amount of \$20,000 as the base amount in the first calculation.

The section provides that, if the calculation results in a reduced amount for the relevant year, the previous amount applies.

The section includes rounding provisions.

- Subdivision 14.3A.3 Payment for administrative expenditure
 - S 215H Application for payment – This section provides that a reporting agent of a party or non-party MLA may apply to the commissioner for payment for administrative expenditure for a quarter. It sets out the application requirements and enables the Commissioner to require additional information. The Commissioner may refuse to consider the application further if the additional information is not provided.
 - S 215I Deciding application and making payment – This section sets out the process by which the Commissioner must decide or refuse to approve an application for payment of administrative expenditure to a party or non-party MLA. It provides that any payment must be made as soon as possible. A note points to the definition of *as soon as possible* in the *Legislation Act 2001*.

Clause 18 – Division 14.4 heading

This clause replaces the existing heading with a new heading, “Gifts and certain loans—records and disclosure” to provide a clearer descriptor for matters that are dealt with in this division.

Clause 19 – Section 216 heading

This clause replaces the existing heading with a new heading, “Definitions—div 14.4” to enable the addition of certain definitions.

Clause 20 – Section 216, new definitions

This clause adds definitions for *anonymously* and *small anonymous gift*.

Clause 21 – New section 216A

This clause sets out the requirements for the recording and regular disclosure of gifts. The clause comprises the following sub-sections.

- Sub-section (1) – Provides that the candidate or associated entity of a candidate must, in accordance with sub-section (3), record a gift received and, if the gift is \$1,000 or more, report the recorded information to the Commissioner within 7 days.
- Sub-section (2) – Provides that the relevant person for a party, MLA or associated entity of a party or MLA must, in accordance with sub-section (3), record a gift received and, if the gift is \$1,000 or more, report the recorded information to the Commissioner within 7 days, if it is received in the capped expenditure period, otherwise within 30 days.

- Sub-section (3) – Sets out the information to be recorded in relation to gifts received.
- Sub-section (4) – Provides definitions for *gift* and *relevant person*.

Clause 22 – Section 217 heading

This clause replaces the existing heading with a new heading, “Disclosure of gifts by candidates” to describe more clearly the purpose of the section.

Clause 23 – Section 220

This clause substitutes a new section 220 (Disclosure of gifts by third-party campaigners) for existing section 220 (Disclosure of gifts by persons incurring political expenditure).

This section requires a third-party campaigner, who incurs electoral expenditure in the capped expenditure period for an election, receives one or more gifts totalling \$1,000 or more from another person and uses that gift to incur or be reimbursed for electoral expenditure, to file a return to the Commissioner within 15 weeks after polling day. Notes are provided indicating that any available form must be used and providing guidance as to how the return may be given.

Sub-section (3) sets out the information that must be provided in a return.

Clause 24 – Sections 221 to 221B

This clause omits sections 221 to 221B.

Clause 25 – Anonymous gifts – New section 222 (1A)

This clause inserts section 222(1A).

This section sets a cap of \$25,000 on small anonymous gifts received in a financial year in the case of a party, MLA or associated entity of a party or MLA, or in the disclosure period for the election in the case of a candidate at an election or associated entity of the candidate.

Clause 26 – Section 222 (2)

This clause amends Section 222(2) to provide that the whole of section 222 applies to gifts received by a party, MLA or associated entity, or a candidate.

Clause 27 – Definitions for div 14.5 Section 223, definition of *electoral advertisement*

This clause relocates the definition for *electoral advertisement* to section 198.

Clause 28 – Section 223, definitions of *electoral expenditure* and *relates*

This clause omits the definitions for *electoral expenditure* and *relates*.

Clause 29 – Annual returns by parties and MLAs Section 230 (6)

This clause amends section 230(6) by removing the list of the types of expenditure incurred by or on behalf of an MLA in his or her role as an MLA and replaces them with the general term electoral expenditure, which is defined elsewhere.

Clause 30 – Section 231B heading

This clause replaces the existing heading with a new heading, “Annual returns by associated entities of parties and MLAs” to describe more clearly the purpose of the section.

Clause 31 – Amounts received – New section 232 (1) (c)

This clause inserts section 232(1)(c) which requires certain additional information to be provided in annual returns of parties and MLAs.

Clause 32 – Section 232 (2)

This clause omits section 232(2).

Clause 33 – New section 232 (3) (c)

This clause inserts section 232(1)(c) which requires certain additional information to be provided in annual returns by associated entities.

Clause 34 – Section 232 (4) (c)

This clause substitutes a new paragraph (c) into section 232(4). It exempts an associated entity from including in annual returns amounts totalling less than \$250 in a financial year received from a particular person or organisation.

Clause 35 – Investigation notices generally – Section 237 (1), definition of *prescribed person*

This clause amends the definition of prescribed person for the purpose of section 237 (Investigation notices generally).

Clause 36 – Copies of returns to be available for public inspection – Section 243 (1)

This clause replaces the existing heading for division 14.4 (Disclosure of donations) with the new heading (Gifts and certain loans—records and disclosure), consistent with another amendment.

Clause 37 – Section 243 (2)

This clause omits the reference to section 221A, which has been omitted by another amendment.

Clause 38 – Section 243 (3)

This clause omits the reference to section 221A, which has been omitted by another amendment.

Clause 39 – New section 243A

This clause inserts new section 243A (Commissioner must publish information given under s 216A).

Section 243A relates to information given to the Commissioner under section 216A (Records and regular disclosure of gifts) and requires the Commissioner to publish information in the way the Commissioner considers appropriate. Two examples are

given and a note is made that the Commissioner is required to publish the information as soon as possible, as defined by the Legislation Act 2001.

Clause 40 – Section 289 heading

This clause replaces the existing heading for section 289 (Discrimination on grounds of political donations) with the new heading (Discrimination on grounds of certain gifts), consistent with new terminology introduced in this Bill.

Clause 41 – Section 289 (1)

This clause omits the word *donation* and substitutes the word *gift*, consistent with new terminology introduced in this Bill.

Clause 42 – Section 289 (2), new definition of *gift*

This clause provides a signpost to the new definition of *gift*, in section 198.

Clause 43 – New section 339

This clause enables the Commissioner, by notifiable instrument, to declare a website to be the commission website.

Clause 44 – New part 31

This clause inserts Part 31 (Transitional—Electoral (Election Finance Reform) Amendment Act 2011).

This Part comprises the following sections:

- S 505 Transitional—annual returns – This section provides that, for the purpose of existing section 230 (Annual 8 returns by parties and MLAs), the information to be provided for the year ending 30 June 2012 is to cover the period 1 July 2011 to 31 December 2011.
- S 506 Expiry—pt 31 – This section provides that Part 31 is to expire one year after it commences, ie by 1 January 2013.

Clause 45 – Internally reviewable decisions – Schedule 5, new items 10A and 10B

This clause sets out the decisions of the Commissioner, introduced in this Bill, which are reviewable through a process of internal review. They relate to refusals to pay or a decision to pay part only in relation to an application for a payment of administrative expenditure.

Clause 46 – Dictionary, note 2

This clause adds a note to the dictionary.

Clause 47 – Dictionary, new definitions

This clause adds signpost definitions for *administrative expenditure*, for a party or non-party MLA, for division 14.3A (Administrative expenditure funding); *anonymously*, for division 14.4 (Gifts and certain loans—records 12 and disclosure); and *capped expenditure period* for part 14 (Election funding, 14 expenditure, records and financial disclosure).

Clause 48 – Dictionary, definition of *defined details*

This clause omits *Disclosure of donations* and substitutes *Gifts and certain loans—records and disclosure*, consistent with another amendment.

Clause 49 – Dictionary, definitions of *electoral advertisement* and *electoral expenditure*

This clause substitutes new definitions for *electoral advertisement* and *electoral expenditure*.

Clause 50 – Dictionary, new definitions

This clause inserts new signpost definitions for *expenditure cap*, for a capped expenditure period for an election, for division 14.2A (Limitations on election expenditure); *incurs*, electoral expenditure, for division 14.2A (Limitations on election expenditure); *non-party candidate grouping*, for a candidate who is not a party candidate, for part 14 (Election funding, expenditure, records and financial disclosure); *non-party MLA*, for division 14.3A (Administrative expenditure funding); *party grouping*, for a party, for part 14 (Election funding, expenditure, records and financial disclosure); *party MLA*, for part 14 (Election funding, expenditure, records and financial disclosure); *relevant person*, for a third-party campaigner, for part 14 (Election 5 funding, expenditure, records and financial disclosure); *small anonymous gift*, for division 14.4 (Gifts and certain loans—records and disclosure); and *third-party campaigner*, for part 14 (Election funding, expenditure, records and financial disclosure).

Clause 51 – Further amendments, mentions of *Election funding and financial disclosure*

This clause omits *Election funding and financial disclosure* from and substitutes *Election funding, expenditure, records and financial disclosure* in the dictionary definitions for *amount*; *associated entity*; *disclosure period*; *disposition of property*; *eligible vote*; *entity*; *financial controller*; *gift*; *party*; *property*; *register*; *registered industrial organisation*; and *reporting agent*.