**2012**

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

# ASSEMBLY AMENDMENTS – ELECTORAL AMENDMENT BILL 2012

## SUPPLEMENTARY EXPLANATORY STATEMENT

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## Assembly Amendments to the Electoral Amendment Bill 2012

These amendments amend the Electoral Amendment Bill 2012 (the Electoral Bill). They have been progressed in order to further strengthen provisions contained in the Electoral Bill, and to reflect detailed negotiations that have occurred between the Government, the ACT Liberal Party and the ACT Greens.

The Assembly amendments seek to progress 17 amendments, the most significant of which are as follows:

- Amendments 2, 3 and 4 – narrows the definitions of "non-party candidate grouping", "non-party prospective candidate grouping" and "party grouping" to ensure that these definitions only apply in cases where the person incurring the electoral expenditure has done so on the authority of the candidate, as it is unreasonable that a candidate should be held responsible for expenditure that has been incurred without his or her knowledge or authority.
- Amendment 5 – amends the definition of "third-party campaigner" to narrow the meaning of the term "publisher of a news publication", which could allow genuine third-party campaigners to avoid their obligations by publishing their own "news publication".
- Amendment 6 amends the definition of "gift" in clause 15 of the Bill to make it clear that payments made at single fund-raising events of more than $250 are to be considered as gifts.
- Amendments 7 to 10 amend clause 19 of the Bill to add further clarity to the provisions relating to electoral expenditure caps. In particular, the amendments deal with expenditure 'on behalf of' another person or entity. The calculation of amounts to determine whether an expenditure cap has been breached is amended to include gifts in kind.
- Amendment 11 – enables gifts-in-kind that are used for electoral expenditure to be included in the calculation used to determine whether the cap on donations has been exceeded.

The remaining amendments address issues that were inadvertently overlooked during the development of the Electoral Bill and are minor and technical in nature.

These amendments do not engage any new rights under the *Human Rights Act 2004*. The analysis of human rights contained in the Explanatory Statement for the Electoral Bill is applicable to these amendments.

## Clause Notes

**Amendment 1** **Clause 4, Section 3A, proposed new dot point, page 2, line 20**

This is a consequential amendment that inserts a new dot point into clause 4 of the Electoral Bill. Clause 4 lists the offences in the Electoral Bill to which the *Criminal Code 2002* applies, and Amendment 1 reflects the insertion of a new section, section 215FA, in Amendment 11.

**Amendment 2** **Clause 12, section 198, proposed new definition of *non-party candidate grouping*, paragraph (b), page 5, line 24**

This amendment amends paragraph (b) of the definition of "non-party candidate grouping" to narrow the current definition contained in clause 12 of the Electoral Bill. As drafted, this definition would capture electoral expenditure by any person to support a candidate, or prospective candidate, without the knowledge of the candidate. This is not the intention of the amendment, as it is unreasonable that a candidate should be held responsible for expenditure that has been incurred without his or her knowledge or authority.

It is conceivable that a person or organisation could deliberately undertake such expenditure to embarrass a candidate or prospective candidate, leading to prosecution of the relevant financial representative. Accordingly, it is proposed that this provision be amended to narrow the definition to only apply in cases where the person incurring the electoral expenditure has done so on the authority of the candidate.

**Amendment 3** **Clause 12, section 198, proposed new definition of *non-party prospective candidate grouping*, paragraph (b), page 6, line 5**

This amendment amends paragraph (b) of the definition of "non-party prospective candidate grouping" in clause 12 of the Electoral Bill. This amendment, like Amendment 2, narrows the current definition to ensure that it only applies in cases where the person incurring the electoral expenditure has done so on the authority of the candidate.

**Amendment 4** **Clause 12, section 198, proposed new definition of *party grouping*, paragraph (g), page 6, line 14**

This amendment omits paragraph (g) of the definition of "party grouping" in new section 198 of the Electoral Bill. As it is currently drafted, this paragraph would include in the definition of party grouping any person who has incurred electoral expenditure to support a party candidate.

This paragraph was inadvertently included in the definition and should be removed, as it would be inappropriate to extend the concept of "party grouping" beyond its intended conception. Inclusion of this paragraph in this definition could have unintended consequences, for reporting and for enforcement of the caps on donations and expenditure.

**Amendment 5 Clause 14, section 198, proposed new definition of *third-party campaigner*, paragraph (b)(iii), page 7, line 24**

This amendment amends the definition of "third-party campaigner" in new section 198 of the Electoral Bill, to narrow the meaning of the term "publisher of a news publication" as used in the current definition in clause 14. As drafted, clause 14 could allow genuine third-party campaigners to avoid their obligations by publishing their own "news publication".

Amendment 5 is intended to address this concern by narrowing this definition by limiting it to a publisher of a news publication, except a publication published for, or for the benefit of, a party, MLA or candidate grouping.

**Amendment 6 Clause 15, proposed new section 198AA, page 8, line 4**

This amendment refines the new definition of "gift" in the Electoral Bill to clarify the current definition in clause 15. The current definition may leave doubt as to whether an amount of more than $250 paid at a single fundraising event could be considered a gift if the donor considered that he or she had received "consideration" for the gift. For example, a person could claim that a payment made to attend a fundraising seminar was not a gift, as the person had received an experience that could be taken to be value for money.

Amendment 6 addresses this doubt by separating the definition of gift into two parts. Section 198AA(1) includes the concept currently contained in the *Electoral Act 1992*, which is the traditional notion that a gift is a disposition of property made by one person to another without consideration in money or money's worth, or with inadequate consideration; and that a gift includes the provision of a service for no consideration or inadequate consideration.

Section 198AA (1A) provides that a payment of a membership fee to a party, or a payment that is made at a single fundraising event of more than $250, is taken to be a gift even if it is argued by the donor that they have received consideration for the payment. The intent of this change is to ensure that donors cannot avoid the obligations pertaining to gifts by claiming that payments to parties and other political entities are not gifts, instead claiming they are membership fees or payments for services received at fundraising events. This amendment makes it clear that payments of this kind over $250 are to be treated as gifts.

**Amendment 7 Clause 19, proposed new section 205F(1)(a), page 15, line 10**

This amendment extends the application of the electoral expenditure cap to include not only expenditure incurred by a party grouping, as currently provided in the Electoral Bill, but also expenditure incurred on behalf of the party grouping. This is intended to ensure that any expenditure undertaken by a donor as a gift-in-kind is also included in the calculations used to determine whether a party grouping has exceeded the expenditure cap.

For example, if this amendment is not made, a party donor could directly buy advertising material that supports a party grouping. This would effectively constitute a gift-in-kind to the value of the advertising material. However, under the currently proposed section 205F(1)(a), this payment would not be included in the expenditure cap calculation as it would not be expenditure incurred by the party. This amendment would include such a gift-in-kind in the expenditure cap calculation.

**Amendment 8 Clause 19, proposed new section 205F(2)(a), page 16, line 1**

This amendment would extend the application of the electoral expenditure cap to include not only expenditure incurred by an MLA or an associated entity of the MLA, as currently provided in section 205F(2)(a), but also expenditure incurred on behalf of the MLA or an associated entity of the MLA. This is intended to ensure that any expenditure undertaken by a donor as a gift-in-kind is also included in the calculations used to determine whether an MLA, or an associated entity of the MLA, has exceeded the expenditure cap.

Amendment 8 is the same in substance as Amendment 7.

**Amendment 9 Clause 19, proposed new section 205F(3)(a), page 16, line 11**

This amendment would extend the application of the electoral expenditure cap to include not only expenditure incurred by a non-party candidate grouping, as currently provided in section 205F(3)(a), but also expenditure incurred on behalf of the non-party candidate grouping. This is intended to ensure that any expenditure undertaken by a donor as a gift-in-kind is also included in the calculations used to determine whether a non-party candidate grouping has exceeded the expenditure cap.

This amendment is the same in substance as Amendments 7 and 8.

**Amendment 10 Clause 19, proposed new section 205F(4)(a), page 16, line 19**

This amendment would extend the application of the electoral expenditure cap to include not only expenditure incurred by a third-party campaigner, as currently provided in section 205F(4)(a), but also expenditure incurred on behalf of the third-party campaigner. This is intended to ensure that any expenditure undertaken by a donor as a gift-in-kind is also included in the calculations used to determine whether a third-party campaigner has exceeded the expenditure cap.

This amendment is the same in substance as Amendments 7, 8 and 9.

**Amendment 11 Clause 19, proposed new section 205G(2A), page 17, line 12**

This amendment inserts a new section into the Electoral Bill, section 205G(2A), for the purpose of including gifts-in-kind in the amounts included in the cap on donations received. Under the current Electoral Bill, only amounts of cash deposited in an ACT election account are included in the calculation used to determine whether a person has exceeded the $10,000 cap on donations in a financial year.

As gifts-in-kind are not included in section 205G, donors could avoid the cap on donations by making donations of gifts-in-kind rather than cash. For example, a donor could directly pay for the printing of electoral material for a party or a candidate. Amendment 11 will enable gifts-in-kind that are used for electoral expenditure to be included in the calculation used to determine whether the cap on donations has been exceeded.

**Amendment 12 Clause 19, proposed new section 215FA, page 24, line 6**

This amendment inserts a new section 215FA to provide that it will be an offence for a party or a non-party MLA to use administrative expenditure funding to pay for electoral expenditure related to an ACT, federal, state or local government election.

This amendment gives effect to the original policy intent of the administrative expenditure fund, which is that this fund will provide support to parties and non-party MLAs by providing them with funding for administration expenses. It was not intended that this fund could be used for election campaigning purposes at ACT level or at any other level.

**Amendment 13 Clause 26, proposed new section 216A(1)(e), except note, page 25, line 17**

This amendment removes a redundant reference to an “associated entity” in section 216A(1). Associated entities are already included in the definitions of the various groupings referred to in subsection (1).

Section 216A provides for regular disclosure of gifts received, and subsection (1) lists those to whom the section applies. As it is currently drafted, section 216A(1) duplicates the reporting requirements with respect to an associated entity, as associated entities are included in a party grouping at (1)(a) and with a non-party MLA at (1)(b). If paragraph (1)(e) is left to stand, gifts received by relevant associated entities will be reported twice, once by the associated entity and again by the party grouping or non-party MLA, respectively.

**Amendment 14 Clause 26, proposed new section 216A(6), definition of *relevant period*, paragraphs (b) and (c), page 27, line 11**

This amendment is intended to correct a reference in proposed section 216A. Section 216A(6) provides for the relevant period for the regular disclosure of gifts. It was determined that the wording of paragraphs (b) and (c) could be expressed more concisely. Accordingly, paragraphs (b) and (c) are substituted with a clearer definition for the relevant reporting period for non-party candidates and non-party prospective candidates.

**Amendment 15 Clause 57, proposed new section 236(2) and (3), page 36, line 13**

This amendment is intended to correct the omission of a reference to the offence of submitting an incomplete return. Section 236 of the Electoral Bill has omitted the existing section 236(2) of the *Electoral Act 1992*, which provides for the offence of submitting an incomplete return, and the offence of failing to keep records in accordance with section 239. The effect of this amendment will be to retain existing offences contained in the *Electoral Act 1992*.

**Amendment 16 Clause 62, page 38, line 8**

This amendment is intended to correct references in relation to the publication of annual returns, which is dealt with in section 243(3) of the Electoral Bill. Amendment 16 is intended to bring forward the date for the publication of annual returns from the beginning of February in the next year to the beginning of September after the end of the financial year to which the return relates.

As it is currently drafted, section 243(3) inadvertently refers to the year of the election to which the return relates, rather than to the financial year.

**Amendment 17 Clause 70, proposed new section 506A, page 40, line 14**

This amendment is intended to close a potential loophole in the transitional disclosure provisions that will apply to the current 2011/2012 reporting period.

For the 2011/2012 reporting year, parties are not required to take account of individual gifts received of less than $1000 in determining which donors they are obligated to identify in their annual returns under sections 230 & 232 of the *Electoral Act 1992*.

As it is currently drafted, the Electoral Bill will perpetuate this situation, whereby it will continue to apply under the transitional provisions for the 2011/2012 financial year. This gap in reporting is in part covered by the requirement under section 221A of the *Electoral Act 1992* for donors who give amounts that sum to more than $1000 in the reporting year, regardless of the size of any individual amounts, to lodge annual returns.

The Electoral Bill closes this gap in party reporting by requiring that all gifts received by parties after 1 July 2012 that total to $1000 or more be reported in their annual returns. The existing section 221B complements section 221A by requiring parties, MLAs and associated entities to advise donors of their reporting responsibilities.

While sections 221A and 221B remain in force until 30 June 2012, they are omitted from the *Electoral Act 1992* after 1 July. However, the Electoral Bill has no transitional provision requiring donors to submit returns to the Electoral Commissioner for the 2011/2012 financial year.

In order to avoid opening a loophole in the reporting of gifts received for the remainder of the 2011/2012 financial year, Amendment 17 provides for a new transitional amendment in section 506A to apply sections 221A and 221B for the purpose of the 2011/2012 reporting year. It also requires that donor returns be submitted by 31 August 2012.