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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

Electoral Amendment Bill 2018

Amendments to be moved by Caroline Le Couteur MLA

SUPPLEMENTARY EXPLANTORY STATEMENT

Circulated by

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This supplementary explanatory statement relates to the amendments to the Electoral Amendment Bill 2018 (the Bill) by Caroline Le Couteur as presented to the Legislative Assembly. It has been prepared in order to assist the reader's understanding of amendments and to help inform debate on them. It does not form part of the amendments to the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the amendments. It is not, and is not meant to be, a comprehensive description of the amendments.

Purpose of the amendments

Each of these amendments have been drafted with a view to preserving and enhancing the integrity of the ACT's electoral system. This system is based on the premise that it is the will of the people that should determine who governs them.

These amendments will:

- Establish a new offence for misleading electoral advertising;
- Introduce a cap for administrative expenditure payments to parties at the equivalent of five times the maximum amount payable per MLA;
- Restrict the receipt of donations to $10,000 per year from any individual or corporate group;
- Introduce a defined period where the disclosure of gifts over $1,000 must be done more frequently;
- Creates a civil, rather than criminal, offence for gifts of less than $250 from property developers, gambling businesses, and their close associates;
- Introduce a new category of prohibited donors, which includes property developers and gambling businesses;
- Broaden the definition of property developer contained in the Bill to include not-for-profit developers; and
- Introduce a higher campaign expenditure cap for non-party candidates.

Further detail regarding each of these amendments is provided below.

1. Establish a new offence for misleading electoral advertising

The proposed new offence for misleading electoral advertising is based on a similar provision that has operated in South Australia since 1985.[1] In Australia there is no shortage of examples of false or misleading electoral advertising. At the 2019 Federal election, for example, the Liberal Party claimed that the Labor Party had "secret plans" to introduce a death tax. The One Nation party also made similar claims in its electoral advertising.

[1] See South Australian Electoral Act 1985 s113.

This amendment is not designed stamp out political debate. Further, it relates only to statements of fact that are inaccurate and misleading to a material extent. For example, if a political candidate claimed that they were the kindest person in the world, or their opponent the nastiest, such a statement would not fall foul of this provision. However, if a candidate claimed that their opponent wanted to introduce a specific policy or tax, when there was no evidence that their opponent had ever indicated they would, then they would breach this proposed new offence.

This amendment only applies to electoral material of the kind that is already required to be authorised. It will not apply, for example, to an opinion piece published in a newspaper, or a social media post from an individual (provided the post is not authorised political advertising). As per the normal requirements for electoral authorisation, the offence is intended to apply only to people or political entities who post an advertisement, not the publisher. It does not extend the existing burden placed on publishers with regard to defamation or publishing offensive material.

Proposed new section 297A establishes an offence for misleading political advertising. Importantly, it also provides the Electoral Commissioner with the power to request that the person who placed the advertisement do one or more of the following:

- Not disseminate the advertisement again; or
- Publish a retraction in stated terms and in a stated way.

This would mean, for example, that the Commissioner could request that an ad posted on a particular social media platform be retracted on the same platform.

2. Introduce a cap for administrative expenditure payments to parties

Political parties and non-party MLAs in the ACT receive an indexed administrative expenditure allowance, currently $23,126 per MLA per year.[2] This funding is not used for Assembly business, but rather for party administration. This proposed amendment would place a cap on administrative expenditure payments equivalent to five times the maximum amount payable per MLA. Based on current figures, this would equate to $115,631per annum for parties with five or more MLAs.

As it currently exists, this is a generous payment. The rationale for placing a cap on administrative expenditure is that the proposed capped amount should be ample to fund party administration.

3. Restrict receipt of donations to $10,000 per year

[2] More information can be found on the Elections ACT website, here: https://www.elections.act.gov.au/funding_and_disclosure/administrative_funding

Democratic electoral systems should be based on the premise that it is the will of the people that should determine who governs them.

Obversely, a system where an oligarchy, corporation, or an individual or sector with a vested interest in the outcome of an election or the actions of elected representatives may influence outcomes through large political donations is undesirable.

Proposed new section 221 caps donations to MLAs, political parties, non-party candidates, and associated entities at $10,000 per year. 221(4) defines close associates in broad terms and includes related body corporates and domestic partners. This means that people or corporations will not be able to circumvent the donation cap by donating more than $10,000 across associated entities, for example by donating $10,000 each to both a candidate and their domestic partner in any given year.

The Electoral Amendment Act 2015 removed the previous $10,000 limit. This amendment seeks to reinstate this previous provision. The proposed limit of $10,000 is generous. It is much higher than the donation limit in Victoria, currently set at $4,000 across a four-year parliamentary term.

Many political parties require that candidates and elected members make a financial contribution to their party. These contributions when required by the party are classed by the Australian Tax Office as work-related expenses and are tax deductable. Clearly any contribution that is regarded by the ATO as a work-related expense is not a donation. This is consistent with the NSW legislation that also caps political donations but recognises the requirements placed upon party candidates and members to pay levies.

4. <u>Change the reporting period for gifts over $1,000</u>

The Government's bill changes the reporting period for gifts of over $1,000 to 7 days after the day the total amount received from a person reaches $1,000, and for any additional gifts from that person to be reported on within 7 days.

This amendment introduces a defined period for reporting, commencing on 1 January of an election year and ending 30 days after an election. During this period donations of more than $1,000 must be reported to the Electoral Commissioner within 7 days. Outside of this defined period, reporting is required 7 days after the end of a month in which a gift or gifts from a person exceed $1,000.

5. <u>Creates a civil, rather than criminal, offences for gifts of less than $250 from property developers, gambling businesses, and their close associates</u>

These amendments create civil offences for gifts from property developers, gambling businesses, and their close associates. Although the giving of gifts by prohibited donors remains an offence, this amendment recognises that small, possibly inadvertent gifts, should not be treated as criminal offences.

6. Introduces a new category of prohibited donors, which includes property developers and gambling businesses

The Government's Bill seeks to ban political donations from property developers. These amendments seek to expand this ban on types of political donors. They do this by creating a new class of "prohibited donors", which includes both property developers as well as gambling entities.

This amendment includes gambling businesses because gambling entities are more likely than many other organisations or sectors to be in positions where relatively simple changes in Government policy can have major implications for their viability and profitability. Such changes could include a cap or an increase in the number of poker machines allowed in a single venue or across the ACT, the reduction or increase in bet limits, or the introduction of pre-commitment requirements for gamblers.

Gambling interests were part of the 2016 ACT election. ClubsACT, a grouping of licensed clubs, ran an advertising campaign, which informed their members that the ACT Labor party planned to "destroy" licenced clubs. It included broadcast and print ads, drink coasters, posters in clubs, and advertising on the back of Canberra's taxis.[3] Such a campaign and associated expenditure would not be affected by this proposed amendment.

At the same election, however, a new party called Canberra Community Voters, with similar aims, ran candidates and received a $100,000 donation from ClubsACT. Such a donation would not be permitted under these proposed amendments.

In addition, there have been several notable cases interstate involving gambling donations to political parties. These include:

- The decision by the Northern Territory Government in 2014 to increase the number of poker machines allowed in hotels from 10 to 20 and in clubs from 45 to 55, which followed a $150,000 donation by the Australian Hotels' Association to the Country Liberal Party prior to the previous Territory election;[4]
- An unprecedented campaigning budget by the Tasmanian Liberal Party prior to the March 2018 Tasmanian election. In the lead up to the 2018 Tasmanian Election, the Labor Party had proposed to ban poker machines in pubs and clubs by 2023.[5] Tasmania's electoral disclosure laws meant

[3] See for example https://www.smh.com.au/national/act/clubsfinanced-campaign-falls-woefully-short-for-canberra-community-voters-richard-farmers-party-20161016-gs3bqc.html (accessed 14 July 2020).

[4] See https://www.abc.net.au/news/2014-12-15/peter-styles-defends-northern-territory-pokie-increase/5968920 (accessed 14 July 2020).

[5] See https://www.theguardian.com/australia-news/2018/jan/28/battle-over-poker-machines-to-take-centre-stage-in-tasmanias-election (accessed 14 July 2020).

that it was only revealed in 2019 that 90% of the Tasmanian Liberal Party's electoral donations came from pro-gambling sources.[6]

- In 2018 the Australian Hotels Association imposed a special one-off levy on pub and club poker machines to fund at least $500,000 in donations to Victorian Labor, and about $300,000 to the Coalition parties in Victoria. It also funded independents who preferenced the major parties. The Age reported that the gaming industry feared the Victorian Greens "winning the balance of power in Victoria because of the party's strong anti-pokies policies".[7] (This occurred immediately before the much lower limit on electoral donations was introduced following the 2018 election.)

New South Wales has a similar ban on political donations from gambling entities, which these amendments broadly mirror.

7. Broadens the definition of property developer contained in the Bill to include not-for-profit developers

The Government's bill does not include not-for-profit organisations or incorporated associations within its definition of property developers. Just because an organisation does not make a profit, however, does not mean that it may not wish to benefit from favourable government policy, for example relating to the zoning of a site or access to Government land or concessions.

In the ACT several licenced clubs have sold off sites that have been redeveloped from community use into other uses. In other cases, clubs themselves have redeveloped land that had previously been owned by them but used for a different purpose, for example from a community facility into a fitness centre or a hotel.

Given the threshold for being classed as a developer under the Government's bill, which requires that in the 7 year period before a donation is made that a property developer or a close associate of the property developer has made 3 or more relevant planning applications,[8] it appears unlikely that any licenced club or community housing provider currently operating in the ACT would meet the definition of a property developer. Nonetheless, not-for-profit entities and incorporated associations who would otherwise meet the definition of a property developer should be treated in the same way as any other individual or entity who would be defined as a property developer for the purpose of this Bill.

8. Introduces a higher campaign expenditure cap for non-party candidates

Reducing campaign expenditure is an important way to ensure a more level playing field in election campaigning. Under existing legislation, there is an

[6] See https://grattan.edu.au/news/tasmanias-gambling-election-shows-australia-needs-tougher-rules-on-money-in-politics/ (accessed 14 July 2020).
[7] See https://www.theage.com.au/politics/victoria/labor-big-winner-from-1m-pokies-donation-jackpot-20190325-p517ed.html (accessed 14 July 2020).
[8] Proposed new section 222F(1)(b)(ii).

indexed cap on campaign expenditure, currently $42,750 per party candidate. This is capped at a maximum of 25 candidates (5 candidates for each of the 5 electorates) for party groupings, allowing for a maximum of $1,068,750 million total expenditure for a party fielding 25 candidates.[9]

This means that the larger parties, which both ran 25 candidates in the 2016 Election, will have had a party expenditure cap of over $1 million. Large parties are offered a significant advantage in their spending as they can pool multiple candidate allocations of $42,750 across their campaign expenditure.

Large parties, already entrenched in the political system, will continue to be able to outspend smaller parties and individual non-party candidates, and thus dominate the media landscape. Smaller parties and independents, which do not have the advantage of pooling resources, are significantly disadvantaged in so far as they are restricted to a maximum of $42,750 expenditure per candidate.

The ACT Electoral Commission in its report on the 2016 election recommended that the Assembly consider amending the Electoral Act to increase the expenditure cap applied to ungrouped candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.[10] This amendment seeks to enact that recommendation.

Human rights implications

1. Misleading electoral advertising

The proposed new offence for disseminating or authorising the dissemination of misleading electoral advertising engages the right to freedom of expression, which is a protected right under Section 16 of the Human Rights Act 2004 (HRA). In particular, the offence relates to political communication, which is an important form of expression, and is also implicitly protected under the Australian Constitution.

Human rights can be reasonably limited by laws that can be demonstrably justified in a free and democratic society, as set out in section 28 of the HRA. It is a reasonable limitation on the right to freedom of expression to introduce an offence for disseminating or authorising the dissemination of electoral advertising that is inaccurate and misleading to a material extent, and to empower the Electoral Commissioner to request the person to publish a retraction and/or discontinue disseminating the advertisement. This is demonstrated by considering the relevant factors under section 28 of the HRA:

(a) The nature of the right affected

[9] See https://www.elections.act.gov.au/publications/act_electoral_commission_fact_sheets/fact_sheets_-_general_html/fact_sheet_-_electoral_expenditure_cap (accessed 14 July 2020).

[10] See https://www.elections.act.gov.au/__data/assets/pdf_file/0016/1044016/Report-on-the-ACT-Legislative-Assembly-Election-2016.pdf (accessed 14 July 2020).

The right to freedom of expression in the HRA is a personal freedom which is considered essential for individuals to achieve full personal development and self-fulfilment through the development and distribution of ideas and opinions.

The proposed new offence in this bill engages the right insofar as it relates to political advertising during an election. The Australian Constitution also contains an implied freedom of political communication, which operates as a constraint on legislative power; that is, a legislature cannot make laws that would unjustifiably restrict the freedom of political communication.

While they are important rights, the right to freedom of expression in the HRA, and the implied right of freedom of political communication in the Constitution, are not absolute and can be justifiably limited. There already exist several limitations on political communication in the ACT, such as the 'blackout' on advertising from the Wednesday before Election Day, and offences for disseminating materials likely to mislead or deceive an elector about the casting of a vote, or misleading representations of ballot papers.

(b) The importance of the purpose of the limitation

Preventing political advertising that is inaccurate and misleading to a material extent is an important initiative to protect and improve the democratic process. It is intended to prevent the voting public from being misled and therefore to protect the legitimacy of their democratic participation, their vote and the integrity of the electoral process.

This is a legitimate purpose for placing reasonable limitations on the implied constitutional right to freedom of political communication. As the Justices made clear in Australian Capital Television Pty Limited v Commonwealth of Australia, the relevant constitutional rights "are conferred for the purpose of enabling the electors to make a true choice in a free and democratic society. They may be regulated by other laws which seek to achieve an honest and fair election process." (McHugh J at 234-5)[11]

Election campaigns are competitive, and political parties spend large amounts of money and resources to try and influence people's votes in a short period of time. The modern election process is increasingly subject to various forms of advertising, and political commentary, often disseminated through multiple media, including social media, which is less regulated than traditional media. Political campaigners are very attuned to the issues that will influence people's votes and are motivated to engage them. This is an environment where inaccurate and misleading statements can be very effective and may even reward the perpetrator of a falsehood with a political advantage and electoral success.

[11] McHugh J at 234-5. The judgement can be viewed here: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/45.html (accessed 14 July 2020).

In this environment it is increasingly important to have some form of protection for the voting public from inaccurate and misleading advertising. Similar protections already exist to protect consumers from retailers using misleading advertising to sell them goods and services.

Political campaigning in overseas jurisdictions provides further examples of how election advertising can become problematic for the democratic process, particularly in an age of social media, and in the absence of laws prohibiting misleading political advertising. As of 9 July 2020, the Washington Post fact checking service reported that United States President Donald Trump had made more than 20,000 false or misleading claims during his term as President. The UK's pro-Brexit campaign was criticised for making false, influential campaign statements, particularly the assertion that EU membership cost the UK over £350 million per week, and this money could be saved from the national budget by exiting the European Union.

These prominent examples have led to increasing concerns among social and political analysts that Western Democracies have entered a 'post truth' era of politics, where lying and misleading is becoming a common political tool, and the general public is increasingly at a disadvantage when it comes to accessing accurate information.

Political advertisements used during recent Australian Elections have also been accused of being misleading. They may have influenced electoral outcomes. These include ads about political parties purportedly having plans to introduce 'a death tax', 'a car tax', and to privatise Medicare.

Truth in political advertising is also an important issue to the Australian voting public. In 2016, the Australia Institute polled 2865 voters on whether the Australian Senate should pass 'truth in political advertising' legislation that would allow political parties and candidates to be fined for false and misleading advertising. 87.7% of respondents supported passing these laws, and only 5% of respondents did not support them.[12]

Australian Courts have been clear that the implied right to freedom of political communication in the Constitution is not absolute and does not apply to simply any political discourse. As Gaudron J observed in Australian Capital Television Pty Limited v Commonwealth of Australia, "the freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the right to disseminate false or misleading material nor limits any power that authorises laws with respect to material answering that description."

In an affidavit filed in the Ontario Superior Court of Justice, an Australian legal academic from University of Queensland, Professor Graeme Orr, an expert in political integrity, made the following remarks:

[12] See https://www.tai.org.au/sites/default/files/TAI%20-%20National%20-%204%20July%202016_results_truth_in_advertising.pdf (accessed 14 July 2020).

This South Australian 'truth in electoral advertising' offence was held to be constitutional by a unanimous, three-member Full Court of the South Australian Supreme Court, in Cameron v Becker (1995) 64 SASR 238. That case concerned false claims about school closure numbers, in opposition party television advertisements. The defendants sought to argue that the offence unconstitutionally breached the freedom of political communication, which the Australian High Court has implied from the Australian Constitution since 1992.

The Magistrate who dealt with the charge at first instance upheld the constitutionality of the provision, noting that it "assumes the existence of freedom of speech. The only limitation that it places on that is that it should be accurate and not misleading". In the Full Court of the Supreme Court, Olsson J (with whom Bollen J agreed) also found the offence to be constitutional. Citing Australian High Court dicta, he observed that "freedom of communication is not an absolute freedom" and "freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the right to disseminate false or misleading material nor limits any power that authorises laws with respect to material answering that description" (64 SASR at p 247). He concluded that the Magistrate's finding of constitutionality was "unassailable", because the "limitation imposed [by the offence] is manifestly proportionate to the legitimate object of ensuring that what is represented as factual material published in electoral advertisements is accurate and not misleading" (64 SASR at p 248).

Lander J also found the offence to be constitutional. He reasoned that whilst the provision "does interfere with the right of freedom of speech, it does so for the purpose of protecting the electors from being misled and deceived. The Act, I think, attempts to balance the concept of freedom of speech and the right to be properly informed" (64 SASR at p 252). Olsson J and Lander J also each noted that the provision did not create an absolute offence because it did not override any common law defence of honest mistake of fact (64 SASR at pp 245-6 and pp 252-3).[13]

The proposal in this bill is intended to achieve an important and legitimate purpose: to prevent false and misleading advertising and thereby to make elections more honest and fairer.

[13] Affidavit of Graeme Orr in Canadian Constitution Foundation and Attorney General of Canada in the Ontario Superior Court of Justice.

(c) The nature and extent of the limitation, and (d) The relationship between the limitation and its purpose

The proposed limitation on freedom of expression is narrow and limited. Political discourse and advertising would remain unaffected, except for the narrow instance of advertisements containing a statement purporting to be a statement of fact, that is inaccurate and misleading to a material extent.

It could be considered that the laws would have a 'chilling effect' on political discourse for fear of committing an offence. Any 'chilling' would only occur in relation to potentially inaccurate or misleading statements. Advertising would remain permissible but would need to be presented in a way that is accurate and does not materially mislead people—this allows for an extremely broad, almost infinite, range of political advertising. The offence does not apply to other forms of political discourse, such as discussions and debates. By preventing the dissemination of inaccurate and misleading advertising, the proposed bill is intended to protect and enhance political discourse in the community—the same rationale for the implied protection of political communication in the Constitution.

The bill empowers the Electoral Commissioner to request either or both the further use of advertising, or the publication of a retraction. The response to this request can be submitted to the court and, would be a mitigating factor in the court's determination of a penalty. The court may order the cessation of the advertising and/or a retraction.

The provision also provides a defence to ensure the offence will not apply too broadly. The offence does not apply if the defendant took no part in deciding the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading. This defence would cover a publisher or other third party that prints, distributes or broadcasts the advertisement.

In these ways, any limitation on freedom of expression imposed by this provision in the bill will be minor and proportionate.

(e) Any less restrictive means reasonable available to achieve the purpose the limitation seeks to achieve

The bill is carefully framed to take the least restrictive approach to achieve its purpose.

The bill does not seek to establish a test of 'truth', recognising that truth is inherently difficult to define; rather it tests for advertising that purports to make a 'statement of fact that is inaccurate and misleading to a material extent.' This addresses an issue that was raised in relation to the Commonwealth Electoral Legislation Amendment Act 1983 (Cth), which referred to advertising that was

'untrue'. The offence is instead framed similarly to fair trading offences, which prevent businesses making claims that are inaccurate and misleading.

The bill requires an offending advertisement to purport to make a statement of fact, which is inaccurate and misleading 'to a material extent'. This ensures the offence will only apply to serious instances of misleading advertising. It is not intended to apply to minor inaccuracies or issues where the extent of misleading is debatable, recognising that political advertising contains a range of policies and concepts, often of a subjective nature.

The restriction is also limited to political advertisements and does not apply to all forms of political speech.

Introduce a cap for administrative expenditure payments to parties at the equivalent of five times the maximum amount payable per MLA

This amendment does not engage any human rights.

Restrict the receipt of donations to $10,000 per year from any individual or corporate group

This amendment engages the human right to freedom of expression, outlined in the section 16 of the HRA. While it limits the amount of money that individuals and bodies corporate are able to donate to MLAs, political parties, and non-party candidates, it does not seek to distinguish between the types of individual or entities that may wish to donate. Under this proposed amendment, all political donations are treated equally and capped at the same level.

This amendment is proportionate and justified given the potential for some donors to make very large donations, which may result in a significantly increased level of access to MLAs and influence in political decision making compared to the rest of the voting population.

Including gambling entities as prohibited donors

The Legislative Assembly's Standing Committee on Justice and Community Safety (Legislative Scrutiny Role; hereafter the Scrutiny Committee) examined a number of these amendments in its Marth 2019 report. Regarding the proposed inclusion of gambling entities as prohibited donors, the report noted that these amendments may

> *Limit the right to freedom of expression protected by section 16 of the Human Rights Act 2004 (HRA) and potentially the right to take part in public life protected by section 17 of the HRA. By distinguishing donations from gambling businesses, the bill may also limit the right to equality before the law protected by section 8 of the HRA.*

As noted above, section 28 of the HRA allows for human rights to be limited if that limit is reasonable.

By attempting to ban donations from property developers, the Government's Electoral Amendment Bill seeks to address this issue for a sector—the property development industry—where there have been proven issues of corruption, albeit in NSW. In McCloy vs NSW [2015] HCA 34, the High Court upheld the NSW Government's restrictions on political donations by property developers.

The same NSW legislation that restricted political donations from property developers, the (now repealed) *Election Funding, Expenditures and Disclosures Act 1981 (NSW)*, as well as the current *Electoral Funding Act 2018 (NSW)* also bans donations from tobacco, liquor, and gambling industries. Although it has been in effect for some time, the NSW ban on donations from these industries has yet to be challenged or tested in the courts.

These amendments seek to extend the ban in the Bill on political donations from property developers to include gambling businesses because gambling entities are much more likely than many other organisations or sectors to be in positions where relatively simple changes in Government policy can have major implications for their viability and profitability.

Minister Ramsay's Explanatory Statement for the Electoral Amendment Bill 2018 notes that:

> *The Senate Select Committee into the Political Influence of Donations reported in June 2018 and made a recommendation that the Australian Government amend the Commonwealth* Electoral Act 1918 *to introduce a ban on donations from developers and a range of other industries to political parties, candidates and associated entities.*

Indeed, Recommendation 9 of the Report from the Senate Committee Inquiry into the Political Influence of Donations called on the Australian Government to

> *introduce a ban on donations from developers, banks, mining companies and the tobacco, liquor, gambling, defence and pharmaceutical industries to political parties, candidates and associated entities.*[14]

In their submission to the abovementioned Senate Inquiry, Dr Charles Livingstone and Ms Maggie Johnson from the Gambling and Social Determinants Unit at the School of Public Health and Preventative Medicine at Monash University, note that:

> *The Australian gambling industry has utilised political donations as a mechanism to exert considerable influence over relevant public policy."*[15]

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[14] Senate Select Committee Into the Political Influence of Donations (2018:91) Commonwealth of Australia. Available at https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024147/toc_pdf/PoliticalInfluenceofDonations.pdf;fileType=application%2Fpdf (accessed 16 April 2019).

[15] Livingstone and Johnson (2017:2) "Submission to the Senate Select Committee into the Political Influence of Donations". Available at

Their submission analyses this phenomenon in detail.

Beyond the well-documented issues of gambling-related harm to individuals, there is a strong body of evidence of the corrupting effect that political donations from gambling entities can and do have. As the Scrutiny Report notes, these proposed amendments to the Electoral Amendment Bill 2018 will limit the human rights of gambling entities and their close associates. There is a strong argument, however, that these limits are proportionate and justified given the potential corrosive impact on our electoral system and actions of Members of the Legislative Assembly of political donations by gambling entities.

Broadening the definition of property developer contained in the Bill to include not-for-profit developers

This amendment engages the human right to freedom of expression, outlined in the section 16 of the HRA. In doing so, however, it simply treats all property developers, regardless of their legal status, in a consistent way.

Other arguments relating to how banning property developer donations engage the human right to freedom of expression are dealt with comprehensively in Minister Ramsay's Explanatory Statement for the Bill. Whether an entity is a not-for-profit or an incorporated association does not necessarily have a bearing on whether they would like to exert political influence by way of political donations to achieve whatever goals they may have as property developers. As such, there is no need to replicate the arguments in Minister Ramsay's Explanatory Statement, and the reader is referred to that document.[16]

Higher campaign expenditure cap for non-party candidates

This amendment engages the right to freedom of expression found in section 16 and equality before the law found in section 8 of the HRA. It creates different expenditure caps for party and non-party candidates. The amount for party candidates reflects the current expenditure cap for the 2020 election but increases the campaign expenditure for non-party candidates to $60 000.

This amendment is proportionate and justified as non-party candidates are at a significant disadvantage in campaigning due to the nature of their candidacy being electorate specific, which does not reflect the majority of media in the ACT. Furthermore, non-party candidates are less likely to receive discounts that parties receive, for example, discounts in printing for large quantities. As such, a higher expenditure cap for non-party candidate will allow them to effectively

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024147/toc_pdf/PoliticalInfluenceofDonations.pdf;fileType=application%2Fpdf (accessed 16 April 2016).

[16] The Explanatory Statement for the Electoral Amendment Bill 2018 can be found here: https://legislation.act.gov.au/View/es/db_59294/current/PDF/db_59294.PDF (accessed 14 July 2020).

campaign and not have their implied right to political communication found in the Commonwealth Constitution impermissibly burdened.

Details of amendments

1 Clause 2 Commencement

This amends clause 2 to outline that the amendments, other than 8B (Payment to party for administrative expenditure) would commence six months after its notification day and therefore would not apply to the 2020 ACT election.

2 Clause 4 Offences against Act – application of Criminal Code etc

This section amends clause 4 to add new offences to the operations of the Criminal Code 2002. These are: a ban on the giving of gifts over $250 from property developers and their close associates, gambling businesses and their close associates, the acceptance of gifts from property developers and gambling businesses where the gift is more than $250; and misleading electoral advertising.

3 Proposed new clause 8A

Proposed new clause 8A substitutes the campaign expenditure cap for non-party candidates to $60 000 and to others, including party candidates to $42, 750 campaign expenditure cap for all others, including party candidates.

4 Proposed new clause 8B

This proposed new clause is entirely new. It limits the administrative expenditure of political parties to the equivalent of 5 times the maximum amount payable to an MLA as under section 215C.

5 Proposed new section 216A (4)

This section omits and substitutes former clause 10, it outlines the reporting requirements of gifts. The ***defined period*** is outlined as the first day of the election period and the 30 days after the election period ends. During the defined period, a financial representative of the receiver must give the return to the commissioner within 7 days from the time the total amount received from the person reaches $1000. Outside of the defined period, the financial representative of the receiver must give the return to the commissioner 7 days after the end of the month in which the total amount received reaches $1000.

6 Proposed new section 221

Proposed new section 221 is entirely new. Subsection 1 restricts a party, MLA, non-party candidate or associated entity from accepting a gift of more than $10,

000 from an individual or corporate group in a financial year. Subsection 2 holds that if that anything received over this amount must be repaid, in equal amount, to the Territory. Under subsection 3, the amount is a debt payable to the Territory and may be recovered by a proceeding in a competent court. Relevant definitions to the amendment are followed. A corporate group is defined as a corporation and any close associate of the corporation. A close associate of a corporation is defined as meaning a related body corporate, an officer of the corporation or a related body corporate, a person whose voting power in the corporation or a related body corporate is more than 20%, any domestic partner of a director, or person with more than 20% voting power, a stapled entity of the corporation, a person who is a beneficiary or holds more than 20% of the units in a trust managed by corporation and any other person or body prescribed by regulation. A stapled entity is defined as meaning an entity whose interests are traded along with the interests of another entity as a stapled security. Where the stapled entity is a trust, this includes any trustee, manager or responsible entity for the trust.

Division 14.4A Gifts from prohibited donors

This proposed new division omits the former heading, Restrictions on acceptance of anonymous gifts and substitutes with proposed new division 14.4A. Proposed section 222B provides key definitions for this division. As such, section 22A (1) (b) is amended for clarity. Furthermore, it omits the definition of *decided*.

A ***gambling business*** is defined as: a casino licensee; a licensee of a gaming machine, or an approved supplier of gaming machines; a person approved to conduct a lottery (other than an exempt lottery); a person approved to carry on a pool betting scheme; a licensee under the *Race and Sports Bookmaking Act 2001*; an approved racing organisation under the *Racing Act 1999*; and a corporation that carries on a business involving wagering, betting or gambling (including the manufacture of machines primarily used for that purpose) for profit.

A ***gift*** is defined as including a loan, other than a loan by a financial institution on a commercial basis; but does not include the gift of the use of a prohibited donor's meeting facilities for a routine meeting of a political entity.

The definition of ***make*** is omitted. ***Meeting facilities*** are defined as the use of a room and anything reasonably necessary for the conduct of the meeting in the room, for example tables, chairs, photocopier, computer or microphone, but does not include any food, drink or other gifts associated with the use of the facilities.

A ***prohibited donor*** is defined as a property developer or a gambling business.

Section 222B subsection 2 clarifies that the definition of gambling business, it does not matter if a corporation is prevented from distributing profit to another person, as may be the case in an incorporated associated or an not-for-profit

company whose governing documents prohibit assets and income being distributed to its members.

Proposed new section 222C (1)(b)(i), (1)(b)(ii) and 222C(1) are omitted. 222C(1A) is inserted to clarify that not-for-profit property developers are captured by the bill. For the purposes of the bill, it does not matter if a corporation is prevented from distributing profit to another person or is an incorporated association.

Subdivision 14.4A.2 Gifts from property developers

In proposed new section 222DA, a relevant planning application is ***decided*** if- regarding an application to make a variation to the territory plan for a draft special variation, the planning and land authority has prepared a draft special variation under the *Planning and Development Act 2007*, section 85B and for a technical amendment, the plan variation is notified under the *Planning and Development Act 2007*, section 89 and in any other case- the planning and land authority had prepared a draft plan variation under the *Planning and Development Act 2008* section 60 and for any other case- it is decided in accordance with the Planning and Development Act 2007. To ***make*** a relevant planning application means make or cause another person to make, the application.

Proposed new section 222E is now part of subdivision 14.4A.2 rather than a new division.

Proposed new section 222EA **Ban on acceptance of gifts from property developers etc – less than $250**

Proposed new section 222EA is entirely new. It holds that a property developer, a close associate of a property developer or a person on behalf of a property developer or a close associate, where they either have 1 or more relevant planning applications that have not been decided or; if in the 7 years prior to the gift being given, they have made 3 or more relevant planning applications, gives a gift or gifts, that equal less than $250, they have committed a civil offence. The giver of the gift must pay an amount equal to the gift to the Territory as a debt payable, which may be recovered by a proceeding in a court of competent jurisdiction.

Proposed new section 222F **Ban on gifts from property developers etc – $250 or more**

This section has been renamed and amended where a property developer, a close associate of a property developer or a person on behalf of a property developer or close associate commit a criminal offence with a maximum penalty of 50 penalty units, imprisonment for 6 months or both where the gift, together with any other gift made by the person, in the financial year, is over $250. To be clear, this offence applies to each person individually, not as a group.

Proposed amendments to section 222F (3) and (4) insert a close associate of a property developer to be captured by the offences. A person commits an

offense if they give a gift to a political entity and the gift is given on behalf of a close associate of a property developer or if the person asks another person to give a gift to a political entity on behalf of a close associate of a property developer.

Proposed new section 222G(2)

These amendments change the examples in section 222G (2). Instead of using the examples of obtaining a statutory declaration from the person who gives the gift about whether or not they are a property developer, or regarding the number of development applications they have made etc., the examples now suggest that a written statement will suffice.

Proposed new section 222H

Proposed section 222H has been renamed to Gifts from people that become property developers. The current heading refers to 'repayment' which is incorrect as the giver of a prohibited gift is subject to a civil penalty to the Territory.

Subdivision 14.4A.3 Gifts from gambling businesses

Proposed new sections 222J-N are entirely new. Together, they provide offences for:

- a gambling business who gives a gift to a political entity; or
- a close associate of a gambling business who gives a gift to a political entity; or
- a person gives a gift to a political entity on behalf a gambling business or a close associate of a gambling business;
- a person asks (causes, induces or solicits) another person to give a gift to a political entity on behalf of a gambling business or a close associate of a gambling business; and
- Accepting gifts from gambling businesses.

In each of the above instances, the giving of gifts of less than $250 is treated as a civil offence, with the money being paid to the Territory. Gifts of $250 or more carry a maximum penalty of 50 penalty units ($8,000 for an individual or $40,500 for a corporation) or imprisonment for six months, or both.

Proposed new section 222J Ban on gifts from gambling businesses etc - less than $250

This section applies for gifts from gambling businesses, their close associates, or people acting on their behalf give a gift of less than $250. The giver of the gift must pay the Territory an amount equal to the amount of the gift.

Proposed new section 222K Ban on acceptance of gifts from gambling businesses etc - $250 or more

Proposed new section 222K is entirely new. It creates an offence for a political entity to accept a gift made by, or on behalf of, a gambling business or close

associate of a gambling business. The offence does not apply where the political entity has taken reasonable steps, for example through obtaining a statutory declaration, to ensure that the person who has given the gift is not a gambling business, or a close associate of a gambling business. This section requires an amount equal to the gift to be repaid to the Territory. This amount is an enforceable debt and can be recovered in court.

The offence carries a maximum penalty of 50 penalty units ($8,000 for an individual or $40,500 for a corporation) or imprisonment for six months, or both.

Proposed new section 222L Ban on acceptance of gifts from gambling businesses etc - less than $250

Proposed new section 222L is entirely new. It provides that a political entity must repay the Territory an amount equal to a gift given by, or on behalf of, a person who within 12 months of giving the gift has become a gambling business or a close associate of a gambling business. It provides that the political entity must take reasonable steps to ensure that the person giving the gift is not a prohibited donor. This amount may be recovered by a court proceeding. It provides examples of reasonable steps, including giving notice to potential donors that donations from gambling businesses are prohibited, and asking the person who gives the gift if they are a gambling business or close associate of one.

Proposed new section 222M Ban on acceptance of gifts from gambling businesses etc - $250 or more

This proposed new section provides for a criminal offence for political entities that accept a gift of $250 or more from gambling businesses or their close associates. Again, it does not apply if the political entity takes reasonable steps to ensure that the giver of a gift is not a gambling business, close associate, or someone acting on their behalf. An example of such a step is given of obtaining a written statement from the person who gives the gift.

Proposed new section 297A Misleading electoral advertising

Proposed new section 297A creates an offence if the person disseminates or authorises the dissemination of an advertisement that contains electoral matter, claiming to be a statement of fact, where that is materially inaccurate and misleading. The offence carries a maximum penalty of 50 penalty units. Subsection 2 provides a defence for an offence where it is proved that the defendant took no part in deciding the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading. As per the Criminal Code, section 58 the defendant holds the evidential burden in relation to these matters.

Subsection 3 and 5 provide remedies for the dissemination of misleading or inaccurate information. The commissioner may ask the person to not disseminate the advertisement again and/or publish a retraction in defined terms and in a stated way. The response of the person in following these requests will

be considered by the court's in deciding the penalty for the offence. However, on application by the commissioner, the Supreme Court may order the person to stop the dissemination of the advertisement and/or publish a retraction in an express way.

Clause 13 Dictionary note 2

This clause inserts note 2 terms defined within the *Legislation Act 2001* that are relevant when interpreting the provisions of the new 14.4A

Clause 14, 15, 16 Dictionary, new definitions

These clauses insert new definitions of terms used in division 14.4A of the bill in the Dictionary for the Electoral Act. The terms have specific meanings that they are given throughout the sections in Division 14 and 14A.