LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into 2020 ACT Election and the Electoral Act)

Members:

MR J HANSON (Chair)
DR M PATERSON (Deputy Chair)
MS J CLAY

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 19 MAY 2021

Secretary to the committee:
Ms B McGill (Ph: 620 70524)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

WITNESSES

BRODRICK, MR LIAM, student, Law Reform and Social Justice Research Hub, College of Law, Australian National University **22**

CAMPBELL, DR EMMA, CEO, ACT Council of Social Service Inc **18**

CANTWELL, MR DAMIAN, ACT Electoral Commissioner, ACT Electoral Commission **1**

MAZAY, MR SEBASTIAN, student, Law Reform and Social Justice Research Hub, College of Law, Australian National University **22**

ROHAN, DR BERNARD GILLES, Committee member, Canberra Alliance for Participatory Democracy **28**

SPENCE, MR ROHAN, Deputy Electoral Commissioner, ACT Electoral Commission **1**

TAIT, DR PETER WILLIAM, Convenor, Canberra Alliance for Participatory Democracy **28**

TEAGUE, VANESSA, Associate Professor **34**

WALLACE, MR CRAIG, Head of Policy, ACT Council of Social Service Inc **18**

WILSON-BROWN, T, Mx **34**

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Amended 20 May 2013

The committee met at 8.59 am.

CANTWELL, MR DAMIAN, ACT Electoral Commissioner, ACT Electoral Commission
SPENCE, MR ROHAN, Deputy Electoral Commissioner, ACT Electoral Commission

THE CHAIR: I declare open the first two planned public hearings by the Standing Committee on Justice and Community Safety on the Inquiry into the 2020 ACT Election and the Electoral Act. The Assembly referred this inquiry on 2 December last year. The committee has received 25 submissions, which are available at the committee website. Today we will be hearing from six witnesses. Those are the Electoral Commission and the ACT Council of Social Services—the Youth Coalition were due to attend but no longer will be today—the ANU Law Reform and Social Justice Research Hub, the Canberra Alliance for Participatory Democracy, and Vanessa Teague and T Wilson-Brown.

Be aware that the proceedings today are being recorded and transcribed.

We will turn now to the first witnesses of the day. We have them for an hour. They are Damian Cantwell and Rohan Spence from the ACT Electoral Commission. Thanks to both of you for attending today. I refer you to the privilege statement, which I know you have both read many times. Nod your understanding that you concur with it all. I invite you, Mr Cantwell, to make an opening statement.

Mr Cantwell: Thank you very much, Chair, and members of the inquiry committee. Thank you for the opportunity for both me and Rohan to appear today, to answer your questions as appropriate and to illuminate or add to the aspects of the election report, which we submitted as part of the inquiry considerations. I will firstly also say that we are very thankful for the support that the government provided by way of funding and additional resources to enable the delivery of election 2020 in a COVID safe environment. It brought with it a number of challenges, which we are all familiar with, in the ongoing COVID pandemic. It was very important that we delivered the standard of electoral services that we wished to, the highest possible standard, in a COVID safe manner. The additional resources enabled us to do that.

We are very proud of the fact that we successfully delivered the election over a three-week voting period, enabled by additional legislation passed by the Assembly—in particular allowing all voters to be considered eligible to be early voters in the terms of the act, and to therefore take the opportunity to vote early. We rolled out additional early voting centres and additional resources to each of those 15 early voting centres—in particular an increased number of eVACS, electronic voting terminals—to assist in COVID safe procedures. We also, in preparations for the delivery of the election, undertook a number of major upgrades to the electronic voting and counting system, eVACS. We introduced a new online voting system for electors based overseas, known as OSEV. We had to develop and implement that in time for the election, which we did—again, enabled by new legislation. We also improved and upgraded our polling place management system. These upgrades collectively, we believe, increased or enhanced the inclusivity, accessibility, integrity

and quality of electoral services provided by the commission.

I think that the community responded to the information campaign appropriately—or as we would wish them to—to take the opportunity to vote early, and also to take the opportunity to vote electronically. Seventy-seven per cent of electors chose to vote early, and 70 per cent cast their vote electronically—a significantly increased take-up of those opportunities as were able to be presented this time compared to 2016. As a result of that, we were able to turn around a result in the fastest time, to this point. It also resulted in the lowest ever informality rate, which highlights the importance and the benefits of electronic voting as was presented to the ACT community.

A number of benchmarks were achieved—the highest number of votes for an ACT election; the highest number of early and electronic votes, as I mentioned; a record low number of informal votes; and successful implementation of the legislation that was passed as late as July. We are also proud of the fact that we were able to introduce telephone voting for blind and vision impaired electors. As I said, the OSEV system saw over 1,500 votes admitted to the count from overseas electors that otherwise would probably not have been able to be admitted in time.

We have a supplementary submission which talks to the terms of reference issue for the proposal of a lowering of the voting age. I can speak to that as required, and also to any of those issues or points we have raised as recommendations for legislative amendment within our report. I will also add that there are a number of recommendations or points that I have raised in the election report which speak to other than legislative changes or recommendations for such. I can quickly paraphrase or refer to those.

Firstly, I highlight the requirement—as has been submitted or addressed in a budget bid currently for consideration by Treasury and government—for funds to enable the provision of a suitable permanent office space for Elections ACT. This might sound like a minor point, but I take the opportunity to raise it in this forum because of its importance to the continuation of the ACT Electoral Commission being able to deliver its services. Such a service currently underway is the ACT Aboriginal and Torres Strait Islander Elected Body election. It is not as if we only do an election every four years and then sit back and wonder what to do or what is on television. There is a whole bunch of work that goes on in between these things, and our election office space historically has been on an ad hoc or just-in-time basis. The small permanent office—which to this point has been in CMAG, opposite the Assembly facility—has been inadequate for the number of staff for some time. That has been increasingly so because of the additional staff requirements to enable and administer the new legislation which has come into effect from 1 July.

We submitted a budget bid to address that specific issue, and I highlight it to this committee, and put on the public record, as part of the considerations which must be addressed very soon. To this point, the temporary accommodation, which is provided to us and funded by Treasury, expires 30 June. Thereafter we are yet to see a permanent office solution developed. In fact, after 30 June we have no office space to move to. We are the only entity left standing in this musical-chair game of "find your nearest office space". I am not degrading or criticising the efforts of ACT Property Group or the government trying to get a solution for us—and we successfully

negotiated and managed a portfolio of around 2,000 square metres for election 2020—but we need to have a permanent home. The challenge is to meet the circumstances that we need to deliver and work from in intervening periods, up to and increasing to an amount of 2,000 square metres over the election period. Details are in the budget bid. The government has that. I know that it is going to be considered as part of the phase 1 budget considerations.

Secondly, and aligned with that, is the need for a small staff increase, and an operational funding increase, so as to deliver the new legislation from 1 July. The legislation from 1 July includes truth in political advertising, continuous seven-day reporting, and the ban on donations by property developers. Thanks Rohan. These are important new legislative initiatives; they will take additional time and resources to deliver and enact properly. Resting upon our capacity to deliver that, or affected by it greatly, is the reputation of both the commission and, more directly and importantly, the government at large. If we cannot deliver the legislative amendment properly, and be seen to be delivering it as it was intended in legislative amendment, then I think we will be diminished as a result. So it is important that we win the minor additional resources and staffing that are required, in our view, to deliver that. The budget bid is also with Treasury for consideration.

I also take the opportunity to encourage an early and proactive engagement by MLAs and advisers with the commission in development of legislation as it relates to the election. Unfortunately, there were a number of instances in the period running up to the election 2020 that saw briefs being passed to MLAs, and indeed debates occurring in the Assembly, that I believe, as the Commissioner, may have been better informed had there been some early and proactive engagement with the commission for the appropriate advice.

It is in our charter. It is one of the things which the statute requires the commission to do—to provide advice to MLAs and to the Assembly on electoral matters. Sometimes I feel that I have not been asked early enough to be able to provide meaningful and proactive advice so that the appropriate corporate knowledge, which has been gained over many years, in the election office—in the ACT Electoral Commission—can be presented to you for your consideration and your debate. I just offer that as an opportunity that I think we should continue to strive towards, and I have made comment of that nature in the report.

MS CLAY: I am assuming that is probably targeted at truth in advertising and bans on political donations?

Mr Cantwell: Not just that but all the formal legislation. In fact, the amendments that were passed on 2 July were quite late in the electoral cycle. That placed additional pressure upon the commission. Now, I am not suggesting—and it would not be my place to suggest—that you do not pass legislation amendments. It is in the wherewithal of the government and the Assembly to consider such things, but I just ask that those considerations and the debate of those matters be tabled early—earlier than was the case in 2020. I also acknowledge, of course, that some of these amendments which were passed in the period up to the election last year were COVID related and also related to circumstances that none of us had any real control over. So you were looking to pass amendments that enabled the facilitates that we ended up

providing; I have mentioned a couple already. But I think we would all be better served if debate in the Assembly was informed by early and proactive discussion with the commission and whoever else you would wish to engage, so as to properly inform the debate and produce timely legislation.

If the enactment of that legislation rests upon the commission, we simply did not have much time between July and the election in September/October to seek legal advice and related advice where we thought it was appropriate to ensure that we were applying the act appropriately, and to seek additional resources where it was appropriate to enact that new legislation and the like. So there were some things there that I think we could all collectively do better by simply doing it earlier. We are always open or ready to stand by and come over and talk to staff, or to MLAs directly, or whomever, that would assist that outcome. As I said, we have got some considerable experience in the commission in a number of staff—Rohan Spence being one of them—who can help the commission inform the MLAs and advisors, as per our statutory requirements.

The last thing I would offer here—I appreciate the opportunity to make this extended statement—is important. We cannot rest upon our laurels here in the election space. It is a challenging environment. Community expectations are placing great demands upon us all in this space. We have achieved a high benchmark of outcomes in this space for 2020—one of those being an enhanced community expectation for early and electronic voting, such has been the case here for some time.

The ICT systems that enable our electronic voting will continue to need upgrading. We spent a good deal of time and resources provided by government to enable that for 2020, but identify that it will be an ongoing requirement. We cannot simply turn eVACS back on in four years' time and expect that it will run as we saw for 2020. The systems around it—LAPPERDS, OSEV and our management systems, collectively—will need continued work. That is going to take some additional resources. So I just foreshadow that the commission will be adding to its funding requirements in line with that operational need to ensure that our ICT systems are the best that they can be and fit for purpose in the years ahead, not just resting upon our success from the years in the past.

Overall, we are all about enhancing and maintaining trust in the electoral integrity through transparency and security, and that takes a concerted, consistent effort. I look forward to working with the Assembly and providing advice in these matters, but also seeking to win the additional resources required to achieve those outcomes that we seek. Thank you for your opportunities.

THE CHAIR: Thanks for your statement. I might just comment and thank you very much for your submission; it is very comprehensive. It is useful for us to get recommendations. Well done on what was a very difficult environment, not just with the late Electoral Act changes which you referred to but also with COVID and the changes that happened there. Certainly, the feedback that I think we all got was that it was done very well. I think the result was a problem, but I accept that that might have been out of your control!

One issue that has come up, though, is the issue of electronic voting and the

confidence in the systems. We have received a submission from a group of academics at the ANU. You are aware of that, I understand. Would you like to respond to that submission and explain what it is that you are doing to make sure that we do have that confidence in the system? Their view is that there were errors that did not affect the result but that the votes counted were perhaps different than they would have been if it were a paper vote. Can you respond to that and tell us what you are going to do in response—particularly with the sharing of the source code as well and whether that is going to happen or not, and how you are going to approach it.

Mr Cantwell: Absolutely. Thank you for introducing that issue. It is very important. It does highlight, as I have mentioned in my opening comments, that the enhancement and maintenance of trust in the electoral outcomes, through transparency and integrity, sits at the core of what we do. Contrary to what might have been suggested in the report you refer to—and also some other media commentary or social media commentary—we are anything but a secretive organisation. We are all about being transparent. It is in our interests and in the interests of government. It is required of us by law. We are all about being transparent, and responsible in doing so.

The commission always seeks to deliver the highest possible trusted electoral services. To do otherwise would be failing in our mission and I would not let that happen. I would also say that we welcome all positive, constructive commentary and input in this matter, and we welcome Professor Teague's report and that of her colleagues. I have made a number of efforts intended to be facilitated by the ANU, of which Professor Teague is an honorary associate professor. Unfortunately, the facilitated meeting that we hoped would occur has not yet occurred. I am not holding them responsible for that, but I think we are now at the point where, subsequent to this election, we will work directly with Professor Teague and her colleagues, as we can, to better understand her views or the views of her colleagues, and to apply them where we think it is appropriate.

The report identified, as you stated, a number of what has been referred to as "errors" in eVACS. We agreed upfront that the author's assertions were correct—that there were no errors or issues associated with the way eVACS managed the counting that would have led to any difference in the outcome in the election 2020, but it is really important that we listen to what is being said and that we act upon that where we think it is appropriate and where it is correct. And we have done so. I thank Professor Teague and her colleagues—and I made mention of this in the election report—for their interest in this matter. They have a history of analysis and reporting on other commissions' elections as well, and this is a healthy thing. We should welcome—and we are welcoming—such positive, constructive commentary. I have chosen to disregard other, perhaps more heated or emotional, aspects of the report but focus on those things of substance that we should be paying attention to.

So we have listened and read that report. We have analysed it and we have applied the issues that Professor Teague and her colleagues have identified. The report makes mention of how eVACS applied a misinterpretation of the act as it related to the management or handling of transfer values, which is a feature of the Hare-Clark counting system. Also, the error identified relating to the handling of decimal places to six points, rounding down versus rounding up, or rounding to the nearest whole six decimal points versus rounding down, has also been addressed. We have made those

amendments in the coding for eVACS, and we would—as you would expect us to, I am sure—pay very close attention to any such issues that might arise so that we can continue to enhance and reassure the community and Assembly members, of course, of the integrity of this system. So we worked hard to understand what the issues are, and we have addressed them. We will continue to work with Professor Teague and her colleagues to address those things as they might arise.

MS CLAY: It was a fairly emotional submission, but I will read from it. We covered this in estimates. Their submission says:

> We had clearly communicated to Elections ACT that some errors were on the order of 20 votes, with the potential for much larger discrepancies due to the algorithmic nature of the coding error.

Is that correct?

Mr Cantwell: The report that we submitted identifies that the errors related to a total of 21 votes in one case and 13 votes in another. It was of no consequence, though, to the end outcome.

MS CLAY: It was not this time around, though.

Mr Cantwell: We have not had the opportunity, regrettably—but we will soon—to speak directly. I understand that she is presenting today, which is great. I do not wish to speak ahead of Professor Teague and her colleagues' submission or their standing here today, because we need to hear what they have to say to support their submission, but where they have categorised a potential for these matters to have a greater effect is a matter of consideration but also debate. The report authors, to me, tend to define such risks as highly likely with the most severe outcome or consequence. That is not my assessment.

MS CLAY: Sure.

Mr Cantwell: There are risks in any electoral system. There are risks in any system. My view is that there are at least the same, if not greater, risks in an entirely paper ballot system. There are other issues associated with such a paper ballot system as well. We worked hard to make eVACS work, and it works according to its intended outcome. We will continue to work with those report authors to make sure that we understand what they are saying, and we will continue to apply, where we think it is appropriate, the lessons that we should.

MS CLAY: Beautiful; thank you.

DR PATERSON: I was just wondering if you could speak to the non-disclosure of the code. What the academics were saying was, firstly, that it should be released broadly, but also that there were issues with when the code could be released anyway, even if you did sign the disclosure statement.

Mr Cantwell: Yes, I think there might be some misunderstanding.

DR PATERSON: Okay.

Mr Cantwell: I am happy to work with Professor Teague to clarify that. Firstly, the intent of the non-disclosure agreement, or the deed of confidentiality, for the 2020 eVACS code was, in this current era of potential misinformation or deliberate disinformation, to allow the commission an opportunity to work for a defined period of time with anyone who would assert or offer that there are issues with the code—60 days in this case—during which time we would work with the vendor, or members of the public, or whomever might raise such an issue. At that time—after that deed expired, the 60 days—the findings would be able to be released by the person who claimed to have made such findings, but not the code.

DR PATERSON: Okay, I see.

Mr Cantwell: So I think that there may have been some misunderstanding, but I have not had the benefit of having that direct discussion with Professor Teague and her colleagues. I think that there may be some confusion there. I am not sure why the confusion arose, because the terms of the deed were made available, and the terms of the deed is as I have described. I think it goes to the assertion made by Professor Teague and her colleagues—or the suggestion or insinuation—that the code is secret. The code is not secret. The code is publicly available, subject to the terms in the non-disclosure agreement.

The intention of that agreement was to have kept the integrity of the code in so far as the opportunity should be afforded to the commission to consider such assertions, as they might arise, of any irregularities or issues with the coding, so as to avoid unnecessary community angst or concern, or doubts about the integrity of the coding, and therefore the outcome of the election. Otherwise, there is potential, in this era of information and social media pervasiveness, for anyone to make such an assertion and put it out in the media tomorrow and for me to have to race around to try to address those issues and do all that I can to enhance or restore the trust and integrity of the system, regardless of the veracity or the integrity of that assertion. So it is all about ensuring that we have a balanced and, I think, a considered approach to any such suggestions of coding or other errors.

DR PATERSON: With respect to the registration of political parties, the first three recommendations are in relation to that, and some of the other party submissions raised the point that some political parties are registering names that are very close to others, so there may be some confusion with voters. I am just wondering if you could speak, I guess, to your recommendations to tighten up political party registration.

Mr Cantwell: There are a couple that relate to that. I might throw to Rohan for some of the commentary here; Rohan can talk to some of the specifics. In Rohan's delegate position as the registrar of political parties, he found a couple of occasions when there were some issues associated with the parties' constitution details, with details of the party secretaries and how they are appointed, and also with getting in contact with the required number of nominations, where we needed to have 100 people contacted and we needed to have ready access through email or other details. I will let Rohan talk to those. I hope that is addressing your particular question. If not, we will certainly circle back as need be.

Mr Spence: As Damian just suggested, the first recommendation is that there be requirements within the Electoral Act for what is within a party constitution. This recommendation comes about because we regularly find that when parties are applying for registration in the ACT, they are required to provide us with a constitution but there is no information on what is required to be within that constitution. In reality they could just put in a piece of paper that says "constitution" on it, and we have no way of objecting and not agreeing that that meets the needs.

We regularly get phone calls from community organisations who have elections. They are not necessarily asking us to run their elections; they are just asking for us to interpret their constitution because there is an internal disagreement. The constitutions fail in so many areas to allow for clear understanding within those organisations about how their party or their organisation should be running. As I administer the party registration process I find that I need to regularly go back to these parties and say, "My recommendation would be that you strengthen the internal workings of your party constitution to ensure that you do not have these internal problems." That is where that recommendation comes from. It is about internal accountability. The people who are signing up to be a member of that party need to know how that party works in order for it to function as you would expect a political party to do so. At the moment, the act does not provide any guidance whatsoever and we could not not register a party because it was failing in that area.

The second recommendation is that the party secretary be a registered position. That recommendation really comes about because the party secretary is a very powerful position within a party, according to the Electoral Act. They have the power to write to the Electoral Commission and seek deregistration. Now, we do not currently know, because there is no register of those, who that person is; and there is no obligation for the parties to inform us of that. There are many other areas within a party—"registered officer" is a registered position—where the party has to inform us when it changes. In fact, there is an objection period of 14 days where you have to advertise that. There is all that sort of stuff. Reporting agents, deputy reporting agents and all of those things are processes. "Party secretary" is not, but it is very powerful. If we were to receive a letter from the person that we believe is the party secretary, asking to deregister—they may be disgruntled, let's say—we would have to act on that. I think that is a problem. So, ensuring that there is a register and that that is kept up to date would be an improvement to the act.

The third one is to do with modernising the party membership checks that we have to do between every cycle, and also at the point of initial application. We need to check that the party has 100 ACT electors. Currently, we do not have the power to ask for email addresses or dates of birth to assist in that process. That recommendation is just to seek that, if they have those details, they can provide them to us. Some parties come back and say, "We are not comfortable with doing that because we do not believe there are necessarily the privacy protections over doing that." We understand that, but it would assist in this process of ensuring that there are ACT electors who are members of that party, basically. Those are the three recommendations.

THE CHAIR: Just a supplementary question on the constitution. Is there a guideline for parties or people registering a party?

Mr Spence: We provide a guideline.

THE CHAIR: You do have a guideline?

Mr Spence: It is in our party registration fact sheet: these are the things that we believe should be in a constitution. I regularly go back to these applying parties and say, "You have not specified any information about how your party internal runs."

THE CHAIR: Are you suggesting that that needs to be in the act or subordinate legislation somewhere?

Mr Spence: In some manner, that is the recommendation—that there is some guidance on the core structural elements that should be within a party constitution.

MS CLAY: I would love to have a chat about voting age. I read your submission—your supplementary—on this one. What I took from that is that the AEC mostly engaged with any change to the self-government act problem, which we cannot fix. If that did not exist, a lot of objections to changing the voting age seem to be based on the fact that a reduced voting age would require mandatory voting. And most of the organisations who have suggested allowing 16- and 17-year-olds to vote would make it non-compulsory voting from 16 and 17, and only compulsory from 18. I did not find that too convincing.

There are resource implications, obviously, but that would not be how you would make a principled decision. You make a decision about what you want to do and then you resource the agency to do it. So I take the point that there would be resource implications of that. I would love to hear your views on non-compulsory voting. The other thing I am interested in—and I do not know the history because I am new—is provisional registration. It is obviously acceptable under the self-government act to have provisional registration. We have had it for one or two elections. It has not been challenged. But I do not know if we ever got legal advice of whether you can have provisional voting or a different class of voting if we have a different class of registration. So have you got any comments on that?

Mr Cantwell: Yes, thank you. I will start and I will pass you over where I may have missed things. The view of the commission has been consistent in that we recommend against lowering the voting age from the current age of—where is it?—18.

MS CLAY: I was going to say, I have just won the case already!

Mr Cantwell: Sorry, 18. The reasons are, effectively as you have outlined. Without significant and fairly complex legislative change, which would include a majority vote in this matter, to lower the voting age, as is in the proposal, below the age of 18, would require such enrolment and voting indeed to be not just voluntary but compulsory. So the proposal is that the voting age be lowered but it be voluntary. When you look at the way the act and the legislation is currently written, you realise that you would have to have a majority vote in the Assembly to change the legislation to make it other than compulsory. Our view is that if enrolment was compulsory then voting would be compulsory. The same penalties that are currently prescribed to

non-voters would also be applied to those 16- and 17-year-olds. And the question would arise whether that is a desirable requirement as a result of the outcome intended, or the proposal as it stands.

MS CLAY: It would be a major legislative change, but it would surely be technically possible to make it non-compulsory. Unfortunately, we were going to be hearing from the Youth Coalition of the ACT but I am not sure if we will get to speak to them now. Their stated strong view is that it should be non-compulsory. That would just be a larger legislative change.

Mr Cantwell: Yes. You would have to then get a two-thirds majority of the Assembly to vote in favour of the changes required to the law.

MS CLAY: Yes.

Mr Cantwell: Otherwise it would be compulsory for both enrolment and voting. Also, the ACT would be the only state or territory in Australia to have such legislation. That, in itself is not a negative, but rather it highlights that we would have to have discrete, unique arrangements with the AEC, with whom we have a joint role arrangement. With additional resources, as you have said, for the administration of the enrolment on the roll. We would be the only organisation doing that, and that would place a body of work upon us and the AEC that currently does not exist or for any other jurisdiction.

So notwithstanding the desire to do so, in summary, there is going to be some significant legislative change, which would require a two-thirds majority to pass. Then there are implications associated with us being the only jurisdiction to have any such legislation. How we would enact it would be problematic for us in terms of how we make that happen. One example that we highlighted in our supplementary submission is that it would exist for ACT elections, but not federally. So if an election was occurring here in the ACT, at about the same time as a federal election was occurring, there would be some community confusion as to whether those 16- or 17-year-olds could vote in one but not the other. That is another point for consideration. Rohan, do you want to add anything to that?

Mr Spence: I am happy to address the provisional enrolment question.

MS CLAY: Yes, thank you.

Mr Spence: Provisional enrolment has been around for a long time. It is in every jurisdiction, including federally. It is provisional enrolment. So they are not enrolled but they are on a list so that when they turn 18 they go onto the roll without having to then re-enrol. There would be an argument to suggest that if the voting age was lowered, then you would lower the provisional enrolment as well to 14- and 15-year-olds. The point of provisional enrolment is to allow anyone who will turn 18 between the close of rolls and election day to be able to be on the roll without being prohibited from doing that by the close of rolls. That is the basis for provisional enrolment.

MS CLAY: There is no problem with that with the self-government act?

Mr Spence: No, because they are not enrolled. So the self-government legislation provides that every person who is entitled to be enrolled, and who is resident of the territory, is required to claim enrolment. So it is the enrolment section within the self-government act. The Proportional Representation (Hare-Clark) Entrenchment Act entrenches compulsory voting in the ACT. To change that requires a two-thirds majority in the Assembly or a simple majority in a referendum.

MS CLAY: Great.

THE CHAIR: I turn to your report and recommendations 6 and 7. This is about the provision of information about candidates to the electorate. It was one of these changes that was made to the Electoral Act in the lead-up to the election that means that you have to be, I guess, the custodian of candidate information. You do not support that. There are other organisations, like the ANU, that are providing a somewhat similar service with smartvote. I understand your point that you do not want to be seen to be in any way putting up information that could be influencing the election in one way or another. But if there is going to be a central repository—I guess a part of that is a lot of fake news out there and a lot of biased information—where do people go to try to get something that is a source? A link is an option that you have raised. The Electoral Commission, although it does not want to be drawn into these issues, is seen as an objective, neutral body. Who else could do it, if we are going to have something like that? I am not sure that, necessarily, any other organisation could. Do you have a recommendation about who could? The government of the day could not, obviously. Is there anyone else that could?

Mr Cantwell: You have highlighted that we have indicated that there might be some academic or other entities that could take that on or provide a like service already. But I feel that the question is a little unfair, if I may, because you are asking me to recommend a solution to a problem that I think is a problem in the first instance, and not of our design. But I do accept the nature of your request.

THE CHAIR: No; I accept that it is not of your design. But if, as you say, you do not want it in the act anymore, I am just trying to see—you accept that you are there to provide advice—if you have any advice on how else it could be done.

Mr Cantwell: Yes, thank you. It is working already! We can come back with some recommendations to the Assembly, or with some more consideration. Beyond this—and we wrote about this previously—we are happy to provide a link to the information: the candidate's home page, or whatever it might be, or the party's page or the like. The concern I have is that if it rests with us, for the very reason you have identified—that we should always be seen as the impartial entity—the risk arises that that is not the case anymore, or at least perceived not to be the case. There were a couple of instances whereby—again this is the first run in this endeavour with new legislation—I had to write to candidates and highlight where I had determined that it did not meet the requirements of the act, as was established, and that the candidate's statement would need to be rewritten.

That was a process of taking advice from the experienced members of my team, considering other advice we had receiving, including legal advice, and then making a decision and writing to the candidate quickly to give an opportunity to amend their

statement as they would wish. In doing that, I feel I have already somewhat breached my impartial stance on these things. I am making that interpretation on my own means; I would rather that that be executed by a body other than this one. I think that the importance of the impartiality of the commission, and all commissions in this regard, is really important and must maintain that, certainly in perceptions as well as—

THE CHAIR: I agree with you, but I guess it is a chicken and egg thing. You are seen as impartial; therefore, it is a repository which is impartial. If you put it to another body—the ANU or anyone else—I do not think that they have that same legislated mandate. There is nothing that says the ANU has to be impartial. So if it is not going to rest with you, who else is out there that would, or could, be seen as impartial or is legislatively required to be impartial?

Mr Cantwell: That is a valid point. As I said, I think I would like to consider it further, and in fact write to the committee and yourself with some potential recommendations in the space. I think there is a threshold that we are at risk of breaching here. In the same way, perhaps, if it is an external body—ANU or whomever would host smartvote, or something like it in the future—it could at least maintain a statement of impartiality. That will always be judged on its merits by the people who wish to review it and it would say that they are taking steps inside their own mechanisms to provide a disclaimer that they are other than impartial.

THE CHAIR: Sure, but that is just a disclaimer. There is nothing legislated that requires them to be impartial, external to the electoral commission. I am not here to debunk what the ANU is doing—that is not my point in this—but an organisation could set up something that they call "clever vote", and attract a bunch of attention to it with advertising and so on. How do you assess how that then aligns voters to particular candidates? To try pushing it to external websites is a risk as well. So I do not dispute what you are saying, but the alternative potentially has problems as well.

Mr Cantwell: The initial alternative was for candidates to make their own statements on their websites and/or the party websites, and I refer inquiries of such nature back to the owner of the information. For me, that is the ideal outcome. I do not own the information, but I can tell you where to find it. There it is, and you make your own judgements based upon engagements with that source of information.

It raises a broad point that for all of us in this era of information and misinformation, and the pervasiveness of communication, we should all stop and think about the source that we are getting our information from, and figure whether it has relevance to us. That is always going to be the case. I would not want to be in that space at all. That would be my ideal outcome, but we will think about it further. I invite Rohan, if you want to have some thoughts about it—

Mr Spence: That is how we have addressed this in previous elections—a webpage linking to links provided by candidates and parties. They are then accountable for the information that they are putting up. We have no play in that and nor should the electoral commission. We have seen in a number of other submissions the, I guess, scope creep—calls for us to be involved in other elements of political canvassing. Yes, we are a great resource for people, but our impartiality is key.

THE CHAIR: That goes to another point, which is truth in political advertising. What is your role in that in the legislation?

Mr Cantwell: So the legislation comes out on 1 July, and we have been looking at this very closely, subsequent to the election. Note that we have a body of work ongoing from the election. We are able to provide staff resources to this study. We have taken advice from the South Australian Electoral Commission and their experience with truth in political advertising and their legislation. We have taken advice in a legal context as well. We developed a way ahead. As I said earlier, in my opening statement, one of our submissions and our budget bids for 2021-22 includes additional staff and resources to be able to outsource or to provide an external provider against this task.

Ultimately, we are still coming to grips with the detail of it, and it is about to become the subject of an information campaign that I will pass back to MLAs and the parties and the future candidates as to the responsibilities in this regard. But it will be a difficult task, I have to say. It is difficult in that it is an area that I would rather not be involved in, for the reasons we have just described. I note the linkages between the former and this current issue. I think that the sense of impartiality and independence is really important for us to maintain.

And my experience—and also the experience that we have been provided by the South Australian Commission—is that it has presented a number of problems to enact this like legislation. We will have to work through it because it is now in place from 1 July. I have to say that I approach this task with some trepidation because I spoke to my counterpart in South Australia a number of times and it has been a body of work that they have yet to properly be comfortable with. It has resulted in another case which has gone on for some time. In the end, the decision which was reached—I am not speaking for the South Australian Commission here—was never a happy outcome for everyone, and it will be a difficult thing to administer.

I would rather have the responsibility for the determination of the truth and the integrity of the information that has been provided in the electoral space ultimately resting with the elector. As long as the elector is aware of, and reminded of, the opportunity to stop and think, check the source and think critically about the information they are receiving, ultimately that is all of the individuals' responsibilities, as individual electors and voters. I think that ultimately rests with them. I can only do so much to help in this legislative sense to filter out that truth or non-truth. But stepping into that decision-making process, I am already becoming partial. I am already forming a view, and then publicising what the view is, and people will then make judgements against my judgements. That is the problem that is arising from such legislation. So I have some difficulties in how I am going to approach this. I am not shying from responsibilities. It is now legislated, but it is a body of work which we properly need to understand and inform people about.

THE CHAIR: Given the complexities that you have raised—we do not have an election for a while—do you need longer?

Mr Cantwell: It would assist, but we need to get to grips with this at some point.

THE CHAIR: No, certainly. It is legislated but you want to get it right.

Mr Cantwell: Yes.

THE CHAIR: You know the legislation is on 1 July, in anticipation of 2024, when the next election is. We could recommend that there be a delay so that you can spend more time to establish exactly what is required.

Mr Cantwell: Yes. I have not considered it at this point, but I will take it on notice. I think that would be very useful, for a number of reasons, as you have alluded to. The election 2024 is a way yet. No-one is out politically campaigning as such, or actively in the electoral space. As I said, I have a budget bid for additional staff—an additional two FTE and some additional money to provide for an external provider in this space—to do some analysis in that space, which I am confusing with property development. I am sorry, let me step back. I think that would give us some more time to further analyse how we are going to enact that legislation and to seek further advice to consider it, and to inform everyone who is going to be affected by this—not just the community, but in particular the candidates or potential candidates in the future. So that would be useful. What are your thoughts, Rohan?

Mr Spence: *Interruption in sound recording—*

Mr Cantwell: That is a very good point. Rohan has highlighted here that we already have started the election period for the ATSIEB election. Now, that voting period runs from 3 to 10 July. So we have just opened up the period by which candidates can nominate themselves through to 2 June. So the same legislation applies to the ATSIEB election. That will affect the conduct of the ATSIEB campaign and the delivery of that election, as it does to other things like candidate information packs. So, again, I would welcome such a delay because it would be useful in terms of consideration of the detail, and I would be happy to write to the committee more formally in that regard.

THE CHAIR: Yes, because if it is going to be unworkable and if it is going to have problems that were not anticipated, that could also be something we could look at—you know, amendments to the act—whilst a delay is in. It is something we could consider as a committee.

Mr Cantwell: Note that it is due to take effect from 1 July. We would have to move pretty quickly.

THE CHAIR: Yes, and that might be problematic too, given the time lines. Anyway, we will consider it.

DR PATERSON: In a similar vein, some of the submissions spoke about the broad definition of "electoral matter" and it being too broad. There was some talk about particular community groups putting out what they deemed to be an electoral matter and having to have the authorisation, and that being complex for them to understand, and then other groups not falling into that category. Could you speak to that?

Mr Cantwell: I will ask Rohan to speak to some of the detail of the relevant submission or submissions, but I think that the definition of electoral matter as it stands at the moment serves the purpose well. "Electoral matter" is defined as matter that is intended to be likely to affect the outcome of the election. It is required to be duly authorised, and the detail of how that authorisation statement appears is well documented. There are also penalties associated with failing to authorise a statement. Where such statements or electoral matters may not be duly authorised, we reach out and engage with the organisations that should have done so and work with them to make sure that they are authorised. It can be a complex task. I think that it serves the purpose well. It captures the definitions of such matters appropriately, and there is a bit of latitude that can be applied. I think that the act works pretty well in everyone's favour.

I will ask Rohan if he wishes to comment on the particular submission.

Mr Spence: I do not have a lot to add to that. One of the submissions was talking about a school putting on a play and saying that that could be considered an electoral matter if it is intended or likely to affect voting at an election. We would consider that unlikely. It is not a relevant example.

I agree with Damian that the current definition in the Electoral Act plays well. Yes, in some instances it requires an authorisation statement on newsletters. We understand that lots of organisations do not believe that what they are doing is political in nature, but if it is commenting on the performance of any political entity in the Assembly, or candidates or something like that, then it is captured by that and it requires an authorisation statement. That is the limit of its requirement: a statement just saying who authorised that publication. We understand that that can have far-reaching impacts. At the moment, that is the way the act is written. It has to be intended or likely to affect voting in an election, and many of those examples were just not.

MS CLAY: We are running out of time. I would like to have a chat about donations. There has been some reform in this area to ensure that certain wealthy individuals or organisations do not have undue influence, and there have been a lot of suggestions in submissions that there is more reform needed in this area. I will run off a couple. One was donations from gambling organisations and donations from organisations that are in receipt of government contracts over a certain value. It touches on our real-time reporting of donations. What is your view on reform of the current donation restrictions?

Mr Cantwell: There is a recommendation in our report which speaks to this issue and recommends that the Assembly review the previous legislation in this space, which is a $10,000 cap on political donations. The argument is outlined in the report, that essentially, as you described, to limit what might be described as undue influence on the political process and to ensure, wherever possible, a level playing field. The intent of such a cap would be along those lines—just to say that not only do you need to declare it, but there is a cap on such donations as well. Do you want to add anything else?

Mr Spence: The ACT has a very strong financial disclosure scheme. It has quite a few levers, in public funding and expenditure caps. The report is just recognising that

there are those elements at play and that, because they all interact, they have an effect on each other. That is really what the report is doing: just reconsidering whether limiting undue influence, whether a cap on donations, is something that the Assembly would like to reconsider as part of this process.

MS CLAY: You would be leaning more towards caps rather than the restrictions on individual organisations that should and should not be eligible to make donations?

Mr Spence: They are policy decisions for the Assembly.

MS CLAY: Political decisions?

Mr Spence: Yes. It is just about the consideration of that and then, as Damian mentioned at the start of this, engaging with the Electoral Commission to get advice on how that would be administered and the impact of those.

MS CLAY: The point is well made; we will do it.

Mr Cantwell: I would not specify particular organisations that the Assembly or the government of the day would be concerned about receiving donations from; I would be careful about staying away from that space as a commissioner. Rather, the point is that consideration of such a donation cap would be useful to further the assurance of the removal of such undue influence from the process.

THE CHAIR: What do you think about the issue where third parties are not really advertising for themselves but are just adding their amount onto a political party? I will give you an example. When I was out campaigning, there was stuff left on my doorstep that looked as though it had been put there from a political party, but when I looked at who had authorised it, and spent the money, it was from another organisation, a third party—in this case a union. Is that an issue as well? Third parties are allowed to expend money, but if they are using it simply to add onto a political party, make it look as though they are, is there a provision in the act? Is that a loophole?

Mr Cantwell: I do not think that there is a loophole as such. There is the requirement to be identified as a third-party campaigner to comply with the ACT's existing disclosure provisions; that is a means by which the electorate can see such expenditure relations being made. I am not sure if it is necessary to consider changes to that or if there is such a loophole, as you described it.

THE CHAIR: Essentially, any third party can brand themselves exactly the same as the Liberal Party, Labor Party or Greens. Then your cap, in effect, is significantly increased. That seems to have been what was happening in this case. An organisation that was not the Liberal Party was distributing material on behalf of a candidate that looked as though it came from that political party.

Mr Spence: Historically, there was a clause in the Electoral Act prohibiting working in concert. That was removed.

THE CHAIR: When was that removed?

Mr Spence: Quite possibly March 2015, when there was a significant change to the Electoral Act. Don't quote me on that, but I suspect that was probably the case.

THE CHAIR: To make sure that third parties are doing what? Pushing their agenda rather than just using it to extend the cap of the political party, working in concert.

Mr Spence: Working in concert.

THE CHAIR: We have run out of time, sadly. Thank you very much for attending, Mr Cantwell and Mr Spence. We will look into the issue of the delay with some urgency—I am not sure whether that is feasible or not because it might be in anticipation of the annual report that we put forward—and how that might be done. If we have any further questions, we will be in touch.

Short suspension.

CAMPBELL, DR EMMA, CEO, ACT Council of Social Service Inc
WALLACE, MR CRAIG, Head of Policy, ACT Council of Social Service Inc

THE CHAIR: I welcome the representatives of ACTCOSS. I need to make sure that you are aware of the privilege statement before you.

Dr Campbell: Yes.

THE CHAIR: Would you like to make a statement?

Dr Campbell: Yes. We would like to begin by acknowledging that we are meeting on the land of the Ngunnawal people and pay respect to Elders, past, present and emerging. ACTCOSS thanks the standing committee for the opportunity to appear before this inquiry into the 2020 ACT election and the Electoral Act. We will make a short opening statement and then take some questions.

As you know, we are the peak body representing community sector organisations and people experiencing disadvantage in the ACT. We are particularly focused on the participation of vulnerable people and community sector organisations in the election. We have a couple of general comments and two more specific issues that we would like to focus on.

ACTCOSS was engaged with Elections ACT. They reached out to us and to the community sector in the lead-up to the 2020 election, on two issues. The first was to ensure that the needs of vulnerable voters, such as people experiencing homelessness and people with disabilities, were included. Also, we ran a session with our members to ensure that our members understood their obligations for authorising electoral material. We would encourage the committee to reach out to some organisations representing disabled people's organisations and other vulnerable groups to make sure that they can give you some feedback on whether the process was effective in including more vulnerable voters.

One area where we were particularly concerned involved reports, which we have since verified, that detainees in the Alexander Maconochie Centre did not receive any candidate or party information, including how-to-vote cards, in the lead-up to the ACT election. The issue was raised in the media, and the lack of access was confirmed by the justice reform group, which is chaired by ACTCOSS. One of our members working with people receiving alcohol and other drug supports in the AMC said that they had to assist three young detainees to find party and candidate information. They wanted to vote, but they did not know who to vote for.

Detainees in the AMC are eligible to vote in the electorates in which they were enrolled before imprisonment. Before the election, we met with Elections ACT to ensure that the voting processes in the AMC would be functional and accessible, and we heard that many detainees had accepted the opportunity to submit postal votes. Having the right to vote is one thing, but that needs to be matched by information so that you have meaningful participation in the process. Given that people in the AMC are some of our most vulnerable Canberrans, who have, more than most, an interest in things like justice, housing, drug and alcohol policy and child protection with regard to their own wellbeing and that of their families, we were very frustrated that they

were not given access to the kinds of information that we think leads to full participation.

We want to use this opportunity to highlight to elective representatives, Elections ACT, political parties, JACS and the AMC the need to ensure that voters in the AMC are enabled to exercise their full democratic rights, including receiving electoral information.

We also have a couple of points on authorisation, which I ask my colleague Craig to speak to.

Mr Wallace: Turning to the electoral authorisation requirements, ACTCOSS has concerns about their reach, unintended impacts and potentially silencing effects. We accept that it is right that we identify the owners of electoral materials as part of a healthy democratic process. However, we hold concerns about the scope of ACT election requirements and the prioritisation of compliance activities, which appear to be overly focused on community sector organisations.

The requirements for authorising material are potentially extremely wide-ranging, ongoing and open-ended. If strictly interpreted to the letter, they require a range of ACT community organisations to include permanent authorisations of an electoral kind on a range of material such as newsletters and sites that could be taken to comment on government policy, raise policy issues or discuss normal interactions with past or current elected officials. They also appear to apply at all times, including outside elections. For instance, we have a question as to whether the coverage of the opening of a new school hall, or the turning of a sod by an MLA in a school newsletter, outside election material, might be taken to be election material and require an election authorisation.

The sector was concerned at the start of the election period that these requirements could be onerous or inappropriate for organisations and dissuade them from taking part in important commentary. It may also misrepresent community sector advocacy and activity as potentially partisan or political.

The boundaries between commentary on the business of government and political material was also unclear. Advocacy organisations like ACTCOSS have a legitimate remit to examine the quality of public administration without it being considered partisan or electorally motivated.

ACTCOSS was somewhat surprised by the initial targeting of authorisation compliance letters to small community groups—such as the ACT Council of Parents and Citizens Associations, the Canberra Gambling Reform Alliance and ACTCOSS—while other groups we spoke to with larger capability to influence election outcomes did not report receiving letters. Subsequently, we were pleased to receive assurances from Elections ACT that they would exercise discretion in their application. However, the scope, reach and disproportionate impact of the authorisation requirements remains a concern to us, as well as the apparent focus of compliance activities. We would invite the standing committee to consider whether the requirements for authorising material under the ACT Electoral Act are appropriate and well targeted.

Dr Campbell and I are happy to take questions.

THE CHAIR: I have a quick question on homelessness and how you are reaching out to people who are homeless—not just rough sleepers, but people who are couch surfing and so on—to make sure that they understand that there is an election happening and they can get onto an electoral roll. How are you doing that, because you probably need an address, don't you?

Dr Campbell: To?

THE CHAIR: To enrol. Is there a process there?

Dr Campbell: I think you would need to ask the Electoral Commission about that.

THE CHAIR: Have you looked at that as an organisation? There is a lot of homelessness in the ACT. Has ACTCOSS looked at that as an issue?

Mr Wallace: That is something we have raised in election after election. We have encouraged Elections ACT to work with the providers of homelessness services to ensure that people have a point of contact. This is not only an issue with elections; it is also an issue which relates to Centrelink compliance and other services that homeless people might need to receive.

DR PATERSON: One of the recommendations of the Electoral Commission was that, while they did have early morning centre voting for homeless people, in the next election they would look to have a mobile voting service to reach more homeless people. Do you have any ideas about how that may work most effectively?

Dr Campbell: It is about engaging with the services. It is like any government services or any engagement: you need to be there—whether it is at the early morning centre or going to places like Havelock House, CHC and Argyle Housing—so that you can engage with vulnerable voters to let them know their rights, let them know how they can register if they do not have a permanent address, and build trust with them to let them have information. Many people might not even know there is an election going on. It is resource intensive, and there is no easy way to do it. It is being there, building trust and working with homelessness providers.

DR PATERSON: Going back to the AMC, one of the things that the commissioner was stressing was the impartiality of the commission, which is so important to them. For example, they do not even like doing the candidate statements and having that on the website; they see that as compromising their impartiality. I foresee that one of the issues with providing candidate information to the AMC is potentially that they may see that as not being their role and as crossing a line. Is there another avenue that you think would be appropriate for AMC detainees to get that information?

Dr Campbell: We are using this as an opportunity to highlight the problem. I also do not think it is the responsibility of the Electoral Commission to be giving out information. You are all representatives of the main parties that stand for election in the ACT. I think the responsibility falls on individual candidates, on parties, on government, on JACS and on the AMC to ensure that that information is there.

The role of the AEC is to explain to the broader public, and those participating as candidates, what an effective election is. That is not just about the voting process; it is also about information. We want to use this opportunity to highlight the responsibility of the parties also in giving out this information. That applies particularly to candidates or parties who claimed to be inclusive of the most vulnerable and yet, when it came to the election, did not step up to provide information to some of those most vulnerable.

MS CLAY: I am interested in how we are helping people in nursing homes and residential aged care. It is probably not about independent living; I assume people in independent living are reached through channels that reach other people. Do you think there is the right information and the right mobile voting support, and do you see any particular ethical concerns in nursing homes?

Dr Campbell: There are a couple of issues there, including striking people off the voting register and the role of carers versus the rights of people to vote.

Mr Wallace: We should not have the default assumption that people who are in residential settings, or who might have diminished cognitive ability in one area of their lives, are not entitled to vote and do not have important things to say about the standards of services and supports that are available to them.

Another observation to make is that, while the AEC has made efforts to provide mobile voting within some nursing homes and aged care settings, it is also important that we have opportunities for elderly and frail people in the community to exercise voting rights, given that the modes of care generally are shifting from residential settings to keeping people at home. We have just had additional home care packages announced; the future of aged care is, hopefully, going to be people outside nursing care. In that case, you would expect all polling places to meet a high standard of access for disabled people and older people. As you might have heard in the evidence I gave in this committee yesterday around schooling infrastructure, all of the ACT's 89 polling places are registered as accessible with assistance, but none were registered as fully accessible. That is a problem.

MS CLAY: Did the telephone voting assist at all? Is it that there really needs to be better disability access at the polling booths?

Mr Wallace: Anecdotally, I have heard it has, but I would encourage you to contact disabled people's organisations, including those who are working with blind and visually impaired people, like BCA, to confirm that.

THE CHAIR: Thank you very much for attending. You have raised a couple of issues that we will have to contemplate. It has been very useful. If we have any follow-up questions, we will let you know.

The public hearing will resume at 11.

Hearing suspended from 10.19 to 11.00 am.

BRODRICK, MR LIAM, student, Law Reform and Social Justice Research Hub, College of Law, Australian National University
MAZAY, MR SEBASTIAN, student, Law Reform and Social Justice Research Hub, College of Law, Australian National University

THE CHAIR: I welcome Mr Mazay and Mr Brodrick from the Law Reform and Social Justice Research Hub at the Australian National University College of Law. The hub is an informal organisation. Thank you very much for your submission. I refer you to the pink privilege statement. Could you confirm that you are both aware of its contents?

Mr Brodrick: Yes.

THE CHAIR: I invite you to make an opening statement.

Mr Brodrick: My co-author, Sebastian Mazay, and I would like to thank the committee for giving us the opportunity to present our submission today. Our submission focuses upon reform of the ACT's misleading political advertising laws to come into force on 1 July this year under term of reference 11 of the inquiry.

Our first recommendation is that the ACT government should proceed with the implementation of section 297A of the Electoral Amendment Act 2020 and not repeal those laws. The laws improve public confidence and faith in the electoral process, and this justifies their existence. However, part of this recommendation is the acknowledgement that the current effectiveness of these laws in curbing false political discourse is limited. A cited UK study refers to South Australia's equivalent laws. This found that they are benign and do not have an enormous effect on information discourse in the course of campaigns. Recommendations 2, 3 and 4 are therefore put forward to reinforce and increase the effectiveness of section 297A in curbing misleading political advertising.

Our second recommendation is that the penalty units be increased for a breach of section 297A(1). Deterrence is identified as a fundamental part of the legislation; increasing penalty units will increase deterrence, thereby promoting the effectiveness of the legislation.

I will hand over to my co-author to briefly explain recommendations 3 and 4.

Mr Mazay: I would also like to thank the committee for reading our submission and hearing us today. I would like to speak to the latter two recommendations of our submission.

As it stands, section 297A(2) of the Electoral Act allows political parties to benefit from misleading advertising which they had no direct involvement with. This creates incentives to turn a blind eye to advertising published or disseminated by members of the organisation.

One way to control vicarious benefit is to introduce vicarious liability, being group responsibility for members' actions. By introducing vicarious liability, political parties may be incentivised to take reasonable steps in creating internal policy

structures ensuring that their members meet party guidelines. We would also remove vicarious benefit derived from members acting independently but in favour of their party.

Another important element of the legislation is the Electoral Commission's enforcement powers. As evidenced by the mirror legislation in South Australia, any practical enforcement will come from take-down orders issued by the Electoral Commission. Electoral commissions have been understandably hesitant to exercise these powers, as they threaten the well-deserved independence, impartiality and non-partisanship which they have cultivated.

These issues will come about in any situation where an arbiter needs to make decisions on vague notions such as truth. Our recommendation looks to establish some clear and uncontroversial guidelines for the exercise of these powers to give legitimacy to decisions. Ultimately, predetermined and publicly available guidelines legitimise controversial decisions by establishing when decisions are to be made.

In summary, truthful political advertising is integral to maintaining a functioning democratic system, whilst the introduction of misinformation regulations such as section 297A mark a significant step towards achieving this goal. More can be done to ensure robust and practical enforcement of the provision.

We appreciate the committee's time and welcome any questions you have.

THE CHAIR: I have a question on vicarious liability if a member of a party does something and then the party becomes responsible. Under the act at the moment, any advertising material requires an authorisation from that representative of the party—or, as MLAs, potentially we authorise it. How would that work? If someone does something that is not authorised and puts something out which would be contrary to the will of the party secretary or the campaign director, they are going to be held accountable for it and the party penalised. Why should a political party be penalised for something that is put out which does not have that authorisation? If it does, where an individual has authorised it, surely they would be responsible.

Mr Mazay: It is important to consider the penalty provision not as an actually enforceable penalty. If you look at how the South Australian legislation has operated—I would need to check the number of years—there has not been an actual penalty invoked, but there have been 17 take-down orders using the powers of the Electoral Commissioner.

What the penalty provision itself does is act as a deterrence incentive. In that respect, we are not penalising parties for a rogue member going off on their own with regard to secretaries giving permission or the existing provisions. If a party member does not follow guidelines which their party establishes, even if the secretary does give approval, it is tentative to say whether they had a significant enough role in actually publishing and disseminating that information rather than just giving it a tick of approval.

Likewise, you can get problematic forms of advertising slipping through the cracks. In that respect, not penalising parties but just incentivising them to be aware of what

their members are doing and aware of the advertising their members are putting forward encourages them to create structures to regulate what their members do.

Mr Brodrick: I will just add one further thing. Even if a party does not authorise what the member has said of their party, they are still going to benefit from what that person has said, so there should still be some responsibility which they have to bear in the course of a campaign for their member.

MS CLAY: I find it appealing to make our advertising laws effective. It is admirable. If there were some kind of responsibility of rather than liability for political parties for what others are saying who are authorised by them—I think it is admirable to incentivise political parties to be actively monitoring—would you see that in practical terms their role would be to actively monitor and report to the AEC? How would you see it working?

Mr Mazay: I would suggest that it would more operate in the sense that you have a big financial penalty that is going to operate against you if you have a rogue member going and doing something. The way vicarious liability or responsibility operates in the legal sense is that if you have taken reasonable steps to control what a member's actions will do and you set up scenarios in which you need to tick these boxes, then I would say yes, that is something I am responsible for.

If you think of tort law with employers, an employer is responsible for the actions of their employee so long as the employee was doing something at least vaguely connected to their job and they were doing it according to the vague general instruction of what the corporation or employer suggested. If you have these members going out on their own, that is a completely different scenario.

With regard to creating the incentive structure, it is more that having the active penalty operating on the collective mind of the party actually incentivises. You can see with tort law that introducing vicarious liability for employers has incentivised employers to be a bit stricter on what they say and what they do not say to their employees. In the same way, the parties, hopefully, will become a bit more conscious of it, regardless of the AEC.

That might be an option; it might be one of their policy guidelines that they create. It is an internal policy structure. They will have stricter internal guidelines for their members when making advertising.

MS CLAY: The mere existence of the penalty might lead to the parties, for instance, routinely sending out a written notice to a member saying, "Please withdraw that." Whether or not that person withdraws it, that might be reasonable steps?

Mr Brodrick: Yes.

MS CLAY: Or something like that. You could come up with a framework where it would be easy enough to discharge your obligations provided you took a reasonable step in the right direction.

Mr Mazay: Exactly—that, and also before the fact. The party might say, "Look, guys,

if you want to have a piece of advertising, you need to tick these boxes. If you are not ticking these boxes, I take issue with that." That might also be a reasonable step which would discharge their liability.

DR PATERSON: Just on your policy guidelines: recognising that this came up in the previous hearing with the commissioner about the challenge of making these decisions, does South Australia have policy guidelines?

Mr Mazay: In our research we could not find any. I would hope so. Generally the way it operates is that you have someone report it to the electoral commissioner, and they tend to be relatively uncontroversial decisions. So you have, what I would describe as, the more overt misleading advertising which comes before the decision maker.

In that respect, because it is such a controversial power, it is better to exercise it according to guidelines. That way people can avoid misleading advertising in the first place, because I like to believe that people in the majority of circumstances are not acting maliciously when making these adverts, and, if they can see the guidelines and know what to avoid, that is better than nothing.

Likewise, if they get pinged by the electoral commissioner, you can just as easily say, "You are in breach of a guideline which I have established," and on that basis someone who has been penalised, or at least requested a takedown order, will be more comfortable receiving that notice.

DR PATERSON: Or it just provides a bit of a framework for the commission to work within?

Mr Mazay: Exactly.

MS CLAY: You mentioned South Australia has had 17 takedown orders.

Mr Mazay: Seventeen takedown orders in the 2014 and 2018 elections.

MS CLAY: So there is quite a body of work already in existence in this country explaining how to exercise this kind of power?

Mr Mazay: I suggest more could be done. Internationally even, it is quite a rare power. South Australia has the legislation. South Africa, I believe, has similar provisions. And the commonwealth government had some in, I want to say, the 1990s.

That is part of our submission. Recommendation 1 is effectively that we have introduced some really good provisions which have a really good purpose behind them, and please do not get rid of them, because in two years time, just like with the commonwealth provisions, there will be a point at which they possibly seem unenforceable. But it is better having them than not.

MS CLAY: I also take your point that the only thing the regulator does when they have a power—and it is certainly my observation of the regulator that they carry out a lot of their functions through conversations and emails—is that they probably are

doing an awful lot before they get to even invoking regulatory power. And I am not entirely certain why this would be any different. We probably do not know much in South Australia about how often that happens.

Mr Mazay: Yes.

Mr Brodrick: We haven't come across that actually.

MS CLAY: Whether or not they even quantify it themselves, I do not know.

Mr Mazay: As I understand the ACT provision, 297A(3) is effectively what that conversation would be. It is a request from the electoral commission and there is no binding force behind it. If the electoral commissioner does want binding force behind that decision, they then have to take that to the ACT Supreme Court under 297A(5).

In that respect, a conversation takes place. I would suggest in most cases a party or a member would be willing to take down an advert which the electoral commissioner has brought to their attention. And then in more serious cases, or in possibly more controversial cases, that gets escalated.

THE CHAIR: The electoral commission was here this morning—I will try not to misquote them—and they seem to be concerned about the role they have as an independent body to run an election and then there are other requirements they are having in terms of truth in advertising and publishing campaign statements which, seemingly in their view, risks making them appear other than bipartisan because if they are making determinations about what is truthful or not and if they are required to put out statements and so on, how do we make sure then that, in the determination of what is true and what is not true, that is just not left as an arbitrary decision? How do you distinguish between what you perceived as the truth, what is an opinion and what is a fact?

Mr Brodrick: I guess a part of that, as Sebastian has been talking about, is that they are the same very clear guidelines which the electoral commission uses. One of the benefits of the act is that always it is going to be an argument and there is going to be controversy around the grey areas, as you are saying, of what is a fact and what is an opinion and all that.

But I think one of the great benefits of the act is that there are some things which are just plain mistruths and I think the act is very good at distinguishing those quite clearly. Obviously in cases where it is not entirely clear whether it is an opinion, whether it is a fact, or a statement of fact, or what have you, the commissioner will probably have to err on the side of caution in terms of using its powers in that regard.

Also, as a part of the electoral commissioner's submission—and I am not sure if they mentioned this in evidence this morning—they discussed establishing an independent body apart from them to enforce these laws. But in our opinion, we think that this should not be done, because essentially that does not really fix the problem at all; it just shifts responsibility from the electoral commissioner to a separate body.

It is better off just to have already a non-partisan body which has credibility with the

public to have these guidelines and to make it very clear how it is going to enforce them moving forward and what its expectations are in regard to these laws.

Mr Mazay: I would also add that, in terms of the commissioner's independence and impartiality and non-partisanship, we appreciate that that is very well earned and is of concern to the commissioner. But part of these powers requires that level of non-partisanship and independence. If you do have a partisan enforcer of truth, that is much, much more problematic than a non-partisan enforcer who might then raise questions.

The thing with establishing guidelines, such as what we have suggested—and these guidelines are very broad-stroke suggestions of what the commissioner could look at—is that really the guidelines merely help direct both the commissioner and advertisers themselves.

THE CHAIR: The commissioner is obviously grappling with this. We spoke with him this morning and he would support an extension in the commencement date. At the moment it is 1 July. We are still a long away from an ACT election. I think his view is that they need to get it right and get it clear, rather than rush to failure. Do you have a view in terms of how far in front of the election it would need to be established if it were to be delayed?

Mr Mazay: I would suggest that, if guidelines such as these are implemented and the commissioner is to publish them, I personally that an extension is not a huge issue at the moment, especially given we had an election at the end of last year. We have got plenty of time. In saying that, I think, at a minimum, a year before the next election would be necessary. I am not sure if in the ACT you can call an election.

THE CHAIR: It is fixed terms.

Mr Mazay: Fixed terms; there we go. I think at least a year before the next election the guidelines need to be out and the power needs to be enforceable.

THE CHAIR: Gentleman, I think we probably have a few more questions for you but we have run out of time. Thank you very much for your submission and thank you for coming here today. If we have got any follow-up, we will be in touch. But it has been very useful. Thanks, thanks for clearing that up.

Short suspension.

ROHAN, DR BERNARD GILLES, Committee member, Canberra Alliance for Participatory Democracy
TAIT, DR PETER WILLIAM, Convenor, Canberra Alliance for Participatory Democracy

THE CHAIR: I will start by making sure that you are aware of the pink privilege statement.

Dr Tait: Yes, thank you.

THE CHAIR: We will crack straight in and invite you to make an opening statement.

Dr Tait: I acknowledge that we are on Ngunnawal and Ngambri country and pay my respects to those Indigenous nations and also to acknowledge that underneath Ngunnawal and Ngambri country is the planet and the ecosystems which provide us with nurture, sustenance and provision. I thank you very much for the opportunity to be able to come along and present.

Just quickly, I think our conclusions from having run our candidate statement exercise over the last two federal and two territory ACT elections are that voters are definitely interested in finding out about candidates themselves and as people, as well as party policies. A lot of candidates are keen to use the candidate statement exercises we have run as a way of being able to talk to candidates and to voters, to get their message out. Again, they have been happy to put out the sort of information that we have been asking around qualifications for the job and how they are going to involve citizens in participating in the governance of the ACT. I think the idea that both candidates and voters want the opportunity to share information is non-controversial.

We believe that the more accurate information that voters have about candidates in the leadup to the elections, the better equipped voters will be to vote for candidates who represent both their interests and their values. Therefore, we strongly endorse the requirement for Elections ACT to invite and host statements, because they are perceived as the impartial body who can do that.

We would also, if that requirement were to be expanded somewhat, be very happy to encourage voters to go along and read candidates' statements to be more fully informed.

Clearly what we saw at the last ACT election was that the fragmentation of the opportunity for both candidates to put in statements and for voters to go to places, into four separate places, really did not help anybody. I think it would be more sensible, or CAPaD thinks it is more sensible, if we can bring all that into one place.

As a consequence we have recommended that Elections ACT continues to be responsible for doing the candidate statement exercise, but we would also agree that they need to be suitably resourced to be able to do that. We also, therefore, think that section 110A of the act does need to be changed to provide a few more guidelines, perhaps, for candidates when they are putting in statements about the things that voters might want to have addressed, such as their skills and role, or the skills they bring to the role of MLA—how they are going to safeguard and strengthen good

governance in the ACT and how they are going to involve us, the constituents, in governing, with MLAs in running the ACT and policy development, policy formulation.

We say this not because we have an opinion that current MLAs are not doing this; we are seeking to bring this in because we think that helping voters to choose better quality representatives—not that you are not better-quality representatives—into the future is going to enhance governance in the ACT. It is not really about addressing a problem; it is about making the system better.

I think there needs to be—and again this is funding probably for Elections ACT—an information program to encourage candidates to put in statements and voters to go and read them. I think I will leave it there.

The only other additional comment I might make that follows on from some of the earlier submissions that I was listening to this morning is that I think CAPaD would appreciate and be happy to put in a submission to an inquiry into the donation system in the ACT, again because I think it is not as good and as robust as it could be.

THE CHAIR: The Electoral Commission does not want to be hosting the statements, because they are of the view—I think it is fair to say from this morning's evidence—that it risks their impartiality. Their preferred option is simply to have links that can be provided by candidates to the candidates' own information, be it a page or social media site and so on. Then it is really up to a candidate, I suppose, to make a determination about what they want to emphasise, how they want to promote themselves.

If you have got to provide this information that is dictated to candidates, is not that, in itself, interfering with the electoral process? Is it not for a political candidate to emphasise what they want to say about themselves, what they want to put forward, how they want to present that information? Why is it that sitting MLAs, as it would be, would determine what information each candidate is to provide? Why are these prescribed statements superior and more democratic than the candidates' own presentation of material in accordance with their own wishes? Why has it got to be controlled by a central agency and not determined by the candidates themselves?

Dr Tait: I think there are two aspects to this. There is the impartiality aspect, and I think the alliance would be really happy to do the candidate statement exercise, take it off Elections ACT. But there are two problems with that: one, we would need resourcing and that would be extra and over and above whatever resources were provided to Elections ACT. But I think the serious problem there is that we would not be seen as being impartial in the same way that Elections ACT is seen to be impartial.

I note the concerns that Cantwell and Spence were observing about the requirement and I think it is very good that they are so carefully guarding their impartiality. But they are perceived to be, and I think several other presenters this morning have made the case, that they are seen to be the body in the ACT who has that role and are already perceived as being impartial. While I note their opinion on this, I think they are the people—

THE CHAIR: But the impartiality is only one aspect. The point I was making is: how—

Dr Tait: Yes, but the second aspect is equally important. The underlying reason why we want voters to have information—we as the Canberra alliance, not candidates—is that we want voters to be able to make informed decisions between the different candidates who are standing as to who might be the best candidate in terms of skills and qualifications, in terms of experience, in terms of a commitment to ensuring good governance and also a commitment to abide by the standing orders that require integrity and all that sort of stuff. It is one of a wide range of factors that we want to encourage voters to start to think about.

As to why that should be controlled, I would suggest—I guess coming out of the conversations this morning—that maybe it would be guidelines rather than a "you shall do this" but that would be open to conversations between MLAs and Elections ACT people as to where they want to put that. But I think from a voter's perspective, to have this information provided and clearly provided, that would be one of the things that voters could take into account.

It could be non-mandatory for candidates, of course, because I agree, you cannot make candidates do things. But it then becomes one of the things that voters take into account when they are looking at the information candidates provide.

THE CHAIR: If it is voluntary, why dictate what that has got to do in terms of the provision of information? Dictating what that is can slant the way it might be perceived. For example, sitting MLAs who might write the rules might say parliamentary experience and understanding of parliamentary procedures is a very important part of being a politician, which would massively favour us, because we would all put our experience there, and then a new candidate does not have any of that experience looks—and that is just an example of how dictating what the information is that they have got to provide skews the way that a candidate might be perceived.

Dr Tait: Yes.

THE CHAIR: We might say it is very important they have got to have a good understanding of the environment, and someone does not or someone does. Who are we to dictate what a candidate is to provide as information? Why would you want to dictate that? I would have thought that is very undemocratic.

Dr Rohan: If I may?

Dr Tait: Sure.

Dr Rohan: I think what we are asking for is that this specific information should not include partisan political campaign canvassing, to use that terminology. I suppose; the questionnaire is be open to change. We are not saying it has to be this. I think it would be useful that if this path was chosen, to use this perhaps as a guideline, but we are not specifying what they should say.

We are simply asking them what skills and experiences, which do not need to be

political, they have. The fact that they have had an interesting working life and had experiences of all kinds can be relevant. These are things that are more likely to connect with voters. That is the sort of thing they are interested in. From discussions I have had—informally, I admit—and also a bit of the research that CAPaD has done, quite a few voters feel disenfranchised. They are not feeling that they are being listened to.

This questionnaire was developed from information that had been derived from various sources, including voters. And it does not specify exactly what people have to say but it does say, "Can these people be trusted? Are they transparent? Are they open? Do they try to provide what voters wish to see in their elected representatives?"

The questionnaire is just a suggestion. We have made some recommendations, some suggestions, but party-political information is for somewhere else. Because Elections ACT is seen as a genuine broker—it is respected—it can have information that is the same for all the people who wish to participate in it.

We are asking for skills and qualification level. We are not dictating what they say or what they put into that. But at least when people have a unique site to go to—whether that be an app, whether that be a website, probably both, and other sources of information—people can go to this and think reliably that the candidate will be talking about the things of interest about them, as a person, not about their party, not about the political message.

Dr Tait: If I could just jump in there and say I think that there are two other aspects to this. I would hope that the Assembly would decide, if they were going to do this, that they might invite community groups in—such as the alliance but other community groups who would have an interest in this—to actually talk about what might be in the guidelines and so it is not seen to be the Assembly setting themselves up.

The other thing I would note is that MLAs who fill in our questionnaires already put that information in there. They have been this long in the Assembly and they have had these portfolios. That is already part of that they do and I imagine they will continue to do that. Yes, you would want to vote for somebody who has had some skills and experience but you also want to vote for people who are coming in who have had a set of skills and experience from outside that will enrich the Assembly.

The other thing is that this speaks to enhancing democracy because there is a lot of emerging evidence around the world that government comes up with better outcomes for the people if the people are involved in developing the policies and the legislation that goes into setting up how projects and programs are financed through the budget.

One of the things we are interested in and why we asked for it in the candidate statement is that we want to know, we want the voters to know, which MLAs are making the commitment to work that way with us, the people, as well as within the existing systems.

Sure, we can come along to inquiries; we can write you letters; we can go and sit in your office; we can invite you out for coffee, as long as you declare that on your whatever. The point is that we want a more structural way of bringing citizen

involvement into the policy-making, legislative-creative process.

DR PATERSON: Peter, can I play devil's advocate and say that, as a candidate, one of the things that I liked was different avenues. For example, your website I thought was great and so clear and easy to fill out and it was asking different questions than the other websites were, and I really appreciated the opportunity to speak to those things. Whereas with the smartvote one, I have a bit of an issue with this predicting voting stuff; I think that is a bit problematic in terms of understanding how it spits out your name as the possible suggestion. I guess from a candidate's perspective, it was quite good. If there was just one avenue and quite strict criteria, that could be problematic as well.

Dr Rohan: If I could just add a brief word on that, I think we also need to consider the benefits for MLAs, for our elected representatives, because it provides an opportunity for the candidate to differentiate themselves from other candidates but on a level playing field.

DR PATERSON: Exactly.

Dr Rohan: It could result in more useful, stronger, more durable relationships between the elected representatives and voters that people wish to become more involved and work with their representatives, be they individuals or groups. It also makes it easier—not only regarding trust, accountability, et cetera—to assist policy development because you have a more consistent process which includes constituents.

In a way, we are seeing the candidate statement as an opening for more involvement by citizens in the political process. And it could also result in polities that are less challenged, better accepted, more likely to build consensus rather than a lot of the grumbling that we are all aware of in this city.

MS CLAY: It is interesting that we are talking about these different formats and we do not have much time now. There is always a trade-off. I actually quite liked the smartvote tool because of its user-friendly format. I come from e-commerce and business, and I liked that it asked specific questions that candidates had to answer; they could not put in a hundred-word statement that could mean anything. They had to pick. So I found that quite useful. And then I found the presentation of the material quite useful but I guess there is a trade-off in usability and integrity. I wonder how you would balance that.

Dr Rohan: There are always other sources of information. We are saying this is one source of information. There are always the websites, and elected representatives have other ways of communicating matters. This is for a purpose and if that purpose is clearly stated then that is where you can have this level playing field I am referring to. But it does not stop there. In fact, it may encourage MLAs on their websites and via other sources of information to say things that perhaps they may not have thought about or at least wished to emphasise in their communications with voters.

THE CHAIR: I wish we had longer. It is an interesting philosophical discussion, if nothing else. Thanks.

Dr Tait: Happy to come back and talk to you more about it.

THE CHAIR: No doubt. Thanks very much for attending today. I look forward to filling in your form in the leadup to the next election. I think most of us do, do we not?

Dr Tait: Yes.

THE CHAIR: Thanks very much.

Dr Tait: Thank you very much.

Short suspension.

TEAGUE, VANESSA, Associate Professor
WILSON-BROWN, **T**, Mx

THE CHAIR: Welcome to you both. Thank you very much for attending in person or on the phone. I just want to confirm if you can wave the little pink privilege statement, that you have read it, and T Wilson-Brown you have seen the privilege statement?

Mx Wilson-Brown: I have seen the privilege statement, yes, and I have read it.

THE CHAIR: Thank you very much. I will invite you to make an opening statement in a minute but did you see the Electoral Commission this morning? We had some good—

Prof Teague: I was on a plane, unfortunately. I know that T was listening remotely and they gave me a rough overview.

THE CHAIR: I will leave it with you to make an opening statement if you would like to.

Prof Teague: T, do you want to start?

THE CHAIR: T, Professor Teague has invited you to make an opening statement, if you want to make one.

Mx Wilson-Brown: Right. Sorry about that. I was having some trouble hearing with the microphone. I would like to start by acknowledging that I am on the lands of the Jagera and Turrbal people and acknowledge their Elders, past, present and emerging.

I am an independent security researcher. I am credited in multiple privacy research papers and software security disclosures. I have been on both sides of software security disclosures. I have reported security issues in operating systems, government systems and internet privacy software. I have fixed security issues in open-source software used by tens of millions of people, under intense media scrutiny. After a while, transparently handling security issues becomes a very routine thing, and that transparency holds you accountable; it makes sure that you handle the biggest risks.

In January 2018 I discovered a few different ways to link ACT voters to their electronic votes. I found these security issues in the source code of the 2001-2016 electronic voting systems, which is publicly available. Elections ACT privately acknowledged these issues but they did not commit to fixing them all. So in October 2018 I publicly disclosed these issues so that there was enough time to fix them before the 2020 election. In 2019 an Elections ACT security review confirmed the issues I had disclosed and suggested some required fixes.

Unlike previous elections, the source code of the 2020 system is under a non-disclosure agreement. I did not sign the non-disclosure agreement, because it might have prevented me disclosing serious issues to any impacted candidate; so I do not know if any of these issues were actually fixed in the 2020 electronic voting system. There is also a risk of similar vote secrecy issues in the new overseas and telephone voting systems. Elections ACT did a lot of work on vote secrecy for polling

booth electronic voting but the same fixes were not required for overseas or telephone voting.

Other documents obtained via FOI raised concerns about the scope of Elections ACT's security testing and audit processes. Unlike paper ballots, scrutineers are unable to track individual electronic votes or scan the images of paper votes; so these checks are vitally important. But the 2020 election audit specifically excluded vote secrecy, correctly recording votes and correctly counting votes.

These review, testing and audit gaps risk the integrity of ACT Legislative Assembly elections. Elections ACT can manage these risks better and they should be transparent with voters about how they are managing them.

Thank you for inviting me to speak today.

THE CHAIR: Have you got anything to add to that or—

Prof Teague: Yes, I have just three other issues to add. You probably know that Andrew Conway, Thomas Haines and I found a series of counting bugs in the code that counts ACT elections. Some of them were small but some of them were quite large, in the order of 20-odd votes. Initially, I know that Elections ACT did not agree with us about the magnitude of those errors and the first time you asked about it you were told that the magnitude of the errors was very small.

I gather that this morning they have acknowledged that in fact the magnitude of those errors was of the order of about 20 votes and they have now corrected the tallies; so I am not going to talk too much more about that, except to say that of course we still have not seen the code; so we still do not know whether there are other errors that just did not happen to crop up this year.

What I would like to do is try to focus your attention on the things that you cannot see and you cannot double-check, because there are actually at least three other paths, three other software systems in the ACT, that are, if anything, more critically important to the integrity of ACT elections. They are the poll site electronic voting system, the internet voting system and the system that scans and digitises paper ballots.

These three systems are, if anything, a greater risk to the integrity of ACT elections because if they malfunctioned there is no way for anybody to double-check. Right? There is no equivalent of what we have done in double-checking the inputs and the outputs of the count, because I cannot double-check the touchscreen inputs and see whether that is accurately reflected in the final electronic votes, and neither can anybody else. So those systems are critically important and there is no reason to think that they have any better software quality or quality assurance or analysis than the things we have already found bugs in. I think the solutions are clear but could take a fair bit of work.

First of all, I do not think that we should be voting over the internet at all. I have looked at internet voting systems all over the world and I have never seen one that I would regard as adequately secured for public elections. I think you should just stop.

On the issue of the poll site voting system, the solution is to provide each voter with a paper record of their vote that they can check, they can see for themselves whether it accurately reflects their intentions and then retain that paper record at the polling place. It could then go into the same box as the ones that are filled in on paper.

This brings me to the next step: the way to double-check the scanning process is to do an audit from one end to the other of that process and compare the digital ballots with the paper ballots after making a random selection in public of some significant fraction of them to check that that software system is functioning correctly. And if you have the combination of those two things—voters can see a paper record of how they have voted and scrutineers can see a rigorous audit of a fair fraction of them taken randomly—then you have a fairly good piece of public evidence that the election has been properly conducted.

THE CHAIR: Obviously this is a bit of an evolving space and none of us are data experts, I think. None of us would put our hands up and say that this is our particular area of expertise. The points you have raised are good. They have highlighted issues. I suppose there might be even others that we are unaware of in the lead-up to the next election, and what I am sort of fishing for is a way that we can make sure that, as we go into the 2024 election, the issues that you have raised, and others that we are unaware of perhaps, are addressed with confidence prior.

Is it a matter of some independent body doing a review or an audit rather than a sort of piecemeal critique which we then address? Is there a substantive way that we can deal with the whole body? Do you have a view of that?

Prof Teague: It is hard to say, because in New South Wales I have seen that process kind of deflected into something that did not actually make any change. I have seen, "Let us all set up an independent committee to have a special security audit." They recommended that there is nothing that has to change and everything is fine. Yes, I think that it does deserve clear and careful consideration by some people who really know what they are doing.

On the other hand, the devil is in the detail of who makes those legislative recommendations, how they get enacted and whether the people really understand the research literature in this space. I have been working in this space for 15 years and there is a lot. So I can tell you roughly what I think it should say.

As to the process, I can really only recommend that you try and engage some people who have a long history of—

THE CHAIR: Is setting up another committee to do it—and I am not suggesting that but I am just trying to think if there is an external body—the sort of direction to go? You guys bring this sort of experience. It then can provide that oversight so that these issues are dealt with one way or another in the lead-up to the election rather than during and retrospectively.

Prof Teague: I hear what you are saying. I think that it is really important to change the legislation. In some ways I feel really sorry for the Electoral Commission in the

sense that there is no minimum standard set in legislation at all. There is, kind of. Sorry, I know T is about to say there is actually quite strong language about privacy but there is nothing that says there has to be a paper trail. So they do not make a paper trail because why would they? They are not obliged to. There is nothing that says there has to be an audit of the paper records. So why would they do an audit of the paper records? It is just going to cost them extra money and take them extra time. The only thing that it is going to do is expose the problem that they could otherwise just kind of ignore and keep going without anybody noticing.

I do not think it is a matter of setting up a group of people like me to examine it. I think you can only make that examination relative to a set of minimum standards. There has to be a set of laws that say, "These are the minimum requirements for election conduct in the ACT." And those laws have to specify a set of transparency requirements.

I think the role of people like me is to help draft that legislation. It is not particularly to stand there at election time and say, "Yes, this election was okay" or "No, this election was not okay". I think that is the role of scrutineers. I think the role of a well-designed electoral legislation should be to specify an electoral process that shows the scrutineers that the whole election was properly conducted.

THE CHAIR: That being the case then, are there other jurisdictions that have done that and have got those minimum requirements in their legislation?

Prof Teague: It is increasingly common in the United States to specify risk-limiting audits of the paper ballots at the end of the election—this process where you vote on paper. It is electronically scanned, electronically counted and then part of the electoral process is an audit of the paper ballots against the electronic results. So there are, I believe—in California, possibly in Colorado and a couple of other US jurisdictions—jurisdictions that have these kinds of rules that say that electronic results do not get certified until there has been a public risk-limiting audit of the paper records. I would not say that there is any other jurisdiction in Australia that is worth emulating in this regard.

THE CHAIR: Given what you have just said, there is a bit of homework to be done. Would you be happy to just list what you think those minimum conditions need to be and to be incorporated into legislation?

Prof Teague: Yes.

THE CHAIR: Rather than us trying to sort of interpret the submission, very clearly this is the minimum: the audit of the vote, or whatever it might be?

Prof Teague: Definitely.

THE CHAIR: Would you be happy to do that as a body? That, I think, would be quite useful.

Prof Teague: Yes, I would be really happy to do that.

THE CHAIR: Thanks.

DR PATERSON: Your submission is very interesting. I will go back to the non-disclosure statement. I appreciated your submission referring to a transparent election system and that you should not have to sign a non-disclosure. When we spoke to the commissioner this morning, he said, "You can come out after the election and disclose your findings. You just cannot disclose the code." I wonder what the issue is with that.

Prof Teague: There are two important details there. One is that the key phrase is "after the election". There was a 60-day minimum disclosure period. Given that they did not even make it available until after voting had started, by my count, even if I had got the code as soon as I saw the NDA, started looking at it straightaway, found something immediately and told them about it straightaway, that period of 60 days would have a very good chance of overshooting the end of the period where a candidate who was potentially affected by some of those issues might have chosen, if they had known about them, to challenge the election result.

I do not think that that is okay. It is really important to have the capacity to tell potentially affected people. It is up to the candidates and the courts if they choose to take advantage of something that has gone wrong; it is not up to me to promise to keep it secret and it is not up to the Electoral Commission to keep it secret. That is the first thing. Sixty days would be fine if the code was available six months before the election but 60 days that overlaps that critical election period is not fine.

The second thing is that the contract was very ambiguous about whether you were guaranteed to be able to speak after the 60 days. The contract says, "The researcher may disclose their findings publicly only if they have told the commission 60 days in advance." I asked the commission if they would change the wording to say "if and only if" I had disclosed it to them 60 days in advance. They refused to make that change. They said that it was not necessary. To my mind, as a formal logic person, it is necessary. "Only if" is not the same as "if and only if". It is unclear, if you did disclose after that time, that the contract allows it.

Those are the two issues and the two reasons that I did not sign it.

Do you want to add anything to that, T?

Mx Wilson-Brown: It is probably also worth mentioning that we know that Thomas Haines asked for access to the source code of the overseas electronic voting system, I think shortly before or shortly after the election, but still has not got access to it. So, in practice, the source code is not available to any researchers in any kind of timely way.

MS CLAY: Could I just reconfirm that? They asked for the source code from the last election and they have still not received a response?

Mx Wilson-Brown: Yes. In our supplementary submission, we said that Thomas Haines asked on 6 October 2020. On 25 February 2021, 142 days later, the Electoral Commissioner made a decision to allow access, but as of 28 April the source code is

still not accessible. So neither the decision nor the access to the source code is happening in any reasonable time.

THE CHAIR: I want to confirm whether a mandated period that that source code be available six months prior would meet your needs, assuming it was then given to you? If it was in legislation—and I am not saying it would be—that that would be available six months prior and must be provided within a certain period of time, is that what you would be looking for, something like that?

Prof Teague: I think that would be a big improvement on the current situation. I still do not think it solves a lot of the other important details that we are now discussing.

THE CHAIR: Maybe you could add that to the homework you are going to do—give a bit of thought about how that could be structured to make sure that it would meet the requirements so that the time frames were not making it unworkable.

Prof Teague: My question then would be: why have the NDA at all? For almost 20 years it has just been posted on the internet. There has been a decision to stop doing that, but there is no good reason to stop doing that. Why not just post it on the internet six months in advance?

MS CLAY: I think the information that we got this morning—correct me if I have got it wrong—is that the commissioner is very concerned that elections are run both with integrity and accuracy and also seen to be run with integrity and accuracy.

Prof Teague: As am I.

MS CLAY: I appreciate that sounds like a regulator being frightened of criticism; I understand how that comes across. But in a context of a great deal of irresponsible misinformation in social media channels, with candidates in an environment where fake news is quite rife, I understand the point. The last thing we want to do is give a false impression that our election results are not reliable. I have seen what happens when that occurs.

THE CHAIR: Their concern is what would happen if an organisation less credible than your organisation were to get the code and make assertions which were inaccurate, vexatious and there to cause trouble. This is not our view; it is the commissioner's view. They are trying to make sure that that cannot happen or that there is an ability to practically respond to it. I think that is their concern. Whether you agree with it or not, that is the way they present it.

Prof Teague: The antidote to fake news is open evidence provided to the public.

MS CLAY: It is a good point.

THE CHAIR: The commissioner mentioned that he is trying to coordinate a meeting with you. Are you aware of that?

Prof Teague: I carefully checked my email trail on this issue. It is a very silly thing to be making such a silly argument about. The third last email in the trail is from me

saying, “I would be happy to meet with you. I am free most of next Tuesday and Thursday.” At this point I get an email back from the PA saying, for some reason, “We are talking to some other part of ANU.” I took that to mean that they did not seriously intend to organise it. I had just made clear exactly the days that I am free and nominated some meeting times. I have to admit that I did then write back somewhat rudely and say, “Okay, when you find the person at ANU who coordinates my schedule better than I do myself, I am sure you will let me know.” That was the end of it. I am happy to meet with the commissioner. I have made it clear that I am happy to meet with the commissioner. I have suggested specific times to meet with the commissioner if he would like.

THE CHAIR: He is keen to meet with you as well. This committee is not a dating agency, so we will not interfere. But given that there is a will on both sides to meet, to address some of those issues, I would encourage both organisations to do that. Some of what is happening may be due to communication issues, it would appear.

Thanks very much for all the work that you have done in the lead-up to the election, for the issues that you have identified and for the submission that you provided and presented to us. We really appreciate it. Thanks in anticipation for the further information you are going to provide us with. I hope that you can work collaboratively with the Electoral Commissioner, because it is very important that, whether you agree or disagree, information be incorporated into the knowledge base leading forward to the next election. I think we are all in accord that the integrity of elections is paramount.

Prof Teague: I would be very happy to help with any redrafting. Maybe you can give me some instructions about exactly what details you request.

THE CHAIR: We will work with the committee secretary on what you are providing to us. In the report that we will put forward, it might be a recommendation or just information that we can provide as an annex or something like that.

That concludes the hearings for today.

The committee adjourned at 12.04 pm.