

## Questions taken on Notice – Joint Standing Committee on Electoral Matters – 22 June 2020

### Question one - Page 3

*Excerpt from transcript:*

**The Hon. BEN FRANKLIN:** Sorry to get right into the weeds on this, but I am bit of a nerd on this stuff. The other question is: Do you have any sense of what the difference between the informality rate for above the line is to below the line of those who did fill in ballot papers?

**Mr SCHMIDT:** Mr Kwok, do you have any figures for that?

**Mr KWOK:** Commenting on informality above the line and below the line, I do not have that at my fingertips, but we can certainly take that question on notice and provide the figures to the Committee.

### *Response*

The figures for Legislative Council ballot informality at the NSW 2019 State election are set out in the table below.

<b>Column 1: Category of marking the ballot paper</b>	<b>Column 2: Total number of electors who marked their ballot paper (either formal or informal) in this category</b>	<b>Column 3: Number of informal ballot papers in this category</b>	<b>Column 4: % of informal ballot papers (i.e. column 3 v column 2)</b>
Blank ballot papers	200,258	200,258	100%
Above the line only	4,300,804	32,655	0.76%
Below the line only	178,913	60,079	33.58%
Above and below the line	72,852	8,689	11.93%
<b>Totals</b>	<b>4,752,827</b>	<b>301,681</b>	<b>6.35%</b>

### Question two - Page 5

*Excerpt from transcript:*

**The Hon. COURTNEY HOUSSOS:** Commissioner, You said you have some compliance teams who might be in the field. Do you have dedicated people who are charged with this or is it just a part of a general management of elections that goes on?

**Mr SCHMIDT:** Yes. We have our funding, disclosure and compliance area but we have put together—I think I will just call up, if I can—the information about that. Ms McCallum, can you talk to the activity we did at the time?

**Ms McCALLUM:** At the 2019 State election, that was the first time there was a dedicated compliance operation where our teams went into the field, so to speak. That was, as I said, the

first time. We gave some evidence about that at the last hearing, I think, or the hearing before that. There is a dedicated compliance area of the Commission and a dedicated investigations team.

**The Hon. COURTNEY HOUSSOS:** Commissioner, can you tell me how many people are in that team? I am happy if you want to take it on notice.

**Mr SCHMIDT:** Yes, I think I will take that on notice

*Response*

The NSW Electoral Commission currently has eight officers tasked with investigating allegations of breaches of the *Electoral Act 2017*, the *Electoral Funding Act 2018*, the *Lobbying of Government Officials Act 2011* and election offences under the *Local Government Act 1993*. Five of these officers are funded from an ongoing funding source while the funding for the three remaining officers is due to end in June 2021.

During the compliance operations for the 2019 NSW State election the NSW Electoral Commission was supported by seven additional investigators. Those additional investigators were all former NSW police detectives, ICAC senior investigators or current staff at NSW Government agencies such as the NSW Crime Commission, the NSW Ombudsman and Revenue NSW.

The Electoral Commissioner's report on the 2019 NSW State election contains more information about the compliance operations.

Question three - Page 5

*Excerpt from transcript:*

**The Hon. COURTNEY HOUSSOS:** That is fine. You said most of them are resolved because it might be a misunderstanding of someone who did not know that they needed to do it. If it is a more serious breach, what then happens? Do you refer to the police for investigation? Do you collect the information yourselves? What is the process?

**Mr SCHMIDT:** We collect the information ourselves. There is a range of offences under the Electoral Act, which is published. We have our compliance guide, as it were, which indicates—as with any compliance regime of any organisation, you have a hierarchy of actions that you can take against people. As I alluded to earlier, you can start off with discussions, with warnings, penalty notices and work your way up from there. There is a suite of actions that can be taken in respect of individuals.

**The Hon. COURTNEY HOUSSOS:** Are you able to provide me perhaps on notice with a bit more of those particular steps—

**Mr SCHMIDT:** Yes.

**The Hon. COURTNEY HOUSSOS:** —and which ones of them are actually undertaken internally, like if the Electoral Commission actually issues the penalty notices or if that gets referred off?

**Mr SCHMIDT:** No, we actually issue them ourselves and we will initiate court action if it got to the other extreme of the spectrum. But, yes, we can provide you with the details of the compliance manual, which indicates in detail our approach.

**The Hon. COURTNEY HOUSSOS:** That would be really helpful. If you could perhaps also on notice tell me how many complaints you received for unauthorised material for the 2019 election, and if you have any comparative previous election data, that will also be useful.

**Mr SCHMIDT:** Ms McCallum, do you have anything?

**Ms McCALLUM:** I was just going to say that in response to questions taken on notice the last time, we did provide some data on that statistic. We had 179 allegations—not about electoral materials but generally—recorded, coming out of the 2019 election. The statistics are in the report, but looking at those, we have divided them up into the types of allegations: for instance, electoral material breaches such as you are referring to, but other offences that come up under our legislation, such as misconduct at voting centres—the six-metre rule that sort of thing—bribery, donations, and related offences. There is some information there that sets out the types of allegations that were investigated. That was at a point in time and I think we have said in our formal response that that was December and there were 11 matters still open at that point in time. The numbers have actually gone up a little bit because we have some more voting-related offences—failed-to-votes et cetera—since that time that have come into our statistics since December.

**The Hon. COURTNEY HOUSSOS:** Have any of those figures in relation to the question I am asking about in terms of unauthorised materials changed?

**Ms McCALLUM:** The material that we have provided to the Committee does not go to that level of detail but we will take that on notice and we can provide that.

#### *Response*

Details on the manner in which the NSW Electoral Commission undertakes its compliance and enforcement activities are available from the following documents published on our website:

- Compliance and Enforcement Policy (<https://www.elections.nsw.gov.au/About-us/Policy-library/Compliance-and-Enforcement-Policy>)
- Compliance and Enforcement Procedures (<https://www.elections.nsw.gov.au/About-us/Policy-library/Compliance-and-Enforcement-Procedures>)

Of the 116 allegations categorised as ‘Electoral Material’ in the Electoral Commissioner’s report on the 2019 NSW State election, 79 were related to alleged deficiencies in the authorisation or printer’s details on electoral material displayed or distributed (56), social media and webpages (21), and electronic billboards (2).

The three-member Electoral Commission was constituted in late 2014, following the abolition of the Election Funding Authority, and did not have a specialist compliance team in place for the March 2015 State election. The Electoral Commission is therefore unable to provide meaningful comparative figures for the 2015 State election about allegations of breach of electoral material requirements. It must also be noted that these requirements have changed with the enactment of the *Electoral Act 2017*, including the removal of size limitation of posters in grounds or on boundaries of enclosures of polling places, and new requirements regarding the publication of paid electoral advertisements on the internet.

#### Question four – Page 9-10

*Excerpt from transcript:*

**The Hon. BEN FRANKLIN:** I am happy to have another crack, Mr Chair. Commissioner, picking up on one of Ms Houssos’ points about authorisation on material, again there has been significant discussion in evidence about social media authorisation and a question about how you would feel about rather than individual Facebook, for example, posts or Instagram posts being authorised, each one of them, rather that that authorisation is carried on the actual site itself—so a person’s individual or a party or

a candidate's individual Facebook site or Instagram site—rather than on every single post. I was wondering if you had any comments about that.

**Mr SCHMIDT:** Yes, it is an interesting issue, and this was the first election, in a New South Wales State election, where the new Act now encompasses social media. I will pass to Ms McCallum in a minute, because my understanding is we did, in trying to grapple with authorisation—and if you are talking about SMSs and even more small datasets, an authorisation would be longer than the message—so in that case, if I recall correctly, and we put out guidance on this, you could have a link to a site which set out all the appropriate authorised details and we again indicated that through websites it may well be that so long as the authorisation was clear on the home page that that would suffice in some circumstances. But, Ms McCallum, can you perhaps expand upon that?

**Ms McCALLUM:** That is the general gist of it. We did put out some explanatory material prior to the election to try to assist participants to deal with the fairly late-in-the-piece changes to the regulations. So I suppose what the rules are is a policy matter for government and the Parliament. So in that sense the lens we would put on to it is the practicality with which it can be enforced and, going to Ms Houssos' point earlier about the resources available to us in terms of monitoring social media for infringements of, say, electoral material rules, that would be a concern to us. I suppose it really is a practical matter to start with where the authorisation should be, and that is a policy question about what is the policy purpose of the authorisation in terms of making sure that people, say, through sharing images and what have you, are understanding the origins of the material, and I am sure that as technology changes there will be different ways in which one would approach that as well.

So we tried to provide some guidance. Before the next State election and possibly before the next local government election there is more work to be done to refine our thinking about how to approach it from an enforcement perspective, but I would say how it should be authorised is probably a policy and a technology practicality question for government or Parliament, depending on whether it is in the regulations or the Act.

**The Hon. BEN FRANKLIN:** Thank you. If you do have any further thoughts on either that issue or, indeed, the compliance issues, which are quite substantial, or the issue that has come up about needing to account for each single post when you are putting in your electoral funding returns, in this whole space I think there is more work that needs to be done and I guess the point that I am making is we would welcome any further thoughts that you have in all of those areas about that after our consideration.

**Ms McCALLUM:** Thank you. I am happy to check.

#### *Response*

#### Vouching for social media advertising

The Joint Standing Committee on Electoral Matters' report on its inquiry into the Administration of the 2015 State General Election recommended an exemption for low-value online advertising to the then rule that copies of all advertising material must be provided to the Electoral Commission as vouching with disclosures of electoral communications expenditure. That report discusses the reasons for excluding certain online advertising transactions and recommended a threshold of \$20 per transaction. (Recommendation 34). That recommendation was implemented in the *Electoral Funding Regulation 2018* and still stands.

The provision of copies of advertising material as vouching for electoral expenditure to the NSW Electoral Commission, including online material, can assist the Commission to perform its statutory functions by:

1. providing a basis upon which to assess whether an electoral participant has stayed within the relevant expenditure cap (particularly the additional cap) and/or has lodged complete disclosures;
2. providing an avenue to consider whether electoral material published online during a campaign complied with the requirements of the *Electoral Act 2017*, noting there is no requirement for such material to be registered with the Commission prior to an election; and
3. supporting the payment of public funding claims for electoral expenditure by ensuring there is robust evidence available (if required) about the basis on which claims for funding have been made.

If the \$20 threshold was to be reviewed, the potential practical impacts on the Commission's compliance functions should be considered. Without detailed vouching supplied by all participants, for example, the Commission may instead need to use its general powers to request the same information, in some circumstances. Such a change may not produce any efficiencies for participants. Records of all electoral expenditure on social media advertising would still need to be retained by participants to vouch for expenditure during the disclosures/claims audit process, in case requested to do so by the Commission.

An online portal for the electronic lodgement of disclosures is presently under active development by the Commission and is intended to assist participants to meet their regulatory obligations in a more convenient and efficient way. It is hoped that the portal will be available for participants in the Local Government 2021 ordinary elections.

#### Social media post authorisations

The extent and characteristics of authorisations for electoral material published online is a policy matter for Government and the Parliament. If the current rules were to be changed, however, the practicability of enforcement needs to be considered in order to maintain overall confidence in the system. Practical enforcement considerations include the often limited time between publication of material online and the voting period, the confined scope of the powers of electoral bodies to assess the "truth" of electoral material content; and the resourcing of compliance activities that are likely to involve global organisations operating outside Australia.

The current rules for social media under the *Electoral Regulation 2018* have been drafted to be "platform-neutral". Maintaining a platform-neutral approach is desirable to support compliance activities but does not provide much guidance ahead of an election for electoral participants about what is lawfully permitted. Some specific examples were published in an accompanying note to Clause 8A of the Regulation about what could satisfy the requirement for name and address details to be "*included in or directly linked to the post*". Given the diverse range of social media platforms used by participants, however, and the desire of some participants for greater clarity in the lead-up to an election, it may be useful if there was a specific power to issue guidelines about electoral material, including about the location and method of authorisations for online materials. There is a model for such a power for the Electoral Commission under the *Electoral Funding Act 2018* in section 152, but that is confined to electoral funding matters.

*Excerpt from transcript:*

**The Hon. BEN FRANKLIN:** It is just about the administration funding side of things. Commissioner, apologies, I just cannot remember if I raised this last time or not, but I know this is of interest to a number of parties, so I just wanted to quickly raise the issues again. It is about the party administration funding. Two questions: first, what your views would be about it being done on an annualised basis rather than needing to account for each three months, because obviously, as a number of parties have suggested, there are some months or quarters where there is less spending and it potentially will go under that quarter of the year's allowance and there are some that will be higher. So it seems to be rather than forcing a party to spend up to a particular cap, if they can make an allowance across the entire year so that some might be less and some might be more but it ends up at the same rate, that might be a fairer way to do it. I was just wondering if you have any comments about that.

**Mr SCHMIDT:** Ms McCallum, do you want to dive into this one?

**Ms McCALLUM:** Probably not the fairness aspect of that, Mr Franklin.

**The Hon. BEN FRANKLIN:** No, no, of course. But in terms of the logistical issues and how that would work for you.

**Ms McCALLUM:** Obviously, we would administer the funding laws as they may be set by Parliament. What I will do is take that on notice in part, to specific administrative barriers that might throw up for us in processing annual claims, but, generally speaking with the quarterly claims, my understanding is we administer that because that is the way the Act is written at this time. It does lead to some claimants not spending everything to which they are entitled, as you say, in a quarter. If it was an annualised amount obviously that is going to be a larger amount and it may throw up interesting record-keeping and maybe some more challenges for the Commission in terms of us seeking to ensure that the amounts were legitimately incurred during the course of a longer period of time. So that is one thing that occurs to me that might be more challenging from an administrative perspective.

**The Hon. BEN FRANKLIN:** I am not suggesting that we go to one return per year; I am still keeping quarterly returns. It is just that rather than needing to spend a quarter of the amount that we are allocated each quarter, when you add up all four quarters it adds up to the total amount that you are allowed to through an entire year.

**Ms McCALLUM:** I might take that on notice, whether that raises a specific administrative issue for us.

*Response*

The current legislation provides that if actual administrative expenditure is incurred by an eligible party or Member of Parliament in excess of the maximum amount to which the party or member is eligible for that quarter, the amount of the excess may be carried over to a subsequent quarter in the same calendar year.

It is a matter for the Parliament to decide whether any unused maximum amount should also be carried over to a subsequent quarter.

While the NSW Electoral Commission would be required to make changes to its system and processes to give effect to such amendment, it is not expected this would create a significant administrative issue.