

**Questions taken on notice by Rachel McCallum – Executive Director and General Counsel – NSW Electoral Commission – 27 July 2022**

QUESTION ASKED BY THE HON. PETER PRIMROSE:

**Given that there don't seem to be concrete processes in place now, how long would you imagine it would take, and what resources would be required, to put those processes in place? I know it's a difficult one but we've heard already from the commissioner the complexity and the unforeseen consequences and the costs of putting things in place quickly. Given the complexity of this, how long do you expect, or do you believe—and maybe it's something that Mr Schmidt may wish to comment on—it would take to actually put something like this in process, if the Houses passed appropriate legislation?**

ANSWER

The NSW Electoral Commission (Electoral Commission) conducts awareness raising and provides stakeholder support about the requirements of the *Electoral Funding Act 2018* (EF Act) and regulation, particularly in the leadup to state and local government elections, disclosure periods and the introduction of legislative or policy change. This is part of usual business practice, noting that Section 151 of the EF Act provides for the Electoral Commission to undertake educational and information programs to educate and inform parties, elected members, candidates, groups, third-party campaigners, associated entities, party agents, official agents and donors of their obligations under the EF Act.

A range of educational and support activities for third-party campaigners (TPCs) ahead of the 2023 state election (at no new or additional cost, and as part of engagement with the range of political participants involved) is already planned for third-party campaigners (TPC) and their official agents, including information about:

- registering to start campaigning - appointing an official agent (who is eligible and credentialed or has completed the mandatory Electoral Commission online compliance training).
- campaign finance rules and management of accounts, donations and expenditure by TPC individuals and entities.
- caps on electoral expenditure, and that it is an offence to exceed a cap by acting in concert with another.
- general guidance on what is acting in concert.
- election campaign obligations, such as registering electoral material.
- obligations to disclose political donations received by the TPC within 21 days during the pre-election period (from 1 October to election day in March 2023).

The Electoral Commission's activities will include direct support and broad awareness-raising activities in a range of formats:

- Webinars and presentations. In the lead up to the state election the Electoral Commission will deliver a webinar seminar series for political participants, including TPCs, and will use these forums to clarify any legislative amendments. Periodically, the Electoral Commission is invited to present to larger groups of political participants, such as TPCs and may, within available resources, deliver such presentations over the coming months.
- Guidance online, including fact sheets. The requirements for TPCs, and other political participants, are set out in plain language on the Electoral Commission website and detailed in fact sheets that are published on the website.
- Video animations are also accessible via the website to provide information about electoral funding and other election-related regulatory obligations. Two new videos about the requirements for TPCs are currently in production.
- Direct written communication. The Electoral Commission directly communicates with each TPC and their official agent that registers for an election, providing information about their obligations under the EF Act. Emails are sent to remind stakeholders of their obligations, such as to submit political donation and electoral expenditure disclosures, and the rules, such as caps on political donations and electoral expenditure. These emails inform political participants about how to comply with the law and where to find more information and assistance. The Electoral Commission will also provide information about the new rules in the 2023 NSW State Election Bulletins.
- Direct phone and email support. Client services officers provide direct support and answer questions over the telephone and in writing (Monday – Friday during business hours) throughout the year, with additional officers assigned to stakeholder support during particularly busy periods. While client services staff cannot provide legal advice in relation to stakeholders' questions, they can and do provide guidance and information about the provisions of the EF Act. Where officers are asked a complex question that may be difficult to answer immediately, they request that the stakeholder email the question and a written answer is provided after careful consideration.
- Reminders after key deadlines. Follow-up emails and SMS messages are sent to stakeholders who are late in meeting their requirements. Where relevant, emails are also sent to previous political participants, such as TPCs and major political donors.

If a state-wide expenditure cap for TPCs at state elections is restored with the passing of the *Electoral Legislation Amendment Bill 2022*, and the acting in concert provision in section 35 of the EF Act is retained, the Electoral Commission will include a focus on these matters in its awareness-raising activities. All relevant instruments, policies and publications will be reviewed to ensure they contain information that is correct at the time.

Although no additional resources will be sought for the above activities, should the regulatory role of the Electoral Commission be further expanded by legislative amendment, such as by

authorising active monitoring of expenditure by TPCs during a pre-election period, then additional funding and time would be essential. Under the current framework, officers of the Electoral Commission routinely assess compliance with electoral expenditure caps through the audit of disclosures made by participants after the financial year in which an election takes place. In order to actively monitor TPC activities during a capped expenditure period, for example, a scheme would need to be implemented that required TPCs to report additional information regarding their campaigns in “real time”. If that change was made, additional resources for Electoral Commission staff with financial, advertising and social media skills would be needed to conduct this type of monitoring and to provide support to TPCs. A new system to report this information may also need to be developed. The extent of these resources would be dependent on the scope of any new functions, the number of TPCs at a particular election and whether a new monitoring function might also extend to other political participants that are subject to expenditure caps (for example, political parties, groups and candidates).

Even if additional funding could be provided, however, it is too late to make significant alterations to the Electoral Commission’s compliance and enforcement processes so close to an election. The capped expenditure period for the 2023 state general election commences on 1 October 2022, which means there is insufficient time for any new TPC electoral expenditure monitoring scheme to be implemented that would not create operational and integrity risks.

QUESTION ASKED BY MR PAUL SCULLY

***In relation to Assembly by-election—as a member of the Assembly here, I should probably ask you about the first term of reference we have. By-elections obviously vary in length—for instance, the 2016 Wollongong, Orange and Canterbury by-elections were considerably longer than, say, the more recent Strathfield and others. Obviously, a longer period of time stretches a period over which a cap and expenditure of a cap could be incurred. In reference to the first term of reference, do you think that there should be recognition of that differing time frame in the cap arrangements? Secondly, in relation to that, the commission itself has additional awareness-raising activities that go on during a by-election than what it would during a general election.***

***Do you have a sense as to how much you spend on additional, say, advertising in print, online and other media for a by-election period, just to get a sense of what people could reasonably spend in that period?***

ANSWER

The cost to the Electoral Commission of advertising a general election is not easily comparable with by-elections. General elections are supported by state-wide campaigns, which include a substantial broadcast media component that is not incurred for by-elections. Unlike by-elections, budgets for state-wide campaigns also do not include addressed mail (elector brochures) for voters or advertising in local newspapers. At by-elections, the most significant advertising cost is for the production and postage of ‘elector brochures’, which summarise the key information and dates about the by-election, and which are posted to all enrolled electors.

All voter awareness advertising campaigns are supported by a website created by the Electoral Commission for each event as well as media outreach, press releases, interviews and social media posts by the Electoral Commission's media team. These activities are not separately funded for by-elections, but are delivered using existing staff, some of whom are resourced through event funding for general elections.

Details of advertising for by-elections are captured in by-election reports, published on our website: <https://www.elections.nsw.gov.au/About-us/Reports/Election-reports#stateby-electionreports>

Advertising for the Upper Hunter state by-election, including an elector brochure posted to each enrolled voter, cost \$119,500. Advertising for the Wagga Wagga state by-election, including an elector brochure posted to each enrolled voter, cost \$98,500. For the February 2022 state by-elections in Bega, Willoughby, Monaro and Strathfield, all electors were sent postal packs including elector brochures. The advertising budget totalled \$187,000 for the four districts including the production of elector brochures, new translated resources and other advertising costs. This amount does not include postage, which would be an additional cost but was not captured by the advertising budget in this case due to the provision of postal vote packs to all electors.

In relation to whether by-election caps could vary according to the length of time of the election period, the timing of by-elections is determined by the Speaker of the Legislative Assembly, who issues the writ. If a sliding scale for by-elections was introduced, TPCs could not know what cap applied to them until the writ was issued. Under the EF Act, a TPC may also be registered for the election with the Electoral Commission prior to the writ being issued. Not knowing the cap that applies until the writ issues may create regulatory ambiguity and administrative complexity. It is also possible (although unlikely) that more than one by-election could be held on the same day but the election period for each election could vary, depending on when the writs were issued. There may also be added complexity if different district caps also applied to candidates and parties, as well as TPCs.