

Answers to supplementary questions

NSW Electoral Commission

Conduct of elections

1. **You proposed that filming or photographing an election official in the course of their duties be prohibited, and that other measures including prohibitions on serious harassment be considered. Could you provide more information on this proposal?**

The safety and wellbeing of the election workforce is of paramount importance to the Electoral Commission. Currently, however, it has insufficient legislative levers to effectively protect the safety and wellbeing of staff while performing their official duties. The Electoral Commission is concerned that without legislative reform to support the safety of election officials, with adequate penalties to provide necessary deterrence, its capacity to recruit willing workers will decline over time and trust in NSW elections will be diminished.

Several factors have contributed to a rise at recent Australian elections, including the 2023 State election, of threats to the physical safety and wellbeing of election officials. During the election, the Electoral Commission became aware that some officials were being filmed or photographed in the course of their duties, without their consent, by members of the public. In some cases, the footage and images were then published on social media, accompanied by false statements or misleading commentary. Election workers were clearly identifiable in posts that contained verbal and sometime written allegations of criminality. Some of the material targeting election officials was of a disparaging and humiliating nature. Although the Electoral Commission provided support to individual workers, who are generally members of the broader community and who are critical to the delivery of Australian elections, some decided not to continue to work at the election.

The proliferation of handheld devices and the rise in dis/misinformation campaigns on social media suggest that this trend is likely to continue and that specific legislative protections for election workforce should be explored further to ensure the physical and psychological safety of election officials.

The legislation currently creates an offence for a person to contravene a direction, without lawful authority, issued by the Electoral Commissioner or voting centre manager to maintain order at any election or any place where voting is occurring, and to obstruct access to a voting centre.

These offences were inadequate, however, to deter the type of conduct observed at the 2023 State election. Enforcement in this context may also be challenging, given the filming and photography of election officials can occur in a public place and not always at proximity to an election worker.

Accordingly, the Electoral Commission recommended in its report on the conduct of the 2023 State election that consideration be given to prohibiting a person from filming or photographing an election official in the course of their duties, and any other supportive measures that may be appropriate, including prohibitions on serious harassment. A new offence would enhance the protections available for election officials and support ongoing public trust in elections.

A new offence potentially could meet at least three strong public interest objectives, namely to:

- deter conduct that causes unacceptable distress to individual election officials and creates safety risks for all officials and, potentially, voters;
- reflect community expectations that the contribution of thousands of election workers to democracy is valued and that the community should take reasonable steps to protect these workers from harm while performing their official duties; and
- support the continued reputation of the Electoral Commission as a trusted election administrator, which is central to a stable democracy.

Risks to the safety of election officials is a matter that is also the subject of serious consideration by other electoral commissions in Australia, with the Australian members of the Electoral Council of Australia and New Zealand (**ECANZ**) recently signing a joint [referral protocol](#) with the eSafety Commissioner in an effort to create a safer work environment for election staff. The protocol is an important step forward and tool for electoral commissions in the management of online threats to the safety of election workers, however it does not replace the need for adequate offences and penalties in electoral legislation.

Other electoral commissions across Australia are making similar recommendations aimed at addressing the safety and wellbeing of election staff. In its [report to Parliament](#) on the 2022 Victorian State election, the Victorian Election Commission (VEC) recommended a new offence be inserted into the *Electoral Act 2002* (VIC) to proscribe a person from, by violence or intimidation or harassment, interfering with the conduct of a person employed or appointed by the VEC with the intent to harass the person or disrupt the conduct of the election.¹

Overseas and interstate voting

2. **You propose allowing absent early attendance declaration voting at overseas voting centres, and for the Commissioner to be able to appoint election officials for these voting centres, based on their skills and experience. Could you provide information on your proposals around voting options for overseas voting?**

Legislative change is required to enable effective participation by overseas electors at all future State general elections.

Leading up to the 2023 State election, the Electoral Commission worked with (i) Investment NSW and (ii) the Department of Foreign Affairs and Trade [**DFAT**] to explore the potential for attendance voting to be offered at several key overseas locations:

- (i) Although Investment NSW has standalone offices in London, New York, Mumbai, Shanghai, Guangzhou, Singapore, Tokyo and Abu Dhabi, these offices are not currently resourced on a full-time basis, so facilitating voting services was deemed operationally difficult by Investment NSW.
- (ii) DFAT did not support the establishment of in-person voting for the 2023 State election. However, after consultation, DFAT did agree to offer postal vote collection services during office hours from Monday, 20 March to Friday, 24 March 2023 at our overseas missions in Berlin, Hong Kong, New York, Ottawa, Paris, Rome, Singapore and The Hague.

¹ Report to Parliament 2022 Victorian State election and 2023 Narracan District supplementary election October 2023, pp. 9 and 28.

One of the challenges to securing the human resources required to deliver voting services at these overseas locations was the eligibility requirements for the election officials in s. 81(1) and (2) of the Electoral Act, which require election officials to be NSW residents who are enrolled for a district or who are enrolled in any other State or Territory of the Commonwealth as an elector for the House of Representatives.

For the 2023 State election, overseas attendance voting was facilitated by the addition of cl 16 to Schedule 7 to the Electoral Act to provide for absent voting relevantly as follows:

(2) ...the Electoral Commissioner may, if the Electoral Commissioner is satisfied it would enhance the convenience of a large number of electors—

(a) appoint a place outside Australia as a voting centre for all electoral districts, and

(b) designate the voting centre as an early voting centre, and

(c) determine the days and hours of operation of the early voting centre, including whether voting will occur at the early voting centre on election day.

...

(6) For this clause—

(a) despite section 81(1) and (2), the Electoral Commissioner may appoint a person, who the Electoral Commissioner considers has the appropriate skills and experience, as an election official for a voting centre appointed under this clause

Clause 16(6)(a) overcame the requirement for an election official to be enrolled for a district or otherwise enrolled to vote in Australia, by providing that any person with the appropriate skills and experience could be appointed as an election official for an overseas voting centre. As this provision is expressed only to apply to the 2023 State election, further legislative change is required to support the appointment of appropriately skilled persons to administer elections in overseas voting centres at future general elections.

Ultimately, the only in person international voting option at the 2023 State election was in New Zealand, where three locations were made available through the assistance of the NZ Electoral Commission.

The Electoral Commission will again approach Investment NSW and DFAT in the lead up to the 2027 State election to explore opportunities for establishing attendance voting offices in key overseas locations.

The Electoral Commission also notes that increased in-person overseas voting services were offered by the AEC in conjunction with DFAT and Austrade in a majority of Australian Embassies, Consulates and High Commissions at the recent referendum. The number of in-person voting centres in cities around the world increased from those available at the 2022 federal election.

In addition to the changes that might be made to aid overseas attendance voting, the arrangements entered into with DFAT at the 2023 State election to provide postal collection points at a number of overseas missions also provided an opportunity to identify some legislative change that would assist in ensuring that overseas postal votes are received by the Electoral Commissioner in time to be included in the count. The options available for managing overseas postal voting at the 2023 State election were limited, because the legislation does not expressly make provision for the return of postal votes from overseas.

The Electoral Commission supports the introduction of provisions to enable a greater proportion of overseas postal votes to be received in time to be included in the count, for example, by allowing postal votes to be received by an election official located overseas by a prescribed date and time and for the forwarding of such postal votes to the Electoral Commission by courier. Increased flexibility as to who can be appointed as an election official for such a purpose would also assist with the return of overseas postal votes.

3. **You propose simplifying interstate voting by allowing absent early attendance declaration voting at interstate voting centres, and for the Commissioner to be able to appoint election officials for those voting centres based on their skills and experience. Could you elaborate on this?**

Legislative change is required to enable effective participation by interstate electors and to remove administrative complexity.

As currently drafted, interstate voting centres are required to be appointed in respect of a particular electoral district (rather than all districts), offer a variety of vote types and election officials are required to meet the standard criterion for appointment, i.e., restricted to NSW residents who are enrolled for a district or people who are enrolled in any other State or Territory of the Commonwealth as an elector for the House of Representatives.

Interstate attendance voting options were available at in each Australian state or territory utilising relevant electoral management body head office locations. However, compliance with existing statutory requirements meant that offering interstate voting was unnecessarily complex and cumbersome. It would be more appropriate to have legislative provisions that are simpler to administer and more appropriate for voting outside of NSW, consistent with those recommended for overseas voting.

Enforcing prohibited donations

4. **You recommend precise descriptions of any new categories of prohibited donor, to support effective enforcement and duty-holders' understanding of their fundraising obligations. Could you provide detail on how any new categories of prohibited donor could be defined to ensure effective enforcement?**

The Electoral Commission's submission to this inquiry gives the example of the former definition of 'property developer' in the *Election Funding, Expenditure and Disclosures Act 1981*: "...a corporation engaged in a business that **regularly** involves the making of relevant planning applications..." (emphasis added). This involves a subjective assessment of the meaning of 'regularly' as demonstrated in a [recent decision](#) in Queensland, where the former NSW definition was adopted. In this matter, one party argued that only one relevant planning

application could be relied on to support that a corporation was engaged in a business that regularly involves the making of relevant planning applications.

The current definition of 'property developer' under the *Electoral Funding Act 2018* provides for a more objective measurement involving a specified number of relevant development applications within a precise timeframe.

As the independent regulator of the electoral funding scheme in NSW, the Electoral Commission does not express views about whether specific entities or individuals connected with particular business endeavours should be prohibited from making political donations. Should the government choose to enact a policy to expand the categories of prohibited donors, the Electoral Commission will be available to comment on operational considerations of any draft legislative amendment.

5. You note that any expansion of categories of prohibited donors should be accompanied by additional funding for the Electoral Commission to undertake compliance and enforcement activities. Could you talk about the work involved in detecting and investigating breaches of donation laws?

The definitions of the various categories of prohibited donors, including their 'close associate' are intricate. For example, not every person or entity involved in property development or benefiting financially through the development of land will be a 'property developer' within the meaning of the *Electoral Funding Act 2018* or its predecessor legislation.

The Electoral Commission cannot audit every donation disclosed in order to confirm it has not been made by a prohibited donor. This would be too resource-intensive and inefficient. The approach the Electoral Commission takes to mitigating the risk that such donations are being made/received is:

- During compliance audits, any donation that appears to be from a person or entity (based on its name only) involved in the property/building industry, the liquor or gambling industry, or the tobacco industry is reviewed against open-source information about that person or entity. Where it appears the entity could be involved in one of those industries, the matter is referred to the Investigations team for review and, if appropriate, formal investigation.
- The Investigations team will review allegations received about donors being prohibited donors. Investigative powers may be used in the course of these investigations.
- The Regulatory Education and Policy team develops resources for election participants about prohibited donors, including fact sheets and webinars.

The number of alleged unlawful donations by prohibited donors in the 2023 State election year was low. As reported in its annual report, during the year ending June 2023 the Commission reviewed only three matters involving allegations of prohibited donations by prohibited donors. It is noted, however, that following the commencement of the *Electoral Funding Amendment (Registered Clubs) Act 2023* on 1 July 2023, the number of donations under review in the current financial year has increased. This is because more individuals may be captured by the definition of a prohibited donor due to their involvement with a registered club.

If the Electoral Commission forms the view that a prohibited donor, including a close associate, made a political donation, it may:

- Educate or issue a warning to the prohibited donor and/or the person or entity that accepted the political donation.
- Prosecute the prohibited donor and/or the person or entity that accepted the political donation. Only the court can impose a fine for that offence (it is not possible for the Electoral Commission to issue a penalty notice). The offence carries a maximum penalty of 400 penalty units (\$44,000) or imprisonment for 2 years, or both.
- Recover from the person or entity that accepted the donation an amount equal to the value of the donation or double that amount if the person knew that it was unlawful.

Information about prosecutions and statistical information about other enforcement activities of the Electoral Commission is available in our annual reports.

Truth in political advertising

6. **You state that if regulation of political advertising is introduced, 'no functions should be conferred on the Electoral Commissioner or ... Commission without a clear understanding of the potential significant risks and impacts for the administration of elections'. Could you expand on these risks and impacts?**

The office or agency which is to be the 'arbiter of truth' would need to be, and be seen to be, completely independent from the electoral process in which it is involved. This militates against the Electoral Commissioner or the Electoral Commission undertaking the role, as they must deal with political participants not only in the course of an election, but also in their ongoing responsibilities with respect to the administration of party registration and electoral funding laws during and outside of election periods.

Being handed the responsibility of making rulings which may impact the electorate's perception or opinion of a particular political participant and, in turn, the success or otherwise of an election campaign, is incompatible with the critical requirement for those who administer electoral processes to be, and be seen to be, completely independent and politically neutral.

Focusing on complaints about the veracity of statements made by political adversaries would risk compromising public trust in the agency's political neutrality, which is critical to maintaining confidence in the NSW electoral system. Rulings that a candidate or party have made an untruthful statement are likely to be met with disagreement by the candidate or party against whom they are made, and their supporters. There is a risk of adverse comments and accusations being made about the exercise of 'arbiter' functions and rulings that are made public, opening the Electoral Commissioner and the agency to perceptions of bias against political participants.

Erosion of the trust placed in the agency to conduct the electoral process impartially may extend into all areas of its operation if parties and members of the public who disagree with decisions on truth in political advertising must still engage with the Electoral Commission throughout the electoral process, as they must in order to participate in the democratic process.

The Electoral Commissioner of the Australian Electoral Commission (AEC), Mr Tom Rogers, has spoken publicly at [Senate Estimates](#) about the risks to an electoral commission's neutrality

and public confidence in the electoral process if the agency responsible for conducting those processes is given the responsibility of being the arbiter of truth in political advertising at election time.² Like the AEC, the NSW Electoral Commission enjoys, and requires, a high level of public trust in order to effectively carry out its functions. The Electoral Commissioner and the Electoral Commission share Mr Rogers' concerns that this necessary trust will be put at risk if either the Electoral Commissioner or the Electoral Commission is required by law to opine on what is "truth" at election time.

Mr Rogers also commented at Budget Estimates that an electoral commission's role is to correct the record when disinformation is spread about electoral processes.³ This involves correcting statements that are legislatively or factually incorrect and that are designed to confuse electors about the act of voting or mislead the public about the agency's activities and processes. The NSW Electoral Commission agrees that the focus and efforts of electoral commissions should be on using all of the tools at their disposal, including social media and disinformation registers, to combat misinformation and disinformation about electoral processes and the act of voting.

The function of deciding what is "truth" in political advertising would be materially different from any others presently exercised by the Electoral Commission: for example, the Electoral Commission's function of regulating statements in electoral material about the process of voting, including conducting appropriate compliance and enforcement activities where a breach is identified. Any size of new function would likely require intense resource allocation during the election period, creating inefficiencies and potentially putting at risk the successful administration of the election.

Even if funding were increased to take into account the additional burden, accountability requirements would inevitably require the Electoral Commissioner and other senior staff to focus on the resolution of complaints about truth in political advertising, at a time when they should be administering and regulating the election. This may compromise the delivery and proper conduct of an election if these key resources are distracted, at best, or effectively sidelined during critical election activities.

The Electoral Commission notes that the Committee previously examined truth in advertising in its Inquiry on the Administration of the 2019 NSW State election, concluding in the [Final Report](#) (p.16) "There should be no changes to the law regarding negative campaigning and truth in advertising". The views of the Electoral Commissioner given to the Committee in the course of that Inquiry remain valid.

The Electoral Commission also notes the potential risks and impacts of the many legal issues highlighted by Professor Anne Toomey in her [submission](#) to the Committee.

7. You note that the 2022 South Australian Election Report details operational issues with regulating misleading political advertising. Could you outline these operational issues and if you are concerned the NSW Electoral Commission

² Hansard, Senate, Finance and Public Administration Legislation Committee, Estimates, Wednesday, 29 May 2024, Page 85.

³ Hansard, Senate, Finance and Public Administration Legislation Committee, Estimates, Wednesday, 29 May 2024, Page 91.

would face similar issues if truth in-political advertising regulation was implemented here?

In his [evidence](#) to the Commonwealth JSCem on 30 November 2022, the South Australian Electoral Commissioner stressed the impact of the regulation of political advertising on resourcing of the Electoral Commission of South Australia [ECSA], as complaints received rose from 38 complaints in the 2018 State election to 122 in 2022. The Commissioner suggested this increase was due to:

- one major party hiring staff to monitor the other major party and the candidates; and
- the use of social media.

The Commissioner noted his response to those 122 complaints as follows:

- In 8, requested a cease publication and to issue a retraction.
- In 1, asked for a retraction.
- In 3, asked to cease publication.
- A 'couple of warnings', but [t]he vast majority that we get don't amount to misleading'.

The ECSA increased from 2 staff dealing with complaints in 2018 to 5 in 2022 and 10 for future elections, plus more than five SA Crown Solicitor's Office solicitors on standby 'basically 24 hours during the two-week voting period and on polling day'.

As the Commissioner also noted, South Australia has only 1.2 million electors, it reasonably can be anticipated that the resourcing requirement for the NSW Electoral Commission, and external legal support, would be considerably more with a voting population of over 5.5 million.