electoral
commission NSW

F2012/54

20 September 2012

Mr Jonathan Elliott
Inquiry Manager
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Elliott

Administration of the 2011 NSW State Election; and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

I write regarding questions taken on notice during my attendance at the meeting of the Joint Standing Committee on Electoral Matters held on 29 June 2012.

Please find the answers to these questions in the attachment.

Yours sincerely

Colin Barry
Electoral Commissioner

New South Wales Electoral Commission
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Q1: What was your budget allocation for 2011-12 and for 2012-13 (transcript p 50)?

NSWEC Funding item ($M)	2011-12	2012-13
Recurrent operating expenditure	16.002M	18.683M*
Depreciation	5.079M	4.972M
Total Recurrent Expenditure	21.081M	23.655M
**2012-13 Includes approved funding for:*		
• Electoral Boundaries Redistribution		1.021M
• Non-Voter Penalty Notice processing for Local Govt Election		1.261M
• Costs for managing 'Non-Client' Local Govt Elections		0.250M

Q2: Your submission advocates the delegation of rule-making power to the Electoral Commission only in areas of limited contention' where the Commission's 'technical expertise is predominant' (p22). Could you please provide an example of the areas which the Commission should not be making rules?

In my submission I stressed that it is not for the NSWEC – or the Electoral Commissioner - to act as substitute legislator, but that the electoral regime must allow for a timely response to emergent needs. Any rulings made by the NSWEC would be limited to the machinery of administering elections and election funding. I note that the EFA already has power to issue guidelines to which regard must be had in dealing with applications, claims, caps and disclosures: s 23 of the EFEDA.

I would refer the Committee to p17 of my submission, where I suggested the following examples as areas of electoral law which are <u>not</u> amenable to delegated rule-making by the NSWEC:

- the core elements of voting;
- the basic rules for party registration;
- qualification to register to vote;
- qualification for and restrictions on candidacy;
- secrecy of the vote;
- election management (i.e., authority, as opposed to the administration of elections);
- offence and penalty provisions;
- methods of filling casual vacancies;
- removal of mandates (i.e., any recall); and
- accountability mechanisms: basic rights of scrutineers, and resolution of disputes (e.g., disputed returns and judicial review).

I note that these are based on the examples provided by the International Institute for Democracy and Electoral Assistance in its 2002 *International Electoral Standards: Guidelines for reviewing the legal framework of elections.*

It is important that these key principles remain within the body of the principal electoral law of New South Wales.

I note also that the core elements of electoral redistribution should remain within the principal legislation, but that redistribution specifically is not within the remit of this Inquiry.

Q3: In your submission's discussion of the importance of an electoral authority, you note that the International Institute for Democracy and Electoral Assistance has considered that Australia to be an example of an independent electoral authority (pp33-34). Are you aware of whether the Australian Electoral Commission has delegated rule-making powers?

The AEC implements the Federal Parliament's directives on electoral policy as embodied in the legislation. Its primary outcome is to maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services and targeted education and public awareness programs.

The AEC does not have delegated rule-making responsibilities under the *Commonwealth Electoral Act 1918.* Nonetheless, I do not consider that this inhibits the Committee from recommending the adoption of principle--based regulation and delegated rule-making. I note that NSW has often been in the vanguard of electoral law reform; for example, the Commonwealth Parliament has only recently passed legislation to provide for continuous update of enrolment.

I note the US Federal Election Commission has responsibility for "interpreting and defending" the Federal Election Campaign Act [FECA].

The FEC implements the various provisions of the FECA through its rulemaking procedures. As part of these procedures, the Commission, with the assistance of the Office of General Counsel's Policy Division, issues notices of proposed rulemaking (NPRMs), collects, reviews and analyzes comments on the NPRMs, conducts hearings and promulgates final rules with explanations and justifications.

Q4: Do you know what sort of parliamentary oversight there is of the Australian Electoral Commission?

The role of the Commonwealth's Joint Standing Committee on Electoral Matters [JSCEM] is to inquire into and report on such matters relating to electoral laws and practices and their administration as may be referred to it by either House of the Parliament or a Minister. The matters that may be referred by the House include reports by the Commonwealth Auditor-General. The Committee can also inquire into matters raised in annual reports of Commonwealth Government departments and authorities. However, it cannot be said that the JCSEM exercises an oversight role in respect of the AEC.

The closest equivalent to the type of Committee oversight proposed in my submission is that exercised by the Victorian Electoral Matters Committee, whose functions are to inquire into any proposal, matter or thing concerned with:

- the conduct of parliamentary elections and referendums in Victoria;
- the conduct of elections of Councillors under the *Local Government Act 1989* (Vic);
- the administration of, or practices associated with, the *Electoral Act 2002* (Vic) and any other law relating to electoral matters.

However, my submission proposes specifically to provide that the NSW Committee oversight the NSWEC in a manner similar to Committees such as the Committee on the Independent Commission Against Corruption; and to impose on the NSWEC a requirement to provide reports on elections in NSW to the Chair of the Committee, who would then table it in Parliament [pp 36-37 of Submission].

Q5: In your evidence to the Committee on 29 June you stated that "there are some things he said in there [the report] that I do not agree with" (transcript p 46). On which aspects of the report do you and Professor Orr's views differ?

My principal difference with Professor Orr relates to the involvement of the courts in the process of the conduct of an election, which he has addressed in that part of his report entitled "Access to Courts – the Judicial Oversight of Electoral Administration Generally".

I consider that the Supreme Court decision in *McDonald v Keats* [1981] 2 NSWLR 268, based on s 155 of the PE&EA, remains good law; and that no recourse should be had to the courts until an election has been finalised. Although Professor Orr has made reference to *Best v Electoral Commissioner of NSW* [2007] NSWSC 269, I note that, due to the extremely tight timeframe in which this case was prepared and argued, the *McDonald v Keats* decision was not brought to the Court's attention.

Q6: What resources are available to the Electoral Funding Authority to investigate prime facie breaches of the Election Funding, Expenditure and Disclosures Act?

The Election Funding Authority's (EFA) compliance Policy provides that potential breaches of election funding, expenditure and disclosure legislation may become known through:

1. the registration, disclosure or audit processes;
2. complaints made by members of the public;
3. information received through media reports;
4. complaints or matters referred by the Independent Commission Against Corruption; or
5. complaints or matters referred to the EFA by other government agencies.

The EFA will not, at this stage, invoke the use of statutory powers of inspection or investigation. Where the allocation of a resource is required to undertake any of the preliminary review and assessment actions above, the EFA has four inspectors who are permanent full-time staff.

Q7: How many people are employed in your investigations team?

The EFA has four permanent full-time positions of inspector appointed pursuant to section 110 of the *Election Funding, Expenditure and Disclosures Act 1981*. These four staff report to one permanent full-time manager.

Q8: Do you believe you have adequate resources to properly investigate electoral irregularities?

As detailed in my submission proper, the only electoral offence that is currently enforced by the Electoral Commissioner is that of Failure to vote pursuant to s.120C of the PEEA and s.312 of the LGA. The reasons for this are twofold:

1. the PEEA does not confer on the Electoral Commissioner or the NSWEC an investigatory or prosecutorial function regarding offences by members, candidates, groups or parties; and

2. it is essential that community and stakeholder confidence in the Commissioner's impartiality is maintained.

That said the wider community and the majority of stakeholders are under the mistaken but understandable belief that the NSWEC *does* investigate and prosecute electoral offences. In the lead up to Local Government and State elections the NSWEC receives numerous complaints relating to the possible commission of electoral offences including treating, non-complying electoral material and canvassing. The NSWEC responds to such complaints by either advising the person to report the matter to the NSW Police Force or itself reporting the matter to the appropriate law enforcement body, depending on the seriousness of the alleged offence. This is in accordance with the NSWEC's Electoral Offences Enforcement Policy published on the NSWEC website at http://www.elections.nsw.gov.au/__data/assets/pdf_file/0020/92351/NSWEC_Electoral_Offences_Enforcement_Policy_-_Summary.pdf. A copy of the Policy is attached for the Committee's information.

If the status quo is maintained, the resources currently available to the NSWEC are adequate to deal (solely) with non-voter offences. The current procedure is for the NSWEC to refer non-voter prosecutions to the Crown Solicitor's Office ("CSO") with whom it has a tied legal services relationship. The NSWEC is responsible for issuing penalty notices to non-voters and preparing contested matters for hearing, whilst the CSO appears on our behalf at hearing.

If the new structure proposed in my submission is taken up, it is possible to separate the functions of the Electoral Commissioner in conducting elections from those of the NSWEC, thereby allowing the latter to exercise investigative and enforcement functions without the potential for any apprehension of bias. It is important at this point to stress that investigative and enforcement functions relate to offences under the relevant Acts, and will not and should not empower the new NSWEC to determine disputes concerning nominations and candidacy. It should remain a matter for any person wishing to impugn the validity of a nomination or election of a candidate to raise the matter for determination by a competent court or tribunal.
A new NSWEC that includes an electoral investigatory and enforcement function will require a significant increase in resources. This function cannot be subsumed within the present EFA Compliance branch, as it does not have the staff or administrative resources to take on this role in addition to funding and disclosure related investigations.

Whilst organisational and operational analysis must be conducted to determine the best model for the new structure, in my view, the new NSWEC will include a large, permanent investigative branch that spans both electoral and funding and disclosure matters, with the ability to retain "seasonal/contractual" staff when necessary.

The commission of electoral offences generally increases during election campaign periods. As discussed in my submission, a possible option is to employ additional staff on a contractual basis to strengthen the investigative branch during local government and State election periods. Considering the type of offences, the significance of real time investigation and the geographical expanse to be covered, a significant budget would be required to allow for additional staff including investigators, legal officers, paralegals and administrative staff, as well as travel, accommodation, computer and electronic equipment, to name but a few of the expenses in running such a team.

A complimentary innovation would be the introduction of penalty notice offences within the electoral offence provisions. Whilst additional resources must also be allocated to establish such a regime, the long term cost savings associated with penalty notices would be of considerable benefit to the State. There is already a model for such a scheme in the *Election Funding, Expenditure and Disclosures Act 1981*.

Q9: Do you believe you have adequate resources and powers under the Act to call and cross examine witnesses?

As discussed above, the NSWEC lacks investigative powers.

Whereas the Election Funding Authority does have limited investigative powers, it does not have the power to call and cross-examine witnesses as, unlike other bodies that perform regulatory or inquiry functions, it does not have the power to conduct hearings. Furthermore, it does not have the power to compel witnesses to answer questions or produce documents, as the privilege against self-incrimination prevails over the EFEDA.

The Authority's investigative powers are found in ss. 110 and 110A of the EFEDA which provide inter alia:

110 Inspection

...

(2) For the purpose of ascertaining whether this Act is being or has been contravened, an inspector may:

(a) inspect or make copies of, or take extracts from, any records kept by or on behalf of, or any bankers' books so far as they relate to, a party, elected member, group or candidate or agent for a party, elected member, group or candidate or a former party, elected member, group, candidate or agent, and

(b) enter at any reasonable time any place at which the inspector has reasonable grounds for believing that any such records or bankers' books are kept.

(3) For the purpose of and in connection with an inspection under subsection (2), an inspector may:

(a) request any person employed or engaged at any place entered pursuant to that subsection to produce to the inspector such records or, as the case may be, such bankers' books, relating to a party, elected member, group, candidate or agent or former party, elected member, group, candidate or agent as are in the custody or under the control of the person so employed or engaged,

(b) examine with respect to matters under this Act any person employed or engaged at any place so entered, and

(c) make such examination and inquiries as the inspector thinks fit for the purpose of ascertaining whether this Act is being or has been contravened.

(4) A person shall not:

(a) refuse or intentionally delay the admission to any place of an inspector in the exercise by the inspector of his or her powers under this section,

(b) intentionally obstruct an inspector in the exercise by the inspector of any such power, or

(c) fail to comply with a request of an inspector made under any such power.

Penalty: 100 penalty units.

110A Power to require provision of documents and information

(1) The Authority may, by notice in writing to a person, require the person:

(a) to provide such information as the Authority reasonably requires for the purposes of the enforcement of this Act, or

(b) to produce to the Authority, at the place and time specified in the notice, any document that the Authority reasonably requires for the purposes of the enforcement of this Act, or

(c) to answer questions about any matters in respect of which information is reasonably required for the purposes of the enforcement of this Act, or

(d) to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.

...

(6) A person who, without reasonable excuse, fails to comply with a requirement made of the person under this section is guilty of an offence.
Maximum penalty: 100 penalty units.

You will note that the provisions do not expressly abrogate the privilege against self-incrimination and this area remains untested.

Investigators are yet to exercise powers under s.110[1], however, on advice, the Authority has resolved to take a more cautious approach and proceed as though s.110 does not abrogate the privilege against self-incrimination. This is because the more general terms of s.110 would make it difficult to sustain an argument that there was a necessary implication of abrogation of the privilege.

Section 110A impliedly, in our view, preserves the privilege against self-incrimination, for s.110A(6) provides a defence of "reasonable excuse" to those who fail to comply with a notice.

The Authority therefore finds itself in the unenviable position of being the primary investigator and regulator of election funding and disclosure breaches and yet has significantly less powers than its brother Commissions. For example, any s.110A notice that is issued to an individual needs to contain a statement that they are not obliged to produce documents, provide information or attend to answer questions (as the case may be) if it would tend to incriminate them. In addition, where the inspector issuing the notice has formed a belief that there is sufficient evidence to establish that the person has committed an offence, the person must be "cautioned", or else information, documents or answers produced may be inadmissible.

Accordingly, it is open to a person served with a notice under s.110A, or to whom a requirement is made under s.110, to refuse to comply with it upon the grounds of self-incrimination.

In my opinion, to be truly effective, the new NSWEC should be empowered to compel persons to produce documents, provide information or attend to answer questions in relation to both electoral and funding and disclosure investigations. I propose powers similar to those granted to the Independent Commission Against Corruption, Police Integrity Commission, Australian Securities & Investments Commission, NSW Environmental Protection Authority and Health Care Complaints Commission.

I propose enhanced powers to those currently found in ss.110 and 110A as follows:

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[1] As the powers are not retrospective and s110A provides greater scope.

Powers of entry, search and seizure

- Beyond the powers currently available to inspectors under s.110, this new power would allow entry, search and seizure in relation to any premises or item therein where the inspector holds a reasonable belief that it is necessary for the purpose of an investigation under the Act.

- An inspector would have the power to examine, seize, retain or remove any records or items from the premises, require production of any records or item held on the premises, take copies of, or extracts or notes from any such records, require any person at the premises to answer questions, furnish information or provide assistance.

- This power would be pursuant to a notice under the Act, it would not, for example, entitle an inspector to apply for a search warrant pursuant to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Power to obtain information, records and evidence

- I propose enhanced powers to those currently available under s.110A as follows:

- An inspector may, by notice in writing, require a person to answer questions, attend at a specified place and time to answer questions, provide information in writing, produce documents and/or provide assistance, where the inspector holds a reasonable belief that it is necessary for the purpose of an investigation under the Act.

- An inspector may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions. Answers given by a person so nominated bind the corporation.

- A notice may specify the time, and manner, for response.

- A person has a right to legal representation when appearing to answer questions.

Self-incrimination not an excuse

- A person is not excused from a requirement to give information, to answer a question, to produce a document or to provide assistance on the ground that the information, answer or document might incriminate the person or make the person liable to a penalty.

- However, any information or answer given by a natural person in compliance with a requirement under a notice is not admissible in evidence against the person in any civil or criminal proceedings (except disciplinary proceedings or proceedings for an offence of failure to comply) if the person objected at the time to doing so on the ground that it might incriminate him/her, or the person was not warned on that occasion that the person may object to giving the information or answer on the ground that it might incriminate him/her.

- Any document produced by a person in compliance with a requirement under a notice is not inadmissible in evidence against the person in any proceedings on the ground that the document might incriminate the person.

- Further information obtained as a result of a document produced or information or answer given in compliance with a requirement under a notice is not inadmissible in any proceedings on the ground that the document, information or answer had to be produced or given or that the document, information or answer might incriminate the person.

Warning to be given on each occasion

- A person is not guilty of an offence of failing to comply with a requirement under a notice unless the person was warned on that occasion that a failure to comply is an offence.

The inability to compel a person to produce documents, provide information or attend to answer questions greatly inhibits the Authority's ability to investigate breaches of funding and disclosure provisions and, consequently, enforce such provisions. A new NSWEC cannot genuinely hold itself out to be the regulator of electoral and funding and disclosure laws if it is not empowered to obtain evidence through the enhanced means discussed above.