

Submission

No 16

Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981

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**Inquiry into Review of the Parliamentary
Electoral and Elections Act 1912**

and

**The Election Funding, Expenditure and
Disclosures Act 1981**

Election Funding, Expenditure and Disclosures Act 1981

The New South Wales Nurses' Association (NSWNA) made a submission and gave evidence to the Legislative Council Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Bill 2011. We outlined our concerns about the Election Funding, Expenditure and Disclosures Act 1981 as it was then, and the amendments proposed in the 2011 Bill. (A copy of that submission is attached.)

We expressed the view at the time that provisions within the Act and the Bill:

- Would undermine democracy and, particularly during an election period, leave political debate largely to the established political parties and powerful media interests;
- Would, contrary to the principles of a free, open and democratic society, restrict organisations such as the NSWNA from participating in and responding to public debate during election periods;
- Were a disproportionate response to the supposed threats of corruption and money being used to buy political influence or access.

March 2012 Amendments to the Act

The March 2012 amendments to the Act did little to address the majority of the concerns raised by the NSWNA and others. The February 2012 report on the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 covers those matters extensively.

Meaning of “electoral expenditure” and “electoral communications expenditure”

A key area of concern was the confusion around the definition of political expenditure and its inter-relationship with political donations and expenditure caps and how that impacted upon third-parties such as the NSWNA (Chapter 6 Third-party campaigners of the Report). Parliament has sought to address those concerns by amending the definition of political expenditure for third parties. The effect of this amendment [section 87(4)] is that expenditure by a third party is not “electoral expenditure” if it is not incurred “*for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.*”

This amendment would seem to address a related concern that an organisation such as the NSWNA may have been prohibited or restricted from contributing to a campaign conducted by a peak body such as Unions NSW or joining an alliance to conduct a campaign such as the "Last Drinks" campaign. Both of those campaigns are of a political nature.

However, there is the possibility of differing interpretations of the meaning of "dominant purpose" so it remains our view that the issue of expenditure and donations is best dealt with through provisions that provide for full and timely disclosure rather than restricting the rights of membership-based organisations by mechanisms such as expenditure caps.

Political Donations

With the recent focus on such things as third-party campaigning provisions, the broad sweep of the donations provisions has not been as fully explored as it needs to be. However, a closer look at the *Election Funding, Expenditure and Disclosures Act 1981* reveals problems with those sections of the Act that regulate political donations. The reason is, the Act's sections on donations, in their current form, appear to impose serious restrictions on organisations such as the NSWNA and, arguably, even on media corporations.

In fact, the NSWNA believes this inquiry needs to consider these provisions carefully, as their sweep is so broad they appear to catch a whole range of legitimate activity by corporations, unions and other community groups, including the provision of information to members.

In particular, the NSWNA believes this inquiry needs to consider the impact of those sections dealing with "gifts" and "in kind" donations on the legitimate campaigning and democratic rights of organisations such as unions and other community groups. Their impact on media corporations also needs to be considered.

(Please note:

The background to this concern about the role of the media and the reasons for assessing any electoral-law impact on media corporations are outlined more fully in the attached submission we made to the inquiry into the 2011 Bill amending the Act. Since that submission was made this issue has undergone even greater scrutiny in the United Kingdom and here in Australia. The NSWNA believes the relationship between the media, politicians, public campaigning and other democratic processes, and the work of the various UK and Australian inquiries into this, also needs to be considered by this inquiry into NSW electoral laws. Finally, it is worth noting that Queensland Newspapers and The Australian have recently registered as third party campaigners under similar Queensland electoral laws.)

The Act currently describes a political donation as:

85 Meaning of "political donation"

- (1) For the purposes of this Act, a "political donation" is:
- (a) a [gift](#) made to or for the benefit of a [party](#), or
 - (b) a [gift](#) made to or for the benefit of an [elected member](#), or
 - (c) a [gift](#) made to or for the benefit of a [candidate](#) or a [group](#) of [candidates](#), or
 - (d) a [gift](#) made to or for the benefit of an [entity](#) or other person (not being a [party](#), [elected member](#), [group](#) or [candidate](#)), the whole or part of which was used or is intended to be used by the [entity](#) or person:
 - (i) to enable the [entity](#) or person to make, directly or indirectly, a [political donation](#) or to incur [electoral expenditure](#), or
 - (ii) to reimburse the [entity](#) or person for making, directly or indirectly, a [political donation](#) or incurring [electoral expenditure](#).

At Section 84 it also describes a gift as:

"gift" means any [disposition of property](#) made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration.

A reportable political donation is defined as:

86 Meaning of "reportable political donation"

- (1) For the purposes of this Act, a "reportable political donation" is:
- (a) in the case of disclosures under this Part by a [party](#), [elected member](#), [group](#), [candidate](#) or [third-party campaigner](#)-a [political donation](#) of or exceeding \$1,000 made to or for the benefit of the [party](#), [elected member](#), [group](#), [candidate](#) or [third-party campaigner](#), or

- (b) in the case of disclosures under this Part by a [major political donor](#)-a [political donation](#) of or exceeding \$1,000 made by the [major political donor](#) to or for the benefit of a [party, elected member, group, candidate](#) or [third-party campaigner](#).

The Act then caps political donations:

95A *Applicable cap on political donations*

- (1) General cap The [applicable cap on political donations](#) is as follows:
 - (a) \$5,000 for [political donations](#) to or for the benefit of a [registered party](#),
 - (b) \$2,000 for [political donations](#) to or for the benefit of a [party](#) that is not a [registered party](#),
 - (c) \$2,000 for [political donations](#) to or for the benefit of an [elected member](#),
 - (d) \$5,000 for [political donations](#) to or for the benefit of a [group](#),
 - (e) \$2,000 for [political donations](#) to or for the benefit of a [candidate](#),
 - (f) \$2,000 for [political donations](#) to or for the benefit of a [third-party campaigner](#).

However, of most significance, the Act also now imposes significant restrictions on who can make a political donation, limiting donations to individuals who are on the electoral roll:

96D *Prohibition on [political donations](#) other than by individuals on the electoral roll*

- (1) It is unlawful for a [political donation](#) to a [party, elected member, group, candidate](#) or [third-party campaigner](#) to be accepted unless the [donor](#) is an individual who is enrolled on the roll of electors for [State elections](#), the roll of electors for federal [elections](#) or the roll of electors for [local government elections](#).
- (2) It is unlawful for an individual to make a [political donation](#) to a [party, elected member, group, candidate](#) or [third-party campaigner](#) on behalf of a corporation or other [entity](#).
- (3) It is unlawful for a corporation or other [entity](#) to make a [gift](#) to an individual for the purpose of the individual making a [political donation](#) to a [party, elected member, group, candidate](#) or [third-party campaigner](#).

These provisions, in their current form, appear to impose serious restrictions on organisations such as the NSWNA and, arguably, even on media corporations.

For example, it is hard to see where something as basic as the provision of free space in a union journal or even a daily newspaper, to candidates and political parties, so they can outline their policy or policies, is not considered a donation under these definitions.

This is a major issue for the NSWNA, as it regularly provides such space to the major parties to put their position at the time of elections. We are clearly gifting space to the said parties and, leaving aside the value of the space, we are clearly not, as an association, "enrolled on the roll of electors" for any elections. Nor are media corporations such as News Limited or Fairfax.

Where do these donation provisions exempt such things as free space for policy speeches or op-ed pieces that directly or indirectly influence voting at an election? The provision of such space is clearly "for the benefit of" the said party or candidate.

The fact that the same deal might be offered to more than one party is no defence. The provision of such space to various parties is surely no different to a cash donation to more than one party.

The donations provisions also raise questions about the right of organisations such as the NSWNA to analyse issues and political policies and publish its views and conclusions.

In comparing and contrasting the policies and views of political parties and candidates there is clearly a benefit to the parties and candidates, whose views the NSWNA endorses or supports. Such activity is often, and legitimately, also clearly promoting or opposing, directly or indirectly, various parties and/or candidates.

Therefore, is the expense incurred in publishing or communicating those views a political donation? If not, where and how are such "gifts" exempted by the Act?

The point is, the current donations and third party campaigning laws, once subjected to closer scrutiny, are extremely broad and impose significant restrictions on freedom of expression, the freedom to associate and the freedom to participate in the political/democratic process.

In a supposed attempt to prevent financial corruption of the political/democratic process, the NSWNA believes the Parliament has, once you have a closer look at their wording, implemented laws that create enormous confusion and have a raft of potentially negative consequences for important freedoms in our society.

The Structure of the Act

A number of submissions to the February 2012 inquiry referred to the fact that piece-meal amendments to the Act resulted in provisions relating to third-parties being entangled amongst provisions relating to political parties, groups and candidates.

We believe that consolidating provisions relating to third-parties into a stand alone part of the Act would bring clarity to the legislation and assist compliance.

Parliamentary Electorates and Elections Act 1912

The NSWNA rules provide for the election of General Secretary (1), Assistant General Secretary (1) and Members of Council (21) every four years.

These elections are conducted by the New South Wales Electoral Commission. Whilst options exist for the elections to be conducted by private election companies, the NSWNA is of the view that the independence, transparency and integrity of the Electoral Commission are key factors in ensuring that our members are satisfied that those elections are conducted fairly and properly. No possible inference of bias or undue influence can arise, as could be the case if a private company was contracted by the NSWNA to run such critical elections.

It is our view that no amendment to the Act or any other change that would affect the ability of the Electoral Commission to conduct the above-mentioned elections should be made.

Conclusion

The NSWNA submits that the Electoral Funding, Expenditure and Disclosures Act 1981 requires a careful review to ensure that there are no restrictions that would impede organisations such as the NSWNA from participating in, and responding to, public debate at any time, including during election periods.

It remains our view that the issue of expenditure and donations is best dealt with through provisions that provide for full and timely disclosure rather than restricting the rights of membership-based organisations by mechanisms such as expenditure caps.

After a careful examination of the definition of political expenditure and the interplay with the new provisions of the Act restricting donation to individuals, we believe that there are now major impediments to any organisation, including media groups, in disseminating information relating to the policies or statements of political parties, groups and candidates.

From the point of an organisation that is not a political party, the Act should be restructured so the provisions for political parties, groups and candidates are clearly separated from any provisions related to third parties.

With respect to the Parliamentary Electorates and Elections Act 1912 no amendment to the Act or any other change that would affect the ability of the Electoral Commission to conduct elections for the positions of General Secretary, Assistant General Secretary or members of Council (the NSWNA's committee of management) should be made.

We would welcome the opportunity to make verbal submissions to the Review should the opportunity arise.

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