

ADMINISTRATION OF THE 2019 NSW STATE ELECTION

Organisation: NSW Nurses and Midwives Association

Date Received: 9 October 2019

Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the Administration of the 2019 NSW State Election and Related Matters

OCTOBER 2019

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Mr Lee Evans, MP
Committee Chair
Joint Standing Committee on Electoral Matters
Liberal Party
Member of the Legislative Assembly

Online lodgement

Re: Inquiry into the 'Administration of the 2019 NSW State Election'

The New South Wales Nurses and Midwives' Association (NSWNMA) is a registered organisation of employees for nurses and midwives in New South Wales. The membership of the NSWNMA comprises those who perform nursing and midwifery work. This includes: registered nurses; enrolled nurses and midwives at all levels including management and education, and assistants in nursing.

The NSWNMA represents a membership of over 66,000 members across NSW and is affiliated to Unions NSW and the Australian Council of Trade Unions (ACTU). Eligible members of the NSWNMA are also deemed to be members of the New South Wales Branch of the Australian Nursing and Midwifery Federation (ANMF), the federally registered organisation. The NSWNMA is registered as an Industrial Organisation of Employees under the *Industrial Relations Act 1996 (NSW)*.

In association with the ANMF, we are part of Australia's largest national union and professional nursing and midwifery organisation who represent the professional, industrial and political interests of more than 275,000 nurses and midwives. We are also affiliated with international unions such as Public Services International.

Our role is to protect and advance the interests of nurses and midwives and the nursing and midwifery professions. Together with our members we are committed to:

- campaigning for safe nurse to patient ratios for safer patient care in all health and aged care settings;
- strengthening the contribution of nursing and midwifery to improving Australia's health and aged care systems;
- a robust public health system in NSW, and
- the health of our national and global communities.

The NSWNMA is not affiliated to any political party.

We welcome the opportunity to provide a submission to this Inquiry.

This submission is authorised by the elected officers of the New South Wales Nurses and Midwives' Association.


BRETT HOLMES

General Secretary, NSW Nurses and Midwives' Association
Branch Secretary, Australian Nursing and Midwifery Federation NSW Branch

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NSWNMA Recommendations

1. The NSWNMA supports a system of transparency and disclosure.
2. The NSWNMA supports a democratic system in NSW:
 - a. whereby all voices have an opportunity to be heard in political debate and
 - b. where it is lawful for groups to act collectively to engage in political discourse.
3. The NSWNMA supports an electoral expenditure cap of \$2 million with annual indexation for Third Party Campaigners.
4. The NSWNMA opposes the restrictions on acting in concert that exceeds the applicable cap for the campaigner on the basis that it should not be unlawful to campaign with other Unions/Civil Society Organisations/ANMF NSW Branch on common issues or to conduct a co-ordinated campaign under the leadership of our peak body Unions NSW.
5. The NSWNMA seeks the definition of electoral expenditure be restored to the previous definition of *“electoral communication expenditure”*.
6. The NSWNMA supports a reduction in the capped period to commence prior to the election, starting 1 January.
7. The NSWNMA supports the current:
 - a. registration process for Third Party Campaigners with the NSW Electoral Commission.
 - b. registration process for electoral materials with the NSW Electoral Commission
 - c. requirements for handing out at pre poll centres and on election day.
8. The NSWNMA supports the disclosure system but recommends a less administratively burdensome approach which would increase transparency.

NSWNMA Campaign for Ratios

The NSWNMA has been campaigning for safe nurse-to-patient ratios since before 2010. Public sector nurses and midwives across the state have been standing up for safe patient care by advocating for a more transparent nurse-to-patient ratios system that would help deliver safe care to all patients across NSW.¹

This campaign has widespread public support.

The current nursing hours per patient day (NHPPD) staffing model, has proven to be fallible to management manipulation. Without minimum nurse-to-patient ratios, nurses and midwives will continue to struggle to meet demand and maintain safe patient care.

In the lead up to the 2019 State Election this campaign by nurses and midwives across NSW resulted in unprecedented promises from both major parties:

- NSW ALP promised nurse-patient ratios and no privatisation of public hospitals.
- NSW Liberal Party promise 5000 nurses and midwives recruited over 4 years with half in regional areas. – this would result in an increase of Peer Group B and C hospitals across NSW, from 5.2 hours to six hours and 5.5 to six hours respectively.

Ratios were in sight

The Ratios promise by the ALP was incorporated into their health policy platform. Buoyed by both promise and policy, nurses and midwives resolved to campaign more strongly than ever to win safer patient care for all patients in NSW.

NSW has fallen behind

Legislated Nurse-to-patient ratios were introduced in Victoria by the Victorian Labor Government in 2015 (part of their industrial agreement since 2000) and in Queensland in 2016 by the Queensland Labor Government.

¹ Published in *The Lancet*: The largest-ever international study of the relationship between nurse staffing levels and the quality of health care, which examined health outcomes in 30 countries on 4 continents has shown that patients suffer when nurses are forced to work without safe staffing ratios. Increasing the workload of nurses produces worse clinical outcomes for patients, including higher mortality following surgery. This research was led by Dr Linda Aiken, professor of nursing and head of the Center for Health Outcomes and Policy Research at the University of Pennsylvania. Dr Aiken is internationally renowned for her work on the relationship between the health care workforce and the quality of health care.

Our members endorse campaigns

As a democratic organisation, NSWNMA members guide, direct and approve campaign activities:

- The NSWNMA Annual Conference is the supreme decision making body where branch delegates present and vote on motions and determine policy.
- The NSWNMA's governing body, the NSWNMA Council of elected officers meets as a minimum every two months and more often as required.
- Elected delegates attend Committee of Delegate meetings every two months.
- Branches in the workplace meet together regularly.

The NSWNMA Rules

The objects of the NSWNMA include:

- "(a) to promote the interests of all members in matters relating to employment and health and safety in the nursing profession and to afford opportunity to discuss such matters;*
- (b) to provide means for combined action in relation to such matters;*
- ...*
- (d) to co-operate or associate with other organisations, associations, or unions, or persons having objects similar to the Association, to the extent of such objects, or, with the approval of Annual Conference, to amalgamate or affiliate with such other organisations, associations, or unions;*
- ...*
- (t) to aid and join with any other association or federation of associations having as part of their objects the promotion of the industrial interests of employees for the purposes of furthering such interests;*
- (u) to aid and join with any other body, association or organisation which has as its objects the furtherance of humanitarian, social or community causes;*
- ...*
- (w) to be non-sectarian and non-party-political, whilst maintaining the right for political lobbying and debate;.."*

The NSWNMA is not affiliated to any political party and we would welcome the commitments for nurse to patient ratios and no privatisation of public hospitals by any political party.

As can be seen in our Rules (effectively our Constitution) we are committed to collectivism and social justice to advance the interests of our members. To act in accordance with our Rules is under sustained pressure in NSW with the electoral and industrial laws both attempting to thwart the voices of nurses and midwives.

Fair and Democratic State Elections in NSW

The NSWNMA acknowledges the breadth of the Terms of Reference for the Inquiry into the Administration of the 2019 NSW State Election and Related matters.

We understand that these Election Inquiries occur routinely following each election.

The NSWNMA did not make submissions to the last Inquiry in 2015.

In 2011 the NSWNMA made comprehensive submissions to that Inquiry which:

- rejected the Election Funding, Expenditure and Disclosure Amendment Bill 2011, and
- sought amendments to the then legislation to remove expenditure caps and overcome confusion over what expenditure should be disclosed.

The *Electoral Funding Act 2018* (“EFA”) introduced in May 2018 severely impacted the ability of the NSWNMA to campaign effectively due to:

- the broadening of the electoral expenditure definition (s7).
- the expenditure cap for Third Party campaigners of \$500,000.
- making it unlawful to act in concert with another union(s) and or civil society organisations to exceed the cap. This had the practical effect of preventing the NSWNMA from even talking to another Campaigner for fear of being caught by a joint cap.

For fair and democratic elections in NSW, we highlight the Objects in section 3 of the EFA:

“(cf section 4A EFED Act)

The objects of this Act are as follows:

- (a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,*
- (b) to facilitate public awareness of political donations,*
- (c) to help prevent corruption and undue influence in the government of the State or in local government,*
- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,*
- (e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme.”*

Whilst we support these objectives, the NSWNMA submits that the EFA is contrary to the objects in relation to being contrary to a fair scheme. That fairness does not extend to Third Party Campaigners.

High Court Challenge

The EFA imposes severe and unjustifiable restrictions on legitimate member –based democratic organisations such as ourselves by limiting our constitutional right to implied freedom to discuss political matters.

As such we challenged the constitutional validity of the legislation and participated as a Plaintiff with Unions NSW and other unions successfully in *Unions NSW v New South Wales [2019] HCA 1*.

NSWNMA members directed us to pursue all avenues to challenge this legislation resulting in the High Court Case with hearings in December 2018. This decision by members to authorise the NSWNMA's participation in challenging the electoral laws at the highest level possible - in the High Court was not taken lightly.

The special case pursued in the High Court is best encapsulated by KIEFEL CJ, BELL AND KEANE JJ:

“The questions stated in the parties' special case concern certain changes effected by the EF Act. The first involves the reduction in the amount that third-party campaigners, such as the plaintiffs, are permitted to spend on electoral campaigning. The second is a prohibition on third-party campaigners acting in concert with others so that the cap applicable to the third-party campaigners is exceeded. The plaintiffs contend that each of the provisions effecting these changes is invalid because it impermissibly burdens the implied freedom of communication on matters of politics and government which is protected by the Constitution.”

The NSWNMA highlights to this Committee the relevant excerpts from the High Court judgement in *NSW v New South Wales [2019] HCA 1* on the 29th January 2019:

1. *“Is s 29(10) of the Electoral Funding Act 2018 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?”*

Answer

Yes.

2. *Is s 35 of the Electoral Funding Act 2018 (NSW) invalid (in whole or in part and, if in part, to what extent), because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?”*

Answer

Unnecessary to answer”

The NSWNMA welcomed this important decision of the High Court. The decision freed the NSWNMA to keep the people of NSW informed about the issues around patient safety in our public health system. The NSW community should be able to expect a safer public health system, properly staffed with nurses and midwives.

The High Court decision must be utmost in the Committee's mind in all deliberations concerning electoral laws.

The NSWNMA asserts that the Recommendations we make in these submissions would enable a fair platform in NSW for political debate and allow Third Party Campaigners a legitimate voice without drowning out the major political parties or those of powerful media organisations at State election time.

The attempts to silence the voices of Third Party Campaigners is disproportionate to the enormous influence of the media on the outcome of elections. We note that media organisations are not excluded from the *Electoral Funding Act 2018 (NSW)*.

In these submissions the NSWNMA will address the following key themes:

1. Regulation
2. Third Party Campaigner
3. Electoral expenditure cap
4. Electoral expenditure definition
5. Capped expenditure period
6. Acting in concert
7. Donations
8. Administration matters

1. Regulation

The Electoral Funding Amendment (Savings and Transition) Regulation 2019 (the Regulation) was introduced shortly before the March State Election on 8 February 2019 and expires on 31st December 2019. The Regulation:

- introduced an electoral funding cap of \$1,288,500 for any third-party campaigner registered before 1 October 2018 (NSWNMA) and
- changed the definition of "electoral expenditure" in s7 of the EFA to the former definition found in s87 of the *Election Funding, Expenditure and Disclosures Act 1981* ("EFED") "Electoral expenditure (and electoral communication expenditure)":

NSWNMA members are extremely concerned about what will happen once the Regulation reaches its expiry and our ability to campaign fairly for ratios and engage in the political discourse.

2. Third Party Campaigner

The NSWNMA is a registered Third Party Campaigner. We have registered as a Third Party Campaigner for State elections since the 2011 State election (when first required to register). We appoint an official agent and comply with disclosure and campaign account requirements.

As part of our democracy it is essential that in the lead up to elections our voices and those of other campaigners be heard in amongst those of political parties and powerful media organisations. The expenditure cap must be fair to enable us this opportunity to be heard and to participate in the public debate.

It is legitimate for third-party campaigners, such as unions, to express the views of our members when elections are being decided by the people.

It is a real opportunity for the NSWNMA to reasonably be able to present our case.

Over recent years the industrial rights of nurses and midwives in NSW have been curtailed with limited access to the NSW Industrial Relations Commission along with the removal of bargaining rights due to the Government Wages Policy.

Currently the Public Health System Nurses and Midwives' Award is "negotiated" annually. Any campaign to improve wages and conditions falls into the "electoral expenditure" territory in the lead up to elections. This a further barrier to our lawful right to bargain collectively.

Without that legitimate voice, the NSWNMA has been left with no option but to campaign constantly and vigorously – especially in election periods where government and candidates for election and their respective political parties are more likely to listen to the voices of their constituents.

This campaign continues to be strongly supported by the members of the public as shown in a survey conducted in 2018 which demonstrated that there is widespread support for mandated ratios in public hospitals.

Surveys of nurses and midwives continue to show that a vast majority view the importance of ratios personally, professionally and for safe patient care as an important issue.

Together with our members we will continue to legitimately campaign on issues that are important for nurses and midwives in the interest of their patients and the communities they serve.

3. The Electoral Expenditure Cap is Insufficient

The NSWNMA does not support the current electoral expenditure cap for a State general election which commences 1 October in the year before the election and ends on Election Day.

\$1,288,500 is the current cap subject to annual indexation for Third Party Campaigners.

Given the importance of government policy and legislation to the working lives of nurses and midwives this is a very small amount and is only sufficient for limited campaigning.

The NSWNMA supports a cap of \$2 million subject to annual indexation. We believe this is realistic and proportionate to the expenditure caps of the political parties.

Alternatives under consideration by the Committee must retain the annual indexation.

The cap proposed by the NSWNMA will in no way drown out the voices of the political parties with their far greater expenditure caps.

The caps on “electoral communication expenditure” were introduced in 2011 – caps we opposed in submissions at the time. In the submissions before the current Inquiry we note that our position has changed significantly from our 2011 submissions whereby we sought the removal of any cap on electoral expenditure.

The cap for Third Party Campaigners in March 2011 was \$1,166,600 and in March 2015 was \$1,288,500 (if registered prior to the capped period).

During the High Court proceedings we submitted that the s29(10) of the EFA which set the cap was not legitimate and that:

“the purpose of s 29(10) is essentially discriminatory. It aims to privilege the voices of political parties in State election campaigns over the voices of persons who do not stand or field candidates, by preventing third-party campaigners from campaigning on a basis equal to parties or groups of independent candidates.”

The juxtaposition of the EFA's halving of the expenditure cap from \$1,050,000 to \$500,000, significant broadening of the definition of electoral expenditure to capture previously uncaptured expenses along with the offensive acting in concert provisions immensely impacted Third Party Campaigners. The NSWNMA faced the NSW Government using legislation to minimise or even silence our long running campaign for improved nurse-to-patient ratios to help deliver safer care to all patients across NSW.

Commenting on the EFA and its large reduction in the cap and introduction of the acting in concert offence – we refer to the High Court proceedings (para 221):

“As senior counsel for the plaintiffs submitted, it was clear “what this law is doing” but one simply does not “know why it is doing that other than to shut down that protected speech. That submission should be accepted.”

The changing landscape of electoral expenditure caps in NSW:



A cap of \$2 million subject to annual indexation would not drown out the voices of the political parties and their privileged position in election campaigns.

In contrast, payments from the Election Campaigns Fund for electoral expenditure in connection with the 2019 NSW State Election provided a maximum entitlement for the major parties (as at September 2019 NSW EC website) ²as follows:

- Country Labor Party (NSW Branch) \$ 5,697,833.76
- Australian Labor Party (NSW Branch) \$ 5,133,398.76
- The Liberal Party of Australia NSW Division \$11,301,138.36

Given the current media landscape and to put the electoral expenditure cap in context, an indication of costs for a modest campaign for a Third Party Campaigner is:

- TV advertisements (cost for production, research and media buy in metropolitan and regional areas over a 4 week period) \$1,150,000;
- Radio advertisements \$ 350,000;
- Newspaper advertisements \$ 200,000,
- Digital media. \$ 100,000

Other examples of the cost of electoral expenditure include:

- The Lamp Magazine \$90,000
- Research \$60,000
- Posters, How to Votes³, Stickers \$30,000
- Telephone/Conference/SMS costs \$20,000

In the 2015 State election the NSWNMA spent \$907,831.

Depending on the issues for our members at election time these expenditure amounts vary from election to election. The ANMF NSW Branch was not registered then as a Third Party Campaigner as it has only had its own employees since 2016 due to the federal industrial landscape and representing members across both State and Federal jurisdictions.

The EFA's changed definition of electoral expenditure meant staff costs not previously required to be included in the expenditure cap had to be captured for disclosure purposes.

We cannot express enough how much this \$500,000 cap enormously inhibited our ability to engage in paid media campaigning and/or associated expenditure.

Due to the volatile environment around electoral expenditure, the NSWNMA was forced to hold off on paid media advertising (TV or radio) until the cap was restored to \$1,288,500. During the period between the High Court decision and the Regulation we campaigned conservatively despite the opportunity presented without any cap.

² Publicly available <https://elections.nsw.gov.au/About-us/Reports/Funding,-disclosure-and-compliance-reports-and-sta/2019-NSW-State-Election-payments>

³ The 2019 State Election was the first election the NSWNMA has ever produced and distributed 'How to Vote' material.

Because on the uncertainty around electoral expenditure and the unlawful acting in concert provisions in the lead up to the 2019 State Election, our electoral expenditure as disclosed in September 2019 to the NSW Electoral Commission was a total of \$1,012,231.98:

- | | |
|-------------------|--------------|
| • NSWNMA | \$677,198.44 |
| • ANMF NSW Branch | \$335,045.54 |

The 2019 March election is not the year to examine our electoral expenditure in the context of a cap. On the contrary, it was a time we felt so constrained and uneasy that we might exceed an ever changing cap that we felt compelled to take a very conservative approach to our expenditure.

If the cap had not been altered by the EFA and the subsequent uncertainty, we would have run a very different campaign and prosecuted our case in the public arena by including broadcast television in support of our campaign.

Much of our expenditure was aligned to the NSWNMA's core usual business where organisers visit members across NSW – which was all captured for disclosure purposes by the definition of electoral expenditure.

Our approach was very conservative and possibly considered to be an over-reporting approach for fear of falling foul of laws in an environment where a spotlight may have been on the NSWNMA as a Plaintiff to the High Court and as a campaigner with a history of expenditure at election periods.

4. Capped Expenditure period

The current capped expenditure period for a State general election:

- commences 1 October in the year before the election
- ends on election day.

This capped period is approximately 6 months prior to the election.

The capped period is complicated by the fact that our member research for example, which we regularly conduct (not just at election time) is currently captured as electoral expenditure (whether or not it is external or internally undertaken), particularly where it subsequently influences any campaign during the capped period.

Whether you are a political party, a media organisation or a third party campaigner, the peak of an election campaign only really commences 3 months prior to the election. The period should reflect this peak activity from 1 January – just short of 3 months.

Perhaps insight into peak activity is provided by the *Broadcasting Services Act 1992 (Cth)*, political parties, candidates and others who are no longer able to purchase any political advertising on radio and television in the electoral blackout from midnight Wednesday to the end of polling day. Social media, text messages and/or phone calls are excluded. This blackout does not extend to articles and opinion pieces in the media close to the Election Day and the influence that has on voters. In a sense this leaves the powerful media organisations without a cap at all.

The NSWNMA supports a reduction in the capped period to commence prior to the election, starting 1 January.

5. Electoral expenditure definition

The electoral expenditure cap and the definition are inextricably linked.

While the cap has undergone substantial changes so has the definition.

For the NSWNMA running an issues based campaign which affects health in NSW: purportedly one-third of the NSW Government budget - quickly morphs into electoral expenditure. It is difficult to argue that any campaigning on health in the lead up to a State election is not trying to influence the vote at that election.

The NSWNMA's core usual business where organisers visit members across NSW to discuss their issues and speak to members on the phone all met the definition of electoral expenditure. These staff costs along with travel to rural areas all added up to significant disclosable expenditure.

The definition of electoral expenditure should not be so broad as to capture our business as usual and everyday staff and travel costs.

Whilst we have an expenditure cap we need to spend the money wisely and in accordance with our obligations to act in the best interests of members. As such our messaging and advertising is tested and endorsed by members. This research is essential for our campaigning.

Just as the expenditure cap was halved, the *Electoral Funding Act 2018* (EFA) broadened the definition of electoral expenditure to:

"7 Meaning of "electoral expenditure"

(cf section 87 EFED Act)

(1) For the purposes of this Act, "electoral expenditure" is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election, and which is expenditure of one of the following kinds:

- (a) expenditure on advertisements in radio, television, the internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,
- (b) expenditure on the production and distribution of election material,
- (c) expenditure on the internet, telecommunications, stationery and postage,
- (d) expenditure incurred in employing staff engaged in election campaigns,
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),
- (f) expenditure on travel and travel accommodation for candidates and staff engaged in electoral campaigning,
- (g) expenditure on research associated with election campaigns (other than in-house research),
- (h) expenditure incurred in raising funds for an election or in auditing campaign accounts,
- (i) expenditure of a kind prescribed by the regulations.

(2) Electoral expenditure does not include:

(a) expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament, or

(b) expenditure on factual advertising of:

(i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or

(ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or

(iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties, or

(c) expenditure of a kind prescribed by the regulations.

(3) Electoral expenditure does not include expenditure incurred by an entity or other person (not being a party, an associated entity, an elected member, a group or a candidate) if the expenditure 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. ..."

The NSWNMA's Ratio campaign is our normal business and the dominant purpose has not been to influence the voting at an election and accordingly has not been disclosed previously. Our different approach in the 2019 State Election meant this was disclosable.

Where an issue arose during the capped period – for example a Coroner's finding that inadequate staffing in a ward/unit was a contributing factor to death. This likely scenario in which members seek our support, prompts our engagement in public comment. In an election context this becomes a separate issue to disclose - even if it is part of expenditure on a campaign which was previously not disclosable.

The Regulation introduced just before the March State Election on 8 February 2019 introduced an electoral funding cap of \$1,288,500 for any third-party campaigner registered before 1 October 2018 (NSWNMA) and changed the definition of “electoral expenditure” in s7 of the EFA to the former definition found in s87 of the *Election Funding, Expenditure and Disclosures Act 1981* (“EFED”) “Electoral expenditure (and electoral communication expenditure)”:

“87 Meaning of “electoral expenditure” and “electoral communication expenditure”

(1) For the purposes of this Act, electoral expenditure is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.

(2) For the purposes of this Act, electoral communication expenditure is electoral expenditure of any of the following kinds:

- (a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,*
- (b) expenditure on the production and distribution of election material,*
- (c) expenditure on the Internet, telecommunications, stationery and postage,*
- (d) expenditure incurred in employing staff engaged in election campaigns,*
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),*
- (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure, but is not electoral expenditure of the following kinds:*
- (g) expenditure on travel and travel accommodation,*
- (h) expenditure on research associated with election campaigns,*
- (i) expenditure incurred in raising funds for an election or in auditing campaign accounts,*
- (j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.*

(3) Electoral expenditure (and electoral communication expenditure) does not include:...

Note. Division 2B caps electoral communication expenditure during a State election campaign (and Part 5 limits public funding for such expenditure at State election campaigns to part of that capped amount). Division 2 (section 93) requires disclosure of the above electoral expenditure incurred at any time for State and local government elections. Section 96N also requires the annual disclosure under this Part by a party of donations and electoral expenditure to be accompanied by an audited annual financial statement of the party.”

The exclusions for expenditure from the abovementioned definitions are relevant and specifically focused upon political parties - not Third Party Campaigners.

This change in definition created confusion – even with the NSW Electoral Commission website which displayed the EFA definition (as at 20 September 2019).

<https://www.elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/What-is-electoral-expenditure>).

Lack of certainty and clarity around these definitions is certainly not a new phenomenon and once again we sought advice on this complicated issue:

- We were obligated to report electoral expenditure but the Regulation referred to “electoral communication expenditure” under the EFED Act (the previous Act).
- Essentially the implications of this for Third Party Campaigner disclosures was that even though the cap of \$1.28 million applies to 'electoral communication expenditure' (as defined under the previous legislation), unions are required to disclose 'electoral expenditure' as defined by the Act.

As an organisation that is strongly committed to transparency and disclosure, the NSWNMA recommends that the definition focusing on electoral communication expenditure be restored.

The expenditure definitions and requirement for disclosure should be clear in the Act:

- to permit us to continue our business as usual;
- to exclude everyday staff and travel costs, and
- to exclude member research (regardless of who conducts it).

This will alleviate the contradictory and impractical considerations of capturing and disclosing a \$20 pizza for members discussing ratios at a meeting (with a requirement to evidence expenditure via a receipt) compared to the complete appropriateness of disclosing a \$300,000 radio advertisement as electoral expenditure.

6. Acting in concert

The EFA made it unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election. Section 35(2) defined ‘act in concert’:

“A person acts in concert with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object...of having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate.”

Because the caps included in the current Regulation are not an ‘applicable cap’ for State election purposes, acting in concert is not covered - except the restriction in relation to electoral district expenditure.

As an affiliate of Unions NSW the NSWNMA joins with other unions to act in the best interests of members to campaign on issues of common interest to members of Unions NSW affiliates.

The idea that informal discussions could bring another campaign into our expenditure cap with the threat of significant penalties seems beyond the realm of any common sense approach and the legislative intent. Despite best efforts to comply with the legislation regime, this provision could risk inadvertent error for a Third party Campaigner.

These may or may not coincide with major issues affecting nurses and midwives or health that we are also campaigning on.

As a large member organisation with progressive values the NSWNMA is approached by many organisations outside the union movement who pursue worthy causes. This provision fetters our ability to campaign on issues of importance for our members – affecting both their professional or personal lives. The acting in concert provisions means any support we consider providing to such organisations (eg family violence groups) is heavily scrutinised:

- Are they are a Registered Third Party Campaigner or not?
- Is the issue in connection with promoting, opposing or influencing the voting at an election?
- Is the expenditure captured?

The NSWNMA supports a fair society and is committed to social justice. We support and have alliances with a range of civil society organisations and not for profit organisations. Not all of these bodies are registered third party campaigners. Areas we support include:

- workplace safety;
- aged care;
- advancing reconciliation
- family violence;
- climate and environment;
- drought relief and
- tax justice and fair trade
- refugees
- women's rights
- equality

Furthermore the acting in concert provisions also impacted on the NSWNMA working with the NSW Branch ⁴of our national union. As a result we minimised our expenditure for the NSWNMA and ANMF NSW Branch for fear of acting unlawfully with the acting in concert provisions only lifted just before the election by the Regulation.

⁴ Due to Federal regulation and working across both the public and private sector in NSW, Organisers must be employed by the ANMF NSW Branch in order to be eligible for Right of Entry permits to exercise their legal rights in the private sector including private hospitals, day procedure centres and aged care facilities.

In his separate judgement in the High Court case, Justice Edelman found that the acting in concert provision was unconstitutional. Accordingly we ask the Joint Standing Committee to remove the offence of acting in concert.

7. Donations

The NSWNMA supports the transparency provided by the current disclosure system. We understand the receipt of donations is a live, ongoing issue with the political parties.

We complete half yearly and annual disclosures of political donations for the NSWNMA and the ANMF NSW Branch.

We support the current requirement to disclose political donations of \$1,000 or more. We do however make a practical suggestion to extend the current requirement to disclose within 21 days of being made or received to allow for the provision of receipts (detail of which is required with the disclosure). Where the provision of receipts is delayed, 21 days can be difficult to comply as a practical issue.

We do not generally accept any donations.

A suggested approach to ensure transparency would have donations being sent straight to the NSW Electoral Commission for vetting. Once determined they are genuine donations then they could be distributed to the recipient.

8. Administration Matters

The administration undertaken by the NSWNMA to comply with NSW EC requirements is estimated at 7 FTE days with the involvement of a range of key personnel across finance, communications, senior management and administration.

Due to the EFA definition of “electoral expenditure” the disclosure for the 2019 State Election included expenditure for staff involved in campaigning (both staff time and associated travel costs).

The capture of travel costs was particularly onerous, having to include travel and accommodation as well as meals – down to minor items such as coffee. These costs are paid for on credit card and the 2019 disclosure included almost 500 individual credit card expenses.

Our disclosure documentation evidenced this expenditure via a report generated from the finance system – we did not include individual invoices per the requirements. This level of disclosure seems an extraordinary amount of information to provide to the NSW Electoral

Commission – let alone the notion of providing invoices for almost 500 items which included a significant number of low cost incidentals. Such information and supporting invoices cannot be particularly illuminating for NSWEC in the context of examining electoral expenditure.

The NSWNMA recommends the definition of electoral communication expenditure be restored which would make the disclosures appropriate.

Alternatively, in the absence of a sensible approach to change the definition we recommend consideration of exempting the disclosure of expenses under \$100 and requirement to provide receipts for expenditure to be above a certain amount: for example \$500.

Alternatively we could disclose the total amounts for travel and accommodation and retain all the material for record keeping available for audit. We note that the Australian Electoral Commission asks for total amounts without the requirement to provide supporting invoices.

The administration burden works both ways. We reflect on the NSW Electoral Commission having to wade through all the receipts. It should be easier for the Electoral Commission to consume and check the information we provide in disclosures. It is almost an obstruction to transparency being overwhelmed with massive amounts of information - too much to scrutinise.

With respect to the registration of electoral material, 2019 was the first experience doing so by the NSWNMA. Despite the formal registration process we are still required to attach these documents to our disclosures -administratively this seems unnecessary and double handling.

Finally, it is incredibly unwieldy to even provide the disclosure documents with the files being too large to send by email. Ultimately we had to post a USB containing the data.

What option is there for the nurses and midwives of NSW if electoral laws silence them?

Our members understand the issues around electoral laws and the impact that changes have on their voices being heard. Their endorsement to proceed to the High Court to challenge electoral laws and being successful has heightened that understanding.

Members are on notice that the Regulation expires in December 2019 and that the NSW Government will once again be considering the electoral laws.

At the July 2019 Annual Conference, the NSWNMA's supreme decision making body, delegates proposed, debated and endorsed a motion for the NSWNMA to investigate the formation of a political party to progress and advance the interests of nurses and midwives in NSW.

Delegates have their say:

"We spent a lot of time in our scrubs over the summer heat making that connection with people in our community and they were very, very open to what we had to say... We need a stronger political voice. The election result was really, really disappointing for us so we need to put our toe in the water here, we need to investigate this, we need to consider this as an option to give us a political voice for our patients, the babies, midwives and nurses – we all deserve this."

"I think it is important that we have some sort of representation within Parliament because they don't listen to us outside of it."

"So let's look at another way of campaigning; we are power, let's harness that power let's use it."

Frustration has been expressed by the membership with the political system coupled with the ongoing threat of limitations and restriction on the ability of nurses and midwives to campaign freely around public policy and public health issues critical to our society.

The combination of pressure on electoral and industrial laws has forced the nurses and midwives of NSW to consider alternatives for having their voices heard.



Consultation with members is currently underway to seek the views of the broader membership as to the next steps regarding the formation of a political party.

Conclusion

The NSWNMA asks the Joint Standing Committee to listen to the thousands of nurses and midwives we represent.

We seek a fair and democratic electoral system where our voices will be heard on the issues affecting healthcare in this State.

The major parties need not fear that they will be drowned out by third party campaigners. Nor should they be afraid of groups acting collectively to pursue common agendas in the best interests of their members.

The High Court has been very clear: The NSW Government has acted contrary to The Constitution.

When considering electoral funding, in particular, the cap and definition of electoral expenditure and the acting in concert provisions, the NSWNMA asks the Joint Standing Committee to be cognisant of The Constitution and the implied freedom of speech enjoyed by our democracy in Australia.

NSW nurses and midwives should not be silenced for standing up for the patients and our precious health system.

Brett Holmes
General Secretary
NSWNMA

Date

Branch Secretary
ANMF NSW Branch

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Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the Administration of the 2019 NSW State Election and Related Matters

OCTOBER 2019