

**CAPS ON THIRD-PARTY CAMPAIGNERS' ELECTORAL EXPENDITURE IN
S29(11) AND S35 OF THE ELECTORAL FUNDING ACT 2018**

Organisation: New South Wales Nurses and Midwives' Association

Date Received: 29 April 2022

Submission to the Joint Standing Committee on Electoral Matters

Inquiry to examine caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the Electoral Funding Act 2018

Submitted by:
NSW Nurses and Midwives' Association
29 April 2022

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To: Leon Last
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**Re: Inquiry to examine caps on third-party campaigners' electoral expenditure in s29(11)
and s35 of the Electoral Funding Act 2018**

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 74,000 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 290,000 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 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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Joint Standing Committee Terms of Reference

This [inquiry](#) was referred to the Committee on 23 March 2022 to examine caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the Electoral Funding Act 2018.

Terms of Reference:

That the Joint Standing Committee on Electoral Matters inquire into and report on:

1. Whether the existing cap on electoral expenditure by third-party campaigners for an Assembly by-election under section 29(11) of the Electoral Funding Act 2018 is reasonably adequate;
2. If the answer to question 1 above is 'no', what the amount of the applicable cap should be; and
3. Whether the prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure in section 35 of the Electoral Funding Act 2018 should be retained, amended or repealed.

NSWNMA Recommendations

1. The NSWNMA's position on the cap on electoral expenditure for a by-election by third-party campaigners is that it is inadequate.
2. The NSWNMA's position on the electoral expenditure cap for a by-election for third-party campaigners is that it should be 75% of the candidate cap.
3. The prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure should be repealed.

In addition:

- a. The NSWNMA supports a system of transparency and disclosure.
- b. The NSWNMA supports a democratic system in NSW:
 - i. whereby all voices have an opportunity to be heard in political debate; and
 - ii. where it is lawful for groups to act collectively to engage in political discourse.

Response to the Terms of Reference

1. The Electoral Expenditure Cap is Insufficient

The NSWNMA does not support the current electoral expenditure cap for a by-election for third-party campaigners (TPCs).

Currently S29(11) caps expenditure at \$20,000 (subject to annual indexation). The indexed cap is currently \$21,600. This is an extremely small amount and severely limits any meaningful campaigning to the point that it is questionable whether we just waste members' money in attempting to run a campaign with such restrictions.

Based on the knowledge of electoral campaigning within the NSWNMA, the electoral expenditure caps in place have impacts beyond simply limiting the amount that a third-party campaigner can spend on an electoral campaign.

First, for the NSWNMA, it leads in some cases to a decision not to campaign at all. For example, currently if the NSWNMA formed the view that it would need to spend more than \$20,000 to run an effective by-election campaign, it would decide not to campaign in the by-election. With the restrictions of the cap, the NSWNMA has decided not to participate in the last few by-elections (2021 and 2022). It is the view of the NSWNMA that there is no value in spending members' funds on a campaign that cannot achieve its objectives.

Second, complying with the expenditure cap, requires both careful prediction and extensive tracking of expenditure. That requires administrative systems and management able to carry out this task, which needs to be done in as close to real time as possible. Because of the difficulty in tracking expenditure from multiple people as it occurs, the NSWNMA plans to spend less than the applicable cap on electoral expenditure so that the NSWNMA can ensure it does not accidentally eclipse the cap.

Third, as described above, because the EF Act restricts the NSWNMA's campaigning during a "capped State expenditure period", the NSWNMA is sometimes forced to schedule campaign activities outside the capped period even if that timing is not optimal for the campaign. This is particularly the case where there is an overlap between the issues the NSWNMA is campaigning on more broadly, such as the Nurse and Midwife to patient Ratios issue, and the issue the NSWNMA wants to focus on in the election campaign. It must be understood that it is the political party in Government which now decides the pay and conditions of public health system nurses and midwives via the Government's legislated wages cap. To achieve change we must campaign to influence that political party.

Fourth, the EF Act also raises uncertainties about whether the NSWNMA needs to take precautions or put restrictions on the day-to-day work that its union organisers might be doing in workplaces once an election or by-election is called. Organisers are key members of staff, and their role ordinarily involves them attending members' places of work to discuss working conditions and changes that may be made to improve them. Where an organiser is already engaged in addressing issues in a workplace, if those activities relate to issues that have a political element, there can be concerns over whether their activities may be seen as having the dominant purpose of influencing voting, and hence whether the costs involved with those activities, or the time of those staff, might be unwittingly caught as electoral expenditure. Until this is tested in the courts no definitive assurance can be given to organisers that they are required to report their discussions with members for the purposes of determining the expenditure is captured or not.

An example of this concern arose in the Upper Hunter by-election in 2021. On 19 April 2021, one of the NSWNMA's organisers who was working in the area on its ongoing nurse-to-patient Ratios campaign, contacted head office to check what the by-election meant for them as an organiser. On that occasion, NSWNMA's Media Advisor advised the organiser that "[NSWNMA staff will] need to be very careful about what [they] do and say, until a decision is made about whether [NSWNMA will] register as a third-party campaigner for the by-election."

2. What Cap is Recommended?

The NSWNMA supports a cap for TPCs of 75% of the candidate cap. With the current candidate cap being \$265,000, 75% would represent \$198,750.

This recommended cap reflects what could reasonably be expected to expend on an effective campaign that has some chance of making an impact on the issues that affect NSWNMA members. This higher cap particularly reflects the requirements to run a campaign for a metro by-election as the campaign cost indications below demonstrate.

The 2018 High Court proceedings that challenged the caps for State general elections for third-party campaigners included themes and arguments that equally apply to the question of by-election caps. For example, Gageler J in that decision:

"To be justified as no more than is reasonably necessary to achieve a level playing field for all participants in political discourse during an election period, the amount of the cap must, at the very least, leave a TPC with an ability meaningfully to compete on the playing field. The TPC must be left with a reasonable opportunity to present its case to voters."

Following are estimates of by-election campaign costs:

Regional by-election campaign cost guide

Print adverts - local press	\$	12,000
Radio adverts - local stations	\$	10,000
Shopping centre billboards	\$	10,000
Social media	\$	5,000
Corflutes and other collateral	\$	3,000
Direct mail campaign	\$	25,000
Total for a regional campaign	\$	65,000

Metro by-election campaign cost guide

Radio adverts*	\$	35,000
TV adverts*	\$	100,000
Print adverts - local press	\$	12,000
Shopping centre billboards	\$	10,000
Social media	\$	5,000
Corflutes and other collateral	\$	3,000
Direct mail campaign	\$	25,000
Total for a metro campaign	\$	190,000

* TV and radio typically only justifiable if at least 3 by-elections are on in a similar timeframe. These figures represent an allocation of one-third of the cost of a campaign aligned to respond to three metro by-elections.

To paraphrase The Honourable Justice Gageler, these campaign cost estimates would allow NSWNMA, as a third-party campaigner, to compete on a level playing field and have a reasonable opportunity to present its case to voters.

3. 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. 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."

The NSWNMA's position on the prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure is that it should be repealed.

As an affiliate of Unions NSW, the NSWNMA wishes to join with other unions to act in the best interests of members to campaign on issues of common interest to members of Unions NSW affiliates. There are often issues like government wages policy, workers compensation and other general industrial rights issues that we have in common with Unions NSW and other affiliates that are in addition to our principle campaign targets such as nurse and midwife to patient ratios.

There are many different ways in which unions can work together on campaigns – both industrial, and in the past, electoral campaigns. Building scale and mobilising large numbers becomes more difficult without joint campaign efforts. Being unable to rely on any resources provided by other unions / organisations limits the NSWNMA's capacity to promote issues beyond the NSWNMA's membership. While joint campaigning is not always appropriate, depending on the issues and the circumstances, being able to campaign jointly is an important aspect of making campaigns effective.

Campaigns in which the NSWNMA has worked with other unions include:

- (a) 2007 – Your rights @ work: Unions NSW organised this as a joint campaign and the NSWNMA was actively involved;
- (b) 2012 – Workers' compensation cuts and attacks on workers' rights: this was a joint campaign run by Unions NSW and involving the affiliated unions. NSWNMA was very actively involved and contributed funding;
- (c) 2015 – Campaign against privatisation of electricity assets: this campaign was run by the ETU. The NSWNMA was not actively involved in running the campaign, but lent support, assisting with rallies and doorknocking;

- (d) 2015 – Penalty rates campaign with United Voice (now UWU) and SDA. This was a joint campaign, and the NSWNMA was very actively involved;
- (e) 2016-18 – The campaign against hospital privatisation, “Keep our Hospitals Public”, was a joint campaign coordinated by Unions NSW. NSWNMA was very actively involved with affiliates HSU and ASMOF.

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.

It is unclear exactly what is prohibited under s.35 which makes avoiding contravening the Act very challenging. One consequence of this lack of clarity is that NSWNMA takes a highly conservative approach regarding working with other organisations during the capped expenditure period. 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 and/or personal lives. The acting in concert provisions means any campaign support we consider providing to such organisations (e.g. family violence groups) is heavily scrutinised by the NSWNMA considering question such as:

- Are they 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 these bodies are registered third party campaigners. Areas we support include:

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

Furthermore, the acting in concert provisions also impacted on the NSWNMA working with the NSW Branch¹ of our national union. As a result, for the 2019 State general election we minimised our expenditure for fear of acting unlawfully with the acting in concert provisions only lifted just before the election by the Regulation.

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.

¹ 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.

High Court proceedings 2018

For this submission it is pertinent to refer to the 2018 High Court proceedings that challenged the caps for State general elections for third-party campaigners. While the proceedings regarding expenditure caps were restricted to the question of State election caps, the themes and arguments equally apply to the by-election caps.

During the 2018 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 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.

It is unfortunate that the High Court did not explicitly confirm, beyond Edelman J, that just as s.35 had no ongoing application to the expenditure cap for general elections, it should have no ongoing application to by-elections as well.

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 NSWNMA welcomed the 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.

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 particularly if they present comprehensive policy positions to the electorate. Nor should they be afraid of groups acting collectively to pursue common agendas in the best interests of their members, ultimately voters should decide based on being the best informed that they can be without political parties being given the sole voice.

When considering electoral matters - in this instance the by-election cap and acting in concert provisions - the NSWNMA asks the Joint Standing Committee to be cognisant of The Constitution and the implied freedom of political communication enjoyed by our democracy in Australia.

Our members understand the issues around electoral laws and the impact that changes have on their voices being heard.

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



BRETT HOLMES

General Secretary, NSW Nurses and Midwives' Association

Branch Secretary, Australian Nursing and Midwifery Federation NSW Branch

29 April 2022

Date