

## **Inquiry into the Electoral Funding Amendment Bill 2023**

### **Supplementary Questions: Professor Anika Gauja**

1. Yes, the amounts provided through each of the three public funds in New South Wales (The Election Campaigns Fund, the Administration Fund and the New Parties Fund) provide resources to political parties and candidates that are currently not accessible by third party campaigners. This lessens the burden on established parties and candidates to raise funds to support election campaigns and day-to-day administration activities, that may eventually be directed towards a funding cap. The advantage speaks to a point I made as part of my evidence to the inquiry – which is that for the majority of third-party campaigners, it will be difficult to raise sufficient funds to meet the proposed expenditure cap.

2. The effectiveness of election funding regulation in NSW relies on the interplay between several elements of the legislative scheme – caps on the amount that can be donated to and spent by electoral participants, which seek to ensure that money cannot buy votes and political influence – and the provision of public funding, which provides electoral participants with the means to communicate with electors on political and policy matters. To ensure that the legislative regime operates effectively, all participants in the electoral process should be regulated. There is democratic risk in not placing expenditure caps on third party campaigners, when both parties and candidates are regulated, as significant expenditure could be used to dominate political debate in a particular campaign. It should be noted, however, that it also could be considered a democratic risk if this regulation is not appropriately balanced. Any caps must be set at a level so as to mitigate the chance of debate being dominated by a high-spender, but not so restrictive that a third party's participation in the campaign is curtailed.

3. In Canada third party expenses limits for regulated activities currently sit at CA\$579,950 (overall) and \$4,971 in any given electoral district (including by-elections) during a pre-election period. By contrast, limits for political parties are set at each individual election based on the number of voters in a riding, and the overall number of ridings a party is contesting. For the latest registered party limits (2022), this ranges between \$23,000 - \$130,000 per district. There are two key advantages of capping third party expenditure at a lower level than that of parties: the first is based on electoral exceptionalism – at election times parties and candidates should legitimately be able to shape the debate, with third parties being able to contribute at all other times. The second is the possibility that third parties with similar messages may proliferate endlessly, creating a risk of collusion.

Section 351 of the Canada Elections Act contains a prohibition on collusion between third parties and registered parties, potential candidates and associated persons. Section 351 also prohibits collusion by one or more third parties so that their combined partisan activity expenses, election advertising expenses and election survey expenses exceed the maximum amount.

I noted in my evidence that it would be difficult to enforce such a provision, insofar as it goes to the intent of the third parties, and the problems associated with distinguishing between collusion and a groundswell of legitimate political support. It is also worth noting that legislation in Ontario, which restricted third parties from spending more than \$600,000 in

the 12 months before an election was called was struck down by the Ontario Court of Appeal earlier this year (*Working Families Coalition (Canada) Inc v. Ontario (Attorney General)*, 2023 ONCA 139), as infringing the right of electors to receive information in order to meaningfully participate in the electoral process. It should be noted that this provision applied to the pre-election period, rather than the election period itself.

4. Electoral legislation should strive to provide participants with an equal ability to participate in election campaigns, though as I noted above, the theory of electoral exceptionalism privileges parties and candidates as key actors at the time of an election. Noting that parties and candidates may incur benefits from their incumbency status, all elements of an electoral regulation regime (donation caps, expenditure caps and public funding) must be considered in determining what constitutes, or facilitates, equal ability.

5. Caps should be set at a level that recognises third parties as legitimate actors in the electoral process, but not at the same level as parties and candidates, who might be regarded as the primary participants in the electoral contest. 75% of the party cap would be high by international standards, and 25% would reflect the most generous relative proportion of the Canadian regime (in a single seat). While there is the theoretical potential for third parties to influence debate with generous caps, the risk is diminished by the fact that third party activity is greatly varied and episodic.

6. Spending caps on all electoral actors (third parties, parties and candidates) build trust in the democratic process by ensuring a more level playing field for political debate, which cannot be influenced by the amount of money that is spent in a campaign.

7. I believe there is limited risk, or cross-over, from these provisions. Third party donations are captured in the existing donations caps.

8. Likely none in practice. There is no evidence, yet, to suggest that third parties have the financial ability – or will – increase their expenditure to meet a ten-fold increase in the cap. It is however, a very important point to note that compared to the major parties, minor parties and independent candidates may be more vulnerable to being ‘drowned out’ by entities that have greater electoral spending power.