

Public Accountability and Works Committee

Inquiry into integrity, efficacy, and value for money of the local small commitments allocation process

Answers to questions taken on notice by the Electoral Commissioner

Questions from The Hon Chris Rath

(1) What kind of enforcement mechanism would be necessary to back up such a register to ensure declarations would be forthcoming? I assume it would have to be self-declared rather than the Commission looking through every candidate, which would be too onerous.

Answer

The NSW Electoral Commission could not monitor in real time every candidate to determine if they had a personal interest in a campaign promise that the law required be disclosed ahead of an election. This would be too onerous and impractical, both in resource impacts and fairness to election participants. If a legal obligation was placed on a candidate to disclose and/or register any personal interest in a campaign promise, however, and the Electoral Commission was authorised to enforce it, such a change would need to be supported by an enforcement mechanism along the following lines, together with additional resourcing:

- a clear definition of what is the interest requiring disclosure. The Electoral Commission notes that, for example, Part 3 of the *Constitution (Disclosures by Members) Regulation 1983* specifies with some precision the types of interests that are required to be disclosed and kept on the Parliamentary Registers;
- a corresponding offence provision, similar to the offence of failing to lodge a declaration of reportable political donations during the pre-election period under section 141 of the *Electoral Funding Act 2018*. The Electoral Commission notes, however, that a strict liability offence would not be suitable if the obligation to disclose involves an assessment of the existence of a conflict of interest rather than prescribing specific interests be disclosed by a certain time (e.g. prior to the start of the voting period);
- clarity that the Electoral Commission was not authorised to provide advice to candidates about whether their specific circumstances required disclosing as a conflict of interest; and
- additional investigative powers if the Electoral Commission is expected to respond to allegations about undisclosed interests ahead of an election.

(2) Are there any penalties or enforcement after the election where candidates that weren't elected are posing in some way as the elected representative? For example, if there are candidates that fail to get elected but then after the election are in some way posing as the elected representative, is there any penalty or enforcement mechanism that the Electoral Commission has in place for trying to prevent that from occurring?

Answer

There are no penalty or enforcement mechanisms available to the NSW Electoral Commission under the *Electoral Act 2017* or any another NSW Act in relation to impersonating a member of the NSW Parliament.

(3) Say you run as the Liberal candidate for Sydney, or something like that, and then, after the election, when the election has concluded—at what point do you no longer hold that title or position to campaign in? Could you take that on notice? You haven't been preselected by your party for the 2027 election, for instance, but the election has concluded in 2023. At what point does your role end as an election candidate?

Answer

Under the *Electoral Act 2017*, a person remains a 'candidate' after 6pm on election day until the date on which the Electoral Commissioner declares the result of the election. This view is supported by the provisions governing recounts (see section 172(1)) and the death of a candidate after 6 pm on election day, but before the election has been declared (see section 220(5)).

Section 9(4)(b) of the *Electoral Funding Act 2018* provides that, for the purposes of the Act, a person who is a candidate in an election is taken to remain a candidate for 30 days after the election day for the election. This, however, is only in the context of their ongoing campaign finance and disclosure obligations. Whether an unsuccessful candidate continues to be considered a candidate of their party after this time is a matter for the relevant party and is not governed by provisions of electoral legislation in NSW.

Questions from The Chair, Ms Abigail Boyd

(4) Have there been any previous cases where we have looked at section 209, or is there policy guidance or any kind of guidance that you've ever put out that talks about how to be careful around that? I can imagine that if you are going around saying to people, "Look, if my party gets elected, I'll give you \$100,000", that could very easily be interpreted or misinterpreted as a vote-buying exercise. Where is the line and how do political parties make sure that they're not falling foul of it?

Answer

The Electoral Commission provides candidates with general guidance as to potential electoral law breaches, such as in its Candidate Handbook for recent state by-elections:

Electoral bribery including asking for or receiving any property or benefit in order to influence or affect the vote of another person (electoral bribery must be of a serious nature calculated to influence the vote of a particular person in a particular way and does not include the general provision of food and drink at "sausage sizzles" or benefit concerts and the like during election campaigns). <https://elections.nsw.gov.au/candidate-handbook-nsw-state-by-elections>

The Electoral Commission has not published any specific guidance about the exemption from the electoral bribery offences under the *Electoral Act 2017* for a "declaration of public policy" or a "promise of public action" and the extent to which it considers that such declarations and promises may lawfully include undertakings during campaigns about the future expenditure of public funds. If guidance was

developed, however, the Electoral Commission would acknowledge that election campaigns generally involve the making of public promises about the future expenditure of public funds. The Electoral Commission considers that the current exemption in section 209 is likely intended to be broad in scope to support traditional campaign activities, including voters being informed about the intentions of participants in an election.

Unlike proceedings for offences under the *Electoral Funding Act 2018*, a prosecution for an offence under the *Electoral Act 2017* does not require consent of the Electoral Commission. Any guidance or educational material the Electoral Commission could issue about the exclusions from such offences would not limit other prosecutors or courts. The Electoral Commission also cannot provide legal advice to election participants about their proposed campaign conduct, including to remain strictly impartial in the administration of an election.

(5) One of the reasons that I was very keen on this inquiry being established was to have recommendations that would guide the next election. It would be good to have a set of guardrails to make sure that a party doesn't fall foul of section 209. I am thinking about what every party can do to make sure it is all very, very clearly above board. Are you in a position, even on notice, perhaps, to come back with any sort of input into what those recommendations might look like in terms of ensuring that those types of allegations can't be made in the future?

Answer

The concepts of “declaration of public policy” and “promise of public action”, which are excluded from the section 209 offences, are not presently defined in the *Electoral Act 2017*. If further legislative guardrails were considered desirable, the Electoral Commission notes that the paper “Some Legal Implications of Pork Barrelling”, prepared by the Hon. J C Campbell QC FAAL in the context of the Independent Commission Against Corruption’s Operation Jersey, would be of assistance. In that paper, section 209 is compared to the former bribery offence under the *Parliamentary Electorates and Elections Act 1912* and Commonwealth legislation. See <https://www.icac.nsw.gov.au/investigations/past-investigations/2022/investigation-into-pork-barrelling--operation-jersey->

(6) I guess what I am more interested in is not you saying where that line is, but us making some recommendations that inform best practice—things like making it very transparent or open. Maybe those things are quite obvious. I would like to make it very clear what is happening and what arrangements there are.

Answer

Laws regulating the conduct of election participants during campaigns need to balance considerations of fairness, transparency for voters, freedom of political communication, and the public interest in maintaining trust in the administration of elections by an independent Electoral Commission. Electoral laws that create criminal offences also need to be reasonably capable of being enforced in a court by the Electoral Commission or another prosecutor. These considerations should inform any changes that may be explored to the electoral bribery offences in section 209, including whether the concepts of a “declaration of public policy” and a “promise of public action” could or should specify any circumstances in which such a promise or declaration involving the future expenditure of public funds is not exempt.

The Electoral Commission acknowledges that most election campaigns involve the making of public promises about the future expenditure of public funds. The current exemption in section 209 may be broad in scope to support such traditional campaign activities, and voters being informed about the intentions of participants in an election.

To assist the Committee, the Electoral Commission notes the following existing legislative transparency measures that are designed to support electoral integrity aims:

- the *Electoral Funding Act 2018* regulates the making and receiving of gifts and indirect campaign contributions to election participants and requires extensive disclosure of donations and expenditure
- the *Electoral Act 2017* requires election participants to register with the Electoral Commissioner any electoral material before it is handed out on election day and registered material is made available to the public on the Electoral Commission website
- the *Electoral Act 2017* requires candidates to provide a child protection declaration as part of their nomination papers, which is then published on the Electoral Commission's website
- local government candidates are required to disclose in their Candidate Information Sheets if they are property developers and these sheets are made publicly available.

Question from The Hon Mark Buttigieg

(7) Are there any other jurisdictions where oversight and enforcement bodies analogous to yours—in other words, electoral commissions elsewhere—have the power to delimit election promises based on perceived conflicts? Are there any other jurisdictions that are doing this now?

Answer

The Electoral Commission is not aware of any Australian jurisdiction that limits campaign promises based on the personal interests of candidates, or that limits donations or indirect campaign contributions from the potential future beneficiaries of campaign promises, other than through electoral bribery laws. It has not, however, reviewed regulations that may be imposed in an overseas jurisdiction where the electoral system may be similar to NSW.

To the extent that election promises include a statement or statements that purport to be factual and can be assessed as such, the South Australian and ACT Electoral Commissioners do have a role of regulation. Those statutory regimes do not include the regulation of campaign promises more broadly, however, only verifiable statements of fact.¹

¹ See Y F Ng, *Truth in political advertising laws: design, operation, effectiveness and recommendations for reform Final Report* December 2024, <https://apo.org.au/sites/default/files/resource-files/2024-12/apo-nid329295.pdf>