Submission No 29

INQUIRY INTO PROVISIONS OF THE ELECTION FUNDING, EXPENDITURE AND DISCLOSURES BILL 2011

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About the PSA

The Public Service Association of NSW (PSA) is an industrial organisation of employees registered under the NSW Industrial Relations Act 1996. It represents 45000 members employed in the NSW public sector as well as general staff employed in universities and employees in a number of formally public entities now operating in the private sector.

The Association welcomes the opportunity to make a submission to the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011.

Support for the Unions NSW submission

The Association would also like to indicate its support for the submission of Unions NSW on behalf of affiliated unions and union members across NSW. We also support all the recommendations of that submission.

Key elements of the Bill

The Election Funding, Expenditure and Disclosures Amendment Bill 2011(the Bill) contains two principal amendments to the existing statutory regime set out in the Election Funding, Expenditure and Disclosure Act 1981 (the Act) both of which are opposed by the PSA. For reasons we will elaborate below we recommend that the amendments as presented in the Bill be rejected by the legislature.

This is not to say we are opposed to a significant reconsideration of the existing arrangements for the regulation of campaign finance in this state or at a Federal level. The role of money in creating an asymmetry between parties in electoral competition needs to be addressed. A uniform system of campaign finance regulation that is constitutionally valid and applies for all elections across the Commonwealth and all the states and territories would be the best arrangement.

Aggregating Electoral Communications Expenditure of Parties and Its Affiliated Organisations

The Bill has two principal amendments the first contained in Schedule 1 [1] amends Section 95G with the effect of aggregate the electoral communication expenditure of a Party and its affiliated organisations. The amendment is set out below:

[1] Section 95G Aggregation of applicable caps

Insert at the end of the section:

> (6) **Aggregation of expenditure of parties and affiliated Organisations**
>
> Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and

> any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.
>
> (7) In subsection (6), an ***affiliated organisation*** of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).

The amendment to Section 95G creates a significant limitation on organisations wishing to affiliate with a political party. This is because the affiliated organisation will lose its capacity to campaign independently from the party to which it is affiliated. The effect of affiliation under this proposed provision will be to make affiliated organisations wholly subservient to the parties to which they are affiliated in terms of their electoral activities.

The massive risks associated with uncoordinated campaign activities between affiliated organisations and the party to which they are affiliated would force impractically close coordination between parties and affiliates. Given the consequential lose of independence this would entail the more likely result would be to force affiliated organisations to sever their ties to the party.

It is evident that the primary party constituted on the basis of organisational affiliates is the Australian Labor Party (ALP) with its historic structure based on affiliated trade unions. As a result the principal effect of this amendment will be to disrupt the structure of the ALP and to curtail the capacity of trade unions to participate in the electoral system via party political activity.

The PSA is not affiliated to the ALP, nor do we have any intention to affiliate with the ALP or any other party. Despite this the PSA believes that the right of unions to form political parties or to affiliate to existing political parties is a legitimate right that should not be infringed.

Both the amendment to Section 95G and the amendment to Section 96D (4) violate the right of unions to freely associate and participate in party political activity.

The PSA rules include the following objects:

> 2(d). To amalgamate affiliate with or incorporate with other unions, organisations or bodies having any objects in common with the Association or able to assist it in the attainment of any of its objects and to be represented thereon and to pay subscriptions and make donations thereto.
>
> 4. The Association shall have the absolute right to determine, publicise and publicly prosecute its official attitude or opposition to, or support, approval or disapproval, of the policy or lack of policy of any political party or any Parliamentary candidate."

The Bill would render these objects redundant and place an unfair limitation on the rights of members to organise in pursuit of their legitimate interests.

Unions are organisations founded on a collective ethos. They encourage collectivism and collective action by their members. This is at the heart of the concept of unionism. The Bill in its conception is premised on privileging an individualised approach to political activity. It is entirely consistent with the world view of the Liberal Party but it runs counter to the collectivist view of political activity that is part of the Labor and union tradition. It seems illegitimate, in a democratic society, for one concept of how democratic politics should be conducted to be imposed, through law, on a substantial element of the rest of society for whom that view is totally alien.

The legislature should not impose a restriction on how political parties are constituted and who can constitute them.

The practical consequence of this proposed provision is to discourage party structures based on collectivist approaches such as through affiliation of organisations.

It is relevant to ask is this a legitimate purpose? The constitutional consideration to which we are directed by 1(h) of the Inquiry's terms of reference provides guidance. The applicable test has been set out by the High Court in *Lange v Australian Broadcasting Corporation ('Political Free Speech Case) [1997] HCA25.*

> The test for determining whether a law infringes the constitutional implication
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> When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect[69]? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people[70] (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid. In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved. And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires.

Does this amendment 'effectively burden freedom of communication about government or political matters either in its terms, operation or effect'?

Party political activity is a form of political expression and a means for pursuing policy change in a representative democracy. The state should not dictate to citizens how and with whom they should associate in pursuit of legitimate political ends. Nor should the state create a regulatory framework that privileges one form of political organisation over another.

The amendment is directed to correcting a perceived imbalance in the current system of campaign finance, particularly the system of capped expenditure set out in Division 2B of Part 6 of the Act. But as the Unions NSW submission contends the evidence from the most recent election does not appear to validate this concern.

To limit a union's capacity to incur expenditure in pursuit of its object at any time, is to place an unreasonable burden on its capacity to communicate about government or political matters.

Prohibiting political donations other than by individuals on the electoral roll

Schedule 1 [2] amends Section 96D to prohibit political donations other than by individuals on the electoral roll. The effect of this provision will be to:

- prohibit third party campaigners from receiving donations from entities other than individuals
- prohibit entities including industrial organisations paying subscriptions for membership to a political party

The amendment is set out below:

[2] Section 96D
Omit the section. Insert instead:

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.

(4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly,

payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

(5) Dispositions of property between branches of parties or between associated parties that are, by the operation of section 85 (3A), taken to be gifts (and political donations to the parties) are not subject to this section.

The PSA opposes this amendment, particularly in regard to the inclusion of Third-Party Campaigners with in its scope. As dealt with elsewhere in this submission Third Party Campaigners should be treated differently to Parties and Candidates. To restrict the capacity of third party campaigners to raise funds is to impose a restriction on civil society that would be deleterious to the fabric of our democracy. The right of individuals to act individually or collectively in the political system should not be restricted by law.

For similar reasons the PSA also opposes the existing arrangements of caped political donations applying to donations received by third parties.

In a democracy citizens should be able to provide material support to causes and organisations established to pursue their interests. Extending support to an organisation is a form of political expression. That support could be in monetary form or in kind. While imposing restrictions on parties and candidates to raise funds may be legitimate, to extend that restriction to citizens and their advocacy organisations is a step too far in free society.

The consequence of the individualisation of the electoral system and the adverse impact of this form of restriction on the capacity of citizens to form organisations like peak councils is canvased in the Unions NSW submission. The PSA strongly supports the position put by Unions NSW in relation to this question.

Because the definition of political donation is also tied to the definition of Electoral Expenditure it consequently burdens freedom of communication by third party campaigners about government or political matters. (See discussion on page 8)

The PSA also strongly opposes the provisions of subsection 96D(4) for the reasons canvased above - citizens should be allowed to act collectively in a democracy.

The right to affiliate to any organisation or party should not be infringed. Individuals should be able to form associations freely and structure the financial arrangements of those organisations in a way that they freely determine. This is the underlining principle of freedom of association.

Party political activity is a legitimate means of pursuing public policy change in a free and democratic system. There is no legitimate or compelling reason why this activity should be done solely on an individualised as opposed to on a collective basis.

Associations are recognised as a legitimate form of citizen participation in the public domain. The advocacy of citizens through associations should not be limited exclusively to advocacy outside the party system. They should be able to advocate within party forums. As such limitations on the expenditure of funds held collectively for those ends places an illegitimate constraint on the capacity of citizens to engage in free political communication.

Regulating Third-Party Campaigners

The PSA questions the legitimacy of regulating Third-Party Campaigners at all. It appears that the reasoning behind the regulation of third party expenditure is to prevent parties and candidates being unfairly disadvantaged by the actions of non-electoral competitors. This is in order to preserve the primacy of parties and candidates as the central actors in the political system. The PSA does not believe this to be a legitimate objective that should be privileged over the competing principals of protecting freedom of speech and freedom of association.

Third-Party Campaigners and Capped Expenditure

The Bill also raises a number of concerns over the existing arrangements in their application to unions. The amendment aggregates '*Electoral Communications Expenditure*' a defined term that provides that basis for the system of capped expenditure set out in Division 2B of Part 6 of the Act.

The PSA does not support the system of capped expenditure applying to "Third-Party Campaigners".

Third Party Campaigners are not ordinary participants in the electoral process as they do not stand to directly benefit from the out come of an election in the way that Parties and Candidates do. They are generally advocacy organisations seeking to place issues in the public domain and despite the outcome of an election, remain dependant on elected public officials to implement their agenda.

The effect of the system of capped expenditure on Third-Party Campaigners is to limit the capacity for an organisation to legitimately place an issue in the public domain. It should be open to an organisation to spend every cent in its treasury in pursuit of its legitimate objectives without restrain if it is in the interests of its members to do so.

The current system of capped expenditure and the further limitations that would flow from the Bill place an unreasonable burden on the capacity to comment on and communicate about government or political matters.

The impact on public sector unions

Public sector unions are particularly burdened in this regard. The system of capped expenditure relies on the definition of *Electoral Communications Expenditure,* which is a subset of the definition of *Electoral Expenditure*. The Act defines Electoral Expenditure at Section 87 (1) in the following terms:

(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.

For public sector unions who represent workers employed by government, public policy affects everything public sector union members do. The government which sets the public policy is elected at “an election” and is composed of members who are “candidates” at elections and are often members of a “party”. Advocacy by public sector unions in the public domain necessarily has a barring on the electoral prospects of governments. The work of public sector unions often influences the voting both “directly” and “indirectly” at an election.

Third-party Campaigners should be regulated separately from political parties and candidates.

The PSA strongly supports the recommendation of Unions NSW to disentangle third party regulation from the arrangements that apply ordinarily to Parties and Candidates under the existing Act.

The evolution of the structure of the existing legislation has meant that the relatively new concept of Third-party campaigners has been added to the existing framework of regulation for parties and candidates. As a consequence many of the arrangements sit uncomfortably or create unintended burdens for entities classed as third-party campaigners.

An example is the impact of the proposed restrictions on donors to voters on the electoral roll. As not all members are enrolled, and hence not all members are eligible to make donations, an administrative difficulty is created by trying to disentangle their subscriptions which could wholly or in part be expended on electoral expenditure. As Third Parties do not have ready access to the electoral roll verifying eligibility would be difficult.

Similarly the Act creates the concept of a Campaign Fund which makes sense for candidates and parties but is ill suited to established organisations who may participate intermittently in the political process. This is particularly difficult where staff costs are required to be paid from the campaign fund yet staff are permanently employed for a range of activities that are not exclusively related to electoral expenditure.

The PSA supports the exclusion of Third-Party Campaigners from the definition of Electoral Expenditure and Electoral Communication Expenditure in Section 87 or in the alternative the PSA supports a narrowing of the definition of Electoral Expenditure to remove the reference to “indirectly” in relation to both promoting or opposing a candidate or party and in relation to influencing the voting at an election.

Are reporting requirements imposed on third parties burdensome to the right to free political expression?

The Act imposes reporting requirements on Third Party Campaigners. These requirements are now significant and impose administrative and cost burdens on organisations. These requirements act to restrict or discourage political participation. This burden is recognised in the statute at Section 97B(1) (a) (v). However unlike the arrangements for political parties and candidates which qualify for public funding under Part 6A there is no financial support from the state to assist third-parties meet their compliance obligations.

Conclusion

The Bill is not supported by any clear or legitimate public policy objective. It appears to be designed by one major party with the intent of undermining its major system competitor and as a result is not in the public interest nor consistent with established constitutional principles of free democratic electoral competition.

For the reasons outlined above the PSA calls on the Parliament to reject the Bill.