

**Submission  
No 10**

## **INQUIRY INTO CONDUCT OF ELECTIONS IN NEW SOUTH WALES**

**Organisation:** Liberal Party of Australia - NSW Division

**Date Received:** 15 July 2022

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# LIBERAL PARTY OF AUSTRALIA

NEW SOUTH WALES DIVISION

State Director

15 July 2022

The Hon. Robert Borsak MLC  
Chair  
Select Committee on the conduct of elections in New South Wales  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Borsak,

Thank you for the opportunity to make a submission to the Select Committee on the conduct of elections in New South Wales.

Broadly speaking, the Liberal Party believes the 2021 New South Wales Local Government Elections and 2022 New South Wales By-elections were conducted in a satisfactory manner, and we acknowledge the effort, experience and professionalism of the NSW Electoral Commission (NSWEC) in preparing for and conducting these elections, especially considering the circumstances in which they took place.

The Liberal Party seeks to maintain a constructive and effective relationship with the NSWEC, not only during the election periods, but throughout the electoral cycle.

The Liberal Party acknowledges the significant challenges of holding elections during the COVID-19 pandemic. The comments made in this submission are intended to provide constructive feedback so as to improve the conduct of elections in future and ensure a level playing field for all political participants.

## **COVID-19 Restrictions**

In response to the COVID-19 outbreak, governments around the world have put in place measures to prevent or control the spread of the virus. To deal with the public health risk of COVID-19 and its possible consequences in New South Wales, the Minister for Health and Medical Research has made a number of Public Health Orders, under section 7 of the *Public Health Act 2010*. These Orders have, necessarily, been amended frequently over the past two years as the pandemic has evolved.

As a result, political participants have needed to recalibrate their activities in order to play their part in protecting the health and well-being of other candidates, their volunteers, electoral officials and the general public.

Our observation is that, for the most part, political participants have taken responsible, common sense precautions in this regard. For instance, at the by-election for the Federal Division of Eden-Monaro, which took place early in the pandemic on 4 July 2021, candidates and political party

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representatives took part in teleconferences with Australian Electoral Commission and NSW Department of Health officials, including the NSW Chief Medical Officer, to better understand the risks and agree to measures that would seek to mitigate against infection or spread of the virus. These included appropriate physical distancing, reducing direct contact with voters (including the early use of QR codes), promoting good hygiene practices and record keeping to allow contact tracing to occur should it be necessary.

### Directions issued by the Electoral Commissioner

Following the declaration by the Australian Government of a biosecurity emergency in respect of COVID-19, which was described as 'a human coronavirus with pandemic potential', the former Minister for Local Government, the Hon Shelley Hancock MP, announced on 25 March 2020 that the local government elections due to take place on 12 September 2020 would be postponed to 4 September 2021. The Minister published orders in the Gazette on 29 June 2020 to this effect.

In response to the escalating outbreak of the Delta variant of the COVID-19 virus in Greater Sydney and the potential for further outbreaks in regional areas, the former Minister published further orders in the Gazette on 25 July 2021 postponing those elections to 4 December 2021.

The *Local Government Amendment (COVID-19—Elections Special Provisions) Bill 2021* passed the NSW Parliament on 19 October 2021, which enabled the making of regulations to modify the provisions of the *Local Government Act 1993* that would apply to the 2021 elections in order to protect the health, safety and welfare of the community.

Pursuant to the *Local Government Act 1993* and the *Local Government (General) Regulation 2021*, a series of Directions were then issued by the Electoral Commissioner. These included a Direction that prohibited the distribution of electoral material, such as a how-to-vote card, poster or advertisement within 100 metres of a pre-poll office or polling place.

A prohibition on canvassing within 100 metres of a polling place has long been part of the electoral practice in the Australian Capital Territory<sup>1</sup> and Tasmania<sup>2</sup>, and was, no doubt, the inspiration for this Direction. However, how-to-vote cards are of limited practical value in either of those jurisdictions, which use the Hare-Clark system of voting. Although parties nominate lists of candidates under that system, there is no single ballot paper to reproduce because the order of candidate names is varied in different batches of ballot papers via the 'Robson Rotation'.

As a result, the Direction had the potential to materially impact upon results as eligible voters weren't necessarily able to consider the choice of candidates in their respective local government areas or receive a recommendation as to how to cast a formal vote for those candidates.

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<sup>1</sup> *Electoral Act 1992* (ACT), section 303

<sup>2</sup> *Electoral Act 1985* (TAS), section 133(2)

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Section 356TA of the Regulation states, in part:

*(2) A direction under subsection (1) may be given only if the election manager is satisfied the direction is necessary—*

- (a) to comply with a public health order that is in force at the time of the election, or*
- (b) to reduce the risk of infection from COVID-19 where the material would be handed out.*

While it can be understood that the Electoral Commissioner may have been seeking to prevent gatherings of volunteers outside polling places or pre-poll offices, such gatherings were not prohibited under the Public Health Orders in place at the time. In effect, the Direction sought to move any electioneering activity beyond his jurisdiction. As such, there would arguably be no reduction in the risk of infection from COVID-19, it would just be moved elsewhere.

If this was the Electoral Commissioner's intention, it simply did not work. Candidates and volunteers still gathered outside polling places but simply changed their methods of communicating with voters. Some wore t-shirts with electoral messages, others directed voters to scan QR codes on signs being displayed, directing them to websites with how-to-vote information.

There was also confusion and inconsistency as to the implementation of the Direction, with local Election Managers making their own determinations or interpretations of the Direction. Anecdotally, we understand instructions were given by a local Election Manager at one booth that volunteers were only permitted to greet voters, not convey a political message (such as "vote for X candidate/team") and at another booth that holding a how-to-vote card or QR code for people to photograph or scan was not permitted.

While we appreciate the need for local Election Managers to be able to make decisions based on local circumstances at a booth, clearly the above examples fall well beyond a reasonable interpretation of the Direction regarding volunteer activities and highlight the need for consistent implementation of any future Directions (COVID-19 related or otherwise).

Separately, a Direction was issued requiring that any posters that were used within 100 metres of a pre-poll office or polling place must be displayed prior to 7.00am, and were unable to be "adjusted or altered in any way" until after 7.00pm. The practical effect of this Direction was to prevent a poster being touched, even in instances where the poster may have fallen, was obstructed, damaged, affected by weather or altered (inadvertently or otherwise), even if it may have posed a risk to members of the general public.

At the pre-poll office I attended on the Saturday prior to election day, posters displayed by various candidates and political parties were strewn across the forecourt area, as the weather changed and strong winds prevailed. Arguably, these posters became a safety risk to the candidates, their volunteers and also the general public. However, if anyone touched these posters, they would have been liable to prosecution.

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Section 356TA of the Regulation states, in part:

*(2) A direction under subsection (1) may be given only if the election manager is satisfied the direction is necessary—*

- (a) to comply with a public health order that is in force at the time of the election, or*
- (b) to reduce the risk of infection from COVID-19 where the poster would be displayed.*

There was, again, no compelling reason, either health-related or otherwise, for issuing such a Direction. The only person likely to touch a poster being displayed was the person who was displaying it. Moreover, this Direction, again, had the potential to impact upon the outcome of individual electoral contests, as voters were potentially denied electoral messages on the way into the polling place to cast their vote.

Of most concern though, was a Direction issued that would have prohibited scrutineers from being present at a polling place. To the best of our knowledge, this Direction was not exercised but was, in our view, overreach. Scrutiny of a returning officer's actions is a fundamental tenet of democratic and fair elections, allowing candidates to view the process and in some cases challenge the interpretation of formal or informal ballots that have been cast. It also provides confidence to political participants and the general public alike that the process has been conducted in accordance with relevant legislation and regulation.

We acknowledge that under section 337A of the Regulation, such a Direction could only have been made if the election manager was satisfied that there were alternative scrutiny arrangements in place. However, denying access to this fundamental process would have given rise to real concerns over the conduct of vote counting and, no doubt, would have the potential to result in legal action over the validity of an election where there was a close result.

We note that the Electoral Commissioner published a COVID-19 protocol for scrutineers ahead of the February 2022 by-elections, which broadly reflected restrictions and venue capacity limits under the Public Health Orders that were in force at the time. They were sensible, proportionate safety measures to protect the health and well-being of electoral officials and scrutineers, without denying the ability to properly scrutinise the conduct of the vote counting process.

## Postal Voting

The *Electoral Amendment (COVID-19) Bill 2021* passed the NSW Parliament on 24 November 2021, which enabled the making of regulations in certain circumstances to modify the provisions of the *Electoral Act 2017* that would apply to the 2022 by-elections in order to protect the health, safety and welfare of the community. It also provided for all electors to be able to apply for early voting and for certain electors to apply to vote by post.

Pursuant to the Electoral Act 2017 and the *Electoral Amendment (COVID-19) Regulation 2022*, the Electoral Commissioner made orders on 21 January 2022 declaring the electors of each by-election district to be "COVID-19 affected" in accordance with the new Regulation.

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‘To help reduce the risk of COVID-19 transmission’, a postal pack was provided to electors enrolled in the districts of Bega, Monaro, Strathfield and Willoughby. Postal packs included a voting instructions brochure, ballot paper, postal vote certificate envelope and a reply paid envelope. Electors could still choose not to cast a postal vote and to instead attend an early voting centre during the two week period prior to election day or attend a voting centre on election day.

The Liberal Party remains concerned about the process of directly issuing ballots to all enrolled residents via post. The Joint Standing Committee on Electoral Matters (JSCEM) has received previous representations from the Liberal Party about the importance of accurate electoral rolls, which reflect bona fide electors properly registered for the correct electorate and has long argued that electoral enrolment should require the provision of suitable identification.

The automatic enrolment provisions need to be carefully supervised both to prevent potential misuse and unintended impacts on the accuracy of the roll as electors may claim addresses other than their actual principal residential location for other purposes, such as motor vehicle registration.

Instances of multiple voting at federal and state elections and the capacity for other forms of voter fraud remain of concern to us. These concerns are only amplified in circumstances where every elector on the roll across four electoral districts were posted ballot papers. Further, we note these voting packs were sent in envelopes that were clearly identifiable as coming from the NSW Electoral Commission.

Noting the volume of ‘return to sender’ mail often received back by the Liberal Party, there would at any point in time be electors whose electoral roll details are incorrect, which would mean postal voting packs would have been posted by the NSWEC to incorrect addresses, addresses with no resident at all, or even short-term stay residences (e.g. Air BnB), creating significant opportunities for electoral fraud to have occurred.

Notwithstanding steps taken to ensure that postal votes would be disallowed if the Electoral Commissioner was satisfied the ‘COVID-19 affected elector’ also received a ballot paper at a voting centre, including an early voting centre, we believe this practice should be discouraged in future.

## **Explanatory materials provided to electors**

The Liberal Party acknowledges the steps taken by the Electoral Commissioner to raise awareness of the local government election and the state by-elections and the voting options available to electors. We also acknowledge the development and distribution of materials to communicate these messages with culturally and linguistically diverse (CALD) communities as well as those people with hearing impairments.

## **iVote**

As outlined in previous submissions to the JSCEM, the Liberal Party has long held concerns with the iVote system and the ability of political parties and candidates to engage with eligible electors who choose to use iVote. While this submission does not seek to restate those concerns, the Liberal Party does wish to reaffirm its position.



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The iVote system was originally introduced prior to the 2011 State election after the trialing of other e-vote systems at the 2007 State election. The original purpose of the iVote system, as outlined in the explanatory note accompanying the *Parliamentary Electorates and Elections Further Amendment Bill 2010*, was to enable disabled and vision impaired electors, and electors whose place of living is not within 20 kilometres of a polling place, to utilise a method of voting through “*means of a networked electronic device, such as by using a computer linked to the internet or by using a telephone*”. The Bill would also establish eligibility for those electors who were unable to access a polling place during the hours of voting on election day, after the 2011 State election.

Slowly the use of iVote has been expanded and used at successive state and local government elections. Access to iVote was further relaxed at the 2021 Local Government elections to include any voter who would be outside of their Local Government Area on election day.

Recurring issues have, however, plagued the system. Of particular note was the omission of candidates from the Legislative Council ballot paper at the 2015 State election and the breakdown of the system in the final 10 days of the 2019 State election.

The various changes to eligibility have seen significant growth in the number of electors using iVote from the original estimate of 10,000 recorded ballots at the time of its introduction in 2011 to 283,699 in 2015 and 234,401 in 2019. In respect of the 2021 Local Government election, a spokesperson for the NSWEC said that “*as a contingency the system was planned and tested for a capacity of 500,000 votes - double the capacity required for the 2015 and 2019 NSW State elections*”<sup>3</sup>. Some 671,657 ballots were in fact recorded.

As a result of higher than expected traffic to the platform, there were two significant interruptions on election day. NSWEC commissioned modelling found multiple elections had high probabilities of producing differing results due to the outages experienced, particularly in respect of Kempsey and Singleton Shire Councils and Shellharbour Council Ward A. The NSW Supreme Court was petitioned by the Electoral Commissioner to void these elections and the Court has ordered that the elections be re-run. These contests will take place on 30 July 2022, at considerable expense to the taxpayer.

Adjunct Associate Professor, Vanessa Teague of the Australian National University’s College of Engineering and Computer Science argued in her submission to JSCEM Inquiry into the adequacy of the funding allocation of the NSWEC for the 2023 State election that the iVote system would “*most certainly fail again*” and that “*the way to stop iVote’s problems from undermining the integrity of the State election - as they have clearly undermined the recent local government elections - is to stop using iVote*”.

Given the issues identified with the iVote system, the Liberal Party supports reviewing the use of the platform and if necessary, replacing it provided its use is limited to those classes of elector first identified in the legislation establishing its use in 2010, so as to ensure the continued integrity of the NSW electoral system.

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<sup>3</sup> ‘No surprise: NSW iVote fails during local council elections’, ZDNet, 5 December 2021.  
<https://www.zdnet.com/article/no-surprise-nsw-ivote-fails-during-local-council-elections/>

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Additionally, the Liberal Party notes that iVote or any similar system would remain a target for cyber-attacks, foreign interference and attempts to commit voter fraud. Naturally, we would encourage the NSW Electoral Commissioner to work with the Australian Government and relevant security agencies to ensure any such systems are robust and safe.

The Liberal Party notes that iVote was not utilised for the 2022 by-elections, nor will it be used at the 2023 state election.

## Other matters

The recent federal campaign demonstrated that a general election can be conducted in the normal way, notwithstanding the public health challenges of a global pandemic. At a Budget Estimates hearing of the Senate Finance and Public Administration Legislation Committee on 5 April 2022, just prior to federal election being called, the Australian Electoral Commissioner Tom Rogers said:

*“We’re very confident with the postal vote process, but my view is that the Act requires people to vote on the day unless there’s a reason for them not to vote. We’re going to have a large number of polling places, and they’re COVID safe, with all the measures you would expect to see in those polling places. If they can’t vote in person, they should vote by pre-poll, and again we are putting measures in place in pre-poll centres to make sure that people can feel safe and that there are not a huge number of queues. We’ve got some modelling in place to help us with that as well. Then the third option is, of course, postal voting, which is a regular part of the Australian vote.”*

At the federal election, the voter turnout for the House of Representatives was 89.82% and 90.47% for the Senate - only slightly lower than in 2019 – and to our knowledge, there has been no evidence to date suggesting that in-person attendance voting contributed to increased transmission of COVID-19 in the community.

We would strongly encourage the NSW Electoral Commissioner to take the same approach in respect of the forthcoming State election.

I trust this information assists the Committee.

Yours sincerely,

Chris Stone  
State Director