

Submission
No 20

INQUIRY INTO CONDUCT OF ELECTIONS IN NEW SOUTH WALES

Organisation: The Greens NSW

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The Greens NSW Submission into the Legislative Council Select Committee on the conduct of the 2021 Local Government elections and 2022 State By-elections

Introduction

The Greens NSW appreciate the opportunity of the committee to contribute to this important inquiry. The Greens NSW participated in both the 2021 Local Government Election and in the 2022 State by elections and have a number of comments to make on the running of these elections and on the general running of Local Government elections. We appreciate all the work that the New South Wales Electoral Commission has done to support the running of these elections. COVID has not made running elections easy however as we have seen we have had three relatively successful sets of elections in recent times including the recently conducted Federal Election, which have demonstrated that it is still possible to run elections during a pandemic.

Terms of Reference

To inquire into and report on the conduct of elections under COVID-19 conditions by the NSW Electoral Commissioner, including the local government elections held on 4 December 2021 and the four New South Wales by-elections held on 12 February 2022, with particular reference to the appropriateness of similar settings in a general election, including:

- a) the COVID-19 restrictions that were in place for the conduct of these elections and any implications that had for the conduct of the elections,*
- b) the issuing of postal votes in both elections to all registered voters in the four New South Wales by-elections and the rationale for doing so, the administrative arrangements and processes employed to support this, and any implications for the conduct of the elections,*
- c) the adequacy or otherwise of material alerting voters to the upcoming by-elections and explanatory information provided in languages other than English,*
- d) the use of the iVote system in the local government elections, the performance of that system and its implications, and future arrangements for use of the iVote system, including the possibility of a replacement software system, and*
- e) any other related matter.*

COVID-19 Regulations

In both the 2021 Local Government Elections and the 2022 by-elections the NSW Electoral Commissioner issued regulations or declarations under the relevant acts to modify the way the elections were conducted.

In the local government elections these generally centred around extending the no campaigning zone from 6m to 100m and in the 2022 election it was prescribing all electors in the four state districts as COVID affected electors.

The Greens NSW do not believe that the extension of the no campaigning zone was warranted or proportional. The adoption of a 100m exclusion zone was clearly intended to prevent traditional polling place canvassing, regardless of the circumstances of individual council areas and the polling places. Further, the restrictions on installation and removal of posters were unnecessarily long and potentially created hazards to electors and the public from posters or other items exposed to wind squalls or in inappropriate locations.

The 100m exclusion zone regulation also caused disadvantage to smaller parties and independents as it required broader coverage of volunteers to cover all possible entry points into the zone.

Predictably, these limitations were frequently bent or ignored by canvassers and polling place staff. Nonetheless, the regulations' intent of limiting transmission of the SARS-COV-2 virus was mostly observed by canvassers.

The novelty of these regulations, the uncertainty around their enforcement were a disruptive factor for election campaigning and would certainly have impacted the ability of community and local independent candidates to conduct their campaigns. For example, in deciding what leaflets to print and how best to distribute them.

The regulations also did not combine well with the extended pre-polling period and the broader availability of postal voting and iVote. The high number of informal votes cast across these recent elections suggests that many people were unable to access "how to vote" information from their preferred candidate/s. On this point, NSW Greens notes the recent introduction of the Electoral Legislation Amendment Bill that would reduce the pre-polling period to one week.

Further work may be required to ensure fair and effective distribution of "how to vote" information in future elections, while ensuring people who are isolating with COVID-19 are able to access a remote voting option during the pre-polling period.

Regulation making power

A better model for regulation making powers and regulating elections was offered during the 2022 Federal election. When a need was identified to amend the provisions for COVID telephone voting, the Electoral Commissioner provided advice to the Special Minister of State who then issued the amending regulation. The Greens NSW believe this is a better model where the executive government controls the regulation making process and also means that it continues with the Westminster tradition of executive government being able to be held to account.

We note that Greens MLCs supported an amendment put forward by Labor when a similar regulation making provision was inserted into the Electoral Act 2017 to allow for COVID related regulations to be made for the state by-elections that prevented the Electoral Commissioner from issuing a similar regulation for the 2022 State By-Elections.

The Greens NSW would also point out to the committee that because the Electoral Commissioner issued the regulations for the 2021 Local Government election under his authority as the electoral manager, this actually meant that there were different rules for elections around the state.

The Fairfield and Penrith Local Councils had opted in 2019 / 2020 to use an alternate election provider. This meant that any regulation that the Electoral Commissioner issued did not apply in those local government areas. We are unaware of whether the Australian Electoral Company, the relevant election manager, issued similar regulations to that of the NSW Electoral Commissioner. Possibly they assumed or allowed candidates and electors to assume that the regulations also applied in those areas.

Technology Assisted Voting

The Greens NSW believe that there can be a role for Technology Assisted Voting while noting that there are fundamental problems with all online voting systems. We have stated our specific concerns about the iVote system in previous submissions and note the work of researchers such as Dr. Vanessa Teague and her colleagues that have identified serious flaws in its implementation. We believe that at a minimum, any such system should be implemented using open source technologies so that security researchers are able to review the code to ensure that it has the highest possible standards of security and integrity while maintaining the secrecy of the ballot.

The problems with iVote in the 2021 Local Government elections were compounded by the additional complexity of several hundred different elections, thousands of candidates and a software and systems platform that was inadequate for the task.

Evidence presented to the NSW Supreme Court in the “Electoral Commissioner v Kempsey Shire Council & Ors.” case clearly demonstrates that the resultant failure of the iVote system on election day (4th December) is likely to have impacted the outcome of many more council elections than the three identified in the case (Kempsey, Singleton and Shellharbour Ward A).

The Greens NSW support the decision made by the Electoral Commissioner to deem that the current system is not appropriate for the upcoming state general election. It is a matter of regret that this decision will reduce options for participation for anyone who required to self isolate in the later stages of the election process. The absence of technology assisted voting would certainly have impacted participation in the 2022 by-elections.

As noted earlier, the ability for councils to use an alternative election manager also meant that voters in Fairfield and Penrith were excluded from access to Technology Assisted Voting during the 2021 local government elections.

Further, that in 2021 the iVote system provided a form of absentee voting for local government elections. This is the first time that election day voting was to be available for people remote from their local government area, an alternative that is routine in NSW and Federal elections. The lack of regular absentee voting is often raised by electors in NSW local government elections.

We note that, for the first time at the 2022 federal election, the AEC provided nationwide absentee declaration voting with the capability for polling place staff to print a ballot paper for the remote division. A similar capability could be provided for local government elections managed by the NSW Electoral Commission to enhance participation.

Postal Voting / Telephone Voting

The Greens NSW note and support community concerns about the lack of information in community languages provided with the universal issuance of postal votes for the 2022 by-elections. With no technology assisted voting available for the 2023 NSW election, postal voting will be the only option for people who are outside of NSW (including overseas), or who meet the other criteria for access, or who are subject to COVID-19 related isolation after postal applications close. Access to postal voting is made more difficult by the short timespan between the close of nominations and polling day.

We would encourage the NSWEC to investigate ways to use consulate voting or other means to relieve any possibilities of postal votes not reaching voters in time. The Greens NSW would also encourage the government to support the NSWEC to provide a telephone voting option for voters who need to isolate very late in the election period similar to the provisions available during the 2022 Federal Election.

Inconsistencies between Parties and Independent candidates in Local Government Elections

Under the current local government electoral regulation, if a Party nominates candidate(s) for councillor position(s) but does not nominate a candidate for an accompanying mayoral election, the Party is prohibited from registering electoral material containing mayoral ballot recommendations. By contrast, an independent councillor candidate has no restriction on mayoral election endorsements, including for mayoral candidates nominated by a political party.

The Greens NSW support an amendment to the regulation to permit inclusion of mayoral election recommendations for party endorsed councillor registered material in these circumstances.

Management and conduct of Local Government Elections.

The Greens NSW repeat our recommendations to earlier inquiries that the NSWEC be the sole electoral manager for local government elections and that the cost of resourcing the NSWEC for local government election be borne by the NSW government. Implementation of this recommendation would remove the existing inconsistencies demonstrated above, while providing for a overall better conduct of these elections.

The Greens NSW also strongly support the repeal of the two votes for businesses in the City of Sydney believing that all ratepayers should have one vote for one value.

Local Government Elections Court of Disputed Returns

The Greens NSW would also like to note that within the Local Government Act there is no clear reference to a court of disputed returns. The recent court case brought by the Electoral Commissioner to resolve the iVote issue was brought under the Supreme Court act invoking the judicial review power. This potentially created jurisdictional issues for the case and also the possibility of appeals not present in existing Court of Disputed Returns legislation.

Another unfortunate aspect of the Supreme Court proceedings was the use of the terms 'plaintiff' and 'defendant' which created the impression of wrongdoing on behalf of the effected councils and councillors who were named in the case. Greens Cr Arthur Bain and other Kempsey councillors reported that they were brought into disrepute as a result of reporting of the case by use of the term 'defendant' in the local press.

The Greens NSW recommend that provisions for a Court of Disputed Returns be established for local government elections.