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## Recent developments in NSW electoral law

by Laura Ismay

### 1. Introduction

On 23 June 2011, former Premier Barry O'Farrell [announced](#) the "long overdue review" of the State's electoral legislation by the NSW Parliament's Joint Standing Committee on Electoral Matters (JSCEM).<sup>1</sup> Whilst the two key Acts of the NSW electoral system – the [Parliamentary Electorates and Elections Act 1912](#) (PE&E Act) and [Election Funding, Expenditure and Disclosures Act 1981](#) (EFED Act) – had undergone numerous changes since their respective enactments, neither Act had been subject to comprehensive review. Indeed, it was the "piecemeal" nature of these changes that later saw the NSW Electoral Commissioner [describe](#) the electoral system under these Acts as "out of step with current electoral practices".<sup>2</sup> Considering the technological developments that had taken place since their introduction, it was argued that wide scale reform was needed to bring the NSW electoral system into the 21<sup>st</sup> century.

A 2015 briefing paper, [Integrity in government: issues and developments in New South Wales, 2011-2015](#)<sup>3</sup>, reviews the electoral law reform process from Premier O'Farrell's announcement in 2011 to the release of the [Final Report of the Panel of Experts on Political Donations](#) in December 2014. This e-Brief recaps the Expert Panel's recommendations and provides an update on developments in NSW electoral law since then. It examines the various inquiries of the NSW Parliament's JSCEM, decisions by the NSW Electoral Commission (NSWEC) and investigations of corrupt conduct of Members of NSW Parliament by the Independent Commission against Corruption (ICAC). It concludes with an overview of current and proposed legislative developments, including the release of the [Draft Electoral Bill 2017](#) and anticipated reform of the EFED Act.

### 2. Current electoral legislation

The [Parliamentary Electorates and Elections Act 1912](#) establishes the NSW Electoral Commission and sets out a number of key provisions relevant to the conduct of State elections including:

- Distribution of electorates (Part 2);

- Entitlement to enrol and vote (Part 3B);
- Registration of political Parties (Part 4A);
- Conduct of elections (Part 5), including issuance of writs, nomination of candidates, postal voting, technology assisted voting, pre-poll voting, compulsory voting and prohibitions under the Act;
- The Court of Disputed Returns (Part 6) and;
- Penalties (Part 7).

The [\*Election Funding, Expenditure and Disclosures Act 1981\*](#) consists of four key components:

- disclosure of political donations and campaign spending;
- caps and bans on political donations;
- caps on election spending; and
- public (taxpayer) funding for elections and party administration costs.

### 3. Expert Panel Report on Political Donations

Released in December 2014, the *Final Report of the Panel of Experts on Political Donations* (the Expert Panel Report), contained as its primary recommendation an immediate, comprehensive review of the EFED Act (Recommendation 1).<sup>4</sup> Unlike previous reports,<sup>5</sup> the Expert Panel Report made no reference to the consolidation of all electoral legislation into a single Act; a strong [recommendation](#) of the NSWEC and consistent focus of the reform process since 2013.<sup>6</sup> Rather, it noted that the result of years of ad-hoc amendments was a “complicated and unwieldy” EFED Act – a description similar to one levelled at the PE&E Act by the NSW Electoral Commissioner<sup>7</sup> – impeding compliance and necessitating immediate reform.

Furthermore, the Expert Panel Report reiterated a longstanding recommendation of academics, parliamentary committees and political parties; that a co-ordinated national approach to reform be pursued. It noted recent developments stemming from ongoing ICAC Operation Spicer and Credo investigations, which it suggested showed the manner by which the federal structure of some political parties created opportunities for avoiding NSW restrictions on political donations. The Expert Panel Report recommended that this national approach to election funding law reform be pursued through COAG (Recommendation 2).<sup>8</sup> Other key findings were as follows:

- **Total ban on political donations:** The Panel concluded that a total ban on political donations would not be feasible, or constitutional, or in the public interest. Nor did the Panel support an opt-in, opt-out model as an alternative to a total ban on political donations (Recommendation 4).
- **Limits on donations:** While there had been systemic failures in the enforcement of the donations regime, the Panel generally supported the limits on donations in place at the time of its inquiry. The Panel did, however, recommend that small anonymous donations be

made exempt from the rules that require multiple donations from the same source to be aggregated for the purposes of the caps on political donations. (Recommendation 5).

- **Level of funding and electoral support:** The Panel supported linking a portion of public funding to electoral support (for example, by allocating a small proportion of public funding on a 'dollar per vote' basis) although this was not its preferred option. Instead, it recommended that the 'funding linked to electoral expenditure' model for calculating entitlements from the Election Campaigns Fund that applied for the 2011 election be reinstated (Recommendation 14).
- **Administration Fund:** The Panel supported some level of public funding for administration costs. It considered the amount of public funding should be scaled back to the levels that were in place for the 2011 NSW State Election (Recommendation 18). This would take the level of public funding for administration costs back to around \$9 million in total per year from the current level of \$11 million. The Panel also recommended clearer rules about what types of expenses can be claimed for administration and that payments should be conditional on appropriate governance standards and conditions (Recommendations 17 and 33).
- **Expenditure caps:** The Panel found widespread support for expenditure caps and concluded that the levels of the caps seem to be appropriate, including the automatic adjustment of the caps for inflation (Recommendation 10).
- **Third Party campaigners:** The Panel found widespread support for third-party participation in elections within limits. Their donations and spending are capped in the same way as parties and candidates, an approach supported by the Panel. However, the third-party spending cap of \$1 million was considered to be too high and the Panel suggested halving the spending cap to \$500,000 to guard against third parties coming to dominate election campaigns (Recommendation 31).
- **Disclosure:** The Panel urged the NSWEC to replace its paper-based disclosure process with an on-line disclosure system as soon as possible (Recommendation 23). It was further recommended that the EFED Act should be amended to require real-time disclosure of political donations of \$1,000 or more in the six-month period before each election (Recommendation 25). The Panel considered that the threshold of \$1,000 was reasonable, but that disclosure should be more detailed. Political parties should identify political donations that have been solicited by or made for the benefit of a particular candidate (Recommendation 26); and parties and candidates should be required to disclose the terms and conditions of any loans (Recommendation 27). Also, associated entities of political parties should have the same disclosure obligations as parties to reduce the opportunities for avoidance (Recommendation 30).
- **Penalties, compliance and enforcement:** The Panel recommended that those offences that require the prosecution to prove knowledge or intent should be retained but must be simplified to improve the chances of successful prosecutions

(Recommendation 45). It also favoured retaining strict liability offences for failing to lodge a disclosure and failing to keep records as these obligations are central to the election funding scheme (Recommendation 44). Supported was a new strict liability offence for lodging an incomplete disclosure similar to offences that exist in Queensland and the ACT. With criminal prosecution said to be a last resort, the NSWEC should have a range of other enforcement options available to it if it is to be an effective, risk-focused regulator. These should include civil penalties and the power to withhold public funding (Recommendation 46).

- **Report to Parliament:** It was recommended that the Premier report to the NSW Parliament on progress in implementing the Panel's recommendations. This should occur in June 2015 and then annually until all recommendations are dealt with (Recommendation 3).

### 3.1 Government response to Expert Panel Report

The [\*Government Response to the Expert Panel Report\*](#), released on 5 March 2015, expressed its in-principle acceptance of all but one of the Expert Panel's recommendations (Recommendation 42).<sup>9</sup> However, the Government also stated that it:

...wishes to attain a full understanding of the [JCSEM's] position on the Expert Panel's recommendations, and the Government's response, before embarking on further reform in this area.

Recommendation 42 – that an independent body be established to approve any changes to amounts provided under the [Election Campaigns Fund](#), [Administration Fund](#) and [Policy Development Fund](#) – developed from the Panel's belief that parliamentarians should not legislate on an area where they have a direct financial interest without some independent oversight.<sup>10</sup> As it currently stands, the levels of public funding provided to candidates and parties through the Election Campaigns Fund, Administration Fund and Policy Development Fund are set out in the EFED Act and determined by the NSW Parliament.<sup>11</sup> The Expert Panel described the funding amounts provided via these three funds as failing to represent "a reasonable and appropriate use of taxpayers' money", having been set "without a detailed analysis of the costs of running a political party".<sup>12</sup> It also noted its concern of the risk of major parties "agreeing on a funding scheme that advantages them at the expense of other electoral contestants and tax payers."<sup>13</sup>

Whilst the Government response confirmed the Coalition's commitment to "restoring the public's trust in NSW politics", it described the creation of an independent panel as "an expensive and inefficient alternative to relying on existing oversight mechanisms", noting:

...no equivalent body exists in any other jurisdiction that administers a public funding scheme. The Government believes that the parliamentary process already ensures that amendments to election funding laws are subject to proper public scrutiny and debate."<sup>14</sup>

## 4. JCSEM Report on the Expert Panel Report

The JSCEM [\*Final Report into The Final Report of the Expert Panel – Political Donations and the Government’s Response\*](#) was tabled on 23 June 2016. The Chair of the JSCEM Jai Rowell [outlined](#) the Committee’s in-principle support for the majority of the Expert Panel’s recommendations.<sup>15</sup> The Committee outlined seven recommendations that required additional work,<sup>16</sup> as well as six recommendations it did not support. These six Expert Panel recommendations are discussed below:

**Recommendation 12 – That the electorate-based caps on expenditure by political parties apply to all expenditure which encourages or tries to persuade electors to vote for or against a candidate in a particular electorate.**

Whilst the Government’s response had accepted the Expert Panel’s Recommendation 12 in principle,<sup>17</sup> the Committee noted concerns expressed by the NSW Nationals during its subsequent inquiry.<sup>18</sup> The Nationals’ [submission](#) questioned whether the change in definition suggested by the recommendation would actually create greater uncertainty around the definition of “electoral expenditure” under section 95F of the EFED Act.<sup>19</sup> The Committee therefore recommended that the current definition of ‘electorate expenditure’ be retained.

**Recommendation 14 – That the ‘funding linked to electoral expenditure’ model for calculating entitlements from the Election Campaigns Fund that applied for the 2011 election be reinstated.**

Recommendation 14 related to the changes in funding introduced by the [\*Election Funding, Expenditure and Disclosures Amendment Act 2014\*](#). This Act introduced a “dollar-for-vote” model for the 2015 election.<sup>20</sup>

The Committee acknowledged the Expert Panel’s view that the ‘dollar per vote’ model created an imbalance in public funding and advantaged the winning parties. It also noted the Panel’s concerns about potential corruption risks if smaller parties were deprived of funding under the ‘dollar per vote’ model and needed to raise significant amounts of money from elsewhere. However the Committee also stated that it had received evidence from smaller political parties, including the Shooters, Fishers and Farmers Party and the Christian Democratic Party, which stated that they preferred the ‘dollar per vote’ model and their belief that reverting to the ‘funding linked to electoral expenditure’ model would result in a significant drop in their funding.

**Recommendation 18 – That the model for calculating entitlements from the Administration Fund, which operated immediately prior to the 2014 amendments to the EFED Act, be reinstated.**

Public funding of eligible parties via the Administration Fund was also increased significantly by the introduction of the [\*Election Funding, Expenditure and Disclosures Amendment Act 2014\*](#) – a change opposed by the Expert Panel. The Committee report noted that it had received persuasive and compelling evidence from a diverse range of stakeholders that the model for calculating entitlements introduced by the 2014 Act from the Administration Fund should be retained. It therefore confirmed its support for the continuation of both the funding model and funding amounts introduced by the 2014 Act.<sup>21</sup>



### **Recommendation 33 - That:**

- a) political parties that receive public funding for administration expenses be required to regularly submit details of their governance standards and accountability processes to the NSW Electoral Commission; and**
- b) the payment of public funding for administration expenses be conditional on NSW Electoral Commission approval of those standards and processes.**

Unlike other Expert Panel recommendations which focused solely on the EFED Act, Recommendation 33 also touched on amendment of the PE&E Act. Whilst supporting the above recommendation in principle, the Government Response noted that any movement in this area would require the input of political parties.<sup>22</sup> The Committee noted that many smaller parties expressed concerns about their ability to comply with the Expert Panel's suggested governance requirements without additional funding.<sup>23</sup> For this reason, the Committee did not support "a one-size-fits-all approach to how a political party is governed".<sup>24</sup> Rather, the Committee recommended that the NSWEC be responsible for "provid[ing] broad guidance to parties on appropriate governance and accountability principles".<sup>25</sup>

### **Recommendation 34 – That:**

- a) parties be required to regularly submit a list of senior officeholders to the NSW Electoral Commission for approval as a condition of receiving administration funding. The Panel expects that, at a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant Secretaries, and the NSW Division of the Liberal Party would, at a minimum, nominate its President and Vice-Presidents, Treasurer, and State Director;**
- b) the Commission only approve the list if it is satisfied that the nominated officers have sufficient seniority, control and decision-making authority to be responsible for the party's compliance with the Act; and**
- c) the approved officeholders, and a brief description of their roles and responsibilities, be published on the NSW Electoral Commission's website.**

Recommendation 34 was concerned with similar issues of governance as those addressed in recommendation 33, and incorporated recommendations from a [2014 ICAC report](#) that advocated for the roles and responsibilities of senior party officeholders to be made public and updated on a regular basis.<sup>26</sup> In its response, the Government acknowledged its support for the "spirit" of the recommendation but stated that further consultation with the NSWEC was required; particularly around any 'veto' powers the NSWEC might be granted.

The Committee Report echoed concerns from submissions about this point, stating that it was not "appropriate or practical for the NSWEC to be empowered to veto a political party's senior officeholders".<sup>27</sup> Rather, the Committee reported, it would be more appropriate for the NSWEC to

provide “best practice advice” to parties to assist them with determining whether a senior officeholder is likely to have the requisite seniority, control and decision-making authority to be responsible for compliance.<sup>28</sup>

### **Recommendation 42 – That:**

- a) an independent body be established to approve any changes to levels of public funding for any purpose, including election campaigns and administration, following a referral by the Premier; and**
- b) this body consist of a retired judge and a person with financial or audit skills.**

Recommendation 42 was the only Expert Panel recommendation that both the Government and Committee rejected.<sup>29</sup> Whilst the Government’s opposition to the idea of an independent body was based on a perceived absence of need,<sup>30</sup> the Committee took a different stance. Upon advice from Professor Anne Twomey,<sup>31</sup> the Committee noted that Recommendation 42 of the Expert Panel would require the Parliament to abdicate its legislative function, something it could not do.<sup>32</sup> As a result, any such independent body would be ineffective from a legal point of view.<sup>33</sup>

### **4.1 Government response to JSCEM Report on the Expert Panel on Political Donations**

On 22 December 2016, the NSW Government released its [response](#) to the JSCEM [Final Report into The Final Report of the Expert Panel – Political Donations and the Government’s Response](#), accepting all of the Committee’s recommendations. In accepting these recommendations, the Government reaffirmed its commitment to comprehensive review of both the EFED and PE&E Acts, with the new legislative structures to be in place at least 12 months prior to the March 2019 election.

## **5. McCloy v NSW**

Throughout the Expert Panel inquiry, hearings for the case of [McCloy v New South Wales](#) had been taking place in the High Court. The case – launched by property developer Jeff McCloy – concerned a challenge to the validity of a number of provisions in the EFED Act, on the basis that the provisions impinged upon the implied freedom of political communication under the Commonwealth Constitution.<sup>34</sup>

The parts of the Act under challenge were:

- [Part 6, Division 2A](#), which provides for general caps on the amount of political donations a person can make to or for the benefit of a particular political party, elected member, group, candidate or third party campaigner;
- [Section 96E](#), which prohibits the making or acceptance of “indirect campaign contributions”; and,
- [Part 6, Division 4A](#), which prohibits the making or acceptance of a political donation by a “prohibited donor” or the soliciting of a person by or on behalf of a “prohibited donor” to make a political donation.<sup>35</sup>

On 7 October 2015, the High Court handed down its decision. Applying the test in *Lange v Australian Broadcasting Corporation*,<sup>36</sup> the High Court unanimously upheld the validity of both Division 2A and section 96E,<sup>37</sup> and by majority (Nettle dissenting), upheld the validity of Division 4A. This was on the basis that these provisions are a legitimate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in New South Wales politics.

### 5.1 Response of political parties

Following the High Court's decision, Professor Anne Twomey described the judgement as:

“pav[ing] the way for broader and much needed reforms across the country... permit[ting] reasonable regulation of political donations to lessen the potentially pernicious influence of money on politics”.<sup>38</sup>

The decision also generated a significant response across the political spectrum, with members of the [Government](#), [Opposition](#) and [Greens](#) coming out in support of the High Court's approach. With interest around the topic remaining high, on 19 November 2015 Greens MP Jamie Parker introduced the [Mining and Petroleum Industry Political Donations Legislation Amendment \(Corruption Risk Reduction\) Bill 2016](#) into the Legislative Assembly. The Bill sought, in part, to extend the ban on campaign donations by “prohibited donors” to the mining and petroleum industry.

Whilst debate on the Bill was brief, both the Government and Opposition opposed the Bill, albeit for different reasons. Speaking for the Government, former Minister for Industry, Resources and Energy, Anthony Roberts, described the measures in the Bill as:

“...excessive and unnecessary...given [the] number of significant measures [already in place] that reduce the risk of corruption in the mining and petroleum sectors. These measures include the strategic release framework for coal and petroleum, which was implemented [in 2015] and enshrined in legislation.”<sup>39</sup>

On the other hand, Shadow Attorney General Paul Lynch questioned the constitutionality of the proposed Bill. He suggested that unlike property developers, who the High Court described as worthy of specific regulation “in light of the nature of their business activities”,<sup>40</sup> the Bill's banning of donations by the mining and petroleum industries appeared to be without a “coherent and persuasive argument”, making its constitutional validity unlikely.<sup>41</sup>

## 6. Withholding of public funding by NSWEC

On 23 March 2016, the NSW Electoral Commission [announced](#) its decision to withhold around \$4.4 million from the Liberal Party of Australia (NSW Division).<sup>42</sup> Based on information received from ICAC as part of its Operation Spicer investigations,<sup>43</sup> the Chairperson of the Commission, Keith Mason QC stated that the party had not submitted a “requisite declaration” as required by the EFED Act, as it had failed to disclose the identity of all major political donors in its 2011 declaration. It confirmed the Party would not receive any further funding from the Election Campaigns



Fund or Administration Fund until it disclosed all reportable political donations in relation to its 2011 declaration.

The Commission's decision had an effect at both State and Federal levels. On 24 March 2016, State Director of the NSW Liberal Party Chris Stone released a [statement](#), confirming the Party's commitment to complying with NSW electoral laws.<sup>44</sup> On 19 September 2016, the Party submitted an amended declaration to the NSWEC which included disclosure of a number of reportable donations previously undisclosed in its 2011 declaration. On 22 December, the NSWEC [declared](#) that the Party was eligible for a total of \$3,802,830.80 in public funding, following the deduction of \$586,992 in unlawful donations from the Party's Election Campaign Fund payment.<sup>45</sup>

### 6.1 Senate inquiry into funding and disclosure regime

Federally, on 19 April 2016 the Leader of the Opposition in the Senate Penny Wong referred the matter of public funding of elections to the Senate Standing Committees on Finance and Public Administration.<sup>46</sup> The primary focus of the Committee inquiry was a review of the adequacy of:

- (a) the funding and disclosure regime relating to annual returns;
- (b) the powers of the Australian Electoral Commission with respect to supervision of the conduct of, and reporting by, associated entities of political parties; and
- (c) any related matters.<sup>47</sup>

Whilst the Senate inquiry focused primarily on the Commonwealth funding and disclosure regime administered by the Australian Electoral Commission, the [final report](#) of the Committee did make a number of comments on the interplay between the State and Commonwealth regimes. In particular, the Committee commented that differences between the two regimes undermined the efficacy and integrity of both levels of governance.<sup>48</sup> This statement echoed the findings of the Expert Panel Report from 2014, which found that differences between legislative funding and disclosure regimes across jurisdictions, as well as the federal structure of some political parties, created opportunities for the avoidance of State restrictions on political donations.<sup>49</sup>

## 7. Local Government and Elections Legislation Amendment Act 2016

The introduction of donation caps on local government elections in July 2016 by the [Local Government and Elections Legislation Amendment \(Integrity\) Act 2016](#) was the first implementation of a recommendation from the Expert Panel report (Recommendation 7). In his appearance at the Expert Panel's Academic Roundtable in 2014, Associate Professor Joo-Cheong Tham described the greater risk of corruption at the local government level, due to "the fact that political donations go much further" at this level.<sup>50</sup> Combined with the centrality of local government to the planning process, as well as an overall lesser level of scrutiny, Professor Tham argued that the implementation of caps on these elections was therefore crucial.<sup>51</sup> In the Bill's [Second Reading Speech](#) the Minister for

Local Government Paul Toole echoed the sentiments of Professor Tham, stating that:

Local councillors, through the decisions they make on behalf of local communities, exert significant influence on the day-to-day lives of the people of New South Wales... [This Bill forms] part of a broader package of measures that are designed to restore community confidence in local councils and to provide an ongoing assurance in the integrity of councils and the decisions they make.<sup>52</sup>

The *Integrity Act 2016* amended the EFED Act to extend the caps on donations that apply at the State level to local government elections.<sup>53</sup> The Act also amended the EFED Act to:

- prevent councillors from making decisions on planning matters in which they or a relative have a **pecuniary interest**, where the permissible use of land is not being altered;
- force councillors to **hand over any financial benefit** they have received if they voted in a matter in which they had a pecuniary interest;
- require candidates at Local Government elections to disclose that they are a **property developer or associate** of a property developer;
- ban people **convicted of a crime** within the past seven years from standing for council if that crime carries a potential jail term of five years or more; and
- restrict people **convicted of a court offence** under the Election Funding Act from standing for council for two years.<sup>54</sup>

Whilst it had been anticipated that accompanying expenditure caps would be introduced in the same Act – a further JSCEM recommendation from 2010<sup>55</sup> – an Office of Local Government [media release](#) dated 22 June 2016 stated:

Local government expenditure caps will be implemented as part of a broader review of the State's election funding laws once the Joint Standing Committee on Electoral Matters delivers its review of the Schott report on political donations.

The NSW Electoral Commission has advised that it would not be possible to implement expenditure caps in time for the September 2016 elections.<sup>56</sup>

## 8. Operation Spicer Report

The release of the [Investigation into NSW Liberal Party electoral funding for the 2011 state election campaign and other matters \(Operation Spicer Report\)](#) on 30 August 2016 represented the culmination of over four years of investigations by ICAC. The Operation Spicer report concluded that a total of 19 individuals – eight of whom were former Members of NSW Parliament – had acted with the intention of evading laws under the EFED Act relating to the disclosure of political donations, the ban on donations from property developers and caps on political donations.<sup>57</sup>

Along with these findings, the Report made a number of observations on the shortcomings of the EFED Act, stating:

At the time of the investigation, NSW had some of the most restrictive political donation and election expenditure rules of any jurisdiction, but those rules by themselves were demonstrated by the investigation as insufficient to make regulation effective. If the framework of enforcement, scrutiny by civil society, incentives and penalties does not support compliance with the rules, then rules alone will be ineffective.

Some of the weaknesses in the system uncovered by the investigation were remedied by the *Election Funding, Expenditure and Disclosures Amendment Act 2014*. This Act amended the *Election Funding, Expenditure and Disclosures Act 1981* by increasing maximum penalties for summary offences relating to political donations and electoral expenditure. The limitation period for commencing proceedings for summary offences was also increased. Importantly, limits on political donations have meant that third-party campaigners and branches of political parties operating in other jurisdictions are no longer an effective conduit for circumventing NSW donation laws. In addition, a new separate indictable offence was created relating to schemes to circumvent the donation or expenditure prohibitions or restrictions. For serious matters, a member of Parliament may now, if convicted, lose their seat.

Despite these welcome changes, there remained flaws in the regulatory framework which, in the Commission's opinion, continued to fall short of an effective system.

In December 2014, the Commission published its report, [\*Election funding, expenditure and disclosure in NSW: Strengthening accountability and transparency\*](#). In that report, the Commission made 22 recommendations affecting electoral funding, disclosure, election expenditure and political party registration operations at both the macro and micro levels in the context of NSW state elections. The report was distributed to NSW Parliament as well as the Political Donations Panel of Experts....<sup>58</sup>

### 8.1 Response of political parties

The release of the Operation Spicer Report occurred at a time of high scrutiny on political donations; with ICAC handing down its findings on the same day that it was [reported](#) that Federal Senator Sam Dastyari had received donations from a Chinese businessman. In response to the Report, then-Premier Mike Baird [confirmed](#) the NSW Government's "zero tolerance for corruption", whilst Greens MP Jamie Parker [reignited calls](#) for the establishment of a Federal ICAC and the introduction of uniform Federal and State donation laws. A number of [media articles](#) in the following days echoed these sentiments,<sup>59</sup> with former Leader of the Liberal Party John Hewson [arguing](#) that the Operation Spicer Report "provide[d] sufficient justification for a national ICAC, an essential element of broad-based electoral reform".<sup>60</sup>

## 9. JSCEM Report on 2015 NSW Election

Whilst reports and Committee inquiries of the last five years had primarily centred on reform of the EFED Act, the JSCEM [\*Report on the Administration of the 2015 NSW Election and Related Matters\*](#) covered the entire electoral regime.<sup>61</sup> Broadly speaking, the report's recommendations

can be divided into three groups: recommendations requiring changes to current processes and technologies used by the NSWEC, recommendations requiring amendment of the PE&E Act and recommendations requiring amendment of the EFED Act. The Report's key recommendations are listed below:

### **Changes to processes and technologies used by NSWEC**

- Expand electronic roll mark-off of electors at pre-polling and Election day polling booths, with a view to a full rollout over the next few elections (Recommendation 1);
- Limit iVote to its existing role (Recommendation 5), and establish a panel of experts to conduct an inquiry into the iVote system prior to the 2019 State Election (Recommendation 6);
- Make political parties How-to-Vote cards available to iVote voters (Recommendation 9);
- Develop an online nomination system for candidates and parties to use to submit nomination forms (Recommendation 13);
- Introduce provisions for the NSWEC to undertake random audits of political party membership to ensure all members are current and genuine (Recommendation 26).

### **Changes to PE&E Act**

- Empower the Electoral Commission to be authorised to deem suspected multiple voters as silent voters (Recommendation 2);
- Introduce voter identification requirements (Recommendation 3);
- Grant the NSW Electoral Commission greater powers with respect to illegal signage and third party material (Recommendation 15);
- Make it an offence for parties, candidates and third party campaigners to distribute registered material on polling day that could reasonably be assumed to be official advice from the Electoral Commission (Recommendation 16(b));
- Increase the number of required nominators for independent Legislative Council candidates from 15 to 100 (Recommendation 19);
- Review Part 6 of the PE&E Act to determine the grounds in which an election result can be challenged and voided by the Court of Disputed Returns (Recommendation 22).

### **Changes to EFED Act**

- Increase the amount of funding available to political parties via the Administration Fund (Recommendation 29);

- Develop an online disclosure portal for political donations, accessible by members of the public and subject to time limits (Recommendation 30);
- Remove the restriction on political parties using subscription fees for campaign purposes under s96(6) of the EFED Act (Recommendation 31);
- Consider greater expenditure caps for rural and regional electorates (Recommendation 33).

### 9.1 Government response to JSCEM Report on 2015 NSW Election

On 17 May 2017, the NSW Government [responded](#) to the JSCEM *Report on the Administration of the 2015 NSW Election and Related Matters*. The Government accepted, or accepted in principle 22 of the Committee's 34 recommendations. The Government rejected only one of the Committee's recommendations – Recommendation 3, on the introduction of mandatory proof of identity requirements. Of the remaining 11 Committee recommendations not expressly accepted, five related to reform of the PE&E Act, including a recommendation that the NSW Government review the grounds on which an election can be challenged and voided by the Court of Disputed Returns. The remaining six – including the recommendation that the increased cost of campaigning in rural and regional areas be taken into account for the development of expenditure caps – related to the EFED Act. The Response noted that each of these recommendations would be considered as part of a broader reform of both Acts.

### 10. Draft Electoral Bill 2017

The [Draft Electoral Bill 2017](#), released for public consultation in August 2017, is the first attempt to replace the entire PE&E Act since it commenced operation in 1912. The Bill implements a number of key recommendations from the most recent JSCEM Report, including:

- Enabling the Electoral Commissioner to deem suspected multiple voters as “special electors” who are required to vote by means of a declaration vote (Schedule 6, Clause 1);
- Amending the number of nominees required to stand as a candidate for election to either the Legislative Assembly or Legislative Council from 15 to 50 (Clause 83);
- Granting the NSW Electoral Commission greater powers with respect to illegal signage and third party material (Clause 204(4));
- Creating a new offence prohibiting a person displaying, publishing or distributing material falsely appearing to be made by Electoral Commission (Clause 215).

Whilst not specifically a recommendation of the JSCEM, the Bill also increases penalties for a number of electoral offences, including but not limited to:



- encouraging a person to put a tick or cross on their ballot paper (Clause 189);
- bribery (Clause 209);
- interfering with political liberty (Clause 210);
- making a false or misleading statement (Clause 216);
- forging an electoral paper (Clause 218);
- stuffing a ballot box (Clause 219);

Public consultation on the Bill concluded in September 2017.

### 11. Conclusion

The NSW Government has [stated](#) that it aims to have a new electoral system in place at least 12 months prior to the State Election in March 2019. The Draft Electoral Bill 2017 was released for consultation in August 2017 but the Bill is yet to be introduced into Parliament. Whilst a Bill to reform the EFED Act is still to be released, considering the numerous inquiries, reports and events involved in its reform, its eventual debate will no doubt generate significant involvement from all sides of the NSW Parliament.

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<sup>1</sup> O'Farrell B, [Question Time](#), NSW PD, 23 June 2011, p 3308

<sup>2</sup> Barry C, [Submission of the NSW Electoral Commissioner](#), Joint Standing Committee on Electoral Matters Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure And Disclosures Act 1981*, June 2012, p 14

<sup>3</sup> Griffith G, [Integrity in government: issues and developments in New South Wales, 2011-2015](#), Briefing Paper 1/2015, January 2015, pp 32-34

<sup>4</sup> Schott K, Tink A and Watkins J, [Political Donations Final Report – Volume 1](#), December 2014, p 1.

<sup>5</sup> Joint Standing Committee on Electoral Matters, [Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure And Disclosures Act 1981](#), Report 3/55, May 2013, p 26; O'Farrell B, [NSW Government Response to Joint Standing Committee on Electoral Matters – Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure And Disclosures Act 1981](#), November 2013, p 1

<sup>6</sup> Barry C, [Submission to Panel of Experts – Political Donations](#), 17 September 2014, p 18

<sup>7</sup> Barry C, note 2, pp 10-11.

<sup>8</sup> Griffith G, note 3, pp 32-34. A summary of the Expert Panel Report's key findings can be found at pages 32-34 of the Research Service's publication [Integrity in government: issues and developments in New South Wales, 2011-2015](#).<sup>8</sup>

<sup>9</sup> NSW Government, [Government Response – Final Report of the Panel of Experts – Political Donations](#), 5 March 2015

<sup>10</sup> Schott K, Tink A and Watkins J, note 5, p 129.

<sup>11</sup> [Part 5, Division 2](#), [Part 6A, Division 2](#), and [Part 6A, Division 3](#) of the [Election Funding, Expenditure and Disclosures Act 1981](#) set out the funding amounts available under the Election Campaigns Fund, Administration Fund and Policy Development Fund respectively. According to the [Explanatory Notes](#) for the [Election Funding and Disclosures Amendment Act 2010](#), which established each of the above funds, "the amount to be distributed from the **Election Campaigns Fund** to a party or a candidate eligible for payment in respect of a State election is the amount of the actual electoral communication expenditure incurred by the party or candidate in connection with the election, on a sliding scale and subject to the applicable cap on electoral expenditure". The [Explanatory Notes](#) also describe the **Administration Fund** for as providing funding for "administrative or operating expenses of a party or Independent member during the year. Parties that are not eligible for payment from the Administration Fund may be eligible for payment from the **Policy Development Fund** of the amount of actual policy development expenditure incurred by or on behalf of the party during the year."

- <sup>12</sup> Schott K, Tink A and Watkins J, note 5, p 130
- <sup>13</sup> Schott K, Tink A and Watkins J, note 5, p 130
- <sup>14</sup> NSW Government, note 10
- <sup>15</sup> Rowell J, Joint Standing Committee on Electoral Matters, [NSW PD](#), 4 August 2016, p 43 (proof). See recommendations two to six, eight to 11, 13, 15 to 17, 19 to 30, 32, 35 to 36, 39, 43 and 45 to 50, Schott K, Tink A and Watkins J, note 5
- <sup>16</sup> Recommendations one, 31, 37, 38, 40, 41 and 44, Schott K, Tink A and Watkins J, note 5
- <sup>17</sup> NSW Government, [Attachment A – Government response to the Final Report Of The Panel Of Experts – Political Donations](#), March 2015, p 3
- <sup>18</sup> Joint Standing Committee on Electoral Matters, [The Final Report of the Expert Panel – Political Donations and the Government’s Response – Final Report](#), Report 1/56, June 2016, p 21
- <sup>19</sup> NSW Nationals, [Submission to the Joint Standing Committee on Electoral Matters Inquiry into The Final Report of the Expert Panel – Political Donations and the Government’s Response](#), 16 October 2015, p 6
- <sup>20</sup> Baird M, [Second Reading Speech](#), [NSW PD](#), 14 October 2014, p 3 (proof)
- <sup>21</sup> Joint Standing Committee on Electoral Matters, note 19, p 26, 32
- <sup>22</sup> NSW Government, note 18, p 9
- <sup>23</sup> Joint Standing Committee on Electoral Matters, note 19, p 53
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Ibid.*
- <sup>26</sup> Panel of Experts, [Political Donations Final Report – Volume 1](#), December 2014, pp 121, 124. See also Independent Commission Against Corruption, [‘Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency’](#), December 2014, p 15
- <sup>27</sup> Joint Standing Committee on Electoral Matters, note 19, p 56.
- <sup>28</sup> *Ibid.*
- <sup>29</sup> NSW Government, note 18, p 12. See also Joint Standing Committee on Electoral Matters, note 19, p 69
- <sup>30</sup> NSW Government, [Government Response – Final Report of the Panel of Experts – Political Donations](#), 5 March 2015
- <sup>31</sup> Twomey A, [Transcript of Joint Standing Committee on Electoral Matters](#), 30 October 2015, p 37-39
- <sup>32</sup> *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, per Barwick CJ at 373. For a detailed discussion on the restriction on NSW Parliament abdicating its legislative function, see Twomey A, *The Constitution of New South Wales*, May 2004, pp. 211- 212
- <sup>33</sup> Joint Standing Committee on Electoral Matters, note 19, p 68.
- <sup>34</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 is most commonly referred to as the definitive statement of the implied freedom of political communication within the Constitution. See *McCloy v New South Wales* [2015] HCA 34 at [23].
- <sup>35</sup> “Prohibited donor” is defined in section 96GAA of the [Election Funding, Expenditure and Disclosures Act 1981](#) as:
- (a) a property developer, or
  - (b) a tobacco industry business entity, or
  - (c) a liquor or gambling industry business entity,
- and includes any industry representative organisation if the majority of its members are such prohibited donors.
- <sup>36</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See *McCloy v New South Wales* [2015] HCA 34 at [2]-[3] for a description of the test to be applied.
- <sup>37</sup> *McCloy v New South Wales* [2015] HCA 34 (French CJ, Kiefel, Bell, Keane JJ in a joint judgement; Gageler, Nettle, Gordon JJ in separate judgements).
- <sup>38</sup> Twomey A, [McCloy v New South Wales: Out with US corruption and in with German proportionality](#), [AusPubLaw](#), 15 October 2017
- <sup>39</sup> Roberts A, [Second Reading Speech](#), [NSW PD](#), 12 May 2016
- <sup>40</sup> Lynch P, [Second Reading Speech](#), [NSW PD](#), 12 May 2016. See also *McCloy v New South Wales* [2015] HCA 34 (French CJ, Kiefel, Bell, Keane JJ a at [49])
- <sup>41</sup> Lynch P, [Second Reading Speech](#), [NSW PD](#), 12 May 2016
- <sup>42</sup> According to the NSWEC, the precise value of the claim for public funding from the Liberal Party of Australia (NSW Division) was \$4,389,822.80.

- <sup>43</sup> Section 16(3) of the [Independent Commission Against Corruption Act 1988](#) states that the Commission may disseminate intelligence and information to law enforcement agencies and such other persons and bodies as the Commission considers appropriate.
- <sup>44</sup> Clennell A and O'Rourke J, "[NSW Liberals will reveal its illegal donors from the 2011 election campaign](#)", *The Daily Telegraph*, 24 March 2016
- <sup>45</sup> NSW Electoral Commission, [Statement by Chairperson](#), 22 September 2016
- <sup>46</sup> Wong P, [Journals of the Senate](#), 19 April 2016, p 4146-4127
- <sup>47</sup> Senate Standing Committees on Finance and Administration, [Commonwealth legislative provisions relating to oversight of associated entities of political parties](#). The Committee's second term of reference – a move that Attorney General George Brandis described as "*unprecedented and a violation of a very fundamental parliamentary principle*"<sup>47</sup> – directly required the attendance of Senator Arthur Sinodinos at the inquiry. This was based on his position as Finance Director and Treasurer of the NSW Division of the Liberal Party of Australia at the time of the Free Enterprise Foundations donations in 2011. The Committee's final report notes that Senator Sinodinos did not attend the inquiry, in contravention of an order of the Senate.
- <sup>48</sup> Standing Committees on Finance and Administration, [Final report on inquiry into Commonwealth legislative provisions relating to oversight of associated entities of political parties](#), May 2016, p 26
- <sup>49</sup> Schott K, Tink A and Watkins J, note 5, p 1
- <sup>50</sup> Tham J, [Panel of Experts - Political donations - Academic Round Table Discussion - Session Three: Public funding of election campaigns](#), 25 September 2014, pg 31.
- <sup>51</sup> Ibid.
- <sup>52</sup> Toole P, [Second Reading Speech](#), NSW PD, 21 June 2016
- <sup>53</sup> Section 95A(1A) [Election Funding, Expenditure and Disclosures Act 1981](#)
- <sup>54</sup> Office of Local Government, [Council integrity legislation passed](#), Media release, 22 June 2016
- <sup>55</sup> Joint Standing Committee on Electoral Matters, [Public funding of local government election campaigns](#), Report 4/54, p 46
- <sup>56</sup> Ibid.
- <sup>57</sup> Independent Commission Against Corruption, [Fact sheet - Investigation into NSW Liberal Party electoral funding for the 2011 state election campaign and other matters](#), 30 August 2016
- <sup>58</sup> Independent Commission Against Corruption, [Investigation Into NSW Liberal Party Electoral Funding For The 2011 State Election Campaign And Other Matters – Final Report](#), August 2016, p 26.
- <sup>59</sup> *Sydney Morning Herald*, [ICAC findings demand tough donations reform](#), 31 August 2016
- <sup>60</sup> Hewson J, [It's high time politicians stepped up to clean up](#), *Sydney Morning Herald*, 31 August 2016.
- <sup>61</sup> Joint Standing Committee on Electoral Matters, [Report on the Administration of the 2015 NSW Election and Related Matters](#), Report 2/56, 17 November 2016

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