PARLIAMENT OF NEW SOUTH WALES

Joint Standing Committee on Electoral Matters

REPORT 3/55 – MAY 2013

REVIEW OF THE *PARLIAMENTARY ELECTORATES AND ELECTIONS ACT 1912* AND THE *ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981*

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New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Joint Standing Committee on Electoral Matters.

Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981 / Joint Standing Committee on Electoral Matters. [Sydney, N.S.W.] : the Committee, 2013. [140] p. ; 30 cm. (Report ; no.3/55).

Chair: Jai Rowell, MP.

"May 2013".

ISBN 9781921686641

1. New South Wales. Parliamentary Electorates and Elections Act 1912.
2. New South Wales. Election Funding, Expenditure and Disclosures Act 1981.
3. Election law—New South Wales.
4. Elections—New South Wales.
5. Campaign funds—Law and legislation—New South Wales.

I. Title
II. Rowell, Jai.
III. Series: New South Wales. Parliament. Joint Standing Committee on Electoral Matters. Report ; no 3/55.

342.944 (DDC22)

The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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Membership

CHAIR	Mr Jai Rowell MP (Member from 21 June 2012, Chair from 29 June 2012)
DEPUTY CHAIR	The Hon. Robert Borsak MLC
MEMBERS	Mr Andrew Fraser MP The Hon. Amanda Fazio MLC The Hon. Trevor Khan MLC (Chair from 23 June 2011 until 29 June 2012) The Hon. Paul Lynch MP (Member from 21 June 2012) Mr Daryl Maguire MP (Member from 21 June 2012) The Hon. Dr Peter Phelps MLC The Hon. Peter Primrose MLC Mr Gareth Ward MP
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Terms of Reference

1) That the Joint Standing Committee on Electoral Matters conduct a comprehensive review of the *Parliamentary Electorates and Elections Act 1912* ("the PE&E Act") (excluding Part 2) and the *Election Funding, Expenditure and Disclosures Act 1981* (the "EFE&D Act").

2) The Committee is to consider whether the Acts should be amended or rewritten to promote free, open and honest elections in New South Wales.

3) In its review of the PE&E Act, the Committee is to inquire into and report to Parliament on the following matters:

   a) whether the terms and structure of the PE&E Act remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;

   b) the role and functions of the New South Wales Electoral Commission;

   c) whether existing provisions regarding the entitlement to enrol and vote in New South Wales elections are appropriate;

   d) the effectiveness of amendments made by the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* to facilitate automatic enrolment for the NSW elections;

   e) whether existing provisions relating to pre-poll voting, postal voting and other forms of voting remain appropriate;

   f) whether the PE&E Act provides appropriate voting options for electors with a disability and rural and remote electors;

   g) those provisions of the *Local Government Act 1993* that relate to local government elections and that are administered by the Electoral Commissioner under section 21AA(2) of the PE&E Act;

   h) whether the offences and penalties prescribed by the PE&E Act remain appropriate; and

   i) any other matter relating to the administration of state and local government elections under the PE&E Act.

4) In its review of the EFE&D Act, the Committee is to consider the following matters:

   a) whether the terms and structure of the EFE&D Act remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;

   b) the role and functions of the Election Funding Authority of New South Wales;

c) the operation and effectiveness of recent campaign finance reforms including the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*, and the *Election Funding and Disclosures Amendment Act 2010*; and

d) the recommendations made by the Committee following its 2010 inquiry into the public funding of local government election campaigns.

Chair's Foreword

I am pleased to present this, the Joint Standing Committee on Electoral Matters' third report of the 55th Parliament, which reviews the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*.

Over the course of this inquiry, the Committee has sought the views of those who administer elections, those who contest them and those other organisations and individuals who hold an interest in our electoral laws.

If one clear theme has emerged from the Committee's consultations, it is that whilst the essential principles of our representative democracy remain valid, the legislative framework through which they are given effect, requires modernisation.

The Committee believes that this modernisation should be delivered by way of a new electoral act for NSW that covers the conduct of State elections and the regulation of campaign finance and expenditure. Furthermore, the administration of the new act should be undertaken by a single statutory corporation.

Whilst those recommendations form the spine of this report, there are many more recommendations aimed at making specific improvements. All of these recommendations share the same goal however, and that is to have a legislative framework that clearly and concisely defines the roles and responsibilities of electoral participants and electoral administrators alike.

The next task for this Committee is to report on its inquiry into the 2012 Local Government Elections. Once completed, that report will be the fourth report of this Committee in this Parliament and it is to be hoped that the work of those inquiries will do much to ensure the good health of our democratic processes as we progress toward the 2015 State Election and beyond.

On behalf of the Committee I would like to extend my sincere thanks to each of the individuals and organisations that made submissions to the inquiry and gave evidence at the Committee's public hearings. Needless to say, the information gathered during the course of the inquiry was invaluable in formulating the report's final recommendations. I would also like to convey the Committee's appreciation to the Electoral Commissioner and the staff of the Electoral Commission for their input into the inquiry and for their ongoing contribution to the work of the Committee.

On a personal note, I want to thank my Committee colleagues, namely the Hon. Robert Borsak MLC, the Hon. Amanda Fazio MLC, Mr Andrew Fraser MP, the Hon. Trevor Khan MLC, the Hon. Paul Lynch MP, Mr Daryl Maguire MP, the Hon. Dr Peter Phelps MLC, the Hon. Peter Primrose MLC, and Mr Gareth Ward MP, for the enthusiasm and insight that they brought to the inquiry. I would also like to thank the secretariat staff for their assistance in the conduct of this inquiry and in the preparation of the Committee's final report.

Mr Jai Rowell MP
Chair

Executive Summary

Background

On 23 June 2011 the Premier, the Hon. Barry O'Farrell MP, indicated that he would undertake a review of the State's two central electoral laws, the *Parliamentary Electorates and Elections Act 1912* (the PE&E Act) and the *Election Funding, Expenditure and Disclosures Act 1981* (EFE&D Act), as a result of significant changes to the political and electoral landscape since the Acts were originally enacted. The New South Wales Electoral Commission (NSWEC) stated that the PE&E Act and the EFE&D Act were in need of an overhaul, as a series of ad hoc amendments to the Acts over time had rendered them out-of-date and overly complicated. On 3 April 2012, following a referral from the Premier, the Joint Standing Committee on Electoral Matters (the Committee) resolved to undertake a comprehensive review of the PE&E Act and the EFE&D Act, referred to as the Review of the Electoral Acts inquiry.

Key issues and outcomes

The Committee received evidence across a broad range of issues, which are grouped in the report under the following categories:

- terms and structure of the PE&E Act;
- role and functions of the NSWEC;
- enrolment and voting; and local government elections;
- offences and penalties under the PE&E Act;
- terms and structure of the EFE&D Act;
- role and functions of the Election Funding Authority (EFA);
- operation and effectiveness of recent campaign finance reforms; and
- public funding of local government election campaigns.

Terms and structure of the PE&E Act

Stakeholder views on the terms and structure of the PE&E Act fell broadly into two parts:

- Firstly, that which proposed fundamental reform of the PE&E Act and its amalgamation into one electoral act for NSW, which covered the conduct of both State and local government elections and the regulation of campaign finance and expenditure.

  The new act would consist of plain English legislative principles to be determined by the Parliament, with the legislative machinery to be implemented by the NSWEC as a trusted integrity agency of the State.

- Secondly, the views of those who did not propose wholesale reform of the Act but submitted that either particular sections should be amended, or that particular sections of the PE&E Act should be retained in their current form.

The Committee supported the proposal for a single, consolidated electoral act and recommended that the NSW Government introduce legislation for a new electoral act for NSW which provides for both the conduct of State elections and the regulation of campaign finance and expenditure (Recommendation 1).

The Committee also recommended that, in drafting legislation for a new electoral act, the NSW Government seek clarity of structure, plain English drafting and include a general objects provision that would assist with judicial interpretation of the Act. It should also ensure that an appropriate balance is struck between retaining the substance of electoral law in the primary legislation, whilst allowing for certain detailed administrative provisions to be dealt with by way of regulations (Recommendation 2).

The Committee did not, however, support the proposal that the NSWEC have delegated rule-making powers, the reasons for which are covered in the report.

Role and functions of the NSWEC

In addition to proposals for a single piece of electoral legislation for NSW, it was also recommended to the Committee that the NSWEC and the EFA should be reconstituted into a single, three-member statutory corporation. This corporation would consist of a retired Supreme Court judge as Chair, the Electoral Commissioner and the Auditor-General of New South Wales, ex officio. The conduct of State and local government elections would be delegated to the Electoral Commissioner and the new three-member Commission would replace the EFA as the campaign finance regulator, thereby approving rules and procedures for the conduct of elections and administrative functions in the funding and disclosure context.

The Committee also considered proposals that it should be given a veto power over the appointment of the Electoral Commissioner and an oversight function in relation to the NSWEC (similar to that performed by the Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission).

Having considered these and other stakeholder views, the Committee recommended that, in drafting legislation for a new electoral act, the NSW Government provide that the conduct of State elections and the regulation of campaign finance and expenditure should be administered by a single statutory corporation (Recommendation 3). In addition, the Committee recommended that the Corporation's structure should support investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections (Recommendation 4).

The Committee did not, however, support proposals that its role and functions in respect of the NSWEC should replicate those of the specialist statutory oversight committees.

Enrolment and voting; and local government elections

The entitlement to enrol and vote

It was the Committee's view that the current functions of the Electoral Commissioner in relation to enrolment were also found to be satisfactory. On the question of compulsory

voting, the Committee made no recommendations for change as it found that compulsory voting had been an effective means of promoting participation in the democratic process in NSW.

In relation to voter disqualification, the Committee shared the concerns of a stakeholder over the section of the PE&E Act which disqualifies a person from voting, if they are found to be incapable of understanding the nature and significance of enrolment and voting, due to being of "unsound mind". The Committee considered s 25(a) of the Act to be unsuitable as its "soundness of mind" test did not provide for determining whether a person has a mental disability or impairment, what the nature of that may be and how it may, or may not, affect their ability to make an informed choice at the ballot box. The Committee further noted that the section failed to state by whom any disqualification decision may be made. Accordingly, the Committee recommended that the provisions of s25 (a) of the PE&E Act be repealed (Recommendation 5) and that, in drafting legislation for a new electoral act, the NSW Government ensures that a person who is unable to vote due to a lack of mental capacity at the time of an election cannot be served with a penalty notice (Recommendation 6).

Automatic enrolment and voting options

The Committee considered issues raised by stakeholders in relation to automatic enrolment and the appropriateness of those voting options which are provided to electors with a disability and to those in rural and remote electorates. It was the Committee's view that these matters had received sufficient attention in the course of its recent inquiry into the Administration of the 2011 NSW Election and reference was made to the recommendations made in that report.

Local government elections

Having noted the evidence received in the course of the inquiry, the Committee deferred any definitive comment in relation to the conduct of local government elections until its report on its inquiry into the 2012 Local Government elections.

Offences and penalties under the PE&E Act; and any other matters

The role of the NSWEC in enforcing electoral offences

The Committee considered the role of the NSWEC in enforcing electoral offences against the Act. Stakeholders noted that the PE&E Act prescribed only a limited enforcement role for the Electoral Commissioner in relation to electoral offences. The lack of any investigatory or prosecutorial role for the Electoral Commissioner was attributed to the need for the Commissioner to be removed from any reasonable apprehension of bias when carrying out his administrative function of conducting an election. It was the Committee's view that this difficulty could be overcome by restructuring the NSWEC and the EFA into a single statutory corporation whose structure supports investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections (see Recommendations 3 & 4).

Specific offences and penalties under the PE&E Act

The Committee heard from stakeholders on specific offences and penalties. The Committee supported a comprehensive review of the penalties which apply for breaches of the PE&E Act, with the object of ensuring that penalties under the new electoral act provide sufficient

deterrence to non-compliance and are consistent with those applicable under the EFE&D Act (Recommendation 7).

Having considered the offences and penalties under the PE&E Act, the Committee then concluded its review of the PE&E Act with an examination of a number of other issues which were raised by stakeholders in their evidence to the inquiry. These were:

- the processes by which the State elections may be disputed;
- candidates' child-related conduct declarations;
- matters in relation to party registration; and
- Legislative Assembly by-elections in the year prior to a state election.

Processes by which State elections may be disputed

The PE&E Act provides for petitions, concerning the validity of any election or return, to be heard by a Supreme Court Judge, sitting as a Court of Disputed Returns (CDR). The Committee considered possible alternatives to this model but concluded that the CDR ought to be retained in its current form.

The Committee did, however, find merit in the idea of holding mandatory process discussions before a matter is heard by the Court. A pre-hearing process shortly after an application for a disputed election has been made may provide an efficient and cost effective means of resolving any misunderstandings between parties (Finding 1).

Whilst the Committee supported CDR being retained in its current form it did make two recommendations to clarify its procedures and facilitate efficient dispute resolution. Firstly, the Committee recommended that when the Court of Disputed Returns sits, the Supreme Court Rules and the laws of evidence apply, subject to a provision that the Court may dispense with the rules of evidence where the justice of the case applies (Recommendation 8).

Secondly, the Committee recommended that a mandatory pre-hearing process be implemented by the Court of Disputed Returns prior to the hearing of any application for a disputed election (Recommendation 9).

Candidates' child-related conduct declarations

Division 5A of the PE&E Act requires that all candidates for election to the NSW Parliament declare whether that they have been convicted of the murder of a child or a child sexual offence, or the subject of proceedings for such an offence; or whether they have been the subject of an apprehended violence order for the purposes of protecting a child from sexual assault. The Committee heard from the NSWEC and from the Commissioner for Children and Young People on what they considered to be the flaws in Division 5A which rendered it unfit for its intended purpose. It was the Committee's view that in drafting legislation for a new electoral act, the NSW Government gives consideration to repealing Division 5A of the PE&E Act and consults upon what measures would be effective in preventing child sex offenders from holding Parliamentary office (Recommendation 10).

Matters in relation to party registration

A number of inquiry stakeholders considered matters relating to party registration in their submissions. The Committee agreed with concerns that the oversight of party registration by two entities across three pieces of legislation had led to convoluted and highly prescriptive arrangements. Accordingly, it recommended that the legislation for a new electoral act, administered by a single statutory corporation, harmonise the arrangements for the oversight of party registration including the requirements for appointing registered officers and party agents and the regulation of unregistered parties (Recommendation 11).

The Committee also accepted that there is a need for party constitutions to provide sufficient detail as to enable the electoral administrators to carry out their statutory functions, though it shared the concerns of several inquiry stakeholders that Parliament should not become overly prescriptive in relation to the internal affairs of political parties. Even so, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government amend the provisions of Part 4A of the *Parliamentary Electorates and Elections Act 1912* and Part 7 of the *Local Government Act 1993* to require that party constitutions provide that information which is required by electoral administrators in order that they may carry out their statutory functions (Recommendation 12).

Finally on the issue of nomination deposits, the Committee was not aware of any reason why deposit payments should continue to be limited to cash or bank cheque, particularly as payments by electronic transfer are a common and convenient means for many organisations and individuals. Accordingly, the Committee recommended that provision be made in the new electoral act for more flexibility in the payment of nomination deposits, including payment by electronic means (Recommendation 13).

Legislative Assembly by-elections in the year prior to a state election

The Committee found some merit in a stakeholder proposal that the PE&E Act should be amended to prevent a by-election being held for any vacancy which arose after 1 October in the year prior to a State election. This would avoid unnecessary expense and the inconvenience to voters, who may very likely elect a candidate who would not then be able to take up their seat in Parliament before it was dissolved. However, the Committee concluded that replacing the current discretion over by-elections with a statutory prohibition would not sit easily with some of the principles of our representative democracy.

Terms and structure of the EFE&D Act

The NSWEC's proposals for reforming the EFE&D Act

The NSWEC stated that the succession of major amendments to the EFE&D Act had rendered it unclear and eroded its internal coherence, making interpretation and compliance with the Act very difficult. In order to address the Act's structural shortcomings, the NSWEC firstly proposed that any overhaul of the EFE&D Act should have consolidated and consistently defined terms used throughout. The Committee determined that this would greatly assist with comprehension and compliance with the Act, and it consequently recommended that the NSW Government incorporate consolidated and consistently defined terms in drafting legislation for a new electoral act (Recommendation 14).

The NSWEC also highlighted the EFE&D Act's structural shortcomings in relation to its treatment of offence provisions. The NSWEC stated that an overhaul of the Act should include

the establishment of new Part in which all campaign finance related offences are listed with their penalty following each offence, as this would promote a better understanding of the campaign finance regime and stakeholder responsibilities under the regime. The Committee agreed that measures to increase understanding of the Act's offence provisions would be beneficial to stakeholders and recommended that in drafting legislation for a new electoral act, the NSW Government incorporate a Part in which all offences, including campaign finance related offences, are listed along with their penalty following each offence (Recommendation 15).

Proposals for reform of specific terms of the EFE&D Act

A stakeholder submitted that Part 6 of the EFE&D Act, which provides for political donations and electoral expenditure, was deficient in that it attempts to homogenously provide for both State elections and Members of Parliament and local government elections and elected members of councils. The stakeholder argued that, in doing this, the Act failed to recognise the inherent differences between the functions and activities of the two levels of government and created administrative difficulties and confusion for stakeholders as a result. Taking into account the NSWEC's concurrence with the stakeholder's view, the Committee determined that unnecessary administrative difficulties and confusion should be addressed wherever possible and, accordingly, recommended that the NSW Government segregate the provisions relating to political donations and electoral expenditure into separate sections, one covering State elections and elected Members of Parliament, and the other covering local government elections and elected members of councils, in drafting legislation for a new electoral act (Recommendation 16).

Stakeholders proposed that the terms of the EFE&D Act which relate to third party campaigners should also be confined to a stand-alone Part of the Act. This is because the current arrangement, whereby provisions relating to third party campaigners are entangled amongst provisions relating to political parties, candidates and groups, creates unnecessary confusion and hinders third party campaigners' capacity to comply with the legislation. Again, the stakeholder views in relation to the Act's treatment of third party campaigners accords with the Committee's own view that electoral legislation should be clear and structured to aid compliance. As a result, the Committee recommended that the NSW Government, in drafting legislation for a new electoral act, confine the provisions that relate to third party campaigners to a specific Part (Recommendation 17).

A stakeholder and the NSWEC further submitted that the EFE&D Act was deficient in terms of its inconsistent recognition of GST, with some campaign transactions being inclusive of GST and others exclusive of GST. The Committee concurred with the view that this creates numerous administrative difficulties for stakeholders and administrators and does not adhere to the widely accepted accounting principle that declarations of income and expenditure should be consistently exclusive of GST. Accordingly, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government provide that declarations of income and expenditure are consistently exclusive of GST (Recommendation 18).

Role and functions of the EFA

The Committee examined the role and functions of the EFA, which is currently constituted as a three member authority with the Electoral Commissioner as its Chairperson and two other members appointed on the nomination of the Premier of NSW and the Leader of the Opposition in the Legislative Assembly, respectively.

It was noted that in Recommendations 1, 3 and 4 the Committee supported the conduct of State elections and the regulation of campaign finance and expenditure being administered by a single statutory corporation under a single act; and that the new corporate structure should support its investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections. The Committee then considered stakeholder comments on the performance of the EFA in carrying out its current functions and concluded that the complexity of the EFE&D Act places a considerable administrative burden on both the Agency and claimants alike. Accordingly, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government address the need for more streamlined administrative processes for administrating campaign finance and expenditure (Recommendation 19).

Operation and effectiveness of recent campaign finance reforms

Political donations

The Committee considered evidence from the NSWEC, stakeholders and an academic who argued for the repeal of Division 4A of the EFE&D Act, which prohibits political donations from prohibited donors. The Committee heard that the prohibited donors provisions were made redundant by Division 2A of the Act, which caps donations variously at $2,000 and $5,000, and were, in themselves, at a sufficiently low level to achieve the objective of reducing the potential for perceived and/or actual occurrences of corruption or undue influence over the NSW political system. Stakeholders also asserted that the recent limiting of political donations to individuals on the NSW and/or Australian electoral roll, which has effectively banned all business entities from making donations to political parties, has further rendered the measures to ban prohibited donors null and void.

Given the clear logic and the weight of the evidence, including that from the NSWEC, that the prohibited donors provisions are extraneous to achieving the objective of mitigating real and/or perceived occurrences of corruption or undue influence, the Committee recommended that, in drafting legislation for a new electoral act, the NSW Government repeal Division 4A of the EFE&D Act, which relates to prohibited donors (Recommendation 20).

Public funding of election campaigns

The Committee heard stakeholder views that the scope of electoral expenditure that qualifies for public funding should be expanded to incorporate all items of State electoral expenditure, not just electoral communication expenditure, as is currently the case. The Committee concurred with stakeholders in relation to this issue and, accordingly, recommended that the NSW Government consider a review of the types of electoral expenditure that qualify for public funding (Recommendation 21).

A stakeholder also submitted that the EFE&D Act provides for differing levels of public funding under the separate candidate and party claims, and that this inconsistency has resulted in confusion and administrative difficulties for candidates and parties seeking to claim funds. In order to promote greater consistency and administrative efficiency in this area, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government harmonise the levels of public funding which may be claimed under the separate candidate and party categories (Recommendation 22).

Financial reporting

Stakeholders raised a series of issues in relation to the EFE&D Act's financial reporting requirements. Two stakeholders submitted that the Act's financial reporting requirements were unnecessarily onerous and had the ultimate effect of imposing a barrier to entry into the electoral process by Independent and smaller party candidates without the administrative and financial resources to effectively comply with the relevant provisions of the Act. Another stakeholder submitted that donors found the donor disclosure forms to be confusing and difficult to complete, and also that donors would like to have been able to indicate on their forms the purpose for which their donation was being made (e.g. for Federal, State or local government campaign purposes). Another stakeholder argued that the 8-week timeframe for the lodgement of disclosure returns was too short and that the timeframe should instead match the comparable provision in the Commonwealth Act, which is 15 weeks after election day. The same stakeholder asserted that that the current requirement that parties and candidates make separate financial disclosures was both onerous and unnecessary, and argued instead for a single, all-inclusive disclosure requirement for party-endorsed candidates. Lastly, two stakeholders raised the issue of delays in payment of public funding as a result of the timeframe for claiming public funding being less than the timeframe for making annual disclosures, and all claims for public funding having to be accompanied by an annual financial disclosure.

Having considered the EFE&D Act's current financial requirements, it was clear to the Committee that there was considerable scope for making these processes more efficient. Accordingly, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government provide a legislative framework which supports a more streamlined and simplified donor disclosure process, specifically:

- harmonisation with the Federal timeframes for submitting disclosure returns
- forms to enable donors to indicate the purpose for which a donation is made
- a single, all inclusive disclosure requirement for party-endorsed candidates, and
- provisions in relation to timeframes for claiming public funding and annual financial disclosures being set out in primary legislation (Recommendation 23).

Vouching requirements

A stakeholder submitted that the EFE&D Act's vouching requirements were far too extensive in respect of claims for reimbursement of electoral communication expenditure, with copies of either the accounts or receipts (or a mixture of both) for all electoral communication expenditure, as well as copies of any advertising material to which any portion of the expenditure relates, being required. The EFA acknowledged the widespread difficulties experienced by stakeholders as a result of the Act's vouching requirements, but asserted that the both the Act and the Regulations did not provide it with any discretion in relation to these matters.

The Committee agreed that complying with the Act's current vouching requirements was unnecessarily onerous for stakeholders and consequently recommended that in drafting legislation for a new electoral act, the NSW Government repeal the requirement that claims

for public funding be accompanied by copies of any advertising material to which electoral expenditure relates (Recommendation 24).

Audit fees

The Committee heard stakeholder evidence that the costs of reviewing all claims for public funding and all disclosures of political donations and electoral expenditure by a registered company auditor, as required under the EFE&D Act, imposed an unreasonable financial burden on political parties and candidates. Stakeholders submitted that this was particularly acute in the case of smaller parties, unregistered parties and Independent candidates, as they do not have the financial resources of the major parties with which to comply with the Act's auditing requirements. The EFA noted the difficulties experienced by stakeholders in relation to this issue and suggested that these could be mitigated by broadening the categories of persons empowered to conduct the audits under the Act.

The Committee agreed that the costs of the audits placed an unreasonable financial burden on parties and candidates and concluded that the EFA's proposed solution was the most appropriate means of addressing the issue. Accordingly, the Committee recommended that in drafting legislation for a new electoral act, the NSW Government provide that the requirement for audits to be conducted by a registered company be changed to provide that audits be conducted by any of the following: a Certified Practising Accountant member of CPA Australia, NSW Division, a member of the Institute of Chartered Accountant in Australia, NSW Region, who holds a Certificate of Public Practice issued by that Institute, or a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute (Recommendation 25).

In addition, the Committee recommended that the NSW Government consider means of streamlining audit processes whilst maintaining the integrity of the system (Recommendation 26).

Public funding of local government election campaigns

The Committee heard evidence from the NSWEC and one other stakeholder on the recommendations made by the previous Parliamentary committee in its 2010 report, *Public funding of local government election campaigns*. In response to the previous committee's recommendation that a public funding scheme administered by the State be introduced in respect of local government elections, the NSWEC and the stakeholder argued that there was no demonstrated case for local government elections to be financed using public funds. Instead, the NSWEC argued that the limiting of electoral expenditure and the consequential reduction of real or perceived incidents of corruption and undue influence on local government would best be achieved by the judicious application of donation caps.

Whilst noting the evidence received by the NSWEC and the stakeholder in respect of the previous committee's recommendations, the Committee concluded that the matters raised would be best examined as part of its current inquiry into the 2012 Local Government elections. Accordingly, the Committee declined to make any definitive comment on the administration of local government elections until it reports on the Local Government elections inquiry, which it will do by 30 June 2013.

Report structure

Chapter one provides the background to the inquiry, its conduct, and a brief description of the report's structure.

Chapter two considers the terms and structure of the PE&E Act, including the NSWEC's proposals for reforming the Act and stakeholder comment on the NSWEC's proposals.

Chapter three examines the role and functions of the NSWEC, including the NSWEC's proposals for reform and other stakeholder views.

Chapter four looks at the provisions of the PE&E Act that relate to the entitlement to enrol and vote in NSW elections and whether those provisions remain appropriate; and those provisions of the Act that relate to local government elections and are administered by the Electoral Commissioner.

Chapter five considers whether the offences and penalties prescribed by the PE&E Act remain appropriate and also other matters raised by stakeholders in respect of the Act, including processes by which State elections may be disputed, judicial oversight of electoral administration and child related conduct declarations.

Chapter six examines the terms and structure of the EFE&D Act, including the NSWEC's proposals for reform across the Act, and the NSWEC's and stakeholders' proposals for reform to specific provisions of the Act.

Chapter seven considers proposals to restructure the EFA and stakeholder comment in relation to the performance of the EFA in carrying out its functions.

Chapter eight looks at amendments to the EFE&D Act since 2008 and the operation and effectiveness of the campaign finance reforms effected by those amendments. The chapter outlines stakeholder views on the impacts of the reforms, and also the NSWEC's view in relation to the Act's internal deficiencies, which are a consequence of the amendments.

Chapter nine briefly examines the NSWEC's and a stakeholder's comments in response to recommendations made by the previous Parliamentary committee regarding public funding of local government elections.

List of Findings and Recommendations

That the NSW Government introduce legislation for a new electoral act for NSW which provides for both the conduct of State elections and the regulation of campaign finance and expenditure.

That in drafting legislation for a new electoral act, the NSW Government seek clarity of structure, plain English drafting and include a general objects provision that would assist with judicial interpretation of the Act.

It should also ensure that an appropriate balance is struck between retaining the substance of electoral law in the primary legislation, whilst allowing for certain detailed administrative provisions to be dealt with by way of regulations.

That in drafting legislation for a new electoral act, the NSW Government provide that the conduct of State elections and the regulation of campaign finance and expenditure should be administered by a single statutory corporation.

That in drafting legislation for a new electoral act, the NSW Government provide for a single statutory corporation whose structure supports investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections.

That in drafting legislation for a new electoral act, the NSW Government repeal the provisions of section 25(a) of the *Parliamentary Electorates and Elections Act 1912*.

That in drafting legislation for a new electoral act, the NSW Government amend the current provisions of section 120C(6) of the *Parliamentary Electorates and Elections Act 1912* to provide that, a lack of mental capacity certified by a medical practitioner, is a sufficient reason for the failure of an elector to vote at an election.

That in drafting legislation for a new electoral act, the NSW Government undertake a comprehensive review of the penalties which currently apply for breaches of the *Parliamentary Electorates and Elections Act 1912*.

The objects of that review should be to ensure that penalties under the new act provide sufficient deterrence to non-compliance and are consistent with those currently applicable under the *Election Funding, Expenditure and Disclosures Act 1981*.

Chapter One – Introduction

BACKGROUND

1.1 In an answer to a Question on notice on 23 June 2011, the Premier, the Hon. Barry O'Farrell MP, stated that he intended to review the State's electoral laws. The Premier remarked that a review such as this was long overdue because much had changed in the nature of politics, parties and political campaigning since the PE&E Act was originally enacted:

> The Parliamentary Electorates and Elections Act was originally passed by this Chamber in 1912, and over the century that it has operated the nature of politics, parties and political campaigning has changed enormously. What were once street corner meetings, pamphlets and radio and cinema broadcasts have been replaced, whether for better or for worse, by direct mail, robocalls and online campaigning.[1]

1.2 The Premier went on to comment that significant changes had also taken place over the past 30 years with respect to the provisions of the EFE&D Act:

> The Election Funding, Expenditure and Disclosures Act is 30 years old and, similarly, the matters that it seeks to regulate have suffered significant change over those three decades. I ask members to think about what things were like when it was passed in 1981. It was before the internet, it was when Joh Bjelke-Petersen was Premier of Queensland, and it was actually the year before the *Today* show started..[2]

1.3 The NSWEC echoed these comments in its *Report on the Conduct of the NSW State Election 2011* (the NSWEC Report), stating that a comprehensive review of the electoral acts was required, as ad hoc amendments to the existing *Parliamentary Electorates and Elections Act 1912* had "…resulted in a complex and outdated piece of legislation."[3] The NSWEC Report further states that Acts are:

> …on the whole, overly prescriptive, anachronistic and an obstacle to re-engineering existing electoral procedures in line with advances in technology.[4]

CONDUCT OF THE INQUIRY

Terms of Reference

1.4 On 3 April 2012, following a referral from the Premier, the Committee resolved to undertake a comprehensive review of the PE&E Act (excluding Part 2) and the EFE&D Act. This inquiry is referred to as the Review of the Electoral Acts Inquiry.

1.5 It should be noted that Part 2 of the PE&E Act, which relates to the distribution of electorates, is excluded from the inquiry terms of reference because this part of the Act is not within the Committee's jurisdiction.[5]

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[1] The Hon Barry O'Farrell MP, *Legislative Assembly Hansard*, 23 June 2011, p. 3308.

[2] The Hon Barry O'Farrell MP, *Legislative Assembly Hansard*, 23 June 2011, p. 3308.

[3] New South Wales Electoral Commission, *Report on the Conduct of the NSW State Election*, 2011, p. 191.

[4] NSWEC, *Report on the Conduct of the NSW State Election*, 2011, p. 192.

1.6 The full inquiry terms of reference can be found at page vi of this report.

Submissions

1.7 An advertisement calling for submissions was placed in the *Sydney Morning Herald* on 18 April 2012. The Committee also wrote directly to relevant individuals, organisations and political parties to inform them of the inquiry and invite them to make a submission.

1.8 The Committee received 19 submissions from stakeholders that included individuals, advocacy groups and political parties. A full list of the submissions received can be found at Appendix One of this report and copies of the submissions are available on the Committee's webpage: www.parliament.nsw.gov.au/electoralmatters.

Public hearings

1.9 Three public hearings were held at Parliament House on 15 June, 29 June and 24 August 2012. Evidence was taken from 28 witnesses. A list of witnesses that appeared before the Committee can be found at Appendix 2 of this report.

1.10 The transcripts of evidence from the hearings can be found at the Committee's webpage: www.parliament.nsw.gov.au/electoralmatters.

1.11 The Committee wishes to expresses its gratitude to all the groups or individuals who made a submission or gave evidence in relation to the inquiry.

Reporting date

1.12 On 24 October 2012 the Committee received and agreed to a request from Mr Colin Barry, Electoral Commissioner, that it consider an extension to the inquiry reporting date of December 2012. A copy of that letter can be found at Appendix Four of this report.

Other inquiries undertaken by the Committee

1.13 Prior to undertaking the Review of the Electoral Acts Inquiry, the Committee commenced an inquiry into the Administration of the 2011 NSW Election. This inquiry, part of the Committee's established Terms of Reference, inquired into the administration of the 2011 election in respect of three acts: the *Parliamentary Electorates and Elections Act 1912* (other than part 2), the *Election Funding, Expenditure and Disclosures Act 1981*, and provisions of the *Constitution Act 1902*, relating to procedures for and conduct of the elections of Members of the Legislative Assembly and Legislative Council (other than sections 27, 28 and 28A relating to the distribution of electorates). The Committee tabled its report of the inquiry in both Houses on 11 December 2012.

1.14 On 13 June 2012, following a referral from the Premier, the Committee resolved to undertake an inquiry into Administrative funding for minor parties. This inquiry reported on matters relating to the administrative funding for minor parties and

[5] See 2(a)(i) of the Terms of Reference establishing the Committee at http://www.parliament.nsw.gov.au/electoralmatters?open&refnavid=CO3_1 <Accessed 25 February 2013>.

specifically the annual amount to be distributed from the Administration Fund to eligible minor parties. The Committee tabled its report of the inquiry in both Houses on 15 November 2012.

1.15 Both inquiry reports can be found on the Committee's webpage. It is recommended that this report be read in conjunction with those reports, in order to attain a full understanding of the Committee's position on the electoral framework of New South Wales.

1.16 Finally on 21 November 2012, following a referral from the Hon. Don Page MP, Minister for Local Government, the Committee resolved to undertake an inquiry into the 2012 Local Government elections. The terms of reference for the inquiry and its progress to date may be reviewed on the Committee's webpage: www.parliament.nsw.gov.au/electoralmatters.

STRUCTURE OF THE REPORT

1.17 The report structure aligns with the inquiry's terms of reference, with the evidence received by the Committee and its comments thereupon being set out in sequential order.

1.18 Where the Committee considers that a particular term of reference has been sufficiently addressed in a recent report, or that it will be addressed in a forthcoming report, then reference is made to that inquiry.

Chapter Two – Terms and structure of the *Parliamentary Electorates and Elections Act 1912*

2.1 The Committee has been asked to conduct a comprehensive review of the PE&E and the EFE&D Acts and to consider whether they should be amended or rewritten in order to promote free, open and honest elections in New South Wales.

2.2 Part 3(a) of the inquiry terms of reference requests that the Committee inquire into and report on whether the terms and structure of the PE&E Act remains appropriate having regard to changes in electoral practices and the nature of modern political campaigning.

2.3 During the course of the inquiry, the Committee received evidence on this issue from academics, individuals, organisations and political parties. This evidence fell broadly into two parts.

2.4 Firstly, the evidence from the NSWEC and Professor Graeme Orr (in a report prepared for the NSWEC) proposing fundamental reform of the PE&E Act; and its amalgamation into one electoral act for NSW that covered conduct of both State and local government elections and the regulation of campaign finance and expenditure.[6]

2.5 Secondly, the evidence from those who did not propose wholesale reform of the act but submitted that either particular sections should be amended; or that particular sections of the PE&E Act should be retained in their current form.

2.6 This chapter begins by focusing on the proposal from the NSWEC for reforming the PE&E Act; and the views from organisations, academics and political parties specifically on that proposal.

2.7 In addition to considering the terms and structure of the PE&E Act, the Committee also held discussions with its Victorian counterpart, the Joint Investigatory Committee on Electoral Matters, on electoral law in that jurisdiction. This chapter summarises the relevant parts of those discussions.

2.8 The chapter then goes on to discuss the evidence of those stakeholders who considered that either particular sections of the current PE&E Act should be amended; or that particular sections of the PE&E Act should be retained in their current form.

[6] Whilst this report was prepared for the NSWEC and tabled by them, the NSWEC did not share all of the opinions Professor Orr expressed in the report. See: NSWEC, Answers to questions on notice, 29 June 2012, Question 5, p. 4.

THE NWEC'S PROPOSALS FOR REFORMING THE PE&E ACT

2.9 In reviewing the history of the PE&E Act, the NSWEC observed that the Act was itself a consolidation of other statutes dating back to 1843; and that since being enacted in 1912 the PE&E Act had been amended by 80 pieces of legislation.

2.10 It was the NSWEC's view that:

> This piecemeal process of amendment has led to the quandary of applying what is in effect a 19th century Act to a 21st century electoral regime.[7]

2.11 The NSWEC compared the PE&E Act to that of Victoria's electoral legislation, prior to its restructure in 2002, in that:

- it is extremely prescriptive in some areas and lacking in detail in other areas;
- it is written in difficult language and is poorly organised;
- it does not provide for modern election management practices; and
- in some cases, it is out of step with current electoral practice and community expectations.[8]

2.12 The NSWEC noted that this complexity did not accord with internationally agreed principles for electoral legislation, which advocated an unambiguous, understandable and transparent structure that addressed all components of an electoral system necessary to ensure democratic elections.

2.13 Electoral legislation which was designed to be easily understood would, the NSWEC argued, have a positive impact on the exercise of the fundamental human right to vote. [9]

2.14 It was the view of the NSWEC, that the terms and structure of the PE&E Act should be reformed and that it should be amalgamated, with the electoral provisions of two other Acts, to form one electoral law:

> …the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding and Disclosure Act 1981*, the electoral provisions of the *Local Government Act 1993* and their respective Regulations require root and branch reform and amalgamation.
>
> New South Wales should have one piece of electoral legislation which encompasses the conduct of both State and Local Government elections and the regulation of campaign finance and expenditure.[10]

[7] NSWEC, *Submission No. 18*, p. 11.

[8] NSWEC, *Submission No. 18*, p. 13.

[9] NSWEC, *Submission No. 18*, pp. 13-16. See also Professor Graeme Orr *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, [June] 2011 p. 3.

[10] NSWEC, *Submission No. 18*, p. 7.

A 'principles-based' electoral act

2.15 In place of what it considered to be the current highly prescriptive electoral legislation; the NSWEC proposed a new electoral act which consisted of plain English legislative principles.

2.16 Those principles would be determined by the Parliament, with the legislative machinery to be implemented by the NSWEC as a trusted integrity agency of the State.[11]

2.17 An illustrative example of this principles-based law making was provided in the NSWEC's submission as:

> (i) **Parliament** laying down *principles and standards* in suitable areas where
>
> (ii) the *detailed implementation* is to be filled in by an **independent and expert agency**.
>
> Therefore, the detailed expression of procedures for balloting and counting would be provided for as follows:
>
> (i) Parliament decides upon the key principles of the particular voting and counting system chosen by the Parliament; and
>
> (ii) the technical implementation of those principles is set out in directions developed by the NSWEC, and made public on the NSWEC website.[12]

2.18 Under the NSWEC's proposed model, issues of principle, or issues where there was a lack of consensus, or a potential conflict of interest, would be determined by Parliament in an electoral act:

> I would suggest that any issues of principle, or those on which there is no real consensus; or where there is a real potential for a conflict of interest involving or within the NSWEC, should *not* be left primarily to delegated discretion. Examples from the current New South Wales regime would include:
>
> - the core elements of voting;
> - the basic rules for party registration;
> - qualification to register to vote;
> - qualification for and restrictions on candidacy;
> - secrecy of the vote;
> - election management (i.e., authority);
> - offence and penalty provisions;
> - methods of filling casual vacancies;

[11] NSWEC, *Submission No. 18*, p. 7.

[12] NSWEC, *Submission No. 18*, p. 20.

- removal of mandates (i.e., any recall); and
- accountability mechanisms: basic rights of scrutineers, and resolution of disputes (e.g., disputed returns and judicial review).[13]

2.19 The NSWEC considered this 'principles-based' approach to be:

> …sufficiently prescriptive to ensure that electoral administrators uphold key principles, while leaving the detailed administrative arrangements as the administrative responsibility of the Electoral Commissioner, to adapt where necessary.[14]

2.20 While Professor Orr, in his report to the NSWEC, set out what 'principles-based' legislation sought to avoid:

> What principles-based law-making seeks to avoid is an excessive attempt by parliaments (or appeal courts) to craft the law as a dense maze of rules that can supposedly be mechanically applied and which somehow forsees all eventualities.[15]

2.21 As a further step to modernising NSW electoral law, the NSWEC proposed that the new act should include a general objects provision that would assist with judicial interpretation of the Act.

2.22 This provision could, the NSWEC argued, set out its mission in delivering high quality election services that are impartial, effective, efficient and in accordance with the law; and expressly provide that a function of the NSWEC was the promotion of public awareness of electoral and parliamentary topics by means of educational and information programs and by other means.[16]

2.23 In Professor Orr's view, a general objects provision, would be effective in drawing public and judicial attention to the purpose of the Act:

> On balance, a general objects clause can do little harm. Why would we not want to draw citizens' – and judges' – attention to such principles? In their absence, any judge interpreting an ambiguous electoral provision may put on the blinkers of a narrowly literal interpretation. Or the judge may invoke some purposes drawn from his own conception of electoral democracy.[17]

Delegated rule-making

2.24 The NSWEC acknowledged that there could be concerns about a model in which the act set out the essential principles and the detailed rule-making for electoral administration was delegated to it. Their submission posed and addressed four such concerns.

2.25 Firstly, the NSWEC considered whether such a process was less democratic than one in which Parliament legislated for both the principles and the detail. It

[13] NSWEC, *Submission No. 18*, p. 18. See also: Professor Graeme Orr, p. 13; and NSWEC, Answers to questions on notice, 29 June 2012, Question 2, p. 1.
[14] NSWEC, *Submission No. 18*, p. 14.
[15] Professor Graeme Orr, p. 6.
[16] NSWEC, *Submission No. 18*, pp. 14-15.
[17] Professor Graeme Orr, p. 17.

concluded that in exercising its delegated powers, the NSWEC would be acting as a trusted impartial agency relieving Parliament from legislating on certain detailed areas of electoral administration; and that Parliament could revoke any of those rules or guidelines made by the NSWEC should it wish to do so.[18]

2.26 The NSWEC noted that a restructuring of the NSWEC and the EFA was integral to its proposal for reforming the act; as per its recommendation that the Commission be constituted as a three-member entity. The members of that entity would consist of the Electoral Commissioner, a retired Supreme Court judge as Chair and the Auditor-General of New South Wales, *ex officio*.

2.27 This restructure would effect:

> …a clear distinction between the Electoral Commissioner as the individual with responsibility for conduct of elections delegated by the NSWEC as statutory corporation, and that entity itself.[19]

2.28 In the NSWEC's view, such a structure would avoid any perception that far-reaching legislative, judicial and executive powers had been conferred on the Electoral Commissioner alone, as a three-member Commission would scrutinise and review any decisions the Commissioner made, thus constituting an important probity mechanism.[20]

2.29 The NSWEC's proposals for a restructured Commission are discussed in further detail in the following Chapter, which focuses on role and functions of the NSWEC.

2.30 The second of the concerns which the NSWEC considered, was whether its integrity would be compromised by becoming a rule-maker rather than purely an administrator of rules. The NSWEC felt this risk could be avoided by way of a balanced approach in which it delegated only in areas of limited contention, where the its technical expertise is predominant; and its discretion was framed within the new electoral legislation with sufficiently clear principles and standards.[21]

2.31 Thirdly, the NSWEC addressed the question of whether the use of delegated rule-making would risk fragmenting the law:

> Members of the public and Parliamentarians may consider that electoral legislation should form a code: a "one-stop shop" for all the elements of electoral regulation. However, I note that there is always some discretion reposed in an administering agency to settle policy and process in putting legislation into effect. What matters is not so much whether the rules are in an Act, a Regulation or some instrument published on an agency website, but that they are developed by the most suitable body, and are consistent, clear and easily accessible to the public.[22]

[18] NSWEC, *Submission No. 18*, p. 21. See also: Professor Graeme Orr, p. 11.

[19] NSWEC, *Submission No. 18*, p. 31.

[20] NSWEC, *Submission No. 18*, p. 21, pp. 31-32. See also Appendix Four: Correspondence from the Electoral Commissioner dated 12 October 2012

[21] NSWEC, *Submission No. 18*, p. 22. See also: Professor Graeme Orr, p. 11.

[22] NSWEC, *Submission No. 18*, p. 22. See also: Professor Graeme Orr, p. 12.

2.32 The NSWEC considered that the new electoral act could clearly signpost the electoral framework and that the delegated rules could be prominently published in a high profile location such as: its website; the Parliament's website; the NSW legislation website; or a combination of these.

2.33 Fourthly, the NSWEC addressed the concern that electoral law would still be complex, but the complexity would be hidden in instruments promulgated by the NSWEC:

> Concerns that principles-based regulation may lead to a lack of clarity and certainty are addressed by integrating the principles with other forms of regulation. Thus, detailed rules will be crafted by the Electoral Commission to supplement the statutory principles; and guidance can be issued by the Electoral Commission to explain the principles.[23]

2.34 The NSWEC went on to note that examples of delegated rule-making in practice, could already be found in the current PE&E Act. Those were sections of the Act which provided for the Electoral Commissioner to approve and publish procedures in relation to technology assisted voting (which were technical provisions rather than pure principles); and those which delegated to the NSWEC the function of approving procedures to enable any Antarctic elector, where practicable, to vote at an election.[24]

2.35 For an international example of principles-based drafting and delegated rule-making, Professor Orr cited the German Federal electoral Law:

> The German Federal Elections Law is written in a very neat and short format, of just under 60 articles. Article 52 then delegates much of the fine detail to regulation. [This illustrates]…the degree to which one leading democracy entrusts the framing of the detail of electoral administration to a bureaucracy.[25]

2.36 Though in providing this example, Professor Orr noted that he was not advocating that model for NSW.[26]

Legislative terminology

2.37 Having noted the merits of electoral legislation which was designed to be easily understood (see paras 2.9-2.10), the submission from the NSWEC provided the Committee with the following example of where the PE&E in its current form failed this test:

> Despite its many amendments, much of the PE&EA's statutory terminology very much reflects its 19th century origins. For instance, s 125 reads as follows:
>
> **Returning officers' parcels**
>
> The returning officer shall, in respect of the polling booth at which the returning officer has presided, make up in separate parcels in like manner as is herein required

[23] NSWEC, *Submission No. 18*, p. 23. See also: Professor Graeme Orr, p. 12.

[24] NSWEC, *Submission No. 18*, pp. 23-28. See also: Professor Graeme Orr pp.13-14.

[25] Professor Graeme Orr, p. 14.

[26] Professor Graeme Orr, University of Queensland, *Transcript of evidence*, 24 August 2012, p. 2.

> of polling place managers, all ballot papers used or unused, and all books, rolls and papers kept or used by him or her at such polling booths and, if relevant, *copies of the electronic authorised copy of the roll*, or other files, showing the delivery of ballot papers to voters at such polling booths; and shall seal up and also permit to be sealed up by the scrutineers, and shall indorse in like manner as aforesaid the several parcels and deal with the same as hereinafter provided; and shall also make out in respect of the said booth the like list as is herein required in the case of polling place managers, which said list shall be verified by the signature of the returning officer, one or more other election officials and scrutineers in manner aforesaid.
>
> The juxtaposition of this archaic procedure with the contemporary use of electronic rolls, as provided for by the Automatic Enrolment Act, exemplifies the many incongruities in the PE&EA.
>
> I would suggest that a more serviceable version of this provision would be:
>
> Each returning officer presiding over a polling booth must account for and secure all ballot papers in accordance with the EC/NSWEC's approved procedures.[27]

2.38 The NSWEC considered the PE&EA to require a thorough re-assessment to gauge the suitability of language used throughout. It considered that:

> …terminology such as "district", "returning officer" and "polling booth" could be rendered much more recognizable to voters if they were replaced with terms such as "electorate", "election manager", and voting centre". Another example would be the removal of references to "treating" as an electoral offence, to be subsumed under the more intelligible "bribery".[28]

Concluding remarks

2.39 In the concluding remarks of its submission on the PE&E Act, the NSWEC considered that the act was not fit for purpose of providing for elections in 21st century NSW. Nor could the necessary reform of the act could be undertaken through amendment:

> Moreover, it is completely inappropriate and counter-productive to continue the piecemeal process of adding and removing sections of an Act which has become the legislative equivalent of the real estate terminology "renovate or detonate".
>
> Rather, as iVote has resoundingly demonstrated, to continue the momentum for reform to best electoral practice, a new Electoral Act should consist - wherever reasonably possible - of principles determined by the Parliament, the implementation of which is undertaken by the Electoral Commissioner.[29]

2.40 In his report for the NSWEC, Professor Orr observed that there was no 'off the rack model' for electoral legislation but that the German Federal Election law provided the best example of a principles-based approach to drafting.

2.41 In the 'British-speaking or common law world' Professor Orr acknowledged, that legislation tended to evolve through amendments and whilst this meant that

[27] NSWEC, *Submission No. 18*, p. 29. See also: Professor Graeme Orr, p.5.
[28] NSWEC, *Submission No. 18*, p. 29
[29] NSWEC, *Submission No. 18*, p. 29

electoral law was always on the agenda it generated legislation which was 'ad hoc and complex'.

2.42 Because there was a tradition in Australia of excessively detailed electoral legislation this made electoral commissions into administrators rather than regulators which:

> under-sells the independence and expertise of the commissions. Principles-based electoral drafting, twinned with delegation of rule-making to the commission in *suitable* areas, would make for more streamlined and flexible electoral rule-making.[30]

2.43 During the course of the public hearing on the 29 June, Mr Colin Barry, Electoral Commissioner, stressed to the Committee that the proposal for delegating rule-making was not a "power grab " by him; nor did he support devolving a lot of the administration of the act to regulation.

> I am not proposing that the electoral commissioner will be inventing law or that the Electoral Commission would be inventing law; that is clearly the role of the Parliament. The New South Wales Electoral Commission and Commissioner would be explaining how they think the principles apply…
>
> … With principle-based legislation I would see that we would do that at least nine months out from a State election. One of the things that would be appropriate, if this was a statutory Committee, is to brief the Committee on how we propose to run the election. What we do not want, from my point of view and the political parties' point of view, are any surprises. There needs to be flexibility around how you can tweak the system and make it better without having to bring every minor piece of procedure back through the Parliament to get changes. Typically what happens is that electoral law is always changed during the very last sitting of Parliament. It does not do me or the political parties any good. You have heard today the changes to the funding and disclosure legislation have created problems for political parties, third parties, and the public and for us to administer it. [31]

2.44 Mr Barry provided an example to the Committee of where a procedural process could have been undertaken by the Committee rather than requiring Parliament to legislate:

> **The Hon. Dr PETER PHELPS:** Can you give examples where you feel your freedom for administrative action has been stifled by the Act, where you think you could have done it better?
>
> **Mr BARRY:** We had some amendments made prior to the last election to do with how-to-vote card registration which nobody disagreed with. Everybody thought it makes it simpler, but it took a long time because it had to come through the Parliament. At the end of the day you are running right up until the last months of when the Parliament is sitting to know whether you are going to be able to implement it. A lot of it is procedural processes that do not need the imprimatur of Parliament in order to give effect to it—in my view.[32]

[30] Professor Graeme Orr, p. 19.

[31] Mr Colin Barry, Electoral Commissioner, *Transcript of evidence*, 29 June 2012, p. 46 and p. 50.

[32] Mr Colin Barry, *Transcript of evidence*, 29 June 2012, p. 50.

COMMENT ON THE NSWEC'S PROPOSAL

2.45 During the course of the inquiry, the Committee received evidence on the NSWEC's proposal in the form of submissions; in evidence given at public hearings; and in answer to questions following those hearings.

2.46 The Committee also convened a Roundtable Discussion on the 24 August 2012 in order to hear the views of selected academics.

Comment from organisations and political parties

2.47 In its submission to the inquiry The Nationals (NSW) considered the proposals from the NSWEC. Whilst sympathetic to the complications that the current legislative framework had caused the NSWEC, The Nationals cautioned against the NSWEC's proposed approach:

> In the ordinary course of government business, the approach advocated by the Electoral Commission may well be appropriate. However, the conduct of elections goes to the very heart of the operation of our democracy. Whilst inconvenient, the requirement for changes to be enacted through legislation guarantees a level of oversight through the Parliamentary processes that may not exist were such changes to be dealt with by regulation or by the publishing of guidelines. It would grant to the responsible Minister or Commissioner for the time being a degree of authority that we consider undesirable on account of the significance of the implication of any such determination. The Nationals have complete confidence in the current Commissioner and Premier to exercise any new authority granted to them in an appropriate and responsible way, but consider that the precedent set by such a grant of power has potential for abuse in the future.[33]

2.48 Adopting the NSWEC model and providing the Electoral Matters Committee with direct oversight of the NSWEC (thus increasing Parliament's oversight of the NSWEC exercise of its new powers) would not allay the concerns of The Nationals because:

> …this only addresses the issue of retrospective oversight of the electoral process. The concerns expressed in our original submission relate to the prospective oversight of electoral processes and procedures, which in our view can only be achieved by dealing with such matters as far as possible through primary rather that subordinate legislation.[34]

2.49 The Nationals' view was that the past practices of the Parliament, in making piecemeal amendments to the PE&E Act had contributed significantly to the complications which the NSWEC was experiencing. It urged the current Parliament to be mindful of the unintended consequences of such further amendments that do not take into account the Act in its entirety.

2.50 In conclusion, The Nationals recommended that so far as possible matters concerning the conduct of state elections be dealt with by the provisions of the PE&E Act rather than by subordinate legislation or the issuing of guidelines by the Electoral Commission.

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[33] The Nationals (NSW Branch), *Submission No. 11*, p. 5.

[34] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 1, p. 1.

2.51 Mr Mark Neeham, State Director of the Liberal Party, NSW Division, informed the Committee that he:

> would like to see, in black and white, legislation for the rules by which we operate election campaigns.[35]

2.52 The Greens expressed some sympathy for the position of the Electoral Commission, but were not sure that the proposed model was feasible:

> By removing some of the more technical operational details from legislation there is a risk of increased uncertainty for candidates and parties as to how those aspects will be managed by the Commission. Any change to the Acts to transfer this kind of rule setting to the Commission would need to have strong safeguards of procedural fairness, extensive and genuine consultation prior to any rule changes and an effective way to appeal for amendment of operational rules which might work against the principles established in the Acts and common law.[36]

2.53 Whilst the NSW Nurses' Association informed the Committee that it was:

> …vehemently opposed to the idea that the electoral legislation should only address essential electoral principles leaving more detailed matters to the Commission, and, as necessary, subordinate legislation. In circumstances where substantial financial penalties and/or imprisonment apply, we say that the legislation should set out in clear, unambiguous detail exactly what is, and what is not required. The determination of what any "principle" may mean and how it is to be interpreted should be a matter for the Parliament to determine and enact clearly through legislation.[37]

2.54 The Australian Sex Party agreed in principle with the NSWEC's proposal; adding that there needed to be a robust and comprehensive complaints, review, and enforcement framework to support the legislative intent.[38]

2.55 The Christian Democratic Party informed the Committee that it agreed:

> … with the Commissioner that the electoral legislation should not try to cover the intimate detail of how elections should be run: the Commission should have the flexibility to introduce processes that facilitate the running of elections provided those processes are not in contravention of electoral legislation or reduce the safeguards required to ensure the transparency, openness and honesty demanded for elections.[39]

2.56 Mr Mark Lennon, Secretary, Unions NSW, supported a less prescriptive approach but considered that care needed to be taken over determining the power to set regulations and the role of Parliament:

> If the thrust of that [the NSWEC's proposal] is that the legislation is too prescriptive, I would say the answer is yes. It is the same principle as set out in the legislation. We

[35] Mr Mark Neeham, State Director, Liberal Party of Australia, New South Wales Division, *Transcript of evidence*, 15 June 2012, p. 57.
[36] The Greens NSW, Answers to questions on notice, 29 June 2012, Question 7, p. 2.
[37] NSW Nurses' Association, Answers to questions on notice, 29 June 2012, Question 3, p. 2.
[38] Australian Sex Party, Answers to questions on notice, 29 June 2012, Question 8, p. 3.
[39] Christian Democratic Party, Answers to questions on notice, 29 June 2012, Question 4, p. 1.

> have to be careful about who is setting regulations and who has the power and whether it is the role of Parliament and how far the role of Parliament goes. We would argue probably the complexity of issues around electoral communication expenditure and we have said in our submission, as I recall, it goes too far in what it defines as electoral communication expenditure. Paid advertising clearly is the big spend by everyone and that should probably be it. We support any views that, when it comes to outlining what is appropriate expenditure, less is better rather than being too prescriptive.[40]

Comment from selected academics

2.57 After the June public hearings, the Committee resolved to invite selected academics to a Roundtable discussion on the proposals for a new electoral act. This was held on the 24 August with the participation of:

- Dr Anika Gauja, Department of Government and International Relations, University of Sydney;
- Ms Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliament Research Library;
- Professor Graeme Orr, TC Beirne School of Law, University of Queensland; and
- Professor Anne Twomey, Sydney Law School, University of Sydney.

2.58 The following paragraphs seek to provide a detailed summary of those discussions, reflecting the importance the Committee attaches to them in specifically debating the merits, or otherwise, of the NSWEC's proposals.

2.59 Dr Gauja noted that, from her political science perspective, this was a timely opportunity to review electoral legislation:

> We are seeing a decline in what is known as formalised forms of participation—disinterest with the electoral system, a shift to more individualised forms of political participation, a decline in party memberships—which I think is very important for reconsidering this legislation. So at that particular point in time I think that any attempt to modernise the legislation to make the legislation clearer, much more accessible to the public and in that way to publicise the activities of the Parliament and what we want to see both the Parliament and political parties achieve into this century is a key strength of the report.[41]

2.60 An electoral act which connected the essential principles to the legislative detail would, in Dr Gauja's view, enhance public confidence in the legislation and assist with its interpretation and administration:

> …if you do, in fact, re-draft the Act, it seems an obvious thing but connecting the basic principles to the legislative detail will go a long way towards increasing public confidence in the document. Some provisions are extraordinarily detailed and because they are so detailed, there is a perception that they serve partisan interests. That may or may not be the case. For the purposes of today I am going to say it is

[40] Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 29 June 2012, p. 44.

[41] Dr Anika Gauja, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 2.

> not going to be the case. But putting the underlying principles will not only help increase public confidence but it will also help in the administration and interpretation of the Act.[42]

2.61 Ms Newton-Farrelly agreed that the time was right to review the Act but anticipated difficulties in the proposed model, when it came to determining what were the standards and rules:

> Essentially the beauty of an Act that is already in place is that it is agreed. As soon as you step back from that and say, "Let's mess around with this", there will be problems with gaining agreement on what you do. So I think that the first area where there is the potential for some messiness is in deciding or agreeing what is a standard and what is a rule. I do not think anybody is going to have problems with the principles, but dividing things up into standards that go into legislation and rules that remain with the commission I think there will be room for disagreement.[43]

2.62 A further difficulty, which Ms Newton-Farrelly anticipated, lay in the respective roles of the Electoral Commissioner, the Committee (in an oversight capacity) and the Parliament:

> Whether the Committee will speak as sort of showing the view of the Parliament and in that way will be able to approve rules that the commission puts into place, whether the commission itself will be able to say that we have made this rule and unless the Committee revokes it, it stands.[44]

2.63 Professor Twomey considered the PE& E Act to be ' a terrible mishmash particularly in terms of language and style' and she had no difficulty in supporting its review. However, she did not support a model in which the principles were set out in the Act and the NSWEC had power delegated to it to make rules.

2.64 This model raised four main areas of concern for Professor Twomey; beginning with the question of clarity:

> First of all, I would contend that it results in a lack of clarity rather than improving clarity. People when they look for rules look in the laws. They will look in the Act, they will see the principle, half of them will not know that there is anything else and they will just think: That's the principle, I interpret it this way, I think what I'm doing is right. Then they will discover later on that what they have done is wrong. It just makes it so much harder for people who just want to apply the rule. Okay, you found the Act, you find the thing, there is a principle, you don't know what it means, and then you have to go on and find there are some directions on some website somewhere and there could be 352 different ones and they have been drafted by someone who is not Parliamentary counsel and they are probably all inconsistent and half of them are probably ambiguous. As a legal practitioner I just think that is a complete nightmare and I never want to go there.[45]

[42] Dr Anika Gauja, University of Sydney, *Transcript of evidence*, 24 August 2012, p.14.

[43] Ms Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliament Research Library, *Transcript of evidence*, 24 August 2012, p. 3.

[44] Ms Jenni Newton-Farrelly, *Transcript of evidence*, 24 August 2012, pp. 3-4.

[45] Professor Anne Twomey, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 3.

2.65 The second main area of concern for Professor Twomey, was that giving the NSWEC legislative power and the power to interpret and enforce legislation would seriously undermine the separation of powers:

> I could direct you to a part in the submission which I think is sort of pretty spectacular in the way it merges into the Electoral Commission all functions. This is at pages 20 to 21 of the submission where it starts off with saying first of all it is the Electoral Commission that makes the law effectively, because the Parliament is just doing the general principles but the Electoral Commission is making the rule…
>
> So you are giving your Electoral Commission legislative power. Then you give them the executive power because they are the ones that are administering the Act and implementing it. Then when you go over to the next page it says and, by the way, this Electoral Commission is going to be one that does the enforcement and the interpretation and is going to come out with a whole lot of directions and findings and precedents and now it is being a court as well. You are effectively giving the one body legislative, executive and judicial power. I find that quite shocking.[46]

2.66 This gave rise to Professor Twomey's third main area of concern, which was that putting all of those powers into one body could put the integrity and independence of the NSWEC at risk:

> Just to go back to the basic principles, the reason why we have separation of powers is that you do not want to put all the power into the one body because if you do put all the power into the one body—all of us here accept that the Electoral Commission at the moment is an integrity body, it is independent, there are no problems with that, but once you give a body all those powers the real risks of corruption or the perception of corruption are there and there is an incentive for all the political parties to be going out there trying to get their people in there and trying to influence the decisions that the Electoral Commission makes. It puts a huge amount of political pressure on what should be an independent body. So the next point there is that it really politicises the Electoral Commission in an enormous way.[47]

2.67 The final main area of concern for Professor Twomey, was the potential for litigation. Whilst currently the provisions in the PE&E Act were uncontestable (unless they were found to be unconstitutional) a position where the NSWEC had delegated rule-making powers could be highly contentious:

> You go to this position of having Parliament sets out principles, Electoral Commission makes the rules, then every one of those rules has to be within the power granted to the Electoral Commissioner under the Act. You might try to stick in a whole lot of privative clauses to stop people from challenging every single one of the rules that they don't like, but the problem is that recently in the High Court in the Kirk case and the Public Service Association case in the High Court has said that the Supreme Court has to have the power of judicial supervision so that it can deal with jurisdictional error.
>
> That means that if the Electoral Commission has acted outside of its power in making each one of these zillion little rules that it is going to make then that is something that you can challenge in court. So any rule that a political party does not like—and I am betting there is going to be a lot of them—they can go to court and they can

[46] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 3.

[47] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p.4.

> challenge it and there is nothing the Parliament can do to stop that from happening. So the amount of litigation that would likely be produced by this sort of approach would be let's just say extremely lucrative for the bar.[48]

2.68 Professor Orr emphasised that far from making 'a grab for power', the model proposed by the NSWEC sought only the ability to draft regulations in technical areas, subject to oversight:

> In Mr Barry's submission you will see all the essential rules should be set by Parliament, including in relation to redistribution, qualification for candidacy, voting and so on. It is the technical detail that is in regulations and other times it is left to commission's discretion. The regulations would be drafted by the New South Wales Electoral Commission and this Committee could have oversight over that process.[49]

2.69 Professor Twomey did not consider that acts which were long or contained a lot of detail to be a problem and preferred this to having to 'scrabble around finding regulations'. However, regulations were preferable to directions from the NSWEC for reasons of accountability to Parliament:

> I would much rather it was in a regulation than a direction from the commission because at least a regulation goes to Parliament and it is a disallowable instrument. You have that democratic accountability aspect. If the Parliament wants to disallow it, it can. I worry about an Electoral Commission making those sorts of decisions when—obviously a Parliament can later override by legislation—they are not regularly being seen.[50]

2.70 In answer to the question of whether there was a middle point to found between an electoral law that was highly prescriptive and a model in which power was delegated to the NSWEC; Professor Orr considered that the:

> …classic example that is given in my report, and the Electoral Commission repeats, is the Commonwealth Act, and your Act as well, specifies that there have to be pencils in the polling station. If the commission needed to use pens they would be in breach of the law. There is inflexibility in relation to that that Professor Twomey has not picked up on. So many details very often need to be changed and Parliament cannot be expected to respond every time the Electoral Commission thinks there might be a problem with excessive prescription of details in some of these laws.[51]

2.71 The proposed model was, in Professor Orr's view, about leaving implementation and detail to the NSWEC but ensuring it was publically available and subject to oversight:

> It is about leaving the implementation and detail of the iVote regulation, Antarctic voting, aspects of postal voting and registration of electors to more flexible mechanisms that will still be publicly available and can be controlled by the Parliament or the Committee process.[52]

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[48] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 4.

[49] Professor Grame Orr, University of Queensland, *Transcript of evidence*, 24 August 2012, p. 5.

[50] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 5.

[51] Professor Graeme Orr, *Transcript of evidence*, 24 August 2012, p. 6.

[52] Professor Graeme Orr, *Transcript of evidence*, 24 August 2012, p. 6.

2.72 For her part, Professor Twomey had no issue with the concept of flexibility but did not support a situation where the NSWEC 'could just change the rules' – this needed to be done through a formally acknowledged process:

> Just leaving it to a single body to decide on the spur of the moment that a law that exists one day does not exist the next day without anyone knowing is problematic.[53]

2.73 The making of regulations, was such a formally acknowledged process, in Professor Twomey's view, because these were considered by the Governor, Executive and the Parliament and were published in the *Government Gazette*. It was also a flexible process because if regulations were needed to be amended quickly, that could be done.[54]

2.74 Consequently whilst minor administrative matters such as forms could be determined by the NSWEC, Professor Twomey had a preference for most matters being set out in an act or a regulation:

> I think the mix we have at the moment is okay. I have no problem with there being long provisions about Antarctic electors being in the Act. I do not think the rules about Antarctic electors probably change all that often and there is no real problem with leaving that sort of stuff there. But certainly when it comes to forms and things like that, there are real issues and I have no problem with those sorts of things being left to the Electoral Commission. Most other things, I think, should be left in the Act and if they cannot be in the Act and you need to be a bit more flexible, it should be in the regulations.

2.75 Professor Twomey noted that there was a practical problem with the consideration of regulations at particular points in the electoral cycle, as they could not be made, or changed, during the election period when the Executive was in caretaker mode.

2.76 A further practical problem would be that of parliamentary oversight during a period of prorogation – as the Parliament could be prorogued prior to the dissolution of the Legislative Assembly and before the Executive's caretaker mode commenced for the election period.[55]

2.77 In seeking to balance that which could be left with the NSWEC - because it was uncontentious - and that which should be set out in the Act, Dr Gauja argued that electoral law was inherently contentious and consequently all but the minutiae of electoral procedure was best left to Parliament:

> My issue with the submission is the question of where you draw the line as to what can be delegated and what cannot be delegated. In paragraph 36 the Electoral Commissioner does that in issues where there is no real consensus and a real potential for conflict of interest involving the Electoral Commission should not be left with discretion. He then goes on to list the whole heap of provisions which, I think, form the substance of electoral legislation.

[53] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 6.
[54] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, pp. 5-7.
[55] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 7.

> Electoral legislation by its very existence is inherently contentious. Because it is so contentious and so partisan, the beauty of it is that you are the only committee that is making the laws for your own existence. I think that needs to be done in a very public way. I would personally err on the side of leaving it more so to Parliament and ideally coming up with a legislative document that is principles based, that has the standards in there, and then perhaps delegate the minutiae of the electoral procedure to the commission. Thinking about how you can really define where there is consensus, what is the general principle and where various potential for conflict of interests.[56]

2.78 On the question whether any comparable parliamentary committee had the power of oversight on decisions and rules made by the Commissioner, Professor Twomey thought not, with parliamentary committees being limited to veto powers over appointments; and parliaments considering whether to disallow regulations.

2.79 Professor Orr did not see a comparator either, but saw a role for the Committee, in appointing Electoral Commissioners and scrutinising the regulatory role of the NSWEC, to be a:

> potential way through some of the thickets and concerns that have been legitimately raised-but overstated-here about a loss of some sort of responsibility or accountability in government…
>
> …You can look at section 125 in its current form-if you can make sense of it-and say, "Why is Parliament telling the Electoral Commissioner how to seal ballot papers and so on?" We are not in the nineteenth century any more when we did not have a trusted agency to run proper, free and fair elections. [57]

2.80 He noted that the NSWEC was already effectively a regulator in that it was entrusted to develop standards and rules about what was a reasonable excuse for voting:

> For all intents and purposes, they are the rules and unless someone comes along to an administrative court and challenges them—and almost no-one goes along to administrative courts and challenges electoral matters in Australia parliaments because we have good, trusted and independent agencies.[58]

2.81 At the minimum, in Professor Orr's view, there should be a 'clean up' of the act to restructure the format, draft it in plain English and remove unnecessary provisions. In this regard Professor Orr regarded the redrafting of the Victorian and Tasmanian electoral acts to be useful comparators.[59]

2.82 None of the selected academics had an appetite for extending the provisions of the PE&E Act to regulate the internal activities of political parties, a view which was largely summarised by Ms Newton-Farrelly:

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[56] Dr Anika Gauja, *Transcript of evidence*, 24 August 2012, P. 8.

[57] Professor Graeme Orr, *Transcript of evidence*, 24 August 2012, pp. 8-9.

[58] Professor Graeme Orr, *Transcript of evidence*, 24 August 2012, pp. 8-9.

[59] Professor Graeme Orr, *Transcript of evidence*, 24 August 2012, p. 11.

> It seems to me that, if you are going to be reviewing the Act, you will come up against enough problems of disagreement without introducing another mammoth one.[60]

2.83 Finally, the discussions concluded with a consideration of the removal of the provisions relating to elections from the NSW constitution. Professor Twomey gave an example of how constitutionalising those provisions had created difficulties:

> **Professor TWOMEY:** Oh yes, I would be more than happy to get rid of that schedule up the back, it is a pain in the neck. I will give you one example of where we have a ridiculous law as a consequence of it and that is, when we did change the electoral laws so as to have optional above-the-line voting, the problem was that the Constitution says that you have to vote for at least 15 people and the risk was that people voting above the line would put "1" in one box and not fill out any of the other boxes. If that party did not have 15 people in it, then the vote would be invalid. So we ended up having to put in a requirement that every party that was the line had to have 15 members. It is stupid. Then we had the problem of, what if one of your members dies in the election campaign? So we had to put in a "death of a candidate" provision so that each party has to nominate somewhere for their vote to flow if one of their members dies. Those sorts of absurdities follow from the stuff that is entrenched in the Constitution.[61]

2.84 Though she considered them to be entrenched in manner and form provisions which made them difficult to remove.

Comment from the NSWEC on the Roundtable discussion

2.85 In a letter to the committee, dated 12 October 2012, the NSWEC responded to some of the comments made during the Round table discussions.

2.86 The NSWEC considered that some of the concerns raised in relation to principles-based electoral law, were in fact answered in the submission which it had made; and that there had been a misconception that adopting principles-based electoral law would confer far-reaching legislative, judicial and executive powers on the NSWEC.

2.87 This misconception, the NSWEC suggested, arose from reading its proposals for delegated rule-making in isolation from its proposals for making structural changes to the NSWEC and the EFA.

2.88 This structure, the NSWEC noted, would divide:

> …decision-making powers between the Electoral Commissioner and the three-member NSWEC, of which the Electoral Commissioner is but one member. This will ensure an additional probity mechanism for internal scrutiny and review of decisions by the Electoral Commissioner as administrator of State and Local Government Elections.[62]

[60] Ms Jenni Newton-Farrelly, *Transcript of evidence*, 24 August 2012, p. 12.

[61] Professor Anne Twomey, *Transcript of evidence*, 24 August 2012, p. 14.

[62] See also Appendix Four: Correspondence from the Electoral Commissioner dated 12 October 2012

2.89 A new three-member NSWEC as a statutory corporation would delegate the conduct of State and Local elections to an Electoral Commissioner whose appointment could be vetoed by an Electoral Matters Committee which had an oversight function in relation to the NSWEC. Under the proposed structure the Electoral Commissioner could only be removed by a vote of the Parliament.

2.90 The three-member NSWEC would approve rules and procedures for the conduct of elections and administrative functions in the funding and disclosure context and operate as the campaign finance regulator in lieu of the current EFA.

2.91 As noted at paragraph 2.29 the role and functions of the NSWEC are discussed in the following chapter.

2.92 The correspondence from the NSWEC also referred to a comparison made by the NSWEC between its proposed rule-making powers and those of the Australian Tax Office.[63]

2.93 The NSWEC considered this to be an appropriate comparison and noted that the ATO was:

> …but one of many rule-making agencies and bodies at both Commonwealth and State levels to which Parliament has entrusted the responsibility under statute for the development and approval of a vast array of instruments including: guidelines, orders, by-laws, standards, plans, codes of practice, directions, accreditations and procedures.

2.94 The NSWEC referred to concerns being expressed during the Roundtable that its proposals for delegated rule-making would exclude Parliamentary oversight; and to queries being made as to the appropriateness of the Electoral Matters Committee being given a function to consider any proposed rules.

2.95 It was the intention of the proposal to relieve Parliament of the *detail* of electoral legislation in suitable areas the NSWEC stated in its correspondence, making reference to a comment by Dr Gauja during the Roundtable, that the NSWEC was a trusted agency and that there was a perception that such agencies were trusted more than politicians.

Discussions with the Victorian Electoral Matters Committee

2.96 During the course of the inquiry, the Committee was grateful to members of the Victorian Joint Investigatory Committee on Electoral Matters (the Victorian Committee), for participating in a teleconference discussion on the approach taken in Victoria to electoral law-making.

2.97 The Committee had resolved to conduct the teleconference in order to learn more about the Victorian approach.[64]

2.98 Members of the Victorian Electoral Matters Committee considered that the approach taken in Victoria worked well, in that it enabled administrative changes

[63] NSWEC, *Submission No. 18*, p .36, and *Transcript of evidence*, 24 August 2012, p. 5.
[64] NSWEC, *Submission No. 18*, p. 13, and Mr Colin Barry, Electoral Commissioner, *Transcript of evidence*, 29 June 2012, p. 49.

to be effected by regulation, rather than requiring legislation to amend the primary act in Parliament.

2.99 The Victorian Committee explained that the Victorian Electoral Commission (VEC) could recommend that regulations be made but it did not possess the delegated rule-making powers which were being sought by the NSWEC in their submission.

2.100 Any regulations which were made, then came before the Victorian Scrutiny of Acts and Regulations Committee for its consideration. Though the Victorian Committee could consider proposals for making or amending electoral legislation and put recommendations to Government, it did not then have any scrutiny function over electoral legislation laid before the Parliament.

Proposals to amend, or retain, parts of the PE&E Act

2.101 As noted in the introduction to this Chapter, the Committee also received evidence on the PE&E Act from those who did not propose wholesale reform of the act but submitted that either particular sections should be amended; or that particular sections of the PE&E Act should be retained in their current form.

2.102 The submission from The Nationals made two recommendations in relation to the PE&E Acts provisions for Legislative Council ballot papers.

2.103 Firstly, The Nationals noted that:

> Following the closeness of the vote in the Legislative Council at the last state election, and especially during the subsequent appeal to the Court of Disputed Returns, it was suggested by an unsuccessful candidate that the absence of that candidate's name above the line had unfairly contributed to the candidate's failure to gain election. The purported solution to this alleged unfairness was to allow the inclusion of a candidate's name above the line where a group is not endorsed by a registered political party or parties.[65]

2.104 The Nationals did not support this approach, noting that the only appropriate name for such a group would be "independent". The Nationals submitted that groups should only have a group name where that group had been endorsed by a registered political party or parties, recommending that:

> Where a Legislative Council group comprises independent candidates not endorsed by a registered political party or parties, that group not be allowed to nominate a group name to appear above the line on the ballot paper.[66]

2.105 Secondly, The Nationals considered groups which were endorsed by two or more registered political parties; noting the previous practice of showing the names (or registered abbreviations) of those endorsers on the ballot paper, separated by a slash (/).

2.106 The Nationals felt that this implied that the group had been nominated by a single party rather than two or more discrete parties and advocated separating the names of those endorsing parties with an ampersand (&).

[65] The Nationals (NSW Branch), *Submission No.11*, p. 7.

[66] The Nationals (NSW Branch), *Submission No.11*, p. 7.

2.107 On the issue of registering political parties, Mr Graham Eames submitted that no party should be allowed to use the word Independent as part of its name, putting the question of 'how can a party be independent if it is a registered political party?'[67]

2.108 For The Greens, any review of the PE&E Act should examine whether the NSW electoral system was delivering fair representation of the community. It was their view that the current division of the state into single-member Legislative Assembly Districts, combined with optional preferential voting, was delivering 'increasingly biased outcomes'.

2.109 The Greens recommended that:

> …a Hare-Clark proportional representation election system similar to that used in Tasmania should be introduced, with New South Wales divided in to electoral districts each returning between 5 and 9 members, with each electoral district having the number of members to be elected directly proportional to the number of voters in the district.[68]

2.110 Such a system would, they acknowledged, potentially result in more Greens candidates being elected; however the number of seats won would be more accurately reflecting the vote received, whilst maintaining a 'reasonable degree of local representation'.

2.111 Adopting the Tasmanian system would also, in the view of The Greens, largely eliminate the need for by-elections, with a count-back system used to fill any vacancies that may arise.

2.112 A further reform, recommended by The Greens, was the amendment of the PE&E Act to confirm the right of public servants, other than those in the most senior positions, to be candidates in NSW elections.

2.113 The Greens considered that currently NSW Government Departments differ in their approaches when employees stand for election with some requiring the employee to take leave with, or without, pay.

2.114 Amending the PE&E Act to confirm the right of public servants to stand as candidates, would in their view, remove an anachronistic restriction on the candidature of public sector employees.[69]

2.115 In reflecting on the changes in electoral practices and the nature of modern political campaigning, the Liberal Party considered that the PE&E Act should regulate social media platforms.

2.116 Mr Mark Neeham, State Director, informed the Committee that:

> ..if we produce a brochure or direct mail piece—any party—it has our authorisation, agent or party's name and the printer's address. It is very different when it comes to social media, especially if it is Twitter or Facebook, where anybody can put up an

[67] Mr Graham Eames, *Submission No.6,* p. 1.
[68] The Greens NSW, *Submission No.15*, p. 3.
[69] The Greens NSW, *Submission No.15*, p. 4.

> account or page that purports to be me or any member of the Committee and make statements that the individual would not be aware of.
>
> …We do not want to change what social media is achieving, but at the same time in a political campaign there has to be an ability to trace it back to a political party or candidate.[70]

2.117 The Liberal Party advocated the establishment of clear guidelines on the use of social media platforms that impact campaigning (such as Facebook and Twitter); and the amendment of s151A of the PE&E Act to include:

> …a provision for "printing false information online" since electronic platforms are also used to mislead and interfere with an elector casting his or her vote.[71]

2.118 For the NSW Nurses' Association, it was critical that no changes be made to the PE&E Act which would inhibit the ability of the NSWEC to conduct elections for office to their Association:

> These elections are conducted by the New South Wales Electoral Commission. Whilst options exist for the elections to be conducted by private election companies, the NSWNA is of the view that the independence, transparency and integrity of the Electoral Commission are key factors in ensuring that our members are satisfied that those elections are conducted fairly and properly. No possible inference of bias or undue influence can arise, as could be the case if a private company was contracted by the NSWNA to run such critical elections.
>
> It is our view that no amendment to the Act or any other change that would affect the ability of the Electoral Commission to conduct the above-mentioned elections should be made.[72]

COMMITTEE COMMENT

2.119 It is the Committee's view that the interests of our democracy are best served by electoral laws which are clearly and concisely expressed; thus facilitating the respective roles of electoral participants and electoral administrators alike.

2.120 During the course of its review the Committee has found that PE&E and the EF&ED acts, as currently constructed, are not meeting these objectives. Therefore the Committee recommends that the two acts be amalgamated into a new electoral act for NSW, which provides for both the conduct of State elections and the regulation of campaign finance and expenditure.

2.121 The question of whether the electoral provisions of the LG Act should also be amalgamated into this new electoral act will be examined by the Committee during the course of its inquiry into the 2012 Local Government elections.

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[70] Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of evidence*, 15 June 2012, pp. 53-54.

[71] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 1.

[72] NSW Nurses' Association, *Submission No. 16*, p. 9.

RECOMMENDATION 1

That the NSW Government introduce legislation for a new electoral act for NSW which provides for both the conduct of State elections and the regulation of campaign finance and expenditure.

2.122 The new electoral act should seek clarity of structure, plain English drafting and include a general objects provision that would assist with judicial interpretation of the Act.

2.123 It should ensure that an appropriate balance is struck between retaining the substance of electoral law in the primary legislation, whilst allowing for certain detailed administrative provisions to be dealt with by way of regulations.

2.124 By appropriate balance, the Committee means that while it recognises the practical value of regulations, it is also mindful that the making of regulations is a matter for executive government and that in considering them the power of the legislature is limited to motions of disallowance. Therefore too much delegation of electoral law to regulation, risks undermining the traditional power of Parliament as a whole, to determine the manner in which its membership is determined.

2.125 The Committee commends the NSWEC for making a well-argued case that it should have delegated rule-making powers. However, the Committee shares many of the concerns expressed during the roundtable hearing.

RECOMMENDATION 2

That in drafting legislation for a new electoral act, the NSW Government seek clarity of structure, plain English drafting and include a general objects provision that would assist with judicial interpretation of the Act.

It should also ensure that an appropriate balance is struck between retaining the substance of electoral law in the primary legislation, whilst allowing for certain detailed administrative provisions to be dealt with by way of regulations.

2.126 During the course of the inquiry, the Committee has gained an appreciation of the breadth and complexity of our electoral framework and the many interests which it serves. It has also gained an appreciation of the expertise within the NSWEC, the academic community and the many stakeholders in the electoral process (many of whom gave evidence to the inquiry).

Chapter Three – Role and functions of the NSW Electoral Commission

3.1 Whilst the previous chapter considered the terms and structure of the PE&E Act, this chapter of the report addresses 3(b) of the inquiry's terms of reference by examining the role and functions of the NSWEC.

THE NSWEC'S PROPOSALS FOR RESTRUCTURING THE COMMISSION

3.2 Integral to the NSWEC's proposal for one piece of electoral legislation for NSW, would be a restructuring of the NSWEC and the EFA into a new three-member statutory corporation which would have overall responsibility for both the conduct of elections and the regulation of campaign funding and disclosure.[73]

3.3 The three members would be "a retired Supreme Court judge as Chair, the Electoral Commissioner and the Auditor-General of New South Wales, ex officio". A model, which the NSWEC considered, resembled systems adopted by other Australian Jurisdictions and New Zealand.[74]

3.4 Under this model, whilst the NSWEC would have overall responsibility, the conduct of State and local government elections would be delegated to the Electoral Commissioner. There would be 'a clear distinction' between the Electoral Commissioner as the individual with responsibility for conduct of elections delegated by the NSWEC as statutory corporation, and that entity itself.[75]

3.5 This new three-member Commission would replace the EFA as the campaign finance regulator; approving rules and procedures for the conduct of elections and administrative functions in the funding and disclosure context.[76]

3.6 The NSWEC considered that this new commission structure with its separation of roles and responsibilities would heighten public perceptions of the independence and impartiality of the NSWEC:

> The proposed membership of the NSWEC would also address any potential appearance of bias in the enforcement of the funding and disclosure regime. While I am not suggesting that there has ever been any impropriety on the part of appointees to the EFA, members of the public would probably be surprised to discover that their appointments are at the behest of the Premier and Opposition Leader.[77]

3.7 Whilst the NSWEC considered that the sums of money being dealt with when the EFA was established in 1981 were 'of such a small amount as to render its make-

[73] NSWEC, *Submission No. 18*, p. 31.
[74] NSWEC, *Submission No. 18*, p. 31.
[75] NSWEC, *Submission No. 18*, p. 31.
[76] NSWEC, *Submission No. 18*, pp. 31-32.
[77] NSWEC, *Submission No. 18*, p. 32.

up uncontroversial', the Election Campaign Fund at the 2011 State Election, had $28,575,000 available for distribution to eligible parties.[78]

3.8 In addition to enhancing external perceptions, the new structure would also constitute an important probity safeguard through performing an internal scrutiny and review function.

3.9 Its approval would be required for any rules or procedures made under the proposed delegated rule-making powers for the NSWEC in relation to the conduct of elections and administrative functions in the funding and disclosure context.[79] It would also be the decision maker in the area of prosecutions for breaches of the funding and disclosure provisions of the legislation.[80]

3.10 In terms of the Commission's accountability to Parliament, the NSWEC proposed a statutory oversight role for the Committee on Electoral Matters, with consideration being given to providing the Committee with a veto power over the appointment of the Electoral Commissioner:

> …thereby removing the appointment from the remit of the Executive alone.[81]

3.11 This oversight role for the Committee would, in the NSWEC's view, be commensurate with its own enhanced responsibilities as an integrity agency with the power to approve rules and procedures and be a decision maker in the area of prosecutions for breaches of the funding and disclosure provisions.

3.12 The Electoral Matters Committee would then provide an oversight function in relation to the NSWEC similar to that performed by other statutory oversight committees such as the Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission; or the Committee on the Independent Commission Against Corruption.[82]

3.13 Direct accountability to the Committee would, the NSWEC considered, fit within the existing statutory scheme whereby the Electoral Commissioner can only be removed from office by a resolution of the Parliament. It would also formalise the existing practice whereby the Committee conducts a review of elections following the NSWEC's report on them.[83]

3.14 The Electoral Commissioner informed the Committee that such an arrangement would clarify the current unsatisfactory situation where it was:

> …very unclear at the moment who the commissioner reports to…I have often explained to visitors and so forth, "Look I generally report to the Parliament" but that is very vague. I report to the Parliament? How do I report to the Parliament? I cannot even table a report in the Parliament.

[78] NSWEC, *Submission No. 18*, pp. 31-32.
[79] See Appendix Four, Letter from the Electoral Commissioner, dated 12 October 2012.
[80] NSWEC, *Submission No. 18*, p. 32.
[81] NSWEC, *Submission No. 18*, p. 37.
[82] NSWEC, *Submission No. 18*, p. 37.
[83] NSWEC, *Submission No. 18*, p .37.

> **…**I do not think that is good. I think that you should report. You have to be accountable to somebody and in my view I think that I should be accountable to this Committee if it is a statutory committee. Whilst of course the Committee cannot sack me there has to be a transparent level of accountability for the conduct of elections, particularly if you adopt my submission that the legislation should be more principle based and less detailed in terms of administration. In my view the commissioner needs to be accountable to somebody.[84]

OTHER STAKEHOLDER VIEWS

3.15 Evidence received by the Committee from other inquiry stakeholders in relation to the role and functions of the NSWEC included comment from The Nationals on the NSWEC's restructuring proposals.

3.16 For The Nationals, there were benefits to the NSWEC's proposed model in which a restructured Commission would have an investigative and enforcement function, whilst avoiding any reasonable apprehension of bias by delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections:

> I think that is a worthwhile approach. We have a situation at the moment where, in most cases, with breaches of the Parliamentary Electorates and Elections Act nothing much really happens unless it is a really significant breach that ends up in the Court of Disputed Returns.[85]

3.17 The Nationals were also supportive of an oversight function for the Electoral Matters Committee in relation to the NSWEC. In responding to a Question on Notice, The Nationals informed the Committee that whilst it did not support the NSWEC's proposals for a 'principles based' electoral Act which provided the NSWEC with delegated powers to approve rules and procedures:

> …we would support the Joint Standing Committee on Electoral Matters having responsibility for oversight of the Electoral Commission (and in this regard we give substantial weight to the Commissioner's expressed concern at the Committee's public hearings that he does not have anyone who he formally reports to)…[86]

COMMITTEE COMMENT

3.18 In the preceding chapter, the Committee recommended that the PE&E and the EFE&D acts should be amalgamated into one new electoral act for NSW which provides for both the conduct of State elections and the regulation of campaign finance and expenditure.

3.19 It follows, in the Committee's view, that this new electoral act should be administered by a single statutory corporation which would assume those functions currently exercised by the NSWEC and the EFA.

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[84] Mr Colin Barry, Electoral Commissioner, *Transcript of evidence*, 29 June 2012, p. 49.

[85] Mr Gregory Dezman, Deputy State Director, the Nationals (NSW), *Transcript of evidence*, 29 June 2012, p. 24.

[86] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 1, p. 1.

RECOMMENDATION 3

That in drafting legislation for a new electoral act, the NSW Government provide that the conduct of State elections and the regulation of campaign finance and expenditure should be administered by a single statutory corporation.

3.20 The Committee notes that the NSWEC's design for a new three-member statutory corporation is integral to its proposal that it have delegated rule-making powers in relation to the conduct of elections and administrative functions in the funding and disclosure context.

3.21 The Committee does not agree that the NSWEC should be given a delegated rule-making power. Though it does believe that the new corporate structure should support its investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections.

RECOMMENDATION 4

That in drafting legislation for a new electoral act, the NSW Government provide for a single statutory corporation whose structure supports investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections.

3.22 Finally, the Committee does not agree with proposals that its role and functions, in respect of the NSWEC should replicate those of the specialist statutory oversight committees.[87]

3.23 Those committees, such as the Committee on the Independent Commission Against Corruption, oversight independent investigatory bodies whose coercive powers are extensive and include covert powers such as the use of controlled operations, telecommunications interception and assumed identities.

3.24 The Committee does not consider that a comparable degree of parliamentary scrutiny is justified in relation to those investigative and enforcement functions currently conferred on the administrators of the electoral acts.

3.25 Nor does the Committee see a statutory oversight role being required on account of the NSWEC being provided with delegated rule-making powers, because as previously stated, it does not support that particular proposal.

3.26 Accordingly the Committee regards the current arrangements, which enable it to conduct inquiries into the electoral laws and any administration and practices associated with them, to be a proven and appropriate mechanism for ensuring parliamentary scrutiny of the role and functions of the NSWEC.[88]

[87] See NSWEC, *Submission No. 18*, p. 37.

[88] The Committee may inquire into and report upon such matters as may be referred to it by either House of the Parliament or a Minister, provided that any inquiry terms of reference are commensurate with the Committee's establishing terms of reference.

Chapter Four – Enrolment and voting; and local government elections

4.1 This chapter of the report firstly considers those inquiry terms of reference which relate to the entitlement to enrol and vote; automatic enrolment; the forms of voting available to electors; and whether appropriate voting options are provided for electors with a disability and to rural and remote electors.

4.2 Where an inquiry term of reference relates to an enrolment or voting issue which has, in the Committee's view, already received sufficient consideration as part of its recent report on the Administration of the 2011 NSW election, then the relevant parts of that report are summarised and no further comment is made.

4.3 Secondly, this chapter reviews the evidence which the Committee received from stakeholders in relation to local government elections and makes reference to the Committee's forthcoming report on its inquiry into the 2012 Local Government elections.

THE ENTITLEMENT TO ENROL AND VOTE

4.4 Part 3 (c) of the Inquiry's terms of reference ask that the Committee consider whether the existing provisions of the PE&E Act, regarding the entitlement to enrol and vote in NSW elections, remain appropriate.

4.5 The entitlement to enrol and vote is set out in Part 3B of the PE&E Act. A person is entitled to be enrolled to vote in an electoral district if they are 18 years of age, an Australian citizen, and they have lived at an address in that electorate for at least one month before enrolling.[89]

4.6 The following paragraphs summarise the evidence which the Committee received in relation to particular aspects of enrolment and voting.

Functions of the Electoral Commissioner in relation to enrolment

4.7 Mr Victor J Batten submitted that the powers of the Electoral Commissioner to enrol a person on a roll for a district on the Electoral Commissioner's own initiative, should be removed, noting that the 'Electoral Commissioner has too many unchallengeable powers already'.[90]

4.8 Whilst for Mr Gregory Briscoe-Hough, it was his view that the NSW Electoral Commissioner and the Australian Electoral Commissioner sought to maximise the number of enrolled voters at the expense of the integrity of the roll:

[89] See s 22(1) of the *Parliamentary Electorates and Elections Act* 1912. See also the restrictions on entitlement to vote and disqualifications from voting set out in s 24 and s 25 respectively.

[90] Mr Victor J Batten, Submission No. 4, pp. 2-3.

> …the KPI they seek is the maximisation of enrolled voters, irrespective of the validity of such registrations or the accuracy of enrolment details. Essential requirements relating to address are generally of no consequence to the Commissioners.[91]

Committee comment

4.9 The Committee does not consider that the provisions of the PE&E Act relating to the enrolment of persons by the Electoral Commissioner require amendment.

Compulsory voting

4.10 The submission from the NSWEC considered the nature of compulsory voting, noting that this was introduced in NSW in 1928 and that it was compulsory for electors to enrol to vote and to keep that enrolment current.

4.11 It was the view of the NSWEC that whilst there was considerable debate on the desirability of compulsory voting it had been an effective means of promoting participation in the NSW democratic processes:

> …I maintain that decisions made by democratically elected governments are more legitimate when higher proportions of the population participate. Moreover, if democracy is government by the people, then it is every citizen's responsibility to elect their representatives. I note that voter participation at the New Zealand 2008 Parliamentary Elections was 79.46%; that of the United Kingdom 2011 Parliamentary Elections was 65.77 % - up from a low of 59.38% in 2001; and the United States 2008 Congressional Elections was only 41.59%.[92]

Committee comment

4.12 The Committee concurs with the view of the Electoral Commissioner that compulsory voting has been an effective means of promoting participation in the democratic process in New South Wales.

Disqualifications from voting

4.13 Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, raised with the Committee her organisation's concerns about section 25 (a) of the *Parliamentary Electorates and Elections Act 1912*.

4.14 This section disqualifies a person from voting, if they are found to be incapable of understanding the nature and significance of enrolment and voting, due to being of "unsound mind".

4.15 It was Ms Given's view that as the section did not state who could make the disqualification decision, it could be open to abuse:

> This section fails to state who can make this disqualification decision. This judgement could be made by someone who is not engaged with the person regularly—someone who does not understand the complex nature of capacity or someone who has a desire to exert control over the person. This means the section is open to being used as a form of abuse towards persons with disability. Persons with an intellectual

[91] Mr Gregory Briscoe-Hough, *Submission No. 13*, p. 2.

[92] NSWEC, *Submission No. 18*, p. 38.

> impairment or psychiatric impairment who are able to understand the ramifications of enrolment and voting could be judged to fall into this definition inappropriately.[93]

4.16 Ms Given considered the section's "soundness of mind" test of understanding the nature and significance of enrolment and voting, to be unsuitable and wished to see the section repealed.

> The section's test as to whether the person in question understands the nature and significance of enrolment in voting is unsuitable. It could be argued that persons of sound mind do not have this understanding when it comes to the electoral system, and incorrect assessment of a person's capacity can result in the denial of a fundamental human right to make autonomous decisions, thereby depriving persons with disability the opportunity for self-determination. Furthermore, in accordance with article 12 of the Convention on the Rights of Persons with Disabilities, legal capacity ought to be recognised and persons ought to be provided with support to exercise their capacity. Therefore, it is our position that section 25 of the Act be repealed in order to eliminate any possibility of persons being wrongfully classified as being of unsound mind and, consequently, being unable to enrol and vote in New South Wales.[94]

4.17 The submission from the NSWEC considered that the Australian Centre for Disability Law had rightly raised concerns over the section; but it also recognised that it could be seen as a necessary means of protecting the electoral system:

> On its face, excluding persons of unsound mind from voting could be viewed as the removal of their fundamental right to vote; on the other hand, this may be viewed as a necessary way to protect the integrity of the electoral system. Also, it may operate as a mechanism by which some persons e.g., those suffering from dementia, are removed from the roll and thereby avoid the distress of receiving penalty notices, etc.[95]

4.18 The NSWEC explained that in practice no "soundness of mind" test was conducted when a person sought to enrol or cast a vote and that an elector could only be removed from the roll on the grounds set out in s 25(a) if a medical practitioner provided a medical certificate to certify that the person did not understand the nature of enrolment and voting.[96]

4.19 However, for the NSWEC, this exemption did not acknowledge that intellectual or psychiatric impairments were not necessarily either permanent or constant.[97]

4.20 The NSWEC suggested that a remedy might be found by abolishing s (25)(a) and amending the section of the Act relating to penalty notices, to exempt persons from voting if they were assessed by a medical practitioner as unfit to do so:

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[93] Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, *Transcript of evidence*, 15 June 2012, p. 34.

[94] Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, *Transcript of evidence*, 15 June 2012, p. 34.

[95] NSWEC, *Submission No. 18*, p. 50.

[96] NSWEC, *Submission No. 18*, pp. 50-51. See also: See New South Wales Electoral Commission Factsheet, *Exemption from enrolment and voting*.
http://www.votensw.info/_media/linked_publications/linked_brochures/information_resources/plain_english/plain_english_fact_sheets/fact_sheet_exemption_from_enrolment_and_voting <Accessed 29 August 2012>.

[97] NSWEC, *Submission No. 18*, p. 51.

> One option that the Committee may wish to consider in addressing the current arrangements would be to abolish the current exclusion for persons of unsound mind, as has occurred in Canada; and introducing a broader medical exemption under s 120C(6) of the PE&EA, which could be available for persons who are medically unfit to vote, by way of a medical certificate stating that a person is at a certain date incapable of understanding the nature and significance of enrolment and voting, without prohibiting the person from voting if they wished to do so on a particular occasion, as suggested by the ACDL.[98]

Committee comment

4.21 The Committee considers s 25(a) of the Act to be unsuitable as its "soundness of mind" test does not provide for determining whether a person has a mental disability or impairment, what the nature of that may be and how it may, or may not, affect their ability to make an informed choice at the ballot box. This risks some very subjective judgements over the rights of a person to vote.

4.22 Furthermore the section does not state by whom any disqualification decision may be made. Whilst it is to the great credit of the NSWEC that they have continued to seek written certification from a medical practitioner when considering disqualification on the grounds set out in s25(a), it appears to the Committee that there is no legal requirement for them to do so.

4.23 Until as recently as 2010, s47(4) of the *Parliamentary Electorates and Elections Act 1912* had required a certificate of an Australian medical practitioner in relation to disqualification on the grounds set out in section 25(a) (then section 21(a)).

4.24 However the amendments to the Act which were made by the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* omitted that provision.[99]

4.25 For these reasons the Committee recommends the repeal of the provisions of s25 (a) of the PE &E Act. The Committee also recommends that the new electoral act for NSW should ensure that a person, who was unable to vote due to a lack of mental capacity at the time of the election, is not served with a penalty notice.

RECOMMENDATION 5

That in drafting legislation for a new electoral act, the NSW Government repeal the provisions of section 25(a) of the *Parliamentary Electorates and Elections Act 1912*.

RECOMMENDATION 6

That in drafting legislation for a new electoral act, the NSW Government amend the current provisions of section 120C(6) of the *Parliamentary Electorates and Elections Act 1912* to provide that, a lack of mental capacity certified by a medical practitioner, is a sufficient reason for the failure of an elector to vote at an election.

[98] NSWEC, *Submission No. 18*, p. 51.

[99] See*: Parliamentary Electorates and Elections Act 1912*, Historical version for 17 September 2010 to 23 September 2010, Section 47(4).

AUTOMATIC ENROLMENT AND VOTING OPTIONS

4.26 Parts 3 (d) to 3 (f) of the Inquiry's terms of reference ask that the Committee examines automatic enrolment, the forms of voting available to electors and whether appropriate voting options are provided for electors with a disability and rural and remote electors.

4.27 The Committee considers that these are issues which have received sufficient attention in the course of its recent inquiry into the Administration of the 2011 NSW election.

4.28 The report on that inquiry found that in relation to the automatic enrolment of voters, the Electoral Commission's SmartRoll system was a significant initiative that provided an effective means of facilitating and increasing participation in the electoral process. However, the report noted the concerns expressed about the system and encouraged the NSWEC to address the issue of potential discrepancies in the NSW electoral roll that have occurred as a result of the implementation of SmartRoll.[100]

4.29 With regard to forms of voting, the report acknowledged that in the case of pre-poll voting the lifestyles of electors' had evolved and that the electoral process should adapt to these changes so as to optimise accessibility. Consequently the Committee recommended that the pre-poll application be simplified by allowing any voter not able to attend a polling place on election day to apply for pre-poll voting.[101]

4.30 The report recognised that there was an ongoing issue with postal voting on account of the infrequency of mail services in remote areas. It recommended that the NSWEC continue to promote alternatives for rural and remote voters, such as registered general postal voting, iVote and mobile voting.[102]

4.31 In relation to voting in hospitals or declared institutions, the report noted the ongoing difficulties experienced by the NSWEC in identifying declared institutions in a timely manner. It recommended that Ageing, Disability and Home Care, Department of Family and Community Services, assist the NSWEC with the timely identification of declared institutions for the purposes of elections.[103]

4.32 The report examined technology assisted voting for persons with a disability and for rural and remote electors. It found that the NSWEC's iVote system had been effective in enhancing voter accessibility and recommended that technology assisted voting be extended to by-elections for those electors who will be more than 20 kilometres outside their electorate on election day.

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[100] Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW Election and Related Matters*, Report No. 2/55, Sydney, December 2012, pp. 37-40.

[101] Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW Election and Related Matters*, pp. 16- 18.

[102] Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW Election and Related Matters*, pp. 12-16.

[103] Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW Election and Related Matters*, pp. 18-20.

4.33 It also noted that a criticism of iVote at the 2011 election, was that voters using the system were unable to verify that their vote was recorded as they intended it and the report recommended that the NSWEC develop and implement voter preference verification for voters using iVote at the 2015 election.[104]

LOCAL GOVERNMENT ELECTIONS

4.34 The PE&E Act gives the Electoral Commissioner the responsibility for administering the provisions of any other Act in so far as they relate to the enrolment of electors, the preparation of rolls of electors, and the conduct of elections.[105]

4.35 The inquiry's terms of reference (part 3 (g)) request that the Committee examines those parts of the *Local Government Act 1993* (LGA Act) that relate to local government elections and are administered by the Electoral Commissioner.

Maintaining consistency in electoral procedures

4.36 The evidence which the Committee received on this matter, largely focussed on the need to achieve consistency between the two acts on the processes for conducting elections.

4.37 It was the perceived lack of consistency between the nomination processes for State and Local elections on which the Liberal Party NSW Division commented in their submission.

4.38 Noting that candidates for local government elections were required to complete 5 forms to nominate as a candidate, the submission argued that this did not match the processes at State or Federal level and was too bureaucratic:

> …we recommend a reduction of forms for both State and local government elections to match the Commonwealth requirement.[106]

4.39 The submission from the NSWEC proposed incorporating Part 6 of the LGA which sets out the Electoral Commissioners responsibilities for the conduct of local government elections into the PE&E Act. This would be in order to overcome the current difficulties in ensuring consistency between the two Acts and their regulations:

> The pressing need for this change is the difficulty in ensuring harmony between the provisions of the PE&EA and of the LGA. Although in some circumstances there may be good reasons for differentiating practice at the State and Local Government levels, generally electors should be able to expect a consistent process in the conduct of elections. As matters currently stand, any amendments to the PE&EA which change practice and procedure must be mirrored by amendments to the LGA and regulations.[107]

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[104] Joint Standing Committee on Electoral Matters, *Administration of the 2011 NSW Election and Related Matters*, pp. 40-52.

105 See section 21AA(2) of the *Parliamentary Electorates and Elections Act 1912*.

[106] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.

[107] NSWEC, *Submission No. 18*, p. 54.

4.40 Where a change to the to the PE&E Act needed to be reflected in the LGA Act, a complicated and resource intensive process of "legislative catch-up" was undertaken whereby amending proposals needed to be formulated, agreed upon and drafted for introduction by the Minister for Local Government.

4.41 The fact that this detailed work needed to be completed within the short time frame between State and Local Government highlighted the deficiencies which the NSWEC considered there to be "in the maintenance of two regimes across two portfolios for the conduct of Statewide elections."[108]

4.42 In the case of the 2008 Local Government Elections, the necessary legislative amendments were only completed two months before the election which left the NSWEC very little time in which to update its administrative processes and guidelines:

> Committee Members will appreciate the significant logistical effort and expense involved in amending forms, handbooks, guides, standard operating procedures and training modules to reflect the changes at such a late date in the process. At the time of writing this submission, the NSWEC is again in the process of settling local government legislation to align it with State provisions at a time very close to the elections.[109]

4.43 In conclusion, the NSWEC contended that a single electoral act which set out the principles and enabled the Electoral Commissioner to develop the detailed procedure for all conducting elections would:

> …lead to certainty and consistency of electoral practice; enhance the general public's perception of the integrity of the process; and result in considerable improvements in efficiency.[110]

Committee comment

4.44 Whilst noting the evidence received in the course of this inquiry, the Committee does not intend to make any definitive comment in relation to the conduct of local government elections until it reports on its inquiry into the 2012 Local Government elections.

4.45 Parliament has resolved that the Committee is to report on the outcome of its inquiry by 30 June 2013.

[108] NSWEC, *Submission No. 18*, p. 55.
[109] NSWEC, *Submission No. 18*, p. 55.
[110] NSWEC, *Submission No. 18*, p. 55.

Chapter Five – Offences and penalties under the *Parliamentary Electorates and Elections Act 1912*; and any other matters

5.1 The first part of this chapter, addresses 3(h) of the inquiry's terms of reference by considering whether the offences and penalties prescribed by the PE&E Act remain appropriate.

5.2 The Committee's review of the PE&E Act is then concluded with an examination of several issues arising under 3(i) of the inquiry's terms of reference which request that it report on any other matter relating to the administration of state and local government elections under the Act.

OFFENCES AND PENALTIES UNDER THE PE&E ACT

5.3 As the NSWEC noted in their submission to the inquiry, there are a broad range of offences and penalties under the PE & E Act:

> There are some 77 offences against the PE&EA. These range from the relatively trivial, such as failing to deliver a request to vote to a pre-poll voting officer [s 114ZQ: 0.5 penalty units]; to those which strike at the heart of the integrity of the electoral process, such as bribery [s 150: 100 penalty units and up to 3 years' imprisonment].
>
> There are also severe penalties for the disclosure or use of enrolment information provided by the NSWEC to candidates, parties, etc., as required under the PEEA, other than for a permitted purpose - a maximum fine of 1,000 penalty units applies [s 43].[111]

5.4 The following paragraphs firstly consider the role of the NSWEC in enforcing electoral offences against the Act; before then going on to examine stakeholder views on specific offences and penalties.

Functions of the Electoral Commissioner in enforcing electoral offences

5.5 The submissions from The Nationals and the NSWEC both focussed on the Electoral Commissioner's limited enforcement powers and argued for the NSWEC to be provided with greater powers and resources.

5.6 For The Nationals, the NSWEC's ability to manage elections was diminished because it could not investigate or prosecute:

> The Electoral Commission does not have any power to investigate or take any other action concerning alleged breaches of the legislation governing the elections which it conducts…

[111] NSWEC, *Submission No. 18*, p. 55. See also: NSWEC webpage, *Electoral Offences*, http://www.elections.nsw.gov.au/about_elections/electoral_offences <Accessed 22 January 2013>.

> We consider that the Commission's lack of power in this area diminishes its ability to fully manage the conduct of elections…[112]

5.7 Providing the NSWEC with the powers and the resources to undertake investigations and prosecutions would, the Nationals considered, equate the role of the NSWEC in relation to the PE&E Act with that of the EFA in relation to breaches of the EFE&D Act; and provide election participants with a "clear avenue" through which concerns could be raised.[113]

5.8 The Nationals recommended to the Committee that:

> The Electoral Commission be granted sufficient powers and resources to investigate alleged breaches of the *Parliamentary Electorates and Elections Act*, and to commence prosecutions when such breaches are established.[114]

5.9 In the view of the NSWEC, the PE&E Act prescribed only a limited enforcement role for the Electoral Commissioner and this was confined to those provisions of the Act which expressly stated that the Electoral Commissioner had a duty.

5.10 By way of example, the NSWEC cited s 120C of the PE&E Act which states that the Electoral Commissioner has a duty to serve penalty notices on electors for failure to vote offences.[115]

5.11 The Act did not confer any investigatory or prosecutorial function on the Electoral Commissioner, because it was critical that there should be no question over their impartiality:

> …it is essential that community and stakeholder confidence in the Commissioner's impartiality is maintained. The Electoral Commissioner must discharge his or her duties in an impartial way and there must be no reasonable apprehension of bias, for example, if the Electoral Commissioner was required to make an administrative decision in relation to an election while at the same time undertaking the prosecution of one or more candidates for offences.[116]

5.12 Whilst the NSWEC recognised that there was a case for interpreting "the conduct of elections" to include a broader enforcement role, it was not structured or resourced in a way which would enable it to do so:

> …I acknowledge that there is a case for interpreting "the conduct of elections" to encompass any alleged offences against the legislation under which those elections are being conducted and which occur during an election campaign. However, the NSWEC as currently structured and staffed is not in a position to bring prosecutions for alleged infringements of the PE&E Act.[117]

5.13 Restructuring the NSWEC into a three-member statutory corporation (as discussed in Chapter three of this report) could, the NSWEC considered, address

[112] The Nationals (NSW Branch), *Submission No. 11*, p. 10.
[113] The Nationals (NSW Branch), *Submission No. 11*, p. 10.
[114] The Nationals (NSW Branch), *Submission No. 11*, p. 10.
[115] NSWEC, *Submission No.18*, p. 56.
[116] NSWEC, *Submission No.18*, p. 56.
[117] NSWEC, *Submission No.18*, p. 56.

these difficulties. This way, the Electoral Commissioner's role in conducting elections would be separated from the NSWEC's corporate enforcement role, thus removing the Electoral Commissioner from any reasonable apprehension of bias:

> One option which would go some way to addressing this is the division of responsibility I have referred to under the proposed new structure of the NSWEC, where the Electoral Commissioner has delegated responsibility for the conduct of elections and is therefore separated from the investigative and enforcement functions vested in the NSWEC entity, the potential for any apprehension of bias is removed.[118]

Committee comment

5.14 The Committee has recommended that in drafting legislation for a new electoral act, the NSW Government provides for a single statutory corporation whose structure supports investigative and enforcement functions, whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections.

Penalties under the Act

5.15 The Nationals (NSW Branch) noted the disparity between the penalties which apply for breaches of the PE&E Act and those applicable under the EFE&D Act, attributing this to the ad-hoc manner in which electoral law had developed.

5.16 On the whole, the Nationals found the penalties under the EFE&D Act to be "more significant" than those under the PE&E Act, although compliance with both acts was necessary to ensure the proper conduct of an election:

> …almost all offences under the Election Funding, Expenditure and Disclosures Act carry maximum penalties of $11,000 or $22,000, with just two minor procedural offences concerning failure to update registers held by the Election Funding Authority having lower penalties. All offences under the Election Funding, Expenditure and Disclosures Regulation have maximum penalties of $2,200. However, offences under the Parliamentary Electorates and Elections Act have maximum penalties that vary widely, from as little as $55 up to $110,000. Although that Act does include a much broader range of offences and can therefore be expected to impose some differing maximum penalties, in our view the degree of discrepancies is too great.[119]

5.17 This disparity between the two acts was particularly clear where terms of imprisonment were applicable:

> Under the Election Funding, Expenditure and Disclosures Act, only those offences with a maximum financial penalty of $22,000 also attract the potential for imprisonment of offenders, whereas under the Parliamentary Electorates and Elections Act there are five offences for which a person may be imprisoned that

[118] NSWEC, *Submission No.18*, p. 56.

[119] The Nationals (NSW Branch), *Submission No.11*, p. 11.

> carry a maximum financial penalty of just $550, and a further 19 for which a person may be imprisoned that carry a maximum financial penalty of $1,100.[120]

5.18 The Nationals argued for a review of the penalties under the PE&E Act to make them more consistent and more comparable with those under the EFE&D Act:

> To do otherwise would be to suggest either that some breaches of electoral law are only minor matters, or that breaches of the financial aspects of electoral law are more serious than breaches of other aspects of electoral law. We don't believe either of these positions to be capable of support.[121]

5.19 The submission from the NSWEC proposed the introduction of a penalty notice regime for "relatively minor offences". Citing a NSW Law Commission report, which identified savings of time and money for the issuing agency and the recipient, the NSWEC considered that:

> …a penalty notice regime would have a powerful deterrent effect and would increase confidence in the NSWEC as a regulator.[122]

5.20 It would also, in the NSWEC's view, assist in the separation of the administration of elections from the enforcement process.[123]

5.21 Whilst this approach would require a "considerable increase of staff", the NSWEC anticipated that these additional officers would only be required around the election period and that recruitment could be undertaken on a similar basis to that used for Returning Officers.[124]

5.22 The NSWEC's penalty notice proposal received in principle support from the Nationals NSW, in their evidence to the Committee:

> I think that is an appropriate way to go. Obviously it is a question of which offences you are applying it to and the quantum of the penalties. But, for minor breaches, I think it is probably appropriate.[125]

5.23 In terms of actual penalty amounts, the NSWEC was not aware of the monetary value of the penalties in the PE&E Act ever having been subject to "systematic review" but considered that a useful comparison could be made between NSW and the penalty amounts applicable in other Australian jurisdictions.

5.24 Any general review of penalty amounts should, in the NSWEC's opinion, be guided by the statements of the International Institute for Democracy and Electoral Assistance that financial sanctions should be proportionate but more than merely symbolic and severe enough to inhibit offending.[126]

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[120] The Nationals (NSW Branch), *Submission No. 11*, p. 11.
[121] The Nationals (NSW Branch), *Submission No. 11*, p. 11.
[122] NSWEC, *Submission No. 18*, p. 57.
[123] NSWEC, *Submission No. 18*, p. 58.
[124] NSWEC, *Submission No.18*, p. 57.
[125] Mr Gregory Dezman, Deputy State Director, the Nationals (NSW), *Transcript of evidence*, 29 June 2012, p. 24.
[126] NSWEC, *Submission No.18*, p. 58.

5.25 Other inquiry stakeholders also considered the deterrent effects of the current penalty amounts, with the Christian Democrats recommending that the fine for not voting should be increased to $200:

> If the State's voting system is to remain Compulsory (which we believe should be the case) then the current level of fines hardly seems to pose a reasonable incentive to vote when the number of non-voters is taken into consideration. The EC should provide information on the total numbers of voters who do not vote end up paying a fine. We imagine that the cost incurred in collecting and chasing up unpaid fines is hardly covered by the amounts actually paid.[127]

5.26 Mr Victor J Batten also supported an increase in the amount for failure to vote offences to $200.[128]

5.27 For the Australian Centre for Disability Law it was the serving of penalty notices to certain persons for failing to vote, which was a cause for concern. Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, informed the Committee that she had received anecdotal evidence from the disability community of persons being unable to vote due to their disability and subsequently being served with a penalty notice.[129]

5.28 The submission from the Greens proposed appropriate penalties for those making false and misleading statements about parties or candidates in order to "damage their credibility and hence their vote".

5.29 The Greens considered that the section of the PE&E Act which dealt with the printing, publishing and distribution of false information (s 151A) was too narrow; and that the courts interpreted its provisions to refer only to electors in the act of voting, rather than a prohibition on false or misleading information over the course of an election campaign:

> Section 151A of the PE&E Act 1912 which deals with publishing false information is far too narrow. It is confined to misleading a voter "in relation to the casting of his or her vote" which we understand has been interpreted by the courts as being confined to false or misleading information influencing a voter in the act of numbering a ballot paper. The narrowness of the provision fails to prohibit simple false statements designed to damage a political opponent during an election campaign. Such a limited interpretation is not a deterrent for those wanting to publish false or misleading information during an election campaign.[130]

5.30 The Greens referred to s 113 of the South Australian *Electoral Act 1985*, which made misleading election advertising an offence. They recommended legislation for NSW which prohibited false or misleading statements being made about a party or candidate in the media and electoral material; and imposed penalties that acted as a sufficient deterrent.[131]

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[127] Christian Democratic Party, *Submission No. 7*, p. 9.

[128] Mr Victor J Batten, *Submission No. 4*, p. 6.

[129] Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, *Transcript of evidence*, 15 June 2012, p. 34.

[130] The Greens NSW, Submission No. 15, p. 5.

[131] The Greens NSW, Submission No.15, p. 5.

5.31 In order to quickly address any alleged breaches of those provisions during an election campaign there would need to be an independent election tribunal in the Green's view, whose purpose would be to:

> …adjudicate on the truth of a statement quickly if election day was imminent; have the power to make public announcements before the election about the inaccuracy of published statements; and impose appropriate penalties.[132]

5.32 Further to these legislative changes, the Greens advocated for a review of s 151G of the PE&E Act which regulates the registration of electoral material, as they did not consider its current construction to be effective in preventing the distribution of misleading material:

> S151G of the PE&E Act is intended to prevent the distribution of leaflets which might mislead voters as to which candidate or party is responsible for them. The Greens are aware of a number of incidents where leaflets were registered which relied on this kind of misconception to be effective. For example, a leaflet which is aimed at voters considering voting for a Greens candidate, is printed to resemble a Greens leaflet, but which solicits that voter to direct preferences to another party, while clearly against the spirit on this section of the Act, are within a narrow reading of its provisions. These kinds of misleading leaflets should also be prohibited.[133]

5.33 For the Liberal Party, the lack of regulation of social media was a concern which needed to be addressed, as the PE&E Act did not currently capture this aspect of modern political campaigning:

> We are talking about authorisation and traceability. In particular, if we produce a brochure or direct mail piece—any party—it has our authorisation, agent or party's name and the printer's address. It is very different when it comes to social media, especially if it is Twitter or Facebook, where anybody can put up an account or page that purports to be me or any member of the Committee and make statements that the individual would not be aware of.
>
> …We do not want to change what social media is achieving, but at the same time in a political campaign there has to be an ability to trace it back to a political party or candidate.[134]

5.34 The Liberal Party proposed the inclusion of a provision in s 151A of the PE&E Act to prohibit the printing of false information online and the establishment of clear guidelines on the use of social media for election campaigning.[135]

Committee comment

5.35 The Committee supports a comprehensive review of the penalties which apply for breaches of the PE&E Act.

[132] The Greens NSW, *Submission No. 15*, p. 5.

[133] The Greens NSW, *Submission No. 15*, pp. 5-6.

[134] Mr Mark Neeham, State Director, Liberal Party of Australia, NSW Division, *Transcript of evidence*, 15 June 2012, p. 53.

[135] Liberal Party of Australia, NSW Division, *Submission No. 17*, p. 1.

5.36 The objects of that review should be to ensure that penalties under the new electoral act provide sufficient deterrence to non-compliance and are consistent with those applicable under the EFE&D Act.

RECOMMENDATION 7

That in drafting legislation for a new electoral act, the NSW Government undertake a comprehensive review of the penalties which currently apply for breaches of the *Parliamentary Electorates and Elections Act 1912*.

The objects of that review should be to ensure that penalties under the new act provide sufficient deterrence to non-compliance and are consistent with those currently applicable under the *Election Funding, Expenditure and Disclosures Act 1981*.

5.37 The Committee was concerned to hear from the Australian Centre for Disability Law that there was anecdotal evidence of persons being unable to vote at an election due to their disability and then subsequently being served with a penalty notice for a failure to vote.

5.38 The Committee has made the recommendation that the new electoral act for NSW should ensure that a person, who was unable to vote due to a lack of mental capacity at the time of the election, is not served with a penalty notice.

5.39 On the question of amending the PE&E Act to prohibit false or misleading statements being made about candidates or parties during an election campaign, the Committee perceives some substantial practical difficulties in developing a satisfactory test of whether a political statement was, or was not, 'factual'.

5.40 Legislating in this area raises the risks, as noted by other parliamentary committees, of introducing a chilling effect on robust political discourse and of a more litigious approach to elections and electoral law, and accordingly, the Committee does not intend to make a recommendation in relation to this issue. [136]

OTHER MATTERS

5.41 The Committee concluded its review of the PE&E Act with an examination of a number of issues which were raised by stakeholders in their evidence to the inquiry.

5.42 Those issues concerned the processes by which the State elections may be disputed; candidates' child-related conduct declarations; matters in relation to party registration; and the legislative provisions for commencing the election period and holding by-elections in the year prior to a state election.

[136] See for example: Parliament of Victoria, Electoral Matters Committee, Inquiry into whether the provisions of the Electoral Act 2002 (Vic) should be amended to make better provision for misleading or deceptive electoral content, [Melbourne] February 2010, pp. 157-60. http://www.parliament.vic.gov.au/emc/inquiries/article/951 <Accessed 25 January 2012>; Parliament of Queensland, Legislative Assembly Legal Constitutional and Administrative Review Committee, *The Electoral Amendment Bill 1999*, Brisbane, April 2000, p. iii.

Processes by which State elections may be disputed

5.43 The PE & E Act provides for petitions, concerning the validity of any election or return, to be heard by a Supreme Court Judge, sitting as a Court of Disputed Returns (CDR).

5.44 Petitions to the CDR may contest matters such as whether a winning candidate was qualified to nominate for election; whether there had been an error of electoral administration; or make claims of campaign malpractice.

5.45 Noting that petitioning the CDR was the only means by which an election outcome could be challenged in NSW, the submission from the NSWEC discussed some possible alternatives to this model. In so doing, the NSWEC acknowledged the assistance of Professor Graeme Orr, of the University of Queensland, from whom it had commissioned a paper on electoral legislation and the role of the courts in electoral law.[137]

5.46 Criticism could the NSWEC considered, be made of the CDR in that its processes are restrictive as petitioners have only 40 days in which to submit their plea; it is expensive as petitioning requires significant legal expertise and the losing party may incur substantial costs; and that because of the rarity of electoral petitions there is little in the way of judicial experience or a body of precedent for interpreting electoral law.[138]

5.47 The NSWEC suggested several alternatives to the CDR, which may be briefly summarised as follows:

- *Giving power over disputed returns to the NSWEC*: the NSWEC considered the likely drawbacks to be perceptions of its impartiality - should its own administrative competence be being called into question. There was also the risk that the NSWEC could be "embroiled in controversy" arising not only from any cases alleging incompetence against NSWEC officers, but also in their having to make any rulings on malpractice allegations involving political parties";

- *Moving from a court to a tribunal model by either adapting an existing tribunal or creating a new one*: the NSWEC saw some advantages in this approach as, for example, it would allow a panel of experts to be established. However the disadvantages included perceptions that a tribunal lacked sufficient status or that its appointment process made it properly independent;

- *Seeking negotiated outcomes by way of an alternative dispute resolution (ADR)*: though the NSWEC considered that ADR might work best as

[137] Professor Graeme Orr, *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, [June] 2011.
[138] NSWEC, *Submission No. 18*, pp. 65-66. Professor Graeme Orr, *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, pp. 23-25.

> mandatory pre-hearing negotiations which sought to clear up misunderstandings rather than a definitive process in its own right.[139]

5.48 On balance however, the NSWEC considered that there was probably little momentum for changing the CDR given the rarity of electoral disputes and the fact that it offered as good a process as any in resolving them when they arose:

> One of the things when one is in the midst of these frustrating challenges that end up nowhere is that on the spur of the moment you madly think, "This is a crazy system and something has got to be better"…When you allow enough time to get over the frustration and the emotion of the immediate frivolous court challenge that you are dealing with and you can reflect on it, you think that, in actual fact, there probably is not much better than what we have got. Maybe the Committee has some greater insight into it than I have. But I think it is probably the least worst option.[140]

5.49 The Greens NSW, noted that reform of the CDR was a very complex area and considered that the circumstances of the 2011 disputes were exceptional:

> Reform of the processes for the Court of Disputed Returns is a very complex area. The circumstances of the 2011 challenges seem to be exceptional and it is difficult to imagine ways to handle such things in a systematic way. The Greens continue to argue for matters related to deliberately false and misleading conduct during the campaign to be subject to appeal to the court as well as the more technical grounds which apply at present.[141]

5.50 The Nationals NSW considered that whilst their recent experiences at the CDR were not without certain frustrations, they had a high degree of confidence in the current system. They thought it appropriate that matters of such importance should be heard by a Supreme Court Judge and considered that the timeliness of CDR's proceedings compared favourably with those of the Administrative Decisions Tribunal in relation to local government elections:

> The court's final orders in the Hanson case were delivered less than two and a half months after the return of the writ for the election. In contrast, the ADT process for disputes concerning local government elections can take almost two years. (In *Jeffrey & ors v Roberts* [2002] NSWADT 57 the decision to dismiss a councillor from office was handed down more than 21 months after the declaration of the poll for the election that was complained about. It was a further 12 months before the Supreme Court determined an appeal by the person dismissed).[142]

5.51 The Nationals supported the continuation of a 40 day period in which petitions must be lodged as this helped to facilitate the timely resolution of disputes. They

[139] NSWEC, *Submission No. 18*, pp. 66-69; See also Professor Graeme Orr, *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, [June] 2011, pp. 26-30, which suggests additionally parliamentary involvement in the resolution of disputes or a statistical approach whereby any election result within some margin of error would trigger another election.

[140] Mr Colin Barry, Electoral Commissioner, *Transcript of evidence*, 15 June 2012, p. 6.

[141] The Greens NSW, Answers to questions on notice, 29 June 2012, Question 8, p. 2.

[142] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 4, p. 2.

also supported maintaining the power of the CDR to award costs in order to avoid frivolous or vexatious petitioning.[143]

5.52 However the Nationals did suggest a change to the current process whereby the Supreme Court Rules and the laws of evidence could be transferred to the CDR with discretion given to the Judge to dispense with them in certain circumstances. This would, the Nationals considered, help to avoid any confusion over the powers a Supreme Court Judge had when sitting as the CDR (rather than the Supreme Court):

> While we are generally supportive of the current process, it must be noted that there was some confusion during the proceedings as to what powers the judge had, given that he was sitting as the Court of Disputed Returns and not as the Supreme Court. It may therefore be procedurally beneficial for the Supreme Court Rules and the laws of evidence to be applied to the Court of Disputed Returns, with a discretion granted to the judge to dispense with them in certain circumstances.[144]

5.53 Mr Antony Green, Election Analyst, also considered that some clarification of the CDR's powers and procedures were necessary:

> What was interesting in those hearings was the judge who was sitting as the Court of Disputed Returns was constantly after clarification as to what his powers were because it is a very unusual court. Graeme Orr has done a paper for Colin Barry—which I have not read but I am sure Graeme as a scholar in this area knows these provisions. I do not think there is any other way, apart from a court of that sort, but it is probably a matter of clarifying the process of how it should work.[145]

5.54 For the Christian Democratic Party the cost of petitioning the CDR could be prohibitive; and whilst they did not wish to invite frivolous actions, they did want a system which enabled valid submissions to be made and not deterred because of the expense involved. They also considered that having a single Judge hear a petition ran the risk of perceptions of bias.

5.55 Their suggestion was the establishment of an independent arbitration process where a non-binding expert opinion could be given on the validity of a claim. If any party subsequently wished to take the matter to the CDR then they would do so with the knowledge that they may incur substantial costs. Any such matter before the CDR should in the Christian Democratic Party's view be heard by more than one Judge.[146]

Committee comment

5.56 Having considered the alternatives, it seems to the Committee that the CDR continues to provide the most appropriate means of definitively challenging the outcome of any election. The Committee also supports the retention of the 40 day time limit in which any petition may be brought because of the importance it attaches to speedily resolving a matter of such public interest as the outcome of an election.

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[143] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 4, p. 2.

[144] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 4, p. 3.

[145] Mr Antony Green, Election Analyst, *Transcript of evidence*, 15 June 2012, p. 28.

[146] Christian Democratic Party, Answers to questions on notice, 29 June 2012, Question 6, p. 2.

5.57 Although it appears that some initial uncertainties may have arisen during recent cases over the CDR's powers and procedures, these appear to be an understandable consequence of the infrequency of CDR hearings and the distinct procedural requirements of that court.

5.58 For example, as the NSWEC noted in their submission, electoral petitions are rarely heard, few Supreme Court Judges will have CDR experience and there is little in the way of precedent.

5.59 While the Committee favours retaining the CDR in its current form, there does seem to be some merit in the idea of holding mandatory process discussions before a matter is heard by the Court. A pre-hearing process shortly after an application for a disputed election has been made may provide an efficient and cost effective means of resolving any misunderstandings between parties.

FINDING 1

The Committee finds some merit in the idea of holding mandatory pre-hearing process discussions, shortly after an application for a disputed election has been made, as these may provide an efficient and cost effective means of resolving any misunderstandings between parties.

RECOMMENDATION 8

That when the Court of Disputed Returns sits, the Supreme Court Rules and the laws of evidence apply, subject to a provision that the Court may dispense with the rules of evidence where the justice of the case applies.

RECOMMENDATION 9

That a mandatory pre-hearing process be implemented by the Court of Disputed Returns prior to the hearing of any application for a disputed election.

Judicial oversight of electoral administration

5.60 Professor Orr's paper on legislative form and the judicial role concludes with a consideration of judicial review outwith the dispute of an election outcome, in which he notes that NSW is currently the only jurisdiction in Australia not to permit judicial review of electoral administration generally. [147]

5.61 As previously discussed, a petition to the CDR seeks post-election remedy, judicial review takes place before the election is determined:

> The usual remedy sought is an injunction telling the commission to do X or refrain from doing Y. It can also end in a declaration as to the proper interpretation of the law. Judicial review occurs before an election is determined, and hence can act as a "stitch in time."[148]

5.62 The counter-argument to judicial review acting as a "stitch in time" is, Professor Orr observes, that an electoral commission may be impeded from doing its job:

[147] Professor Graeme Orr, *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, [June] 2011 pp. 31-32.

[148] Professor Graeme Orr *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, p. 31.

> …electoral commissions, as respected integrity agencies, should be trusted to definitively administer the law. If they are unduly open to judicial review, especially during the hothouse of an election campaign, good administration may be impeded rather than assisted.[149]

5.63 Professor Orr argues that any review of the NSW electoral acts should "address the availability of judicial review" for two reasons. Firstly because Parliament has not considered the decision in *McDonald v Keats* (which found that general judicial review is not available to oversee "any step in an election") or deliberated on whether it is desirable to adopt a Commonwealth provision empowering the NSWEC and candidates to seek injunctions.

5.64 Secondly, if under a principles-based electoral act, the NSWEC has delegated power to make rules then the question of accountability takes on a new importance as it becomes both electoral regulator and electoral administrator.[150]

Committee comment

5.65 As noted in Chapter 2 of this report the Committee does not support the proposal that the NSWEC be given delegated rule-making powers. Therefore in the Committee's view questions of accountability, where the NSWEC is both electoral regulator and electoral administrator, do not arise in any practical sense.

Child-related conduct declarations

5.66 The submission from the NSWEC considered Division 5A of the PE&E Act. This part of the Act requires that all candidates for election to the NSW Parliament must declare whether that they have been convicted of the murder of a child or a child sexual offence, or the subject of proceedings for such an offence; or whether they have been the subject of an apprehended violence order for the purposes of protecting a child from sexual assault.

5.67 Following a State election the declarations of elected candidates only are reviewed by the Commissioner for Children and Young People, who then tables a report on the findings in both Houses of Parliament.

5.68 The NSWEC noted that this declaration was based on the NSW *Working With Children Check*, and that Members of Parliament would not otherwise fall within the definition of "child-related employment" in s 33 of the *Commission for Children and Young People Act 1998*.[151]

5.69 It was the NSWEC's view that Division 5A, as currently structured, was not fit for achieving its objectives:

> I would suggest that, in its current form, Division 5A has a number of flaws The first is that it fails to actually address the "mischief"' at which it is directed: Mr Orkopoulos could easily have signed such a declaration when he nominated for the

[149] Professor Graeme Orr *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, p. 32.
[150] Professor Graeme Orr *Modernising the Electoral Act: Legislative Reform and the Judicial Role*, p. 32.
[151] NSWEC, *Submission No.18*, p. 62.

> 2003 State Election, as he hadn't been charged with, let alone convicted of, any of the relevant offences.[152]

5.70 Division 5A could only be effective, in the NSWEC's view, if the declarations of all candidates to be audited by the Commissioner for Children and Young People, as a pre-requisite to a nomination being accepted. Though the NSWEC noted that:

> ... that it was suggested in the Second Reading speech of the *Parliamentary Electorates and Elections Amendment (Child Sexual Offences Disclosures) Bill 2006* that this process was "simply not practical".[153]

5.71 The NSWEC considered that Division 5A should make specific reference to the disqualification provisions for Members of Parliament in the *Constitution Act 1902* which provide that it is a criminal offence to make a false declaration:

> Accordingly, if a Member of Parliament is convicted of making a false declaration, he or she will be disqualified from sitting in Parliament pursuant to s 13A(1)(e). I note that, in the event of a single-seat majority or a hung Parliament, this could result in a change of Government, and would create significant uncertainty as the case was heard in the courts, including any appeal process.[154]

5.72 The Committee sought the views of the Commissioner for Children and Young People on the issues which had been raised by the NSWEC.

5.73 The Commissioner informed the Committee that in addition to the flaws in Division 5A which had been identified by the NSWEC, there was a further flaw in that members appointed to vacant positions in the Legislative Council were not captured by Division 5A and were not required to make a child related conduct declaration.[155]

5.74 In the Commissioner's view, if the intention was to discourage or bar child sex offenders from holding Parliamentary office, then the most appropriate tool for doing this, would be the Working With Children Check (WWCC).

5.75 The WWCC was established in 2000 to protect children from known sex offenders and targets those persons who are employed in defined child related work such as those employed in sectors such as children's health services or education.

5.76 Members of Parliament, the Commissioner noted, were not currently covered by the WWCC because they do not have focussed contact with children:

> Many people have contact with children through their work, like Members of Parliament, but not the focussed contact that triggers the Working With Children Check. Members of Parliament are not defined as child related workers in either the old or the new legislation.[156]

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[152] NSWEC, *Submission No.18*, p. 62.

[153] NSWEC, *Submission No.18*, p. 62.

[154] NSWEC, *Submission No.18*, pp. 62-63.

[155] See Appendix Four, Letter from the Commissioner for Children and Young People to the Chair, dated 13 March 2013.

[156] See Appendix Four, Letter from the Commissioner for Children and Young People to the Chair, dated 13 March 2013, p. 1.

5.77 However if Members of Parliament were to be included in the WWCC, then compatibility issues would arise once a new WWCC was introduced later in 2013. This would be because the PE&E Act and the *Parliamentary Electorates and Elections Regulation 2008* make reference to Apprehended Violence Orders which would not be used in the new WWCC:

> The current child related conduct declaration refers to Apprehended Violence Orders. As the new Working With Children Check does not use these orders as assessment triggers, the Commission for Children and Young People will not be in a position to verify the truth of declarations in relation to these orders. The forms in the current regulation also refer to these orders as well as to checking processes that will not be available in the new Working With Children Check.[157]

5.78 Whilst the Commission noted that it would still be able to audit the declarations made by the elected candidates, as required by Division 5A, this would need to be done by way of a labour intensive manual checking process that was more subject to human error than would the case if the new WWCC were able to be used.[158]

5.79 The Commissioner was of the view that any decision to include Members of Parliament in the WWCC, would require careful analysis; and that it would be inappropriate for any decision as to whether Parliamentary office should be denied to any elected or appointed member, to be left to the Commission for Children and Young People alone:

> …if the government wishes to retain the practice of either discouraging or barring child sex offenders from holding Parliamentary office, the most appropriate tool would be the Working With Children Check. The enforcement of this requirement and the impact of a bar against working with children on an elected or appointed Member of Parliament would need careful analysis. It would not be appropriate for the Commission's powers and decisions to stand alone in denying parliamentary office to an elected or appointed member.[159]

5.80 In addition to the NSWEC Commission and the Commission for Children and Young People, the Committee heard from two other stakeholders on the issue of child related conduct declarations.

5.81 In Professor Graeme Orr's view, the provisions of the PE & E act in relation to child-related offences, were poorly drafted:

> Another classic example is in your electoral Act in relation to child sex offences, candidates and so on. That is a classic example—and I will not use ''that'' word again—but a kind of meddlesome style of drafting, of trying to be prescriptive about

[157] See Appendix Four, Letter from the Commissioner for Children and Young People to the Chair, dated 13 March 2013, p. 2.
[158] See Appendix Four, Letter from the Director, Working with Children Strategy, Commission for Children and Young People, to the Chair, dated 21 March 2013.
[159] See Appendix Four, Letter from the Commissioner for Children and Young People to the Chair, dated 13 March 2013, p. 2.

> things and not even thinking about the consequences of it. It sometimes happens when you have politicians making up rules about politicians.[160]

5.82 Whilst for Mr Graham Eames, the PE&E Act should be amended so that any candidate would be required to make a declaration if they had been convicted of a criminal offence for which they had served 12 months imprisonment.[161]

Committee comment

5.83 The Committee supports any child protection measures which are effective; however in the case of Division 5A it would appear that neither the Electoral Commissioner, nor the Children's Commissioner, regard its provisions as being fit for purpose.

5.84 Accordingly the Committee recommends that in drafting a new electoral act the NSW Government gives consideration to repealing Division 5A of the PE& E Act and consults upon what measures would be effective in preventing child sex offenders from holding Parliamentary office.

RECOMMENDATION 10

That in drafting a new electoral act, the NSW Government give consideration to repealing Division 5A of the *Parliamentary Electorates and Elections Act 1912* and consults upon what measures would be effective in preventing child sex offenders from holding Parliamentary office.

Party registration

5.85 A number of inquiry stakeholders considered matters relating to party registration in their submissions.

5.86 The NSWEC highlighted what it considered to be the "fragmented arrangements" whereby the PE&E Act, the EFE&D Act and the Local Government Act 1993 (LGA) all had provisions under which a party could be registered:

> These fragmented arrangements highlight the benefits of a holistic approach to regulation of elections and campaign finance through the consolidation of state and local government provisions.
>
> Consolidation would facilitate removal of the current convoluted and highly prescriptive arrangements for the oversight of party registration by two entities across three pieces of legislation: the PE&E Act, EFE&D Act and the LG Act and regulations.[162]

5.87 Its submission also commented on the requirement for a party to have a written constitution setting out its objectives, in order for it to be registered under the PE&E and the LGA Acts, noting that the legislation did not make further reference

[160] Professor Graeme Orr, University of Queensland, *Transcript of evidence*, 24 August 2012, p. 11.

[161] Mr Graham S. Eames*, Submission No. 6*, p. 1.

[162] NSWEC, *Submission No.18*, p. 59.

as to what a party's constitution might consist of; or require that the party provide notification of any amendments to its constitution.[163]

5.88 The NSWEC argued that it was critical that it had regular up to date and detailed information in relation to party constitutions and internal governance rules, including processes for office bearer appointments, in order that it may carry out its registration functions:

> This is important in respect of validating whether an applicant for amendment of the Party Register is the relevant party office bearer as prescribed by the legislation, and where that applicant is not the person appearing on the register at the time of application. The matter takes on particular significance where the application is disputed. In these circumstances, it is necessary to examine the processes by which the applicant purporting to hold a particular prescribed office was validly appointed in accordance with the party constitution.[164]

5.89 Appropriate discretion to make binding determinations on the matters to be included in a constitution should be conferred on the NSWEC, in its view, and if there were to be statutory requirements for a complying party constitution, then the NSWEC recommended consideration of provisions of the Queensland Electoral Act:

> The NSWEC should also be conferred with the appropriate discretion to make binding determinations as to the matters that should be included in a constitution. Where it is considered appropriate that minimum matters should be prescribed in principal legislation, I would recommend that the Committee has regard to Part 6 of the *Electoral Act 1996* (Qld) which sets out "complying constitution" requirements for the purposes of party registration Section 76 of the Qld Electoral Act…[165]

5.90 Were minimum requirements for a constitution to be prescribed, the NSWEC stressed the importance of allowing some flexibility in the legislation so that appropriate modifications could be made to the criteria. It also noted that should the NSWEC and the EFA continue as separate entities, there would need to be arrangements made for the transfer of information between the NSWEC as the entity that processes party registrations and the EFA which regulates campaign finance and expenditure.[166]

5.91 The question of whether, and to what extent, Parliament should legislate on the internal activities of parties was considered at the Committee's Roundtable discussion.

5.92 Dr Anika Gauja noted that a lack of detail in party constitutions had created a significant problem:

> ...[the] suggestion that the commissioner makes that we adopt the provisions of the Queensland Electoral Act. This relates to party constitutions and the requirement that you provide a political party's constitution in order to be registered. For the most part there is very little detail as to what is contained in these constitutions and

[163] NSWEC, *Submission No.18*, p. 60.
[164] NSWEC, *Submission No.18*, p. 60.
[165] NSWEC, *Submission No.18*, p. 60. See also NSWEC Submission, Annexure 4.
[166] NSWEC, *Submission No.18*, p. 61.

> that has created a significant problem, I think, for the judiciary and also for political parties themselves, those starting up, looking for guidance as to how to formulate their internal affairs. Queensland is interesting because it contains a provision that pre-selections, which is a very contentious topic, need to be conducted in a democratic manner.[167]

5.93 However she expressed concern that incorporating elements of Queensland's "complying constitution" requirements might restrict political participation:

> …some of the suggestions to incorporate elements of the Queensland Electoral Act will actually act as a disincentive or may, in fact, hinder the abilities of political parties to innovate with new forms of political participation, particularly community pre-selections.[168]

5.94 By restricting pre-selection to members of the party who were on the electoral roll, it was her view that the Queensland legislation defined party membership too narrowly:

> My point is that what the Act is doing is conceiving of party membership in a narrow way that ties it to a requirement to be on the electoral roll, which disadvantages non-citizens but it also disadvantages non-members and parties innovating to that effect.[169]

5.95 Professor Anne Twomey informed the Committee that she had reservations about Parliament becoming involved in the internal affairs of political parties but recognised that it did so:

> I do not know, is the answer generally. I am pretty queasy about Parliament getting too involved in political parties, for obvious reasons. But I am also conscious of the fact that, in some ways, Parliament does and has…
>
> …As a general principle, I would probably say that in some areas you may need to but, to the extent you can avoid getting into internal party politics, it is probably a good thing.[170]

5.96 As examples of where legislation affected the internal workings of parties, Professor Twomey cited the statutory requirements for parties to register and for it obtain funding:

> I remember, in particular, after the tablecloth ballot paper we had the issue of numbers of members of parties in order to be able to register to be above the line... There were rules that, first of all, you had to register at least 12 months before so that we did not end up with that problem again. But there were also rules that—I think originally the Government said 1,000 and then the Parliament said 500 and we negotiated it to 750—you had to have 750 members to get above the line. So that partly dictates to parties what they need to get certain things.
>
> There are other conditions that you have as to what you need to be able to get funding, what you need to be able to get tax deductibility status, and in particular

[167] Dr Anika Gauja, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 10.

[168] Dr Anika Gauja, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 3.

[169] Dr Anika Gauja, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 10.

[170] Professor Anne Twomey, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 13.

> the most recent changes where you have that stuff about the parties and whether people from other organisations are involved in choosing your candidates. That then affects how your money is worked out for your expenditure limits. So, all those things affect the internal workings of parties.[171]

5.97 Another matter which was raised by the NSWEC, was that of registered officers and party agents. In their opinion this was another example that highlighted the inconsistencies between the electoral acts. Registered Officers are required under the PE&E Act to furnish to the Electoral Commissioner a return each year as to the party's continued eligibility for registration, however that position was not always filled:

> There have been many instances where a registered officer has advised of his/her resignation but there is currently no impetus for the party to appoint another person to the office to fulfil the role of furnishing annual returns for continuing party registration.[172]

5.98 The NSWEC noted that under the EFE&D Act it is a requirement that the party appoints a party agent and at any time where the party does not have a party agent then that party's registered officer would become the "default party agent".[173]

5.99 The NSWEC perceived difficulties arising in that enrolment (to vote at State elections) was a qualification under the EFE&D Act for a person's appointment to the position of party agent; but as enrolment was not similarly a qualification for a person's appointment as a registered officer under the PE&E Act.

5.100 There could therefore be a circumstance in which an unenrolled registered officer could serve as the "default party agent" and this could have an effect on enforcement:

> Consequently, there is a possibility that a registered officer who is a party agent for the time being under the EFEDA may not be enrolled. This would cast doubt from an evidentiary perspective on the ability to issue penalty notices to or prosecute a registered officer as "default" party agent for offences against the Act.[174]

5.101 Finally in the case of unregistered parties, the NSWEC found that the EFE&D Act recognised them as participants but the provisions of the PE&E Act applied exclusively to registered parties. This had created some confusion:

> …amendments to both the PE&EA and the EFEDA over the years has led to overlaps and inconsistencies in the regime for regulation of the campaign finance activities of unregistered parties.[175]

5.102 In their submission to the inquiry the Nationals expressed their support for the continuation of the requirement that a party have 750 members in order for it to be a registered party. They saw the NSWEC's new online Political Party

[171] Professor Anne Twomey, University of Sydney, *Transcript of evidence*, 24 August 2012, p. 13.
[172] NSWEC, *Submission No.18*, p. 61.
[173] See s41 of the *Election Funding, Expenditure and Disclosures Act 1981*
[174] NSWEC, *Submission No.18*, p. 62.
[175] NSWEC, *Submission No.18*, p. 62.

Registration System as a significant improvement and recommended that parties be given ongoing access to the system in order to update member's details:

> …parties should be given access to this online member registration system year round, not just as the 30 June deadline for renewal of registration approaches…[176]

5.103 It should also be possible, the Nationals contended, to provide the NSWEC's Political Party Registration System with the details of more than the required 750 members:

> At the moment, any declarations from members in addition to the required 750 are returned to a party after the renewal of its registration is confirmed. While the requirement facing parties is that the details and signed declarations of 750 members be provided for the purpose of the party's registration, that should not restrain parties from providing statements from further members and the Commission retaining those records.[177]

5.104 The Christian Democrats also saw the new online Political Party Registration System as "a great advancement" but considered that the overall system could be improved in relation to "relied members":

> that is a member who has previously been used as part of the registration of one political party but who has joined a different party and wishes to be used for the registration of the latter party cannot be included for the newer party until the individual writes to both the EC and to the first party and that party acknowledges that the individual is no longer to be included for its registration.[178]

5.105 It was unacceptable in the Christian Democrat's view that this process could take over a year and they recommended instead that the latest Party Declaration form completed by any individual should determine the Party which can rely on that individual for registration.[179]

Committee comment

5.106 The NSWEC has advocated for the removal of what it considers to be convoluted and highly prescriptive arrangements for the oversight of party registration by two entities across three pieces of legislation.

5.107 These arrangements have led, in its view, to inconsistencies between the respective provisions for appointing registered officers under the PE& E Act and those for appointing a party agent under the EFE&D Act.

5.108 The Committee agrees with the NSWEC on these matters; and it has made the recommendation that the conduct of State elections and the regulation of

[176] The Nationals (NSW Branch), *Submission No.11*, pp. 5-6.
[177] The Nationals (NSW Branch), *Submission No.11*, p. 6.
[178] Christian Democratic Party, *Submission No.7*, p. 10.
[179] Christian Democratic Party, *Submission No.7*, p. 10.

campaign finance and expenditure should be administered by a single statutory corporation under a single act.[180]

5.109 This amalgamation of both the legislation and the regulating bodies provides, in the Committee's view, the perfect opportunity to harmonise the arrangements for the oversight of party registration including the requirements for appointing registered officers and party agents and the regulation of unregistered parties.

RECOMMENDATION 11

That in drafting legislation for a new electoral act, the NSW Government harmonise the arrangements for the oversight of party registration including the requirements for appointing registered officers and party agents and the regulation of unregistered parties.

5.110 In regard to party constitutions, the Committee does share the concerns of several inquiry stakeholders that Parliament should not become overly prescriptive in relation to the internal affairs of political parties.

5.111 For this reason, the Committee would be cautious about seeing the Queensland Electoral Act as a ready model for NSW; or in conferring upon the NSWEC the power to make binding determinations as to what a party's constitution should include.

5.112 That being said, the Committee accepts that there is a need for party constitutions to provide sufficient detail as to enable the electoral administrators to carry out their statutory functions.

5.113 For example, it is necessary for the electoral administrators to ensure that an office bearer in a party was validly appointed, or discharged, in accordance with the party's constitution.

5.114 It is also necessary for the electoral administrators to be notified of amendments to a party's constitution and to be able to verify that those amendments were made in accordance with that party's procedures.

5.115 Therefore, the Committee supports amendments to the PE&E Act and the LG Act to require that party constitutions provide that information which is required by electoral administrators in order that they may carry out their statutory functions.

RECOMMENDATION 12

That in drafting legislation for a new electoral act, the NSW Government amend the provisions of Part 4A of the *Parliamentary Electorates and Elections Act 1912* and Part 7 of the *Local Government Act 1993* to require that party constitutions provide that information which is required by electoral administrators in order that they may carry out their statutory functions.

[180] As previously noted the question of whether the electoral provisions of the LG Act should also be amalgamated into this new electoral act will be examined by the Committee during the course of its inquiry into the 2012 Local Government elections.

Nomination deposits

5.116 Both The Nationals and the Liberal Party noted that currently, the nomination deposits for candidates for the Legislative Council and Legislative Assembly could only be paid either by cash or bank cheque.

5.117 The Nationals stated that while an "aversion to the acceptance of personal cheques" was understandable there seemed to be no reason not to enable payment by electronic means. Accordingly The Nationals recommended:

> That ss 79(7A) and 81F of the Parliamentary Electorates and Elections Act be amended to allow more flexibility in the payment of nomination deposits, including payment by electronic means.[181]

5.118 The option to make nomination deposit payments electronically was also supported by the Liberal Party in their evidence, with Mr Simon McInnes, Finance Director, Liberal Party of Australia, informing the Committee that:

> …it is cash or bank cheque. We would prefer to do an electronic transfer.[182]

Committee comment

5.119 The Committee is not aware of any reason why deposit payments should continue to be limited to cash or bank cheque; particularly as payments by electronic transfer are common and convenient means for many organisations and individuals.

RECOMMENDATION 13

That in drafting legislation for a new electoral act, the NSW Government amend the provisions of sections 79(7A) and 81F of the *Parliamentary Electorates and Elections Act 1912* to allow more flexibility in the payment of nomination deposits, including payment by electronic means.

Legislative Assembly by-elections

5.120 The submission from The Nationals considered Legislative Assembly vacancies which arose late in a parliamentary term as a result of a member's resignation or death.

5.121 It was their view that the PE&E Act should be amended to prevent a by-election being held for any vacancy which arose after 1 October in the year prior to a State election. This would avoid unnecessary expense and the inconvenience to voters, who may very likely elect a candidate who would not then be able to take up their seat in Parliament before it was dissolved:

> Any such by-election is unlikely to be able to be held earlier than late November or early December, and there will be a further delay prior to the return of the writ before the new Member would be eligible to take their seat in the Parliament. We note that the last sitting day of the Parliament prior to the 2011 election was 3 December. If such a sitting pattern were to be adopted prior to future general state

[181] The Nationals (NSW Branch), *Submission No.11*, p. 7.

[182] Mr Simon McInnes, Finance Director, Liberal Party of Australia, *Transcript of evidence*, 15 June 2012, p. 50.

> elections, the result would be that a Member so elected would be unable to take their seat before the Parliament was formally dissolved and the general election held.[183]

5.122 The Nationals noted that because there were no legislative requirements concerning the timing of by-elections and this could allow the government of the day to hold the seat vacant until the State election; however they considered that such a decision might be criticised for being politically motivated. Accordingly the Nationals recommended that:

> The Parliamentary Electorates and Elections Act be amended to prevent the holding of a Legislative Assembly by-election in the event of a casual vacancy arising on or after 1 October in the year prior to the next general state election.[184]

Committee comment

5.123 The Committee is advised that since the introduction of fixed term Parliaments, neither House has sat later than 5 December in a year prior to the State election. The only by-election to fall within the post 1 October period, in a year prior to the State election, was the Cabramatta by-election of 22 October 1994.[185]

5.124 With these facts in mind, there appears to be merit in The Nationals' proposal that legislating to prohibit a vacancy being filled late in a Parliament would avoid inconvenience to electors and unnecessary public expense, and would relieve the government from any unfounded accusations that the decision not to hold a by-election was politically motivated.

5.125 However, replacing the current discretion over by-elections with a statutory prohibition would not, in the Committee's view, sit easily with some of the principles of our representative democracy. Namely, that constituents should only go the shortest possible time without a local member to hear their grievances and be their voice in Parliament, and that the popular will should be tested and affirmed when a vacancy occurs and not six months later.

5.126 As it is not inconceivable that Parliament could be recalled in the months prior to an election, it would be incongruous if it were electoral law itself rather than government discretion which prevented a particular electorate from being

[183] The Nationals (NSW Branch), *Submission No.11*, p. 12.

[184] The Nationals (NSW Branch), *Submission No.11*, p. 12.

[185] Advice provided by the NSW Parliamentary Research Service. Last sitting days and day of prorogation are as follows:

Last sitting day	Day of prorogation
3 December 2010	22 December 2010
23 November 2006	15 January 2007
5 December 2002	31 January 2003
3 December 1998	3 February 1999
5 December 1994	7 December 1994

represented at that time – especially if the circumstances for the recall related directly to matters within that electorate.[186]

5.127 There is also a practical argument for retaining the current flexibility, in that the inability to hold a by-election could affect the numbers in the Legislative Assembly especially in a hung Parliament, and could even result in a change of government late in the Parliament.

5.128 Whilst it could be argued that, with Parliament routinely ending sitting in early December such a late change of government would not make any real difference, it is the view of the Committee that the authority of any government should be tested on the floor of the House (fully constituted), thereby presenting a true reflection of the popular will.

[186] For example, having adjourned for the Christmas recess, Parliament was recalled on 15 December 2005 as a result of large scale public disorder in Cronulla. Hypothetically the seat of Cronulla could have become vacant after 1 October 2005 prior to an election taking place in March 2006.

Chapter Six – Terms and structure of the *Election Funding, Expenditure and Disclosures Act 1981*

6.1 As previously stated in this report, the Committee has been asked to conduct a comprehensive review of the PE&E and the EFE&D Acts and to consider whether they should be amended or rewritten in order to promote free, open and honest elections in NSW.

6.2 Part 4(a) of the inquiry terms of reference requests that the Committee inquire into and report on whether the terms of the EFE&D Act remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning.

6.3 During the course of the inquiry the Committee received evidence on this issue from individuals, organisations, political parties, and the NSWEC. The pervading view through much of the evidence received was that the Act, as it is currently structured, presents significant problems for the organisations and political parties that seek to comply with its provisions. Some stakeholders referred to certain provisions of the Act as being in need of amendment while others argued that the Act should undergo a complete overhaul.

6.4 The latter view, for example, was held by Mr Simon McInnes from the Liberal Party, who stated that the current EFE&D Act is deficient, primarily because it attempts, and fails to adequately provide for matters relating to both State and local government election campaigns:

> We believe the Election Funding, Expenditure and Disclosures Act 1981 is a cumbersome and contradictory piece of legislation. It tries to cover matters for State election and local government election campaigns, and in doing so brings everything down to a lower level and makes matters even more confusing. The differences between a State election campaign and a local government campaign are significant and trying to have a one-size-fits-all legislation is not working…
>
> We believe the Act needs a complete overhaul to ensure that it is relevant and workable both from the political parties and candidates point of view and for election funding.[187]

6.5 The Nationals also argued for a comprehensive review of the Act, stating that its inherent deficiencies were the result of the ad-hoc manner in which it had been amended throughout its existence, making the legislation unnecessarily complicated and inconsistent:

> There is no doubt that the ad-hoc manner in which the *Election Funding, Expenditure and Disclosures Act* has been amended over time, and most particularly in recent years, has created unnecessary complication and inconsistencies within the Act. For

[187] Mr Simon McInnes, Finance Director, Liberal Party of Australia, NSW Division, *Transcript of evidence*, 15 June 2012, p. 50.

> that reason the more fulsome any future reform of the Act is, the more likely it would be in our view to achieve a consistent and efficient regime for the regulation of campaign and other political finances in New South Wales.[188]

6.6 Similarly, Mr Mark Lennon from Unions NSW, cited the numerous amendments to the Act and its resultant complexity as being the key reason for which the Act should be re-drafted:

> In relation to the Electoral Funding Act I think from having a look at the other submissions, the clear theme that is running through is whatever else happens, the number of amendments since 1981, amendment upon amendment, and particularly in the past few years, the complexity of the Act cries out for a rewrite, a redraft. It does not necessarily mean-we would like to see obviously some provisions changed as well, but the primary cause for a rewrite would be for the essence of simplicity.[189]

6.7 As the main proponents for a complete overhaul of the EFE&D Act, the NSWEC stated that the series of ad-hoc amendments to the Act have ultimately rendered it unfit for the purpose of providing an effective legislative framework for governing the election funding and disclosure scheme in NSW. The Commission's view is that "root and branch" reform is the only effective means of developing an Act that is appropriate for the modern political environment and that further piecemeal amendments will only exacerbate the current problem:

> Far too many injuries have been done to the EFEDA by the implementation of ad hoc amendments. Those injuries have long been terminal, and we have reached the point where the responsible thing to do is to "let the Act go". The modern political environment requires modern funding and disclosure legislation.
>
> ...it is important that we do not become bogged down in the detail and look for quick fixes through further piecemeal amendments. My submission is for root and branch reform: to start from the beginning with a clean slate and to be guided by appropriate principles.[190]

6.8 While the evidence received by the Committee reflected widespread support for amending the terms and structure of the EFE&D Act to some extent or another, it fell broadly into two separate categories: that which argued for the repeal of the current Act and for its replacement with a new piece of legislation, as described above; and that which argued for certain provisions of the Act to be amended for the purpose of achieving specific ends.

6.9 The chapter begins with a description of the current structure of the EFE&D Act, and then examines the NSWEC's proposal for repealing and replacing the current Act with a new piece of legislation and also those stakeholder views that express support for wholesale reform of the Act.

6.10 The chapter then goes on to examine evidence from stakeholders who argue for reform to specific terms of the Act in order to achieve a particular outcome or outcomes.

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[188] The Nationals (NSW Branch), Answers to questions on notice, 29 June 2012, Question 1, p. 1.

[189] Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 29 June 2012, p. 41.

[190] NSWEC, *Submission No. 18*, p. 71.

THE CURRENT TERMS AND STRUCTURE OF THE EFE&D ACT

6.11 The submission from the NSWEC described the EFE&D Act as incorporating three central elements which have been evident since its inception in 1981:

- Public funding for State elections, which can be supplemented by private funds;
- Disclosure of political donations by both donors and recipients; and
- Disclosure of electoral expenditure.[191]

6.12 Although there has been sustained and extensive amendment to the EFE&D Act since 1981, the structure of the Act has remained largely constant and is as follows:

"Part 1 – Preliminary" contains the formalities of the legislation and an inclusive definitions list.

"Part 2 – The Election Funding Authority" establishes the Election Funding Authority ("the Authority") and its procedures.

"Part 3 – Responsibilities of the Authority" provides an outline of the Authority's duties.

"Part 4 – Registration" comprises the responsibilities of candidates, groups, third party campaigners, party agents and official agents to register for local government, State general and by-elections. The Part outlines the procedure for registration and the corresponding responsibilities and powers of the Authority.

"Part 5 – Public Funding of State election campaigns" applies to State elections only. It contains provisions relating to the establishment of the public funding regime for State parties and candidates and the procedure for allocating and claiming said funding. The Part contains relevant definitions.

"Part 6 – Political Donations and electoral expenditure" contains an extensive list of definitions relevant not only to the Part but to other provisions throughout the Act. The Part outlines the duties and procedure of disclosure, caps on political donations for State elections, caps on electoral expenditure for State election campaigns, duties in the management of donations and expenditure, prohibition on certain political donations and incidentals relating to disclosure and offences under the Part.

"Part 6A – Administrative and policy development funding" outlines the Administration Fund and Policy Development Fund for State members and parties.

"Part 7 – Financial provisions" contains surplus provisions in relation to funding and expenses.

[191] NSWEC, *Submission No. 18*, p. 69

> "Part 8 – Miscellaneous" is the repository for residual provisions. It empowers the Authority to investigate offences, impose sanctions such as penalty notices, compliance agreements or commence prosecutions, produce evidence, as well as procedural matters such as the power of delegation, reporting to Parliament, transitional provisions and regulations.[192]

6.13 Unlike its basic structure, some of the Act's terms have, however, undergone significant change as a result of its regular amendment, with the EFA being conferred with an enhanced regulatory role in relation to election campaign finance management, as well as the matters of donations, expenditure, caps and campaign amounts becoming central to the EFE&D Act's objectives.[193]

THE NSWEC'S PROPOSALS FOR REFORMING THE EFE&D ACT

6.14 In its submission, the NSWEC asserted that the succession of major amendments to the EFE&D Act had created significant problems in terms of the Act's clarity and interpretation, particularly the implementation of significant amendments in 2008, 2009, 2010 and 2012 which "...did not sit well with the existing scheme".[194] In short, the "...unnecessary complexity of the EFEDA in its current form has rendered it unclear, and therefore makes it bad law."[195]

6.15 A report prepared for the NSWEC by Dr Joo-Cheong Tham, Senior Lecturer, Law Faculty, University of Melbourne, stated that the 2008, 2009, 2010 and 2012 amendments to the Act, while representing a significant paradigm shift in the regulation of election funding and spending in NSW[196], were problematic principally because the outdated EFE&D Act was an inadequate vehicle for enacting this change:

> Instead of these game-changing rules being enacted through a new Act, they were enacted as amendments to this decades-old Act. The result is a poorly integrated Act that lacks internal coherence, is overly complex and prescriptive in some areas while scant on detail in others. This has profound consequences for the ability to effectively comply with the Act and also its legitimacy.[197]

6.16 Below are the some of the more significant features of the NSWEC's comprehensive proposal to reform the terms and structure of the EFE&D Act.

General principles

6.17 To overcome many of the perceived problems inherent in the current EFE&D Act, the NSWEC proposed that the Act be repealed and replaced with a new piece of

[192] NSWEC, *Submission No. 18*, pp. 69-70. See also *Election Funding, Expenditure and Disclosures Act 1981.*

[193] NSWEC, *Submission No. 18*, p. 69.

[194] NSWEC, *Submission No. 18*, p. 71.

[195] NSWEC, *Submission No. 18*, p. 71.

[196] The amendments progressively altered the election funding and spending scheme in NSW from one that was more "laissez-faire" to a scheme that is more tightly regulated.

[197] Dr Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending in NSW* [November] 2012, p. 17.

legislation that is guided by general principles aimed towards developing and implementing reform of the funding and disclosure system in NSW.[198]

6.18 The role that general principles, or "central objects", play in the development and ongoing operation of legislation such as the EFE&D Act has been outlined by Dr Tham:

> A statement of objects is vital as it provides the key rationales for the Act, paving the way for greater clarity, understanding and confidence on the part of the public. A statement also lays down clear benchmarks for evaluating the implementation and impact of the Act.[199]

6.19 In its submission, the NSWEC proposed that the following four principles, as identified by Dr Tham, should be utilised to guide any future version of the EFE&D Act that would replace the current Act:

- protecting the integrity of representative government;
- promoting fairness in politics;
- supporting parties to perform their functions; and
- respecting political freedoms.[200]

Definition of terms

6.20 The NSWEC proposed that any new, restructured version of the EFE&D Act must incorporate consolidated and consistently defined terms throughout. As a result of the series of amendments which the current Act has undergone, the definitions are fragmented throughout, making it unnecessarily difficult for stakeholders to comprehend, interpret, and ultimately comply with the Act's provisions:

> Fundamental to the review and restructure of the EFEDA must be the consolidation of definitions which are presently fragmented throughout the Act and, at times, unclear. The definitions of "candidate", "official agent", "affiliated organisation", "party" (namely unregistered or not), and "third-party campaigner" are examples of definitions that suffer from these issues.[201]

6.21 In its submission, the NSWEC also suggested that the terms "political donation", "electoral expenditure and electoral campaign expenditure", and "prohibited donor" (if the provision is retained) be clearly and consistently defined as part of any re-draft of the EFE&D Act.[202]

6.22 The need for more clearly defined terms in a new EFE&D Act was echoed by Unions NSW, who drew attention to certain"...difficulties created by some of the

[198] NSWEC, *Submission No. 18*, p. 71.

[199] Dr Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending in NSW*, p. 17.

[200] NSWEC, *Submission No. 18*, pp. 71-72. See also Dr Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending in NSW*, p. 17

[201] NSWEC, *Submission No. 18*, p. 89.

[202] NSWEC, *Submission No. 18*, p. 89.

subjective nature of the definitions in the Act..." and recommended that a comprehensive re-draft of the Act incorporate consistent terms "...to ease compliance and provide greater clarity for parties of their obligations".[203]

6.23 During the public hearing on 29 June 2012 Mr Mark Lennon, Secretary, Unions NSW, reiterated the organisation's difficulties with the Act's inconsistent definition of terms and its view that the Act should be re-drafted with consistent terms and greater clarity:

> The way the legislation is structured, putting aside the actual provisions themselves...makes it very difficult to get a real handle on what we can and cannot do. We can get legal opinions about what our obligations are but they can be in conflict, with different views. I reiterate, whatever else comes out of a review of the legislation, a redraft and clarity would be a major step forward for everyone.[204]

Compliance-oriented regulation

6.24 In the area of regulation of election campaign finance, the NSWEC stated that offence provisions, as they exist in the current EFE&D Act, are overly convoluted and therefore not as effective as they could be in achieving their intended ends.[205]

6.25 The NSWEC proposed that a re-drafted Act should incorporate a regulatory regime for finance management that encourages compliance, and that this would be best achieved when obligations and entitlements are plainly and clearly expressed in the legislation, as this provides greater certainty to both stakeholders and the regulatory authority.[206]

6.26 The NSWEC describes three important principles that should be considered when formulating effective compliance-oriented legislation and which should, therefore, be incorporated into a re-drafted EFE&D Act. According to the NSWEC, compliance-oriented legislation should enable a regulatory authority to:

- secure voluntary compliance with regulatory objectives;
- undertake informed monitoring for non-compliance; and
- engage in enforcement actions where voluntary compliance fails.[207]

Offence provisions

6.27 Another central aspect of the NSWEC's proposal to reform the EFE&D Act is a comprehensive overhaul of the Act's offence provisions, which is intended to promote a better understanding of the campaign finance regime and stakeholder responsibilities under the regime.[208]

[203] Unions NSW, *Submission No. 19*, p. 2
[204] Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 29 June 2012, p. 45.
[205] NSWEC, *Submission No. 18*, p. 73.
[206] NSWEC, *Submission No. 18*, pp. 73-74.
[207] NSWEC, *Submission No. 18*, p. 74.
[208] NSWEC, *Submission No. 18*, p. 90.

6.28 As part of the proposed overhaul, the NSWEC firstly recommended introducing a Part in a new EFE&D Act in which all campaign finance related offences would be listed with their penalty following each offence. The NSWEC stated that this would not only promote better understanding, but that it would allow for a "…fairer and tailored approach to individual offences…rather than the current "one size fits all" provision."[209]

6.29 A second, and, in the NSWEC's view, the most important feature of the proposed overhaul is the introduction of "specified strict liability offences". Strict liability offences displace the common law presumption that a prosecutor must prove that a defendant *intended* to commit an offence. Instead, a prosecutor would only be required to prove that an alleged act took place, but not that a defendant intended to commit the act.[210]

6.30 The NSWEC asserted that the introduction of specified strict liability offences in a re-drafted Act would be fundamental to promoting fairness, equity and integrity in the campaign finance regime, as the current requirement for the prosecution to prove that a defendant has knowledge of the unlawfulness of his/her actions effectively prevents the successful prosecution of all but those offences where a clear admission has been made.[211] It must be noted, however, that the NSWEC recommended that any offence carrying a penalty of imprisonment should not be a strict liability offence.[212]

6.31 Other recommendations that were made by the NSWEC in relation to the proposed overhaul of offence provisions include the introduction of provisions to enable the EFA (if it is retained) to prosecute political parties in their own right; and the creation of sanctions, such as the reduction of public funding or the suspension of public funding for parties found to be in breach of the Act.[213]

Committee comment

6.32 The Committee accepts the NSWEC's view that the series of amendments to the EFE&D Act have rendered its terms and structure unnecessarily complex, unclear and inconsistent, resulting in a piece of legislation that is both difficult to comprehend and comply with.

6.33 Earlier in this report the Committee recommended that the NSW Government seek clarity of structure and utilise plain English drafting when developing legislation for a new electoral act.

6.34 With the specific reference to the shortcomings of the terms and structure of EFE&D Act, the Committee would like the NSW Government to incorporate consolidated and consistently defined terms in drafting legislation for a new electoral act, to assist with comprehension and compliance.

[209] NSWEC, *Submission No. 18*, p. 90.
[210] NSWEC, *Submission No. 18*, p. 90.
[211] NSWEC, *Submission No. 18*, p. 90.
[212] NSWEC, *Submission No. 18*, p. 91.
[213] NSWEC, *Submission No. 18*, p. 91.

RECOMMENDATION 14

That the NSW Government incorporate consolidated and consistently defined terms in drafting legislation for a new electoral act to assist with comprehension and compliance.

Committee comment

6.35 In respect of the proposed reform to the EFE&D Act's offence provisions, the Committee agrees with the NSWEC's recommendation that a new electoral act should incorporate a Part in which all campaign finance related offences are listed along with their penalty following each offence, as this will enhance stakeholders' understanding of their responsibilities under the campaign finance regime.

6.36 In relation to the matter of strict liability offences, the Committee understands the NSWEC's difficulties with prosecuting offences under the common law presumption that a prosecutor must prove that a defendant intended to commit an offence. However, the Committee believes that a significant change such as that proposed by the NSWEC should be undertaken with caution. Consequently, the Committee suggests that should strict liability offences be introduced as part of a new electoral act, the bill containing those provisions should be scrutinised by the Parliament, by means of the Legislation Review Committee, to determine whether the measures trespass on "personal rights and liberties".

RECOMMENDATION 15

That in drafting legislation for a new electoral act, the NSW Government incorporate a Part in which all offences, including campaign finance related offences, are listed along with their penalty following each offence.

PROPOSALS FOR REFORM OF SPECIFIC TERMS OF THE EFE&D ACT

Treatment of State and Local Government election campaigns

6.37 In its submission to the inquiry, the Liberal Party asserted that Part 6 of the EFE&D Act should be re-drafted, so that matters relating to political donations and electoral expenditure provided for by the Part are divided into separate sections, one covering State elections and elected Members of Parliament, and the other covering local government elections and elected members of councils.[214]

6.38 In the Liberal Party's view, segregating the Part into distinct sections is necessary because Part 6, as it stands in the current Act, attempts to cover both State and local government elections homogenously, and in doing so fails to recognise the inherent differences between functions and activities of the two levels of government. The consequence of this, according to the Liberal Party, are significant administrative difficulties and the creation of unnecessary confusion for the parties and organisations that attempt to comply with the provisions of the Part.[215]

[214] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 3.

[215] Liberal Party of Australia (NSW Division), *Submission No. 17*, pp. 2-3.

6.39 The Party's view in relation to the deficiencies of Part 6 of the current Act and its proposal for the reform of the Part were summarised by Mr Simon McInnes, Finance Director, during the public hearing on 15 June 2012:

> [The Act] tries to cover matters for State election and local government election campaigns, and in doing so brings everything down to a lower level and makes matters even more confusing. The differences between a State election campaign and a local government campaign are significant and trying to have a one-size-fits-all legislation is not working. Appropriate disclosure thresholds and caps for State elections are significantly different from what is required for local government elections. It is the New South Wales division's position that part 6 of the Act should be split into two parts, one covering State elections and one covering local government elections.[216]

6.40 In its *Responses to submissions to the inquiry into the Administration of the 2011 NSW Election and related matters*, the NSWEC indicated that it agreed with the Liberal Party's proposal in respect of Part 6 of the Act, for the reasons put forward by the Party.[217]

Committee comment

6.41 The Committee has considered the view of the Liberal Party that Part 6 of the EFE&D Act, which attempts to provide homogenously for both State and local government elections, fails to take into account the inherent and fundamental differences between the functions and activities of the two levels of government.

6.42 The proposal to segregate the relevant sections of the Act into those which provide for State elections and for local government elections, which was supported by the NSWEC, has merit in the Committee's view.

6.43 Accordingly, the Committee recommends that the NSW Government segregate provisions relating to political donations and electoral expenditure into separate sections, one covering State elections and elected Members of Parliament, and the other covering local government elections and elected members of councils, in drafting legislation for a new electoral act. It is the Committee's view that this will have the effect of mitigating the confusion and administrative difficulties created by the current provisions of Part 6 of the Act.

RECOMMENDATION 16

That the NSW Government segregate provisions relating to political donations and electoral expenditure into separate sections, one covering State elections and elected Members of Parliament, and the other covering local government elections and elected members of councils, in drafting legislation for a new electoral act.

[216] Mr Simon McInnes, Finance Director, Liberal Party of Australia, NSW Division, *Transcript of evidence*, 15 June 2012, p. 50.

[217] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, pp. 19-20.

Treatment of third party campaigners

6.44 Unions NSW and the NSW Nurses' Association both proposed that the terms of the EFE&D Act that relate to the Act's treatment of third party campaigners should be confined to a separate, stand-alone part of the Act.

6.45 It was the view of Unions NSW that the current Act was problematic for third party campaigners, primarily because the provisions relating to these organisations were "entangled" amongst provisions relating to political parties, candidates and other groups. According to Unions NSW, this created unnecessary ambiguity for third party campaigners, and made it unnecessarily difficult for third party campaigners to comply with the Act's provisions.[218]

6.46 Mr Mark Lennon, Secretary, Unions NSW, made this point during the public hearing on 29 June 2012:

> As it stands at the present time, and as third party campaigners we are thrown into the legislation, together with political parties, it just serves to add to the confusion, and the inability for third parties to effectively campaign, no matter what actual provisions are applied to them.[219]

6.47 Consequently, in its submission to the inquiry Unions NSW recommended that the terms of the Act be re-drafted so that the provisions relating to third party campaigners are more appropriately dealt with in a stand-alone section of the Act, which removes those provisions that are designed for the regulation of political parties and candidates and are not relevant or appropriate to third party campaigners.[220]

6.48 During the public hearing on 29 June 2012, Mr Lennon said:

> …if we get to the issue of a redraft…it is clear on both sides of politics that third party campaigners are captured by this legislation, but there has to be a separate section of provisions that relate directly to them to overcome this issue of confusion and go down the path of clarity.[221]

6.49 The submission from the NSW Nurses' Association echoed the view of Unions NSW, stating that the consolidation of provisions relating to third party campaigners into a stand-alone part of the Act would have the effect of bringing clarity to the legislation and assisting with third party campaigners' capacity to effectively comply with the legislation.[222]

Committee comment

6.50 The proposals that the EFE&D Act provide for the treatment of third party campaigners in a separate, stand-alone section accords with the Committee's overall view that electoral legislation should be structured in a way which enables

[218] Unions NSW, *Submission No. 19*, p. 2.
[219] Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 29 June 2012, p. 42.
[220] Unions NSW, *Submission No. 19*, p. 2.
[221] Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 29 June 2012, p. 41.
[222] NSW Nurses' Association, *Submission No. 16*, p. 9.

stakeholders to identify and comply with those provisions that are relevant to them.

6.51 The Committee therefore recommends that the NSW Government, in drafting legislation for a new electoral act, confine the provisions that relate to third party campaigners to a specific section.

RECOMMENDATION 17

That the NSW Government, in drafting legislation for a new electoral act, confine the provisions that relate to third party campaigners to a specific Part.

Electoral expenditure

6.52 In its submission to the inquiry, The Greens NSW raised a number of issues about certain provisions of the EFE&D Act that relate to electoral expenditure and proposed that the terms of the Act be amended to address these issues.

6.53 The first issue related to the requirement under section 96(3) and (4) of the Act requiring parties "to make payments for electoral expenditure for a State election campaign from the State campaign account of the party". In The Greens' view, this provision meant that every Legislative Assembly candidate was required to have a campaign bank account in their own name and that all election expenditure must be made from either the party's campaign account or the candidate's campaign account.[223]

6.54 However, during the 2011 NSW election The Greens stated that they knew of one or more parties invoicing Legislative Assembly candidates for electoral expenditure without those candidates having campaign bank accounts. Moreover, the Party was aware of instances whereby expenditure for which a candidate was invoiced was made from a party branch bank account, rather than a party campaign account.[224]

6.55 While The Greens understood that once a candidate has been invoiced by a party, the amount is regarded as electoral expenditure (even if the amount is never paid), the Party questioned the legality of such an arrangement under the current Act, if payment was made from a party branch account, rather than the party's state election account.[225]

6.56 Consequently, the Greens proposed that the EFE&D Act be amended to provide greater clarity for candidates and parties as to whether electoral expenditure from a party branch bank account and a corresponding invoice to a candidate is a legal and appropriate financial arrangement, and if all candidate expenditure is incurred by this method, would the candidate not be required to open a campaign bank account.[226]

[223] The Greens NSW, *Submission No. 15*, p. 9.
[224] The Greens NSW, *Submission No. 15*, p. 9.
[225] The Greens NSW, *Submission No. 15*, pp. 9-10.
[226] The Greens NSW, *Submission No. 15*, p. 10.

6.57 In its *Responses to submissions to the inquiry into the Administration of the 2011 NSW Election and related matters*, the EFA indicated that it accepted that expenditure from a party branch bank account accompanied by a corresponding invoice to a candidate was a legal and appropriate financial arrangement. This was on the basis that the party branch bank account is owned by the party and operated under the control and direction of the party agent.[227]

6.58 The second issue raised by The Greens related to after polling day expenditure. It was The Greens' assertion that there were some items of after polling expenditure that were legitimate and unavoidable, but that did not attract electoral funding because they are incurred after polling day. Two examples given by The Greens were campaign office rent for one week following an election and wages for a campaign manager for one week after polling day.[228]

6.59 The Greens proposed that the EFE&D Act should be reformed to provide that the above after polling day expenses, and also the expenses associated with auditing funding claims and campaign finance disclosures, should be treated as legitimate electoral expenditure for which electoral funding can be claimed.[229]

6.60 Lastly, The Greens' submission drew attention to the fact that the current EFE&D Act did not require political parties to disclose the amount of electoral expenditure incurred substantially for the purposes of an election in a particular electorate. According to The Greens, the effect of this is that electorate specific expenditure can be hidden in the state party's return, making it difficult to determine if the party electorate specific expenditure cap of $50,000 per electorate had been complied with or breached. The Greens stated:

> There are strong suspicions that one or more of the parties in the 2011 state election breached this cap in relation to a number of electorates, but the absence of a disclosure requirement makes this harder to verify.[230]

6.61 To address this perceived shortcoming, The Greens proposed that section 93 of the Act be reformed to require disclosure of party electoral communication expenditure incurred substantially for the purposes of an election in a particular electorate, detailing each electorate in which such expenditure was incurred and the amount spent in relation to each electorate.[231]

Treatment of donations

6.62 In its submission the Liberal Party stated that the EFE&D Act was deficient in that it did not recognise or provide any guidance in relation to its treatment of joint donations and other payments under the Act, and that a re-drafted Act should incorporate explicit provisions for the treatment of joint donations.[232]

[227] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 18.
[228] The Greens NSW, *Submission No. 15*, p. 10.
[229] The Greens NSW, *Submission No. 15*, p. 10.
[230] The Greens NSW, *Submission No. 15*, p. 11.
[231] The Greens NSW, *Submission No. 15*, p. 11.
[232] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.

6.63 In its *Responses to submissions to the inquiry into the Administration of the 2011 NSW Election and related matters*, the EFA addressed this point, stating that it considered donations from a joint bank account to be divided equally between the joint holders of the account.[233]

6.64 The Party also stated that the current Act did not provide any guidance in relation to its treatment of donations given and used for Party administrative purposes, those being donations given to the Party (mainly from Party members) to be used for administrative purposes and not for State election campaigns, local government election campaigns or federal election campaigns. Again, the Party's view was that a re-drafted Act should explicitly provide for the treatment of donations given and used for Party administrative purposes.[234]

Committee comment

6.65 The views expressed by The Greens on specific aspects of electoral expenditure and the views of the Liberal Party in relation to the treatment of joint donations are not matters on which the Committee heard a range of stakeholder views. However, they are illustrative of an Act which political parties find inconsistent and unclear.

Recognition of GST

6.66 The Liberal Party noted that the terms of the current EFE&D Act demonstrated little recognition of GST, both in terms of income (fundraising and donations) and expenditure (election campaign expenditure) and considered this factor to be an inherent inadequacy of the Act.[235]

6.67 The Liberal Party consequently proposed that a re-drafted Act should incorporate widely accepted accounting principles, by providing that the declaration of income and expenditure is consistently exclusive of GST[236]

6.68 In its *Responses to submissions to the inquiry into the Administration of the 2011 NSW Election and related matters*, the NSWEC indicated that it agreed with the Liberal Party's proposal and stated that the current legislative provisions require the disclosure of electoral expenditure to be GST inclusive and, in respect of State elections, the GST component of electoral communication expenditure is subject to the applicable expenditure caps. Furthermore, the reimbursement of electoral communication expenditure by the EFA to parties and candidates includes the GST component. At present, it is a matter for the person receiving a reimbursement of electoral communication expenditure from the EFA to ensure that the GST component of electoral communication expenditure that is reimbursed is not claimed as a tax credit through the Australian Tax Office (ATO).[237]

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[233] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 21.

[234] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.

[235] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.

[236] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.

[237] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 21.

Committee comment

6.69 Having heard the evidence from the Liberal Party and the NSWEC on the EFE&D Act's treatment of GST, it is apparent to the Committee that the inconsistencies of the Act, whereby some transactions are GST inclusive and others are exclusive of GST, have created a great deal of confusion and administrative difficulties for stakeholders and administrators.

6.70 The Committee also notes the Liberal Party's point that, at present, the relevant provisions of the Act do not adhere to the widely accepted accounting principle that declarations of income and expenditure should be consistently exclusive of GST.

6.71 For these reasons, the Committee recommends that, in drafting legislation for a new electoral act, the NSW Government provides that declarations of income and expenditure are consistently exclusive of GST.

RECOMMENDATION 18

That in drafting legislation for a new electoral act, the NSW Government provide that declarations of income and expenditure are consistently exclusive of GST.

Chapter Seven – Role and functions of the Election Funding Authority

7.1 While Chapter Three of this report considered the role and functions of the NSWEC, this chapter examines the role and functions of the EFA.

7.2 The evidence which the Committee received in relation to this matter fell broadly into two parts. Firstly, proposals to restructure the EFA, and secondly, commentary on the performance of the EFA in carrying out its functions.

PROPOSALS FOR RESTRUCTURING THE EFA

7.3 Constituted under Part 2 of the EFE&D Act, the EFA is a three member authority with the Electoral Commissioner as its Chairperson and two other members; these members are appointed on the nomination of the Premier of NSW and the Leader of the Opposition in the Legislative Assembly respectively.

7.4 The EFA states that it has three main purposes;

- to allocate public funds to parties and candidates for State election campaigns and, in the case of parties, to allocate public funds for administrative and policy development expenses;
- to enforce the imposition of maximum amounts (or 'caps') on the value of political donations that might be lawfully accepted and the the electoral communication expenditure that might lawfully be incurred, and to enforce the prohibition on donations from a limited class of intending donors, and
- to enforce the requirement to disclose the source and the amount of all political donations received and the amount of electoral expenditure for State parliamentary and Local Government election campaigns.[238]

7.5 The NSWEC proposed that it and the EFA should be merged into a new three-member statutory corporation which would have overall responsibility for both the conduct of elections and the regulation of campaign funding and disclosure:

> Given the functions of the EFA, the regulatory model as established in 1981 is no longer appropriate. As indicated previously in this submission, it is my view that the entity that is the EFA should be subsumed into a new NSW Electoral Commission that delegates to the Electoral Commissioner the responsibility for administering elections while the Commission entity is responsible for enforcing compliance with electoral laws in relation to both the elections and campaign finance processes. As the electoral process and campaign finance are inextricably intertwined, the schemes would be best governed holistically by a single entity, with membership holding appropriate expertise, rather than treated as parallel worlds that occasionally collide.

[238] NSW Election Funding Authority webpage, *Our charter*, http://efa.nsw.gov.au/about_us <Accessed 18 February 2013>.

7.6 As noted in Chapter Three, the NSWEC proposed that this new statutory corporation should consist of three members, "a retired Supreme Court judge as Chair, the Electoral Commissioner and the Auditor-General of New South Wales, ex officio".

7.7 Their approval would be required for any rules or procedures made under the proposed delegated rule-making powers for the NSWEC in relation to the conduct of elections and administrative functions in the funding and disclosure context.[239] They would also be the decision maker in the area of prosecutions for breaches of the funding and disclosure provisions of the legislation.[240]

7.8 It was the view of the NSWEC that this new structure would remove any appearance of bias in the enforcement of the funding and disclosure regime.[241]

7.9 The NSW Greens also considered perceptions of bias over the membership of the EFA making the recommendation that it should be comprised of the NSW Electoral Commissioner and two independent members, who were not the nominees of the leaders of the major political parties:

> The nominees of leaders of the major political parties should not be members of the EFA which should be completely independent of political parties. The EFA adjudicates on a range of electoral financial matters including those that impact significantly on major parties and minor parties sometimes in different ways. All members of the EFA should be independent of political parties and be seen to be independent of them.[242]

Committee comment

7.10 The Committee has recommended (in Chapter Three of this report) that the conduct of State elections and the regulation of campaign finance and expenditure should be administered by a single statutory corporation under a single act.

7.11 The Committee has also stated that whilst it does not agree that the NSWEC should be given a delegated rule-making power, it does believe that the new corporate structure should support its investigative and enforcement functions; whilst delegating to the Electoral Commissioner the distinctly separate responsibility for the administration of elections.

COMMENT ON THE PERFORMANCE OF THE EFA IN CARRYING OUT ITS FUNCTIONS

7.12 The NSW Nationals commented on the delays which they had experienced in having their disclosure and funding claims assessed by the EFA, following the 2011 election. These and other problems arising from their dealings with the EFA such as the display of disclosures on the EFA's website and the addressing of correspondence, may it considered, be indicative of resourcing, training and systemic shortcomings within the Authority:

[239] See Appendix Four, Correspondence from the Electoral Commissioner dated 12 October 2012.

[240] NSWEC, *Submission No. 18*, p. 32.

[241] NSWEC, *Submission No. 18*, p. 32.

[242] The Greens NSW, *Submission No. 15*, p. 10.

> As well as the significant delay in receipt of audit requests and the processing of the party's returns, there have been numerous other factors that seem to indicate
>
> inadequate resourcing, inadequate staff training or a failure of internal systems within the Authority…
>
> …It may be that these issues, taken in isolation, are not considered to be overly serious. However, when taken together, they appear to be indicative of an organisation that is unable to adequately manage the responsibilities and workload with which it is charged.
>
> …We should emphasise at this point that we have no complaint with any of the officers of the Authority with whom the party has had dealings.[243]

7.13 The Nationals recommended an internal review of the EFA's processes in order to ensure better preparedness for future disclosure periods and for the next state election; as well as recommending increased resources for the EFA, website upgrades and improved training for its staff.[244]

7.14 In considering the delays which it had experienced, The Nationals noted that at the Federal level, parties and candidates received 95% of their estimated funding entitlements within 21 days. This system provided a significant degree of financial security in their view:

> Following Commonwealth elections, parties and candidates receive 95% of their estimated funding entitlement within 21 days, which provides significant financial certainty. While the differences between the state (reimbursement) and federal (rate per vote) systems mean that it is not realistic to have claims paid as quickly at the state level, providing a guarantee of 95% of the estimated funding entitlement after 90 days will make a significant contribution to parties' ability to manage their finances.[245]

7.15 The Nationals recommended an amendment to the EFE&D Act to require the EFA to assess claims within 90 days of receipt or make preliminary payments equal to 95% of the total estimated amount (less any previous advance payments made).[246]

7.16 In response to The Nationals, the NSWEC acknowledged that the EFA had experienced time and resource constraints around the 2011 State Election and

[243] The Nationals (NSW Branch), *Submission No. 11* [to the Administration of the 2011 NSW election and related matters Inquiry], pp. 11-12 and p. 18.
NB: It was the request of The Nationals that the comments and recommendations in their submission to the Administration of the 2011 NSW election also form part of its submission to the Act Reviews inquiry.
[244] The Nationals (NSW Branch), *Submission No. 11* [to the Administration of the 2011 NSW election and related matters Inquiry], pp. 12-13 and p. 18.
[245] The Nationals (NSW Branch), *Submission No. 11* [to the Administration of the 2011 NSW election and related matters Inquiry], p. 14.
[246] The Nationals (NSW Branch), *Submission No. 11* [to the Administration of the 2011 NSW election and related matters Inquiry], pp. 14.

that there had been a short term technical issue which affected the publication of disclosures on its website.[247]

7.17 Though the NSWEC had no objection to The Nationals' proposal for the EFA to assess claims within 90 days of receipt or make an initial payment; they considered that the requirements of the EFE&D Act for claims would need to be met first:

> There is no objection to this proposal although it needs to be determined that the period of 90 days would only commence once the requirements of the EFE&D Act are met by the claimant. In this regard, it needs to be recognised that the requirements of claimants for the payment of claims would still be subject to the (current) provisions of the EFE&D Act that require claims to be accompanied by all required supporting documentation including a valid disclosure, vouching and copies of relevant material and to be subject to a compliance audit.[248]

7.18 In addition to The Nationals, the Committee also heard from the Liberal Party and The Greens about delays over the payment of claims.

7.19 The Liberal Party submitted to the Committee that:

> The time delays in the payment of public funding are far too great.[249]

7.20 Whilst the Greens gave evidence that both the frequency of the EFA's meetings and its means of communication were significant factors in delaying the assessment of claims.

7.21 Mr Christopher Maltby, Registered Officer, The Greens, informed the Committee that with the EFA only meeting once a month, any non-compliant claims had to wait another month before they could be resubmitted:

> It has been complicated, as we point out in the recommendations, by the fact that the governing board of the Election Funding Authority only meets once a month; so if you miss the deadline there is another month's turnaround; they come back and say, "That is terrific but you left this out—you did not cross that "t" or dot that "i", so you have got to go through and send it in again and another month goes by and so forth.[250]

7.22 So that election funding payments could be approved in a timely fashion, the Greens recommended that the EFA meet more frequently in the months following an election and particularly in the months surrounding the due date for lodging electoral and annual financial returns.[251]

[247] NSWEC and EFA, *Responses to submissions to the inquiry into the Administration of the 2011 NSW election and related matters*, p. 14 and p. 16.
[248] NSWEC and EFA, *Responses to submissions to the inquiry into the Administration of the 2011 NSW election and related matters*, p. 15.
[249] Liberal Party of Australia (NSW Division), *Submission No.17*, p. 3.
[250] Mr Christopher Maltby, Registered Officer, The Greens, *Transcript of evidence*, 29 June 2012, p. 17.
[251] The Greens NSW, *Submission No.15*, p. 10.

7.23 The Greens also recommended that the EFA communicate with parties or candidates via email as well as by post in order to reduce delays over the payment of claims:

> The remittance advice from the EFA as well as being posted should be sent to the party or candidate agent by email. Following part payment of a claim for electoral funding there was also significant delay in the EFA sending follow up compliance letters containing queries about the financial return. This resulted in delays in parties obtaining substantial amounts of funding to which they are entitled…
>
> … The EFA as well as communicating by post about funding payments and financial compliance of electoral returns, communicate by email with the party or candidate agent about these matters to save time.[252]

7.24 The Greens considered, as The Nationals had, the provisions for prepayment on the lodgement of a claim. Noting that s69 of the EFE&D Act provides for part pre-payment of funding for parties, where the EFA is unable to finalise a claim for payment within 14 days, The Greens advocated a similar provision in the Act for LA candidates:

> Under section 69 of the EFE&D Act if the EFA is unable to finalise a claim for election funding payment by a party within 14 days of lodgement, then the EFA is required to make a preliminary payment of 70% of the total amount it estimates to be payable to the party.
>
> No similar provision exists in relation to claims for payment by LA candidates. This can result in considerable delays while all details are clarified before candidates receive any electoral funding.[253]

Committee comment

7.25 When considering the delays which parties have experienced in their dealings with the EFA there is no doubt in the Committee's view that the complexity of the EFE&D Act places a considerable administrative burden on both the Agency and claimants alike.

7.26 Indeed, given the many legislative changes which were made just before the State election in relation to donations, disclosures and political funding, it is to the credit of the EFA that it has been able to provide the levels of service which it did.

7.27 The Committee considers that the ability of the regulators to carry out their functions can be enhanced by two reforms.

7.28 Firstly, clarifying the legislation should assist claimants and administrators. To this end, the Committee has made the recommendation that there should be a new electoral act for NSW that provides for both the conduct of State elections and the regulation of campaign finance and expenditure. The act should have clarity of structure, plain English drafting and a general objects provision that would assist with interpretation.

[252] The Greens NSW, *Submission No.15*, p. 10.

[253] The Greens NSW, *Submission No.15*, p. 11.

7.29 Secondly, assimilating NSWEC and EFA would harmonise the administration of the electoral process and the regulation of campaign finance and expenditure. Here the Committee has made the recommendation that the new electoral act should be administered by a single statutory corporation which would assume those functions currently exercised by the NSWEC and the EFA.

7.30 A further improvement, which should result in administrative efficiencies, is the NSWEC's decision that it would now become standard practice for correspondence in relation to funding payments to be sent by mail and by email.[254]

RECOMMENDATION 19

That in drafting legislation for a new electoral act, the NSW Government address the need for more streamlined administrative processes for administrating campaign finance and expenditure.

[254] NSWEC and EFA, *Responses to submissions to the inquiry into the Administration of the 2011 NSW election and related matters*, p. 19.

Chapter Eight – Operation and effectiveness of recent campaign finance reforms

8.1 This chapter examines the operation and effectiveness of the series of recent amendments to the EFE&D Act that have put in place significant reforms to the to the campaign finance scheme in NSW. The chapter commences with a brief outline of the amending acts and their intended reforms to the EFE&D Act; it then goes on to give an overview of the NSWEC's view regarding the internal deficiencies of the Act as a result of those reforms; and then concludes by examining stakeholder evidence assessing the operation and effectiveness of the reforms and proposals for improving the current regime of campaign finance in NSW.

LEGISLATIVE REFORMS TO THE EFE&D ACT SINCE 2008

8.2 Since 2008 the EFE&D Act has undergone a series of amendments that were aimed at effecting significant reforms to the campaign finance scheme in NSW. A brief description of the amending acts and their central features follow.

The Election Funding Amendment (Political Donations and Expenditure) Act 2008 [the 2008 amendments]

8.3 The 2008 amendments were introduced with the intention of strengthening the regulation of political donations and electoral expenditure in relation to State and local government elections and elected members.[255] Significant reforms that were effected by the 2008 amendments included:

- requiring biannual disclosures of political donations and election expenditure;
- extending reporting to elected Members of (State) Parliament and local government councillors (in addition to reporting by parties, groups and candidates for election);
- imposing an obligation to disclose details of all political donations of, or above $1,000;
- requiring the disclosure of details of membership or affiliation fees of, or above $1,000;
- prohibiting entities from making reportable political donations unless they have an ABN; and
- prohibiting indirect campaign finance contributions valued at $1,000 or more.[256]

[255] NSWEC, *Submission No. 18*, p. 78.
[256] NSWEC, *Submission No. 18*, p. 78.

Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 [the 2009 amendments]

8.4 The 2009 amendments introduced prohibitions on political donations (including loans) made or made on behalf of property developers, as well the acceptance of political donations made by, or on behalf of property developers. "Close associates" of property developers were included in the definition of property developers for the purposes of the prohibitions.[257]

Election Funding and Disclosures Amendment Act 2010 [the 2010 amendments]

8.5 The 2010 amendments were put in place in in order to provide greater confidence in the impartiality of decision-making and the transparency of process in government through the imposition of caps on political donations and electoral funding, as well as the expansion of the amount of public funding that is available to political parties. It was intended that these measures would reduce real or perceived undue influence of political donors and of the wealth of individual parties and groups on the political process in NSW.[258] Significant reforms that were effected by the 2010 amendments included:

- setting the applicable cap on political donations to a registered party or group set at $5,000 per financial year;
- setting the applicable cap on political donations to non-registered parties, elected members, candidates or third-party campaigners set at $2,000 per financial year;
- introducing expenditure caps for political parties, candidates and groups contesting State elections, and the regulation of advertising and communication by third parties;
- increasing the level of public funding available to political parties and candidates under a reimbursement scheme;
- restricting donations from individuals to individuals on the NSW and/or Australian electoral roll;
- entitling 'entities' that include companies with an ABN, registered trade unions and incorporated associations which carry out the majority of their activities in NSW to make political donations;
- exempting party membership fees and party compulsory levies on parliamentarians from the cap on political donations;
- introducing the regulation of third party campaigners into the election funding and disclosures regime;

[257] NSWEC, *Submission No. 18*, p. 79.
[258] NSWEC, *Submission No. 18*, p. 80

- increasing the relevant disclosure period for lodgement of disclosures or political donations received or made, and electoral expenditure incurred to each 12 month period ending 30 June; and
- extending the range of persons/entities who are "prohibited donors" to include property developers, tobacco industry business entities and liquor and gambling industry business entities.[259]

Election Funding, Expenditure and Disclosures Amendment Act 2012 [the 2012 amendments]

8.6 The 2012 amendments put in place a suite of measures which had the broad objective of further strengthening the accountability, integrity and transparency of the political donation and expenditure scheme in NSW.[260] Significant reforms that were effected by the 2012 amendments included:

- providing for the aggregation of the electoral communication expenditure of parties and their affiliated organisations within the applicable cap for the party;
- limiting the ability to make political donations to individuals enrolled on the roll of electors for local government, State or Federal elections; and
- prohibiting the payment of annual or other subscriptions to a party by an entity, including an industrial organisation, other than a citizen on the electoral role for affiliation with the party.[261]

DEFICIENCIES OF THE EFE&D ACT RESULTING FROM THE REFORMS (THE NSWEC'S VIEW)

8.7 In its submission to the inquiry the NSWEC asserted that the program of electoral finance reform to the EFE&D Act, in the form of those amending acts described above, and the ad-hoc nature of the amendments to the Act, has resulted in an Act that contains numerous significant deficiencies.[262]

8.8 The inherent deficiencies of the EDE&D Act are summarised by the NSWEC as:

- internal inconsistencies and contradictions;
- disjointed definitions and related provisions;
- an absence of definition for some critical terms (e.g. election material, advertising, extended meaning of "candidate", and unregistered parties);
- the relationship with definitions in the PE&E Act;
- excessive complexity rendering it difficult for stakeholders to comply and the EFA to enforce/implement; and

[259] NSWEC, *Submission No. 18*, pp. 80-81.
[260] NSWEC, *Submission No. 18*, pp. 81-82.
[261] NSWEC, *Submission No. 18*, p. 81.
[262] NSWEC, *Submission No. 18*, p. 77.

- out of date provisions that should have been repealed.[263]

STAKEHOLDER VIEWS REGARDING THE OPERATION AND EFFECTIVENESS OF RECENT CAMPAIGN FINANCE REFORMS

8.9 The bulk of evidence received by the Committee in relation to the EFE&D Act from stakeholders concerned the impact of the campaign finance reforms described above on candidates, political parties, affiliated/third party organisations and others. This chapter categorises the stakeholder evidence as follows: political donations, public funding of election campaigns, expenditure caps, financial reporting, vouching requirements, audit fees, and the treatment under the Act of affiliated/third party organisations.

Political donations

Prohibition of donations from prohibited donors

8.10 The Committee considered evidence from stakeholders who asserted that Division 4A of the EFE&D Act, prohibiting political donations from property developers (and their "close associates"), tobacco industry business entities and liquor or gambling industry business entities, was made redundant by Division 2A of the Act, which caps donations variously at $2,000 and $5,000, and should therefore be repealed.[264]

8.11 The NSWEC suggested that Division 4A's prohibited donor provisions were no longer relevant, taking into account the imposition of the general donation caps and the restrictions on the making of political donations to individuals on the electoral roll.

> …it is questionable whether the original intent of the provisions remains relevant. It is therefore recommended that the policy rationale underpinning the prohibited donor provisions is re-examined and/or the provisions themselves are overhauled.[265]

8.12 The Nationals argued that the general caps on political donations provided for by Division 2A of the Act were at a sufficiently low level in themselves to achieve the objective of reducing the potential for perceived and/or actual occurrences of corruption or undue influence over the NSW political system. Consequently, the prohibitions on property developers and tobacco industry, liquor and gambling business entities provided for by Division 4A were deemed by The Nationals to be no longer necessary.

> We believe that Division 2A provides an effective mechanism to address public concern about perceived and/or actual corruption, and that Division 4A, which now serves no useful purpose, should therefore be repealed.[266]

8.13 The Nationals stated that the repeal of Division 4A was also appropriate taking into account the introduction of the provision in 2010, which limited the making of political donations to individuals on the NSW and/or Australian electoral roll,

[263] NSWEC, *Submission No. 18*, p. 77.

[264] See *Election Funding, Expenditure and Disclosures Act 1981.*

[265] NSWEC, *Submission No. 18*, p. 95.

[266] The Nationals (NSW Branch), *Submission No. 11a*, p. 16.

effectively banning all business entities from making donations to political parties.[267]

8.14 The Liberal Party also proposed that Division 4A of the Act should be repealed on the grounds that the making of political donations is limited to individuals on the electoral roll and that the provisions of Division 2A were sufficient in themselves to reduce perceived and/or actual instances of corruption or undue influence.

> Given that only individuals on the electoral roll can make donations and that there is a cap on donations for state campaign purposes, the bans on certain classes of individual donors are now irrelevant and impedes on their constitutional rights to contribute to the political process.[268]

8.15 Dr Joo-Cheong Tham echoed the views of The Nationals and the Liberal Party, stating that a central recommendation of his report was that the prohibition of donations from prohibited donors was redundant and that the relevant provisions of the Act should therefore be repealed.[269]

8.16 In relation to the recommendation Dr Tham stated:

> [The prohibited donor provisions] are unnecessary. The key justification for these prohibitions is that they address the problem of corruption and undue influence in relation to property developers, gambling, liquor and tobacco companies. The caps on political donations, however, effectively do so, rendering these prohibitions redundant. In a way, these prohibitions are an anachronism.

Committee comment

8.17 The Committee considers that the provisions of Division 4A of the EFE&D Act, prohibiting political donations from prohibited donors are no longer relevant to achieving the intended aim of mitigating perceived and/or actual occurrences of corruption or undue influence over the NSW political system.

8.18 This is because the donation caps of $2,000 and $5,000 and the restrictions on the making of political donations to individuals on the electoral roll are, in themselves, sufficient measures for achieving the above objective.

8.19 Accordingly, the Committee recommends that, in drafting legislation for a new electoral act, the NSW Government repeal Division 4A of the EFE&D Act, which relates to prohibited donors.

RECOMMENDATION 20

That in drafting legislation for a new electoral act, the NSW Government repeal Division 4A of the *Election Funding, Expenditure and Disclosures Act 1981*, which relates to prohibited donors.

[267] The Nationals (NSW Branch), *Submission No. 11a*, p. 16.

[268] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 5.

[269] Dr Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending in NSW*, p. 153.

Prohibition on political donations other than by individuals on the electoral roll

8.20 A number of stakeholders raised issues in relation to section 96D of the EFE&D Act prohibiting political donations other than by individuals on the electoral roll.

8.21 The Christian Democratic Party (CDP) stated that the requirement to confirm an individual's enrolment in order to accept a donation or entry fee to a fundraising event placed a significant administrative burden on smaller parties such as the CDP. This is because only political parties that have registered offices in every state are eligible to receive a copy of the full Australian Electoral Roll, which they can use to easily confirm an individual's enrolment.[270]

8.22 On the other hand, parties such as the CDP that do not have registered offices in every state and are therefore ineligible to obtain a copy of the Australian Electoral Roll are required to individually confirm donors' enrolment status at the point of donation. This, according to the CDP, was very time consuming process and could be avoided if the Party was provided with access to the full Australian Electoral Commission (AEC) Roll.[271]

8.23 Consequently, the CDP recommended that the NSWEC make a facility available whereby a nominated party representative can confirm donors' electoral enrolment irrespective of the state in which the donor or function attendee resides, or arranges with the AEC to make the Australian Electoral Roll fully available to all registered parties.[272]

8.24 The CDP made the additional point that the current donation provisions prevented permanent residents of Australia from donating to political parties and that this was not a reasonable situation as permanent residents, although ineligible to vote, are equally impacted by State laws and should be able to support political parties that promote their ideals and aspirations.[273]

8.25 The CDP therefore recommended that the prohibition on political donations other than by individuals on the electoral roll should be relaxed to include permanent residents of Australia.[274]

8.26 The Greens, on the other hand, recommended that section 96D of the EFE&D Act be amended to provide an exemption to the requirement for political donors to be on the electoral roll when the amount of any individual donation is less than $100 and the aggregate amount of that person's donations in any year does not exceed the threshold of reportable donations.[275]

8.27 The Greens' recommendation stemmed from its view that an unintended consequence of the section was that parties may not admit or retain members under the age of 18 on the basis that membership fees are taken to be donations, and, members under the age of 18 would therefore be prohibited from paying

[270] Christian Democratic Party, *Submission No. 7*, p. 11.
[271] Christian Democratic Party, *Submission No. 7*, p. 11.
[272] Christian Democratic Party, *Submission No. 7*, p. 11.
[273] Christian Democratic Party, *Submission No. 7*, pp. 11-12.
[274] Christian Democratic Party, *Submission No. 7*, p. 12.
[275] The Greens NSW, *Submission No. 15*, p. 11.

the fees due to not being on the electoral roll. The significance of this, according to The Greens is that "…there are many politically aware young people who may be denied the opportunity and historical right to join a political party by this provision".[276]

8.28 The Australian Labor Party recommended that section 96D of the EFE&D Act be amended to permit the making of political donations by non-profit organisations, but to otherwise restrict political donations to individuals on the electoral roll.[277]

8.29 According to the Labor Party, corporate donations may create the risk or perception of undue influence because they influence decision making by public officeholders in informal ways and are made by entities whose ultimate purpose is to make a financial profit. As a result, the Party deemed it appropriate that political donations from corporate donors remain prohibited.[278]

8.30 By contrast, the Party asserted that non-profit organisations represent groups of individuals within the community that openly advocate for their interests without the goal of making a financial profit, and that these groups provide an effective voice in the political process to individuals who would not otherwise have the financial or administrative resources to effectively participate.[279]

8.31 The Labor Party submission used the example of the Unions NSW 'Better Services for a Better State' issues-based campaign that was conducted in the lead up to the 2011 NSW Election as an example of the type of not-for-profit campaign that is prohibited by the Act's current provisions. This is because the campaign was co-ordinated by Unions NSW, but financed using contributions from union affiliates of Unions NSW, and not individuals on the electoral roll.[280]

8.32 The Labor Party stated that the Act, as it currently stands, imposed unreasonable restrictions on non-profit organisations and on those individuals that the organisations represent from effectively participating in the political process. Consequently, the Labor Party argued that:

> Non-profit organisations should therefore be permitted to fully participate in the political process by pooling resources from individuals on the electoral roll and either donating to political parties and candidates, or undertaking their own advocacy as a third party campaigner.[281]

8.33 The NSW Nurses' Association (NSWNA) also stated that section 96D imposed unreasonable restrictions on it and other non-profit organisations like it, in terms of its freedom of expression, the freedom to associate and the freedom to participate in the political/democratic process.[282]

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[276] The Greens NSW, *Submission No. 15*, p. 11.
[277] The Australian Labor Party (NSW Branch), *Submission No. 10*, p. 5.
[278] The Australian Labor Party (NSW Branch), *Submission No. 10*, p. 4.
[279] The Australian Labor Party (NSW Branch), *Submission No. 10*, pp. 4-5.
[280] The Australian Labor Party (NSW Branch), *Submission No. 10*, p. 4.
[281] The Australian Labor Party (NSW Branch), *Submission No. 10*, pp. 4-5.
[282] NSW Nurses' Association, *Submission No. 16, p. 8.*

8.34 By way of example, the NSWNA stated that it regularly provided free space in its journal for candidates to promote their views ahead of elections so that Association members were better informed of where the major parties stood in relation to their interests. It was the contention of the NSWNA that the provision of space in the journal to candidates must be considered a donation under the provisions of section 96D, and because the Association was not "…an individual who is enrolled on the roll of electors", the practice was therefore prohibited.[283]

8.35 Because the NSWNA viewed this practice, and other activities such as the publishing of op-ed pieces that directly or indirectly influence voting at an election, as legitimate communication with the Association's membership, it concluded that the current Act significantly infringed upon the Association's freedom of political communication, association and participation.[284]

Provisions relating to Federal campaign and personal bank accounts

8.36 The Nationals raised the issue of the EFE&D Act's treatment of donations made to parties' bank accounts kept exclusively for the purposes of Federal or local government election campaigns.

8.37 In its submission The Nationals stated that section 95B(2) of the Act, which provides that the applicable caps on political donations (provided for by section 95A) do not apply to donations paid into a party's Federal campaign account, was an appropriate measure.[285] The Party went on to recommend that that the Act be amended to explicitly state that its provisions have no application whatsoever to accounts that are used exclusively for expenditure in connection with Federal government election campaigns.[286]

8.38 The rationale for The Nationals' recommendation was that parties that are engaged in Federal election campaigns are subject to the relevant provisions of the *Commonwealth Electoral Act 1918* and, for the sake of simplicity and the potential jurisdictional conflicts that may arise, matters relating to Federal election campaigns should be governed exclusively by Commonwealth law.[287]

8.39 The Nationals also recommended that section 96D of the EFE&D Act be amended to explicitly allow for donations to be received in circumstances where an individual on the electoral roll does not maintain a bank account in their own name.[288]

8.40 According to The Nationals this is a necessary measure as many donors (for example, farmers) do not keep bank accounts in their own name, but rather maintain their personal and business finances through a single account in the name of the business, or in the name of a family partnership or trust. As such, personal donations made by these individuals would appear to be in breach of

[283] NSW Nurses' Association, *Submission No. 16, p. 8.*

[284] NSW Nurses' Association, *Submission No. 16, p. 8.*

[285] The Nationals (NSW Branch), *Submission No. 11b*, p. 17. See also *Election Funding, Expenditure and Disclosures Act 1981.*

[286] The Nationals (NSW Branch), *Submission No. 11b*, p. 17.

[287] The Nationals (NSW Branch), *Submission No. 11b*, p. 17.

[288] The Nationals (NSW Branch), *Submission No. 11b*, p. 18.

the prohibition of non-individual donations provided for by section 96D of the Act, even though the donation is being made in a personal capacity, rather than as a business or other entity.[289]

Restrictions on the sources of income into party and candidate campaign bank accounts

8.41 In its submission The Greens stated that the 2010 amendments, which provided for the caps on political donations, and the 2012 amendments, which prohibited political donations other than by individuals on the electoral roll, created unnecessary difficulties for parties wishing to donate funds to their own endorsed candidates' campaigns.[290]

8.42 According to The Greens, while the majority of supporters and party members will make donations to the party itself rather than to individual candidates' campaign accounts, parties, being organisations, are prohibited from making donations to their own candidates' campaigns under the current provisions. Consequently, parties must instead utilise section 84(7) of the EFE&D Act and directly incur the campaign expenses and then invoice their candidate for those expenses to make them claimable election expenditure. Parties can also provide loans to their candidates, but a candidate's inability to pay the appropriate interest on the loan or repay of the principle sum would similarly be in breach of the current donations provisions.[291]

8.43 The Greens contended that both of the above mechanisms represented:

> …a convoluted method for a party to provide essential support to its candidates' campaigns while maintaining a highly desirable level of transparency as to the funding and expenditure of each individual candidate's campaign.[292]

8.44 To address this issue, The Greens recommended that there be an exemption from the provisions of the Act relating to political donations in respect of party donations of funds to the campaigns account of a Legislative Assembly candidate or local government candidate or group endorsed by the party.[293]

8.45 The Greens also stated that the prohibition of membership fees as a source of income that could be donated into a party's campaign bank account was an overly strict measure to reduce perceived and/or actual instances of corruption or undue influence.[294]

8.46 The Greens' view was that because membership fees are subject to a cap per member they should be regarded as a non-corrupting source of income for a political party. Accordingly, The Greens recommended that the EFE&D Act should

[289] The Nationals (NSW Branch), *Submission No. 11b*, p. 18.
[290] The Greens NSW, *Submission No. 15*, p. 8.
[291] The Greens NSW, *Submission No. 15*, pp. 8-9.
[292] The Greens NSW, *Submission No. 15*, p. 9.
[293] The Greens NSW, *Submission No. 15*, p. 9.
[294] The Greens NSW, *Submission No. 15*, p. 8.

be amended to permit membership fees to be deposited into a party's State election campaign account.[295]

Public funding of election campaigns

Adequacy of current funding levels

8.47 In its submission The Nationals expressed their strong support for the change from a system whereby public funding payments were calculated on a fixed amount per vote, to one where funding is based on a proportion of actual expenditure, subject to meeting a qualification threshold.[296] The impact of the new system, according to The Nationals, is that:

> It provides more certainty to all participants in election campaigns, and due to the imposition of caps on expenditure, does not expose the state's finances to excessive liabilities.[297]

8.48 The Nationals went on to state that the overall increase in the level of funding available, both to parties and candidates, was an effective means of compensating for the restrictions that were placed on the source and value of donations by the recent campaign finance reforms, and that, in the Party's view, the current levels of funding were appropriate.[298]

8.49 Accordingly, The Nationals recommended that the thresholds for eligibility for payments from the Election Campaigns Fund, and the rates of those payments remain at the levels specified in sections 57-60 of the EFE&D Act.[299]

8.50 By contrast, the Liberal Party asserted that the current levels of public funding for administrative and campaign purposes were inadequate, and it recommended that the amount of administrative public funding be increased from the current indexed cap of $2 million to $3 million.[300]

8.51 The Liberal Party made the point that the level of public administrative funding was inadequate for both major and minor parties alike, and that $3 million was an appropriate level for a political party the size of the NSW Division of the Liberal Party, particularly taking into account the increased costs of compliance to parties as a result of the multiple reforms made to the EFE&D Act.[301]

8.52 In determining and maintaining levels of public funding that are appropriate for the full spectrum of political parties and to contemporary circumstances, Dr Joo-Cheong Tham recommended that this Committee conduct a comprehensive review of the level of public funding payments following each NSW election, starting with the election in 2015. According to Dr Tham, these reviews should be informed by a corresponding report from the NSWEC and be undertaken with a

[295] The Greens NSW, *Submission No. 15*, p. 8.
[296] The Nationals (NSW Branch), *Submission No. 11a*, p. 13.
[297] The Nationals (NSW Branch), *Submission No. 11a*, p. 13
[298] The Nationals (NSW Branch), *Submission No. 11a*, p. 13
[299] The Nationals (NSW Branch), *Submission No. 11a*, p. 13
[300] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 4.
[301] Liberal Party of Australia (NSW Division), *Submission No. 17*, pp. 4-5.

view to developing a methodology for determining appropriate public funding levels.[302]

Issues with the current public funding model

8.53 The political parties raised a number of issues in relation to the public funding model that is currently in use for NSW elections.

8.54 The Greens, for example, identified significant structural issues with model, stating that it is "…too complex and needs simplifying", and recommended that a simpler model be adopted that is based on a dollar amount per vote obtained, provided that the dollar amount is sufficient for a "no frills" comprehensive campaign to be conducted within the funding available for 4% of the vote.[303]

8.55 In contrast, the Liberal Party argued that, generally, the EFE&D Act should emphasise the status of the role of the party to a greater extent than it currently does and, therefore, as a logical consequence, overall funding (and caps) needs to be based on the number of party-endorsed candidates.[304]

8.56 The Greens also stated that the Party had difficulties with the EFE&D Act in relation to its narrow definition of "electoral expenditure" for the purpose of claiming funding, and also complying with the expenditure cap.[305]

8.57 The Greens noted that, at present, the definition of electoral expenditure does not incorporate what it viewed as legitimate electoral expenses, such as expenditure on candidate travel, compulsory auditing of election claims, and research, including polling and focus groups. According to The Greens, this narrow definition particularly impacts on smaller parties "…whose budgets are much lower than the expenditure caps [and who] prefer a broader definition of electoral expenditure so that all legitimate election expenditure is able to be reimbursed".[306]

8.58 To address this issue The Greens recommended that the definition of the types of electoral expenditure for the purpose of claiming funding, and also compliance with the expenditure cap, should be broadened to include legitimate electoral expenditure that is currently excluded. Alternatively, The Greens suggested that the definitions of electoral expenditure in respect of the two different purposes (e.g. funding claims and compliance with expenditure caps) could be decoupled, with the definition for the purposes of claiming electoral funding being broadened to include legitimate electoral expenditure that is currently excluded.[307]

8.59 The Liberal Party similarly recommended that the scope of electoral expenditure that qualifies for public funding should be expanded to incorporate all items of

[302] Dr Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending in NSW*, pp. 192-193.
[303] The Greens NSW, *Submission No. 15*, p. 7.
[304] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 3.
[305] The Greens NSW, *Submission No. 15*, p. 7.
[306] The Greens NSW, *Submission No. 15*, p. 7.
[307] The Greens NSW, *Submission No. 15*, p. 7.

State electoral expenditure, not just electoral communication expenditure, and acknowledged that a revision of the current expenditure caps might be required to accommodate this.[308]

8.60 Further, the Christian Democratic Party recommended that the scope of electoral expenditure for which funding could be claimed should be broadened, specifically to include candidates' travel expenditure.

8.61 The Party argued that the exclusion of travel expenditure from claimable electoral expenditure effectively restricted the campaigning capacity of non-sitting candidates and provided a distinct advantage to sitting Members because "…the sitting member has been able to effectively campaign for 4 years using his or her Member of Parliament travel entitlements. This bias towards a sitting member is obviously even greater in the larger electorates".[309]

8.62 Lastly, the submission from the Liberal Party drew attention to the fact that the EFE&D Act provides for disparate public funding levels between individual candidates and parties.[310] The Liberal Party illustrated this point stating that Part 5, Division 2 of the Act provides that public funding can be claimed for electoral communication expenditure of an endorsed candidate under either the candidate claim or the party claim. Under the candidate claim the maximum rate of public funding equates to 30 cents in the dollar, whereas under the party claim the maximum rate of public funding equates to 75 cents in the dollar.[311]

8.63 In the interests of consistency and clarity for parties and candidates, the Liberal Party recommended that the Act be amended to provide that the maximum rates of public funding are the same for both the candidate claim and the party claim.[312]

Committee comment

8.64 Having heard stakeholder concerns in relation to the current scope of electoral expenditure that qualifies for public funding, the Committee considers that these should be the subject of a review. The aim of the review should be to determine whether the current categories of electoral expenditure remain appropriate.

8.65 The Committee is of the view that this should either be undertaken by the NSW Government, in consultation with stakeholders, as part of the electoral act reviews; or alternatively the Committee would consider any inquiry referred to it for this purpose.

RECOMMENDATION 21

That the NSW Government consider a review of the types of electoral expenditure that qualify for public funding.

[308] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 5.
[309] Christian Democratic Party, *Submission No. 7*, p. 11.
[310] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2.
[311] Liberal Party of Australia (NSW Division), *Submission No. 17*, pp. 2-3.
[312] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 3.

8.66 In relation to the apparent disparity between the levels of public funding under the separate candidate and party claims, the Committee concludes that the two levels of funding should be harmonised in order to promote consistency and administrative efficiency.

RECOMMENDATION 22

That in drafting legislation for a new electoral act, the NSW Government harmonise the levels of public funding which may be claimed under the separate candidate and party categories.

Preliminary payments

8.67 The Nationals raised two issues in relation to the preliminary payment of public funding to political parties under the EFE&D Act.

8.68 The Nationals firstly stated that the Act, as it presently stands, provides that parties are eligible to receive some preliminary payments of public funding, but there is no comparable provision for individual candidates to receive any payments at all until the assessment of their claims has been completed.[313]

8.69 The Nationals concluded that these circumstances were inequitable and recommended that the issue should be addressed by amending the EFE&D Act so that all provisions relating to preliminary payments of public funding claims under section 69 apply equally to parties and candidates.[314]

8.70 The second issue raised by The Nationals related to the method by which PAF payments are made. At present, payments are made in arrears and on an annual basis following assessment of a party's claim for funding by the EFA, which must be accompanied by copies of invoices or receipts to vouch for all expenditure claimed, as funding is only paid to reimburse actual expenditure of certain allowable types.[315]

8.71 The Nationals argued that this payment model had the effect of creating potentially significant cash-flow problem for parties that are required to spend money they may not have (because of the donation restrictions and caps) in order to qualify for the public funding that is intended to mitigate the impact of the donation restrictions.[316]

8.72 Rather than making the PAF payments in arrears annually, The Nationals recommended that the EFE&D Act should be amended to provide that preliminary payments can be made available to parties on a quarterly basis in arrears, as this would alleviate the potential financial difficulties parties might face as a direct consequence of the donation restrictions. This approach, according to The Nationals:

[313] The Nationals (NSW Branch), *Submission No. 11a*, p. 15.
[314] The Nationals (NSW Branch), *Submission No. 11a*, p. 15.
[315] The Nationals (NSW Branch), *Submission No. 11a*, p. 19.
[316] The Nationals (NSW Branch), *Submission No. 11a*, p. 19.

> …would strike a more appropriate balance between the current PAF system of annual payments in arrears, and the former Political Education Fund system of annual payments in advance.[317]

Committee comment

8.73 It should be noted that, following on from a recommendation in the Committee's report on administrative funding for minor parties, the *Election Funding, Expenditure and Disclosures Amendment (Administrative Funding) Act 2013* provided for reimbursements from the PAF to be paid to members and parties quarterly in arrears.[318]

Financial reporting

8.74 A number of political parties and organisations raised issues in relation to the disclosure requirements of political donations received or made, and electoral expenditure incurred, provided for by Part 6, Division 2 of the EFE&D Act.

8.75 The Wianamatta Community Alliance stated that the financial reporting and other requirements of the EFE&D Act were unnecessarily onerous and had the effect of imposing a barrier to entry to the electoral process by Independent and small community group candidates.[319] It was the view of the Wianamatta Community Alliance that the 2010 amendments effectively gave an unfair advantage to the larger political parties that have greater organisational and financial resources to enable them to effectively comply with the relevant provisions of the Act.[320]

8.76 Similarly, the Australian Sex Party asserted that the current reporting provisions were "unfair" for unregistered parties and Independent candidates.[321] The Australian Sex Party submitted that the current reporting provisions appear to have been designed specifically to deal with major political parties and their financial arrangements, and that it was:

> …unfair to apply the same very onerous rules to unregistered parties and independent candidates, when they don't enjoy the electoral benefits of the registered parties, and they don't have anywhere near the financial machinery or cash flow of the registered parties.[322]

8.77 The ultimate effect of this, according to the Australian Sex Party was that "…the current financial regulatory framework…serves to inhibit the emergence of new political parties…".[323]

8.78 The Nationals, on the other hand, raised issues in relation to difficulties that donors had with the process of complying with the current financial reporting

[317] The Nationals (NSW Branch), *Submission No. 11a*, p. 19.

[318] See *Election Funding, Expenditure and Disclosures Amendment (Administrative Funding) Act 2013.* See also Joint Standing Committee on Electoral Matters, *Administrative Funding for Minor Parties*, [November] 2012, pp. 11-12.

[319] Wianamatta Community Alliance, *Submission No.*5, p. 1.

[320] Wianamatta Community Alliance, *Submission No.*5, p. 1.

[321] Australian Sex Party, *Submission No. 8*, p. 3.

[322] Australian Sex Party, *Submission No. 8*, pp. 3-4.

[323] Australian Sex Party, *Submission No. 8*, p. 4.

requirements. For example, The Nationals' stated that the Party had received feedback following the 2011 NSW Election that donors, particularly those who made donations just above the threshold for reportable donations, found the donor disclosure forms to be confusing. Many donors also expressed frustration at not being able to complete their disclosures other than in hard copy.[324]

8.79 To improve the process, The Nationals recommended that the EFA develop an online disclosure form, which could ease the burden of complying with the reporting requirements by enabling on-line completion of the form and simplify matters by allowing those parts of the form that are not relevant to the donor to remain hidden.[325]

8.80 The Nationals also received feedback from donors suggesting that they would like to be able to show in their annual disclosure whether their donations had been made for Federal, State or local government campaign purposes.[326] This is significant because the cap on donations does not apply to donations made to party accounts kept exclusively for the purposes of Federal election campaigns. Therefore donors whose total contribution to a party is more than the amount of the donation cap would have a means of demonstrating that they had not made any donations in breach of the cap.[327]

8.81 To achieve this end, The Nationals recommended that the EFA's future donor declaration forms should include an optional field for donors to indicate the purpose for which a donation was made.[328]

8.82 In its submission to the inquiry, the Liberal Party raised the issue of the timeframe for the making disclosure returns to the EFA, stating that the 8-week period for disclosure returns to be lodged, as provided for by Part 6, Division 2 of the EFE&D Act, was too short. Rather, the Liberal Party recommended that the disclosure timeframe should match that of the comparable provision in the Commonwealth Act, that being 15 weeks after Election Day.[329]

8.83 The Liberal Party submission also argued that the EFE&D Act should recognise the role of the party to a greater extent and, as such, advocated for a single, all-inclusive disclosure requirement for party-endorsed candidates. This is in contrast to the current legislative requirement for parties and candidates to make separate disclosures.[330]

8.84 The last issue raised by the Liberal Party about the EFE&D Act's financial reporting requirements stemmed from the fact that, under Part 5, Division 3 of the Act, the timeframe for claiming public funding is less than the timeframe for making annual financial disclosures. Because all claims for public funding must be accompanied by an annual financial disclosure the Liberal Party asserted that the

[324] The Nationals (NSW Branch), *Submission No. 11a*, p. 16.
[325] The Nationals (NSW Branch), *Submission No. 11a*, pp. 16-17.
[326] The Nationals (NSW Branch), *Submission No. 11a*, p. 17.
[327] The Nationals (NSW Branch), *Submission No. 11a*, p. 17.
[328] The Nationals (NSW Branch), *Submission No. 11a*, p. 17.
[329] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2. See also *Commonwealth Electoral Act 1918*.
[330] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 3.

current provisions create unnecessary delays for parties seeking to submit claims.[331]

8.85 The Nationals raised the same matter, stating that it had experienced delays in receiving public funding due to the situation whereby claims are to be lodged within 120 days of the return of the writs for the election, but the vouching requirements at clause 6 of the Regulations prevent lodgement of a claim prior to the lodgement of the party or candidate's annual financial disclosure. The Nationals stated that this has the effect of delaying the submission of claims for funding until after the end of the financial year in which the election giving rise to the claim occurs, and in a practical sense results in a delay of at least 4 months.[332]

8.86 In its *Responses to submissions to the inquiry into the Administration of the 2011 NSW Election and related matters*, the NSWEC acknowledged the issues arising from the respective timeframes for claiming public funding and making annual financial disclosures, and stated that the discrepancy has been addressed in a recent amendment to the EFE&D Regulation (clause 6). However, the NSWEC suggested that consideration might be given as to whether the amendment should be placed in the Act rather than the Regulation, or whether the current approach is adequate.[333]

Committee comment

8.87 Having considered the current requirements for financial reporting in the EFE&D Act, it is clear to the Committee that there is considerable scope for making these processes more efficient. Accordingly, the Committee makes the following recommendations.

RECOMMENDATION 23

That in drafting legislation for a new electoral act, the NSW Government provide a legislative framework which supports a more streamlined and simplified donor disclosure process, specifically:

- **harmonisation with the Federal timeframes for submitting disclosure returns**
- **forms to enable donors to indicate the purpose for which a donation is made**
- **a single, all-inclusive disclosure requirement for party-endorsed candidates, and**
- **provisions in relation to timeframes for claiming public funding and annual financial disclosures being set out in primary legislation.**

[331] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 2. See also The Nationals (NSW Branch), *Submission No. 11a*, p. 14.
[332] The Nationals (NSW Branch), *Submission No. 11a*, p. 14.
[333] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 20.

Vouching requirements

8.88 The Liberal Party argued that the degree of vouching required by the EFA in respect of claims for reimbursement of electoral communication expenditure is far too extensive.[334]

8.89 At present, the EFE&D Regulation provides that copies of either the accounts or receipts (or a mixture of both) issued in respect of electoral communication expenditure, as well as copies of any advertising material to which any portion of the expenditure relates must accompany any claim for reimbursement.[335]

8.90 The difficulties that were created by the current vouching requirements at the last NSW election were described by Mr Simon McInnes from the Liberal Party:

> During the last State election campaign the Election Funding Authority required copies of artwork or material for every single piece of election campaigning—that included t-shirts, balloons, every single piece that they needed. I do not believe that they need all of that. A detailed invoice specifying what it is should be sufficient. All we are doing is creating an administrative nightmare. First, it makes it difficult for the Election Funding Authority to enforce and, secondly, something that is difficult to enforce in essentially what is a voluntary party.

8.91 The EFA acknowledged that the vouching requirements were proving difficult for claimants to comply with in order to secure public funding, but stated that the EFE&D Act and Regulations did not provide it with any discretion in relation to these matters.[336]

Committee comment

8.92 The Committee notes the difficulties raised by stakeholders in relation to complying with the current vouching requirements under the EFE&D Act. It recommends that these be simplified by amending the regulations to provide that vouching requirements for claims of public funding may be done by providing copies of either the accounts or receipts (or a mixture of both). The requirement for copies of any advertising material to which the electoral expenditure relates should be repealed.

RECOMMENDATION 24

That in drafting legislation for a new electoral act, the NSW Government repeal the requirement that claims for public funding be accompanied by copies of any advertising material to which electoral expenditure relates.

Expenditure caps

8.93 A range of views were expressed in relation to the caps that were imposed on political parties' (and others) electoral expenditure by the 2010 amendments to the EFE&D Act.

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[334] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 3.

[335] *Election Funding, Expenditure and Disclosures Regulation 2009*.

[336] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 22.

8.94 The Nationals, for example, found the limits imposed on parties' and candidates' expenditure to be reasonable and the legislative framework sufficiently flexible that they did not impede the practice of parties using a variety of promotion tools to support multiple candidates at the same time.[337] Accordingly, the Party recommended that the provisions of section 95 of the EFE&D Act relating to caps on electoral communication on State election campaigns should be retained in their current form.[338]

8.95 On the other hand, The Greens asserted that the current caps on campaign expenditure were "too generous", and that the caps could be reduced further to ease the financial pressure on parties and candidates and "…to help ensure that wealth is not buying an election outcome."[339] The Greens did, however, acknowledge that the expenditure caps had been responsible for reducing the excessive expenditure that took place in a number of electorates during the 2007 NSW election.[340]

8.96 The Greens also argued that the current aggregations provisions in section 95G (6) and (7) of the EFE&D Act unfairly impacted on the electoral expenditure of third party organisations formally affiliated with a political party (for example, unions), while leaving third parties composed entirely of members of a particular political party free to advertise for that party without it being accounted for as expenditure for the party.[341]

8.97 To address this issue The Greens recommended that where a third party entity's membership is composed of more than 75% membership of a particular political party, its electoral expenditure should be aggregated into that of the political party.[342]

8.98 Further, The Greens stated that there was nothing in the current Act that would prevent a corporation which, for example, profits from the sale of tobacco or alcohol, or developing land, from incurring up to $1.15 million in electoral expenditure as a third party. The Greens suggested that this situation enables corporate for-profit entities free to advertise in favour of whichever political party promises to provide the most favourable outcome for their industry. The Greens consequently recommended that the EFE&D Act should be amended to prohibit corporate for-profit organisations from being third parties.[343]

Audit fees

8.99 Section 65 and section 96K of the EFE&D Act provides that all claims for public funding and all disclosures of political donations and electoral expenditure need to be reviewed by a registered company auditor (unless an exemption has been

[337] The Nationals (NSW Branch), *Submission No. 11a*, p. 13.
[338] The Nationals (NSW Branch), *Submission No. 11a*, p. 13.
[339] The Greens NSW, *Submission No. 15*, p. 7.
[340] The Greens NSW, *Submission No. 15*, p. 7.
[341] The Greens NSW, *Submission No. 15*, pp. 7-8.
[342] The Greens NSW, *Submission No. 15*, p. 8.
[343] The Greens NSW, *Submission No. 15*, p. 8.

approved by the EFA) and accompanied by a certificate of the auditor stating that they were given full and free access to all accounts and documents.[344]

8.100 A number of the parties raised concerns about having to bear the cost of the audits. The Christian Democratic Party, for example, stated that the cost of having election and party disclosures audited was not a minor consideration, particularly for individual candidates who do not have the financial resources of the major parties. The Christian Democratic Party further suggested that because the audit fees are not claimable, they amount to what "…is effectively an additional election nomination fee."[345]

8.101 The Australian Sex Party also argued that the current auditing requirements were unreasonably onerous on small parties, unregistered parties and independent candidates. In its submission, the Party stated that both its independent candidates for the 2011 NSW election were charged $440 each for their audits, where one candidate spent less than $10,000 and the other candidate spent nothing other than his nomination fee. The Party stated that its unregistered NSW branch was also required to spend $440 on an additional audit, even though it receives none of the electoral benefits of registered parties.[346] It was the view of the Australian Sex Party that the current requirements did not constitute a sensible or fair approach to the issue, a view the was underscored by the "…fact that one of [their] independent candidates spent more on his audit than on his actual campaign…".[347]

8.102 The Australian Sex Party submitted that the current auditing requirements should be replaced by a more "realistic and graduated approach", whereby mandatory official audits are only required to be undertaken in respect of campaign expenditure over $20,000, while retaining the option for the EFA to audit any disclosures it deems necessary.[348]

8.103 The Liberal Party similarly asserted that the auditing requirements of the EFE&D Act imposed an unnecessary financial burden on political parties and that, accordingly, the Act should be amended to reflect the comparable requirements of the Commonwealth Act, which provides that the AEC conducts the disclosures audits on an ad hoc basis.[349]

8.104 The EFA noted that this issue had been raised with the previous Committee, most recently in relation to its inquiry into public funding for Local Government election campaigns in 2010. In the course of the inquiry two recommendations for addressing the issue were made to the Committee:

- That additional funding should be made available to parties to assist with the cost of an audit; and

[344] *Election Funding, Expenditure and Disclosures Act 1981*.
[345] Christian Democratic Party, *Submission No. 7*, p. 10.
[346] Australian Sex Party, *Submission No. 8*, p. 5.
[347] Australian Sex Party, *Submission No. 8*, p. 5.
[348] Australian Sex Party, *Submission No. 8*, p. 5.
[349] Liberal Party of Australia (NSW Division), *Submission No. 17*, pp. 3-4.

- That the Act be amended to provide that the requirement for audits to be conducted by a registered company be changed to provide that audits be conducted by any of the following: a Certified Practising Accountant member of CPA Australia, NSW Division, a member of the Institute of Chartered Accountants in Australia, NSW Region, who holds a Certificate of Public Practice issued by that Institute, or a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute.[350]

Committee comment

8.105 Having considered the evidence from the Christian Democratic Party, the Australian Sex Party and the Liberal Party, as well as the views of the EFA, in relation to the costs of the current auditing requirements to candidates and parties, it is the Committee's view that measures should be put in place to ease the financial burden of having the audits carried out, as this particularly impacts on smaller parties and independent candidates with limited capacity to meet such costs.

8.106 While there is always the option of further public funding to alleviate the auditing expenses of candidates and parties, the Committee sees merit in broadening the categories of persons empowered under the Act to conduct the audits.

8.107 The Committee therefore recommends that in drafting legislation for a new electoral act, the NSW Government provide that the requirement for audits to be conducted by a registered company be changed to provide that audits be conducted by any of the following: a Certified Practising Accountant member of CPA Australia, NSW Division, a member of the Institute of Chartered Accountant in Australia, NSW Region, who holds a Certificate of Public Practice issued by that Institute, or a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute.

RECOMMENDATION 25

That in drafting legislation for a new electoral act, the NSW Government provide that the requirement for audits to be conducted by a registered company be changed to provide that audits be conducted by any of the following: a Certified Practising Accountant member of CPA Australia, NSW Division, a member of the Institute of Chartered Accountants in Australia, NSW Region, who holds a Certificate of Public Practice issued by that Institute, or a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute.

RECOMMENDATION 26

That the NSW Government consider means of streamlining audit processes whilst maintaining the integrity of the system.

[350] NSWEC and EFA, *Responses to submissions to the inquiry into Administration of the 2011 NSW election and related matters*, p. 3. See also NSWEC, *Submission No. 18*, pp. 99-100.

Treatment of affiliated/third party organisations

8.108 The Committee heard stakeholder concerns about the 2012 amendments to the EFE&D Act, which prohibited the payment of annual or other subscriptions to a party by an entity, other than a citizen on the electoral roll, for affiliation with the party; and which aggregated the electoral communication expenditure of political parties and organisations that are affiliated with those parties for the purposes of the expenditure cap.

Committee comment

8.109 While the Committee notes the concerns of stakeholders, it does not wish to comment further on matters that have been previously considered by the Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011[351], and which, at the time of reporting, are under adjudication by the courts.[352]

[351] See Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, *Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011*, [February] 2012.

[352] http://www.abc.net.au/news/2013-04-08/unions-take-donation-law-challenge-to-high-court/4615498 <Accessed 8 April 2013>.

Chapter Nine – Public funding of local government election campaigns

9.1 The inquiry's terms of reference (part 4 (d)) requests that the Committee examine evidence received by stakeholders in relation to the recommendations made by the previous Parliamentary committee following its 2010 inquiry into the public funding of local government election campaigns.

9.2 Because the Committee only received substantial evidence from the NSWEC in relation to part 4 (d) of the terms of reference this chapter will, in the main, focus on the NSWEC's view and make reference to the Committee's forthcoming report on its inquiry into the 2012 Local Government elections.

The NSWEC's view

A public funding scheme for local government election campaigns

9.3 In its submission to the inquiry the NSWEC noted that the previous committee's report on *Public funding of local government election campaigns* had recommended that consideration be given to the reformation of the political finance regime for local government election campaigns, including the introduction of a public funding scheme administered by the State Government.[353]

9.4 In contrast to the previous committee's recommendation, it was the NSWEC's view that public funding should not be introduced for the purpose of financing local government campaigns, because essentially "…there is no demonstrated case for public funding of local government election campaigns."[354]

9.5 The NSWEC noted a report by Dr Joo-Cheong Tham which described three possible rationales to support the introduction of public funding for local government elections:

- anti-corruption – by reducing reliance on private funding, thereby lessening the risk of corruption and undue influence:
- fairness – by ensuring that the electoral contest is open to "worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known; and
- compensatory – to compensate for reduced private income resulting from the introduction of contribution limits.[355]

[353] NSWEC, *Submission No. 18*, p. 98. See also Joint Standing Committee on Electoral Matters, *Public funding of local government election campaigns*, December 2010, pp. 34-35.
[354] NSWEC, *Submission No. 18*, p. 98.
[355] NSWEC, *Submission No. 18*, p. 98. See also Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in NSW*, December 2010, p. 64.

9.6 However, the NSWEC stated that it concurred with Dr Tham's conclusions that those rationales lacked persuasiveness in relation to NSW local government elections. The first rationale (anti-corruption), according to Dr Tham, was not strong in relation to public funding of elections at any level. The second rationale (fairness) was not compelling when placed in the context of 'low cost' election campaigns, which, the NSWEC asserted, the vast majority of local government elections in NSW are. The NSWEC further suggested that the introduction of public funding actually creates the risk of inflating election spending, thereby undermining the objective of ensuring fair elections. In relation to the third rationale (compensatory), Dr Tham argued that it, too, was very weak in relation to local government candidates, as contribution limits of $1,000 per financial year will have a minimal impact on these candidates.[356]

9.7 The NSWEC's view was echoed by the Liberal Party's submission, which stated "We are of the opinion that no public funding should be allowed for local government elections".[357]

Donation and expenditure caps

9.8 The submission from the NSWEC noted that the previous committee's report recommended that a cap on donations to local government campaigns be introduced, having regard to consistency with the donation caps applicable for state election campaigns; and the arguments made by the Independent Commission Against Corruption and the NSWEC for lower donation caps than those for state government election campaigns.[358]

9.9 The NSWEC also noted that the previous committee recommended that expenditure caps be similarly introduced in respect of local government election campaigns. It was the view of the NSWEC, however, that this recommendation would be unworkable on the grounds that due to the overly elaborate nature of local government elections, each local government area would require its own formula for capping expenditure. The NSWEC commented that:

> …the complicated nature of any such undertaking is suggested by the fact that seven of the Committee's 16 Recommendations dealt with how this might be implemented in practice.[359]

9.10 While it questioned the practicality of the previous committee's recommendation in respect of expenditure caps, the NSWEC argued that the introduction of donation caps, in itself, would have the effect of limiting the amount of money spent on local government election campaigns:

> Although there may be exceptions in the case of high-wealth individuals, the fact that a candidate is only able to receive a certain amount of campaign donations most likely means that he or she will limit the amount of money spent on a

[356] NSWEC, *Submission No. 18*, p. 99. See also Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in NSW*, p. 64.

[357] Liberal Party of Australia (NSW Division), *Submission No. 17*, p. 5.

[358] NSWEC, *Submission No. 18*, p. 99. See also Joint Standing Committee on Electoral Matters, *Public funding of local government election campaigns*, pp. 38-39.

[359] NSWEC, *Submission No. 18*, p. 99. See also Joint Standing Committee on Electoral Matters, *Public funding of local government election campaigns*, p. 46.

campaign. Therefore, it will be possible for an overall scheme limiting donations to have the effect of capping expenditure in each local government election campaign.[360]

Audit costs

9.11 Finally, the NSWEC noted the previous committee's recommendation that, to ensure compliance with disclosure requirements, public funding could be introduced in the form of an allowance to candidates and groups to assist with the costs of auditing, as required under the EFE&D Act.[361]

9.12 Rather than making public funding available to candidates and groups in the form of an audit allowance, the NSWEC suggested that the costs of the audits could instead be alleviated by allowing any of the following to undertake the audit:

- a Certified Practising Accountant member of CPA Australia, NSW Division;
- a member of the Institute of Chartered Accountants in Australia, NSW Region, who hold a Certificate of Public Practice issued by that institute; or
- a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute.[362]

9.13 The NSWEC also noted that, although no public funding is currently available at local government elections, the EFA does not require an independent audit to be carried for candidates and groups contesting local government elections, except where there is more than $2,500 in political donations or electoral expenditure.[363]

Conclusion

9.14 For the reasons described above, the NSWEC concluded that there was insufficient evidence to suggest that participants in local government elections should receive funding from the State, as was recommended by the previous committee in its report on *Public funding of local government election campaigns*. Rather, the NSWEC suggested that limiting campaign expenditure at the local government level would be better achieved by the judicious use of donation caps, "…especially as the complexity of the electoral structure of local government in New South Wales…bears little resemblance to the funding approach to the 93 single member electorates which make up the Legislative Assembly."[364]

Committee comment

9.15 While noting the evidence received by the NSWEC and the Liberal Party in relation to the previous committee's recommendations following the 2010 inquiry into the public funding of local government elections, the Committee has

[360] NSWEC, *Submission No. 18*, p. 99.
[361] NSWEC, *Submission No. 18*, p. 99. See also Joint Standing Committee on Electoral Matters, *Public funding of local government election campaigns*, p. 61.
[362] NSWEC, *Submission No. 18*, p. 100.
[363] NSWEC, *Submission No. 18*, p. 100.
[364] NSWEC, *Submission No. 18*, p. 100.

concluded that the matters raised can be more fully examined as part of its current inquiry into the 2012 Local Government elections.

9.16 Accordingly, the Committee does not intend to make any definitive comment in relation to the conduct of local government elections until it reports on the inquiry into the 2012 Local Government elections, which it will do by 30 June 2013.

Appendix One – List of Submissions

1	Dr Craig Boutlis
2	Name Suppressed
3	Name Suppressed
4	Mr Victor J Batten
5	Wianamatta Community Alliance
6	Mr Graham Eames
7	Christian Democratic Party
8	Australian Sex Party
9	Australian Centre for Disability Law
10	Australian Labor Party (NSW Branch)
11	The Nationals (NSW Branch)
12	Vision Australia
13	Mr Gregory Briscoe-Hough
14	Liberal Democratic Party
15	The Greens NSW
16	NSW Nurses' Association
17	Liberal Party of Australia (NSW Division)
18	NSW Electoral Commission
19	Unions NSW

Appendix Two – List of Witnesses

15 June 2012, Waratah Room, Parliament House

Witness	Position and Organisation
Mr Colin Barry Mr Paul Beeren Mr Brian Decelis Mr Ian Brightwell	Electoral Commissioner, Electoral Commission of NSW Director Enrolment, Electoral Commission of NSW Director Funding & Disclosure, Electoral Commission of NSW Director Information & Technology, Electoral Commission of NSW.
Dr Roland Wen Dr Vanessa Teague	Computing Research and Education Association of Australia
Mr Mark Radcliffe	Business Development Manager (International Sales), Everyone Counts Pty Ltd
Mr Antony Green	Election Analyst
Ms Fiona Given	Policy Officer, Australian Centre of Disability Law
Ms Susan Thompson	Advocate, Vision Australia
Mr Digby Hughes	Policy and Research Officer, Homelessness NSW
Mr Mark Neeham Mr Simon McInnes	State Director, Liberal Party of Australia, NSW Division Finance Director, Liberal Party of Australia, NSW Division

29 June 2012, Waratah Room, Parliament House

Witness	Position and Organisation
Mr Ian Smith	Treasurer and Party Agent, Christian Democratic Party
Mr Leighton Thew	Acting State Manager, Christian Democratic Party
Mr Chris Maltby	Registered Officer, The Greens
Ms Lesa de Leau	State Election Campaign Co-ordinator, The Greens
Mr Ben Franklin	State Director, The Nationals (NSW Branch)
Mr Greg Dezman	Deputy State Director, The Nationals (NSW Branch)
Mr Andrew Patterson	Registered Officer, Australian Sex Party
Mr Brett Holmes	General Secretary, NSW Nurses' Association
Mr Tony O'Grady	Manager Projects & Compliance, NSW Nurses' Association
Mr Mark Lennon	Secretary, Unions NSW
Mr Paul Doughty	Industrial and Campaigns Officer, Unions NSW
Mr Colin Barry	Electoral Commissioner, NSW Electoral Commission
Mr Brian DeCelis	Director, Funding and Disclosure, NSW Electoral Commission

24 August 2012, Waratah Room, Parliament House

Witness	Position and Organisation
Dr Anika Gauja	Department of Government and International Relations, University of Sydney.
Ms Jenni Newton-Farrelly	Electoral Specialist South Australian Parliament Research Library
Professor Graeme Orr	TC Beirne School of Law, University of Queensland
Professor Anne Twomey	Sydney Law School, University of Sydney

Appendix Three – Extracts from minutes

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 2)

9.30 a.m. Wednesday 3 August 2011

Waratah Room, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Dr Phelps and Mr Primrose.

The Chair opened the meeting at 9.34 a.m.

1. Confirmation of Minutes

Resolved on the motion of Mr Fraser, seconded by Mr Borsak:

"That the Minutes of the meeting of 23 June 2011 be adopted".

2. Apologies

Apologies were received from Ms Fazio and Mr Ward.

3. ***

4. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

The Committee noted that, in response to a question in the Legislative Assembly, the Premier had stated that the Committee would be asked to review the above Acts, such reviews to be completed by 2012.

Resolved on the motion of Mr Primrose, seconded by Mr Borsak:

"That the Committee write to the Premier, referring to his answer in the Legislative Assembly on 23 June 2011, and noting that it looks forward to receiving the reference to review the State's electoral legislation".

5. ***

6. ***

The Committee adjourned at 9.46 a.m. until 9.00 a.m. on Wednesday 24 August 2011.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 3)

9.00 a.m. Wednesday 24 August 2011

Committee Room 1153, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Dr Phelps, Mr Primrose and Mr Ward.

The Chair opened the meeting at 9.08 a.m.

1. Confirmation of Minutes

Resolved on the motion of Mr Primrose:

"That the Minutes of the meeting of 23 June 2011 be adopted".

2. Apologies

An apology was received from Ms Fazio.

3. ***

4. *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

The Chair advised that he had written to the Premier in relation to the proposed review of the above Acts. The Committee noted that no response had been received to date.

5. ***

The Committee adjourned at 10.26 a.m. until a time and date to be agreed upon.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 5)

8.35 am, Wednesday, 22 February 2012

Committee Room 1136, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Primrose and Mr Ward.

Apologies

An apology was received from Dr Phelps.

Officers in attendance: Ms Vicki Buchbach, Mr Jonathan Elliott and Mr Rohan Tyler.

1. Confirmation of Minutes

Resolved on the motion of Mr Fraser, seconded by Mr Ward: That the minutes of the meeting of 25 November 2011 be adopted.

2. Proposed Reviews of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Mr Fraser, seconded by Mr Ward:

1. That the Committee write to the Premier indicating that it agrees 'in principle' to review the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*, but noting that it is unable to undertake Part 3 (c) of the review Terms of Reference as a consequence of the provisions of Part 2 (a) (i) of the Committee's establishing Terms of Reference.
2. That the Committee suggest that the Premier might wish to revise the review Terms of Reference accordingly or alternatively seek an amendment to the Committee's establishing Terms of Reference.

3. ***

4. Future Work Programme - Inquiry into the Administration of the 2011 New South Wales Election and Related Matters

The Committee discussed its future inquiry work programme, including possible dates on which to schedule public hearings.

The Committee noted that should it receive a referral to review the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* there would be merit in conducting the reviews concurrently with the inquiry into the administration of the 2011 NSW election and related matters.

Resolved, on the motion of Ms Fazio, seconded by Mr Ward:

That the Chair seek the agreement of the Houses to extend the reporting date of the Committee's inquiry into the administration of the 2011 NSW election and related matters until the end of December 2012.

5. ***

6. ***

The Committee adjourned at 8.53 am, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 6)

1:30 pm, Wednesday, 14 March 2012

Committee Room 1153, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Dr Phelps, Mr Primrose and Mr Ward.

Apologies

All members were present.

Officers in attendance: Ms Vicki Buchbach, Mr Rohan Tyler and Ms Mohini Mehta.

1. Confirmation of Minutes

Resolved, on the motion of Mr Fraser:

That the minutes of the meeting of 22 February 2012 be adopted.

2. ***

3. ***

4. General Business

The Committee noted that it had not received a response to its correspondence to the Premier dated 22 February 2012 in relation to the proposed reviews of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981.*

Resolved, on the motion of Mr Fraser, seconded by Mr Borsak:

That the Committee write to the Premier following up its earlier correspondence.

The Committee adjourned at 1:35 pm, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 7)

1:29 pm, Tuesday, 3 April 2012

Committee Room 1153, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Dr Phelps and Mr Primrose.

Apologies

Apologies were received from Ms Fazio and Mr Ward.

Officers in attendance: Ms Vicki Buchbach, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Mohini Mehta.

1. Confirmation of Minutes

Resolved, on the motion of Dr Phelps:

That the minutes of the meeting of 14 March 2012 be confirmed.

2. ***

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Mr Fraser:

1. That the Committee commence a review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*;
2. That an advertisement calling for submissions to the inquiry be placed in the press; and
3. That the closing date for the receipt of submissions be 6 to 8 weeks from date of the advertisement.

Resolved on the motion of Mr Borsak:

That letters be sent to stakeholders that had made submissions to the Committee's inquiry into the administration of the 2011 New South Wales election and related matters, advising them of the review and of the option to make a further submission.

Resolved on the motion of Dr Phelps:

That further administrative arrangements be put in place by the secretariat under the direction of the Chair.

The Committee adjourned at 1:35 pm, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 8)

1:15 pm, Thursday, 10 May 2012

Committee Room 1153, Parliament House

Members Present

Mr Borsak (Deputy Chair), Mr Fraser, Dr Phelps and Mr Primrose.

The Deputy Chair opened the meeting at 1.20 pm.

Apologies

Apologies were received from Ms Fazio, Mr Khan (Chair), and Mr Ward.

1. Confirmation of Minutes

Resolved, on the motion of Mr Fraser:

That the minutes of the meeting of 3 April 2012 be confirmed.

2. ***

3. Inquiry into the Administration of The 2011 NSW Election and Related Matters and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* - Potential witnesses for public hearings

The Committee considered potential witnesses it wishes to examine at public hearings on Friday 15 June 2012 and Friday 29 June 2012:

Resolved on the motion of Mr Fraser:

That the Committee invite the groups and individuals listed below and any other stakeholders identified by Committee members:

Electoral Commission of NSW;

Christian Democratic Party;

Everyone Counts Pty Ltd;

Computing Research and Education Association of Australia;

Mr Antony Green;

Australian Centre for Disability Law;

Homelessness NSW;

Australian Labor Party;

The Nationals;

The Greens;

Liberal Party of Australia;

Shooters and Fishers Party; and

Vision Australia.

The Committee adjourned at 1:22 pm, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 9)

9:00 am, Wednesday, 13 June 2012

Committee Room 1153, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Dr Phelps and Mr Primrose.

The Chair opened the meeting at 9.03 am.

Apologies

An apology was received from Mr Ward.

1. Confirmation of Minutes

Resolved, on the motion of Dr Phelps:

'That the minutes of meeting no. 8 held on 10 May 2012 be confirmed.'

2. ***

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Mr Primrose:

'That the Committee agrees to publish those submissions, or parts of submissions, that are not confidential in the table, on its website.'

The Chair noted that the Electoral Commission's response to the submissions received to the Committee's inquiry into the Administration of the 2011 NSW Election and Related Matters had been received on Tuesday 12 June and that the Commission had requested it be kept confidential until after the public hearings.

4. Arrangements for the forthcoming public hearings on 15 and 29 June

Members considered a briefing paper from the Committee staff in relation to the hearings.

It was noted that Ms Fazio was an apology for the hearing on 15 June and that Mr Fraser was an apology for 29 June.

The Chair informed the Committee that the Australian Sex Party, the NSW Nurses' Association and Unions NSW had put together considered submissions to the Act reviews or were in the process of doing so.

The Chair proposed that as there was capacity in the schedule to examine additional witnesses, consideration might be given to inviting those organisations to give evidence.

Discussion ensued and it was resolved on the motion of Mr Fraser:

'That the Committee invite the Australian Sex Party, the NSW Nurses' Association and Unions NSW to give evidence at the public hearing on Friday 29 June'.

The Committee adjourned at 9:12 am, until Friday 15 June.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 10)

10:00 am, Friday, 15 June 2012

Jubilee Room, Parliament House

Members Present

Mr Khan (Chair), Mr Fraser, Dr Phelps, Mr Primrose and Mr Ward.

The Chair opened the meeting at 10.02 am.

Apologies

Apologies were received from Mr Borsak and Ms Fazio.

1. Hearing - Administration of the 2011 NSW election; and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Mr Colin Barry, Electoral Commissioner, Electoral Commission NSW and Mr Paul Beeren, Director Enrolment, Electoral Commission NSW, affirmed and examined.

Mr Ian Brightwell, Director Information and Technology, Electoral Commission NSW, sworn and examined.

Mr Barry agreed to take a Question on Notice and to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Ms Vanessa Teague, Honorary Fellow, University of Melbourne and Mr Roland Wen, Research Fellow, University of New South Wales, sworn and examined.

Ms Teague agreed to take a Question on Notice and she and Mr Wen agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

The Committee adjourned for morning tea at 11:20 a.m.

The Committee reconvened at 11:36 a.m.

Mark Radcliffe, Business Development Manager, Everyone Counts, affirmed and examined.

Mr Ian Brightwell, Director Information and Technology, Electoral Commission NSW, on previous oath, examined.

Mr Brightwell agreed to provide the Committee with a copy of the Procedure Information Technologies Conditions of Engagement document and he and Mr Radcliffe agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Mr Antony Green, Election Analyst, affirmed and examined.

Mr Green agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witness withdrew.

The Committee adjourned for lunch at 12:30 p.m.

The Committee reconvened at 1:35 p.m.

Ms Fiona Given, Policy Officer, Australian Centre for Disability Law, affirmed and examined.

Ms Given was assisted by Ms Rozsa Brown, communication support worker.

Ms Given agreed to take a Question on Notice and to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witness withdrew.

Ms Susan Thompson, Advocate, Vision Australia, sworn and examined.

Ms Thompson was assisted by Ms Susan Crane.

Ms Thompson agreed to take a Question on Notice and to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witness withdrew.

Mr Digby Hughes, Policy and Research Officer, Homelessness NSW, affirmed and examined.

Mr Hughes tendered, for the information of members, a document published by the Victorian Electoral Commission entitled "Homeless shouldn't mean voteless".

The Chair having sought leave of the Committee to accept the document, document accepted.

Mr Hughes agreed to take a Question on Notice and to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witness withdrew.

The Committee adjourned for afternoon tea at 3:03 p.m.

The Committee reconvened at 3:18 p.m.

Mr Mark Neeham, State Director, Liberal Party of Australia, sworn and examined.

Mr Simon McInnes, Finance Director, Liberal Party of Australia, affirmed and examined.

Mr Neeham and Mr McInnes agreed to provide a written reply to any further questions the Committee might have

Evidence concluded, the witnesses withdrew.

Mr Brian Decelis, Director Funding and Disclosure, Electoral Commission NSW, sworn and examined.

Mr Colin Barry, Electoral Commissioner, Mr Ian Brightwell, Director Information and Technology, Electoral Commission NSW, on previous oath, examined.

Mr Fraser withdrew at 4:46 p.m.

Mr Barry agreed to take two Questions on Notice and to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses and public withdrew at 4:49 p.m.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 11)

9:00 am, Wednesday, 21 June 2012

Parkes Room, Parliament House

Members Present

Mr Khan (Chair), Mr Borsak (Deputy Chair), Dr Phelps, Mr Primrose and Mr Ward.

The Chair opened the meeting at 9.01 am.

Apologies

Apologies were received from Ms Fazio and Mr Fraser.

1. Confirmation of Minutes

Resolved, on the motion of Mr Ward:

'That the minutes of meeting no. 9 held on 13 June 2012 be confirmed.'

2. Public hearing in relation to the Administration of the 2011 NSW election; and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Mr Ward:

'That the Committee agrees to publish the transcript of evidence for the public hearing on 15 June 2012, once any corrections for inaccuracy have been made.'

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Dr Phelps:

'That the Committee agrees to publish the submission from Unions NSW on its website.'

4. Arrangements for the Public hearing on 29 June 2012.

Members noted the revised hearing schedule.

The Committee adjourned at 9:03 am, until Friday 29 June 2012.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 12)

9.30 am, Friday, 29 June 2012

Jubilee Room, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps and Mr Primrose.

The Deputy Chair opened the meeting at 9.30 am.

1. Apologies

Apologies were received from Ms Fazio, Mr Fraser and Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Dr Phelps:

'That the minutes of meeting No. 10 held on 15 June 2012 and Meeting No. 11 held on 21 June 2012 be confirmed.'

3. ***

4. ***

5. ***

6. Hearing - Administration of the 2011 NSW election; and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

The press and public were admitted at 10.00 am

Mr Ian Smith, Treasurer and Party Agent, Christian Democratic Party and Mr Leighton Thew, Acting State Manager, Christian Democratic Party, sworn and examined.

Mr Smith agreed to take three Questions on Notice and Mr Smith and Mr Thew agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Mr Christopher Maltby, Registered Officer, The Greens and Ms Lesa de Leau, State Election Campaign Coordinator, The Greens, affirmed and examined.

Mr Maltby and Ms de Leau agreed to take five Questions on Notice and also to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

The Committee adjourned for morning tea at 11.22 am

The Committee reconvened at 11.45 am

Mr Ben Franklin, State Director, The Nationals (NSW Branch) and Mr Greg Dezman, Deputy State Director, The Nationals (NSW Branch) sworn and examined.

Mr Franklin and Mr Dezman agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Mr Andrew Patterson, Registered Officer, The Australian Sex Party, affirmed and examined.

Mr Patterson agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witness withdrew.

The Committee adjourned for lunch at 12.35 pm

The Committee reconvened at 1.45 pm

Mr Brett Holmes, General Secretary, NSW Nurses' Association and Mr Tony O'Grady, Manager Projects and Compliance, NSW Nurses' Association, affirmed and examined.

Mr Holmes tendered, for the information of members, an example from *The Lamp* journal of where the NSW Nurses' Association published information for candidates during the 2011 State Election.

The Chair having sought leave of the Committee to accept the document, document accepted.

Mr Holmes agreed to take two Questions on Notice and Mr Holmes and Mr O'Grady also agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Mr Mark Lennon, Secretary, Unions NSW and Mr Paul Doughty, Industrial and Campaigns Officer Unions NSW, sworn and examined.

Mr Lennon agreed to take one Question on Notice and Mr Lennon and Mr Doughty agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses withdrew.

Mr Colin Barry, Electoral Commissioner, Electoral Commission NSW and Mr Brian Decelis, Director Funding and Disclosure, Electoral Commission NSW, on previous oath, examined.

Mr Barry tendered, for the information of members, a diagram of the Commission's proposed model for electoral administration and a report prepared for the Commission by Dr Graeme Orr, entitled *Modernising the Electoral Act: Legislative Form and Judicial Role*.

The Chair having sought leave of the Committee to accept the documents, documents accepted.

Mr Barry agreed to take one Question on Notice and Mr Barry and Mr Decelis agreed to provide a written reply to any further questions the Committee might have.

Evidence concluded, the witnesses and public withdrew at 3.52 pm

7. Administration of the 2011 NSW election; and Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved on the motion of Mr Lynch:

'That the Committee agrees to publish the transcript of evidence for the public hearing on 29 June 2012, once any corrections for inaccuracy have been made.'

The Chair noted that evidence which might reflect adversely on third parties had been suppressed in the published versions of submissions and proposed that the corrected transcript for the hearing on the 29 June be similarly amended.

Discussion ensued.

Resolved on the motion of Mr Primrose:

'That committee staff amend the transcript for the hearing on the 29 June in line with the Committee's previous resolutions on suppressing content in submissions'.

The Committee adjourned at 3:55 pm, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 13)

12.30 pm, Wednesday, 25 July 2012

Via teleconference

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Dr Phelps, Mr Primrose and Mr Ward

The Chair opened the meeting at 12.30 pm

1. Apologies

Apologies were received from Ms Fazio, Mr Khan, Mr Lynch and Mr Maguire.

2. Confirmation of minutes

Resolved, on the motion of Dr Phelps, seconded by Mr Borsak:

'That the minutes of meeting No. 12 held on 29 June 2012 be confirmed.'

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* – Analysing the NSW Electoral Commission model for electoral reform

The Chair explained proposed arrangements for progressing the inquiry. Discussion ensued.

Resolved, on the motion of Mr Fraser, seconded by Mr Primrose:

'That the Committee conduct a video conference with members of the Victorian Parliamentary Committee on Electoral Matters and invite the comments of interested academic experts on electoral law in order to enhance its evidence base for the inquiry.'

The Committee agreed to conduct the video conference and round table discussion on 24 August, which was the next day scheduled for a public hearing in relation to the inquiry into administrative funding for minor parties, subject to the availability of participants.

4. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* – Documents received by the Committee

Resolved, on the motion of Mr Primrose, seconded by Dr Phelps:

'That the Committee publish the following documents it has received on the relevant inquiry web pages:

1. *NSW and EFA responses to submissions to the inquiry into the Administration of the 2011 NSW election and related matters* (NSW Electoral Commission);
2. *Homeless shouldn't mean voteless* (Homelessness NSW);
3. *NSW Election 2011 – What the parties are promising* (NSW Nurses' association);
4. Diagram of the NSW Electoral Commission's proposed model for electoral administration (NSW Electoral Commission); and
5. *Modernising the Electoral Act: Legislative Form and Judicial Role* (NSW Electoral Commission).'

The Committee adjourned at 12.34 p.m., *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 14)

9:18 am, Friday, 24 August 2012

Waratah Room, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps, Mr Primrose and Mr Ward.

Staff in attendance: Ms Carly Maxwell, Ms Emma Matthews, Mr Jonathan Elliott, Mr Rohan Tyler, Ms Jenny Whight, Ms Millie Yeoh

1. Apologies

An apology was received from Ms Fazio.

2. Confirmation of minutes

Resolved, on the motion of Mr Fraser, seconded by Mr Primrose, that the minutes of the deliberative meeting no. 13 be confirmed.

3. ***

4. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved, on the motion of Mr Fraser, seconded by Mr Primrose, that the Committee invite the following witnesses to give evidence –

> Dr Anika Gauja, Department of Government and International Relations, University of Sydney
>
> Ms Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliament Research Library
>
> Professor Graeme Orr, TC Beirne School of Law, University of Queensland
>
> Professor Anne Twomey, Sydney Law School, University of Sydney; and

That the Committee publish the transcript of evidence for the public hearing, once any corrections for inaccuracy have been made.

5. ***

6. Public Hearing - Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Dr Anika Gauja, Department of Government and International Relations, University of Sydney, sworn and examined.

Ms Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliamentary Research Library, sworn and examined.

Professor Anne Frances Twomey, Sydney Law School, University of Sydney, sworn and examined.

Professor Graeme Orr, Professor in Law, University of Queensland, before the Committee via teleconference, affirmed and examined.

The Chair gave a short address in which he explained the purpose of the Roundtable discussion.

The witnesses made opening statements and then discussion ensued.

The witnesses made closing statements and agreed to provide written responses to any further questions the Committee might have.

Evidence concluded witnesses and public withdrew at 1:13 pm.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 15)

12:30 pm, Wednesday, 19 September 2012

Room 1254, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meike Bowyer.

The Chair opened the meeting at 12.33 pm.

1. Apologies

An apology was received from Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Mr Fraser, seconded by Mr Khan, that the minutes of the deliberative meeting No. 14 be confirmed.

3. The Committee's current work programme

The Chair spoke to the item, noting that in relation to the review of the electoral acts the Committee had the options of meeting during early December to deliberate on the Chair's draft report; or writing to the Premier to advise that it will make its report to Parliament at the beginning of the Autumn sitting period.

Resolved, on the motion of Mr Fraser, that committee staff make the administrative arrangements for the Committee to meet in December.

4. ***

5. Teleconference with the Victorian Parliamentary Committee on Electoral Matters

The Chair welcomed via teleconference Mr Adem Somyurek MLC (Deputy Chair), Mr Lee Tarlamis MLC and Heidi Victoria MP of the Victorian Parliamentary Committee on Electoral Matters.

Discussion ensued.

Mr Lynch and Mr Primrose withdrew at 12.58 pm.

The Committee adjourned at 1:19 p.m., *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 16)

12:30 pm, Wednesday, 17 October 2012

Room 1136, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Mr Fraser, Mr Khan, Mr Maguire, Dr Phelps and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meike Bowyer.

The Chair opened the meeting at 12:31 pm.

1. Apologies

Apologies were received from Ms Fazio, Mr Lynch and Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Dr Phelps, seconded by Mr Borsak, that the minutes of the deliberative meeting No. 15 be confirmed.

3. ***

4. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* inquiry

Resolved, on the motion of Mr Khan, seconded by Dr Phelps, that the Memorandum of Proceedings for the teleconference with the Victorian Parliamentary Committee on Electoral Matters, held on 19 September 2012, be confirmed.

The Committee noted correspondence that it had received from Mr Colin Barry, NSW Electoral Commissioner, in relation to the roundtable discussion, held on the 24 August 2012, for the Review of the Electoral Acts inquiry.

5. ***

6. ***

The Committee adjourned at 12:34 pm until 12:30 pm, Wednesday 24 October 2012.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 17)

12:30 pm, Wednesday, 24 October 2012

Room 1254, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Mr Khan, Mr Maguire and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Jonathan Elliott, Mr Rohan Tyler, Ms Emma Matthews and Ms Meike Bowyer.

The Chair opened the meeting at 12:30 pm.

1. Apologies

Apologies were received from Ms Fazio, Mr Fraser, Mr Lynch, Dr Phelps and Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Mr Maguire, seconded by Mr Borsak, that the minutes of the deliberative meeting No. 16 be confirmed.

3. Correspondence

a) The Chair advised that correspondence had been received from the Electoral Commissioner in relation to the roundtable discussion and the Review of the Electoral Acts Inquiry.

Resolved, on the motion of Mr Maguire, seconded by Mr Primrose, that the Committee publish the correspondence on its website.

b) ***

c) The Chair advised that correspondence had been received from the Electoral Commissioner requesting an extension to the reporting deadline of December 2012, for the Review of the Electoral Acts Inquiry.

Resolved, on the motion of Mr Primrose, seconded by Mr Borsak, that the Committee extend its reporting deadline for the Review of the Electoral Acts Inquiry from December 2012 to April 2013; and that the Chair write to the Premier informing him of the resolution.

4. ***

5. Answers to questions on notice and additional questions.

Resolved, on the motion of Mr Primrose, seconded by Mr Borsak, that the Committee publish the answers to questions on notice and additional questions, from the public hearings on 15 and 29 June 2012, on its website.

6. ***

The Committee adjourned at 12:36 pm *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 18)

12:00 pm, Wednesday, 14 November 2012
Room 1153, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Rohan Tyler and Ms Emma Matthews.

The Chair opened the meeting at 12:11 pm.

1. Apologies

An apology was received from Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Mr Primrose, that the minutes of the deliberative meeting No. 17 be confirmed.

3. ***

4. General business

The Committee noted that the secretariat had received from the NSW Electoral Commission a report prepared by Dr Joo-Cheong Tham entitled Establishing a Sustainable Framework for

Election Funding and Spending Laws in New South Wales and that a copy would be made available to Members shortly.

The Committee noted that the secretariat had received a book from Dr Vanessa Teague entitled Broken Ballots: Will your vote Count? which the staff can make available to Members on request.

A copy of a letter from the Minister for Local Government dated 13 November 2012 outlining the terms of an inquiry into Local Government elections was circulated and noted. Resolved, on the motion of Mr Primrose, to further consider this letter at the next meeting of the Committee.

Mr Khan noted an apparent inconsistency between evidence previously provided by the Electoral Commissioner in relation to the process undertaken in Victoria in relation to regulations made under the Electoral Act 2002 (Victoria) and information provided by staff of the Victorian Electoral Matters Committee. Resolved, on the motion of Mr Khan, that the Committee write to the Commissioner, enclosing the relevant transcripts and meeting notes, and inviting him to clarify this issue.

The Committee adjourned at 12:40 pm until 1:00pm on 21 November 2012 in room 1153.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 19)

1:00 pm, Wednesday, 21 November 2012

Room 1153, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps, Mr Primrose and Mr Ward.

Staff in attendance: Ms Rachel Simpson, Mr Jason Arditi, Mr Jonathan Elliott and Mr Rohan Tyler.

The Chair opened the meeting at 1:08 pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Mr Fraser, that the minutes of the deliberative meeting No. 18 be confirmed.

3. ***

4. Review of the Electoral Acts inquiry

The Committee noted correspondence that it had received from Mr Colin Barry, NSW Electoral Commissioner, dated 19 November 2012, in relation to Regulation making powers under the *Electoral Act 2002* (Vic)

5. ***

The Committee adjourned at 1:55 pm, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 20)

1:00 pm, Wednesday, 20 February 2013

Room 1153, Parliament House

Members Present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Khan, Dr Phelps and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Jason Arditi, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meike Bowyer.

The Chair opened the meeting at 1:00 pm.

1. Apologies

Apologies were received from Mr Lynch, Mr Maguire and Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Mr Fraser:

'That the minutes of the deliberative meeting No. 19 be confirmed.'

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

a) The Committee considered a briefing note in relation to Division 5A of the *Parliamentary Electorates and Elections Act 1912*, which requires all candidates for election to the NSW Parliament to declare whether they have been convicted or have been the subject of proceedings for child sexual offences.

   Resolved, on the motion of Mr Fraser:

   'That the Committee write to the NSW Commissioner for Children and Young People, seeking her views on the effectiveness, or otherwise, of Division 5A of the *Parliamentary Electorates and Elections Act 1912*.'

b) The Committee noted the issues paper entitled Key issue 1: *The design of the Parliamentary Electorates and Elections Act 1912* and agreed to defer substantive discussion on the paper until its next meeting on 27 February 2013.

c) The Committee noted the issues paper entitled Key issue 2: *The design of the NSW Electoral Commission* and agreed to defer substantive discussion on the paper until its next meeting on 27 February 2013.

4. ***

The Committee adjourned at 1:05 pm, until 27 February 2013.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 21)

1:00 pm, Wednesday, 13 March 2013

Room 1153, Parliament House

Members Present

Mr Rowell (Chair), Mr Fraser, Mr Khan, Mr Maguire, Dr Phelps, Mr Primrose and Mr Ward.

Staff in attendance: Ms Rachel Simpson, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meike Bowyer.

The Chair opened the meeting at 1:02 pm.

1. Apologies

Apologies were received from Mr Borsak, Ms Fazio and Mr Lynch.

2. Confirmation of minutes

Resolved, on the motion of Mr Fraser:

'That the minutes of the deliberative meeting No. 20 be confirmed.'

3. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

a) The Committee considered the briefing paper entitled Key issue 1: *The design of the Parliamentary Electorates and Elections Act 1912*; and discussion ensued.

b) The Committee considered the briefing paper entitled Key issue 2: *The design of the NSW Electoral Commission*; and discussion ensued.

4. ***

5. General business

- ***
- The Chair advised members that he had recently met with the Electoral Commissioner and that the Committee's review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981* had been discussed.

The Committee adjourned at 1:05 pm, until 20 March 2013.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 22)

1:30 pm, Wednesday, 27 March 2013

Room 1153, Parliament House

Members present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Khan, Mr Maguire, Dr Phelps and Mr Primrose.

Staff in attendance: Ms Rachel Simpson, Mr Jason Arditi, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meike Bowyer.

The Chair opened the meeting at 1:34 pm.

1. Apologies

Apologies were received from Mr Fraser, Mr Lynch and Mr Ward.

2. Confirmation of minutes

Resolved, on the motion of Mr Primrose, seconded by Mr Borsak:

'That the minutes of the deliberative meeting No. 21 be confirmed.'

3. Correspondence

a) The Committee noted correspondence that had been received from the Commissioner for Children and Young People in relation to Child Related Conduct Declarations.

b) The Committee noted correspondence that had been received from the Director, Working with Children Strategy, Commission for Children and Young People, in relation to Child Related Conduct Declarations.

c) ***

4. ***

5. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

Resolved, on the motion of Mr Maguire:

'That the Chair writes to the Premier to advise that the Committee will table its inquiry report by Thursday 9 May 2013.'

The Chair informed Members that consideration of the Chair's draft report would be undertaken at the Committee's next meeting, and that Committee staff would arrange a meeting date and time in consultation with Members and distribute the Chair's draft to Members in advance of the meeting.

The Committee adjourned at 1:42 pm *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no. 23)

12:30 pm, Tuesday, 7 May 2013

Room 1153, Parliament House

Members present

Mr Rowell (Chair), Mr Borsak (Deputy Chair), Ms Fazio, Mr Fraser, Mr Khan, Mr Lynch, Mr Maguire, Dr Phelps, Mr Primrose and Mr Ward.

Staff in attendance: Ms Rachel Simpson, Mr Jason Arditi, Mr Jonathan Elliott, Mr Rohan Tyler and Ms Meg Banfield.

The Chair opened the meeting at 12:35 pm.

1. Confirmation of minutes

Resolved, on the motion of Mr Maguire: 'That the minutes of the deliberative meeting No. 22 be confirmed.'

2. Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

The Chair made a statement about the unauthorised disclosure of the Chair's draft report and reminded members of the provisions of Legislative Assembly Standing Orders 297 and 300.

Resolved, on the motion of Mr Khan, that the draft report be considered chapter by chapter.

The draft report, having been circulated, was taken as read.

Resolved, on the motion of Mr Ward: That Chapter 1 be adopted.

Resolved, on the motion of Mr Borsak, that paragraph 2.127 and Recommendation 3 be omitted, which read:

"For this reason, the Committee would encourage the NSW Government to develop legislation for a new electoral act with the assistance of an expert advisory panel; and recommends that such an important piece of legislation should be released for public consultation in the form of a draft exposure bill.

Recommendation 3

That in drafting legislation for a new electoral act, the NSW Government engages the assistance of an expert advisory panel, and that the legislation be released for public consultation in the form of a draft exposure bill."

Resolved, on the motion of Dr Phelps: That Chapter 2, as amended, be adopted.

Resolved, on the motion of Mr Ward: That Chapter 3 be adopted.

Resolved on the motion of Mr Khan: That paragraphs 4.7 to 4.9 be omitted, which read:

"The age for enrolment and voting

With regard to the enrolment age, Mr Victor J Batten considered s 22(2)(f) of the PE & E Actwhich provides that a person is entitled to be enrolled for a district if that person is enrolled under s 100 of the Commonwealth Electoral Act 1918 should be amended to replace 16 with 17

In relation to the voting age, the submission from the Christian Democratic Party expressed its opposition to any reduction in the age at which a voter becomes eligible to vote:

We understand that some people would like to see the voting age reduced to 16. The CDP is totally opposed to any further reduction in the age at which a voter becomes eligible to vote. There may be a small number of 16 year olds who are mature enough and aware enough of political issues but they are the exception.

Committee comment

The Committee considers that the provisions of the PE&E Act relating to the age for enrolment and voting are satisfactory and do not require amendment."

Resolved, on the motion of Mr Fraser: That Chapter 4, as amended, be adopted.

Resolved on the motion of Mr Khan: That a new recommendation be inserted after Finding 1 to read:

"Recommendation

That when the Court of Disputed returns sits the Supreme Court Rules and the laws of evidence apply, subject to a provision that the Court may dispense with the rules of evidence where the justice of the case applies.

Recommendation

That a mandatory pre-hearing process be implemented by the Court of Disputed returns prior to the hearing of any application for a disputed election."

Resolved, on the motion of Mr Ward: That Chapter 5, as amended, be adopted.

Resolved on the motion of Mr Khan: That Recommendation 16 be amended by omitting the word "section" and inserting instead the word "Part"

Resolved, on the motion of Dr Phelps: That Chapter 6, as amended, be adopted.

Resolved, on the motion of Mr Ward: That Chapter 7 be adopted.

Ms Fazio moved that:

1) Paragraph 8.17 be amended by omitting the words "are no longer" and inserting instead the word "remain";
2) Paragraph 8.18 be omitted; and
3) Recommendation 19 be omitted.

Question put.

The Committee divided.

Ayes: Ms Fazio, Mr Lynch and Mr Primrose.

Noes: Mr Rowell, Mr Borsak, Mr Fraser, Mr Khan, Mr Maguire, Dr Phelps and Mr Ward.

Question resolved in the negative.

Resolved on the motion of Ms Fazio: That:

Paragraph 8.64 be amended by omitting the words "and whether the current expenditure caps are adequate"; and

1) Recommendation 20 be amended by omitting the words "and whether the current expenditure cap levels remain appropriate".

2) Resolved on the motion of Mr Borsak: That a new recommendation be inserted following Recommendation 24 to read:

"Recommendation

That the NSW Government consider means of streamlining the auditing process whilst maintaining the integrity of the system."

Resolved, on the motion of Mr Fraser: That Chapter 8, as amended, be adopted.

Resolved, on the motion of Mr Ward: That Chapter 9 be adopted.

Resolved, on the motion of Mr Ward: That:

1) the report, as amended, be the report of the Committee and that it be signed by the Chair and be presented to the House;

2) the Chair and the Secretariat be permitted to correct stylistic, typographical and grammatical errors; and

3) once tabled, the report be published on the Committee's webpage.

The Committee adjourned at 1:03 pm *sine die*.

Appendix Four – Correspondence

Letter from the Premier to the Chair

NSW GOVERNMENT

Premier of New South Wales

27 MAR 2012

DPC11/01683 – LB

The Hon Trevor Khan MLC
Chairperson
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr ~~Khan~~ Trevor

I refer to your letter dated 22 February 2012 regarding my request that the Committee undertake a review of the *Parliamentary Electorates and Elections Act 1912* (the "PE&E Act") and the *Election Funding, Expenditure and Disclosures Act 1981* (the "EFED Act").

I enclose revised terms of reference for the reviews. I note that the revised terms of reference acknowledge that the Committee does not have jurisdiction to review Part 2 of the PE&E Act relating to the distribution of electorates.

I would be grateful if the Committee could report to Parliament on the outcome of its reviews as soon as practicable, and in any event by the end of 2012.

Yours sincerely

Barry O'Farrell MP
Premier

GPO Box 5341, Sydney NSW 2001 ■ P: (02) 9228 5239 ■ F: (02) 9228 3935 ■ www.premier.nsw.gov.au

Terms of Reference

1) That the Joint Standing Committee on Electoral Matters conduct a comprehensive review of the *Parliamentary Electorates and Elections Act 1912* (the "PE&E Act") (excluding Part 2) and the *Election Funding, Expenditure and Disclosures Act 1981* (the "EFE&D Act").
2) The Committee is to consider whether the Acts should be amended or rewritten to promote free, open and honest elections in New South Wales.
3) In its review of the PE&E Act, the Committee is to inquire into and report to Parliament on the following matters:
    a) whether the terms and structure of the PE&E Act remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;
    b) the role and functions of the New South Wales Electoral Commission;
    c) whether existing provisions regarding the entitlement to enrol and vote in New South Wales elections are appropriate;
    d) the effectiveness of amendments made by the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* to facilitate automatic enrolment for NSW elections;
    e) whether existing provisions relating to pre-poll voting, postal voting and other forms of voting remain appropriate;
    f) whether the PE&E Act provides appropriate voting options for electors with a disability and rural and remote electors;
    g) those provisions of the *Local Government Act 1992* that relate to local government elections and that are administered by the Electoral Commissioner under section 21AA(2) of the PE&E Act;
    h) whether the offences and penalties prescribed by the PE&E Act remain appropriate; and
    i) any other matter relating to the administration of state and local government elections under the PE&E Act.
4) In its review of the EFE&D Act, the Committee is to consider the following matters:
    a) whether the terms and structure of the EFE&D Act remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;
    b) the role and functions of the Election Funding Authority of New South Wales;

c) the operation and effectiveness of recent campaign finance reforms including the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*, and the *Election Funding and Disclosures Amendment Act 2010*; and

d) the recommendations made by the Committee following its 2010 inquiry into the public funding of local government election campaigns.

Letter from the Electoral Commissioner to the Chair

electoral commission NSW

F2012/54

22 October 2012

Mr Jai Rowell MP
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Rowell

Review of the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding, Expenditure and Disclosures Act 1981*

I refer to the Inquiry into the above matter and note that the Committee's plan was to report in December 2012.

As you are aware, the New South Wales Electoral Commission (NSWEC) commissioned Dr Joo-Cheong Tham to prepare a report on electoral funding in NSW and his report should be completed by mid November. As discussed at our meeting on 12 October 2012, it would be beneficial for the Committee to consider Dr Tham's report as part of the above Inquiry.

Having read a first draft of Dr Tham's report I think it will provide an important insight for the Committee considering that Dr Tham has interviewed all of the major political parties in the course of preparing this report. His findings will be helpful in guiding the Committee's consideration.

I would greatly appreciate if you could consider requesting the Premier to give the Committee an extension to report possibly until early next year.

I look forward to your early response.

Yours faithfully

Colin Barry

Colin Barry
Electoral Commissioner

New South Wales Electoral Commission
Level 25, 201 Kent Street Sydney 2000 GPO Box 832, Sydney 2001 T 02 9290 5999 F 02 9290 5991 www.elections.nsw.gov.au

Letter from the Commissioner for Children and Young People to the Chair

NSW GOVERNMENT | Office of Communities
Commission for Children & Young People

Obj File Ref: C13/0815
Your Ref: D13/03561

Mr Jai Rowell MP
Chair, Committee on Electoral Matters
Parliament of New South Wales
Macquarie St
Sydney NSW 2000

Dear Mr Rowell

I am writing in response to your letter about your review of the *Parliamentary Electorates and Elections Act 1912,* and in particular about the provisions of Division 5A for child related conduct declarations. Thank you for giving me the opportunity to comment.

The Commission for Children and Young People is aware of the flaws in Division 5A noted by the NSW Electoral Commission. A further flaw not noted is that members appointed to vacant positions in the Legislative Council are not captured by Division 5A, so are not required to make child related conduct declarations.

The Working With Children Check was established in 2000 to protect children from known sex offenders. This program targets child related workers defined in Part 7 of the *Commission for Children and Young People Act 1998.* A new model for the Working With Children Check will commence later this year. The *Child Protection (Working With Children) Act 1912* and the *Child Protection (Working With Children) Regulation* (currently in draft form) also target defined child related work. People the following defined sectors are required to have a Working With Children Check:

- Child development
- Child protection
- Children's health services
- Clubs or other bodies providing services for children
- Disability services
- Early education and child care
- Education
- Entertainment for children
- Justice services
- Religious services
- Residential services
- Transport services for children

Many people have contact with children through their work, like Members of Parliament, but not the focussed contact that triggers the Working With Children Check. Members of Parliament are not defined as child related workers in either the old or the new legislation.

Department of Education and Communities Commission for Children and Young People
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ABN 13 078 452 725

Nevertheless, if the government wishes to retain the practice of either discouraging or barring child sex offenders from holding Parliamentary office, the most appropriate tool would be the Working With Children Check. The enforcement of this requirement and the impact of a bar against working with children on an elected or appointed Member of Parliament would need careful analysis. It would not be appropriate for the Commission's powers and decisions to stand alone in denying Parliamentary office to and elected or appointed member.

The Commission for Children and Young People's powers under the *Commission for Children and Young People Act 1998* and the new *Child Protection (Working With Children) Act 2012* do not equip it well even now for enforcing the requirements of Division 5A of the *Parliamentary Electorates and Elections Act 1912*.

The Electoral Commission suggests that the Commission for Children and Young People should audit all declarations before a person is accepted as a candidate for election. This is not a practical possibility as it can take months to complete a check, given the processes involved. If a candidate did not nominate early enough, he or she could be denied the opportunity to stand for office, if a completed audit of the child related conduct declaration were a prerequisite for candidacy. It would not be appropriate to give the Commission for Children and Young People a role in determining who may or may not stand for Parliamentary office.

In addition, I should point out some practical issues for the current provisions of the *Parliamentary Electorates and Elections Act 1912* and the *Parliamentary Electorates and Elections Regulation 2008* when the new Working With Children Check commences later this year. The current child related conduct declaration refers to Apprehended Violence Orders. As the new Working With Children Check does not use these orders as assessment triggers, the Commission for Children and Young People will not be in a position to verify the truth of declarations in relation to these orders. The forms in the current regulation also refer to these orders as well as to checking processes that will not be available in the new Working With Children Check.

If you would like more information about this, please contact Ms Virginia Neighbour, the Commission's Director, Working With Children Strategy, on 9286 7245.

Yours sincerely

Megan Mitchell
Commissioner
13 **March 2013**

cc Ms Vicki Dadam ✓

Letter from the Director, Working with Children Strategy, Commission for Children and Young People, to the Chair

NSW GOVERNMENT Office of Communities
Commission for Children & Young People

RECEIVED 25.3.13

Obj File Ref: C13/0815
Your Ref: D13/03561

Mr Jai Rowell MP
Chair, Committee on Electoral Matters
Parliament of New South Wales
Macquarie St
Sydney NSW 2000

Dear Mr Rowell

I am writing to follow up the Commission's previous response about your review of the *Parliamentary Electorates and Elections Act 1912*.

In its letter, the Commission pointed out some practical complexities and problems with the requirements of the *Parliamentary Electorates and Elections Act 1912* and regulation that will arise when the new Working With Children Check commences later this year.

I would like to advise the Commission has reviewed its arrangements for criminal record checking and discovered that the Commission will in fact be able to audit declarations made by elected candidates as required under Part 5A of the *Parliamentary Electorates and Elections Act 1912*.

I confirm the Commission's previous advice that the processes involved in meeting these obligations are labour intensive and that being manually operated, they are more subject to human error than the new Working With Children Check processes. Accordingly, the Commission believes that Part 5A of the *Parliamentary Electorates & Elections Act 1912* should be amended to ensure consistency with the new Working With Children Check introduced by the *Child Protection (Working With Children) Act 2012*.

If you would like more information about this, please contact me on 9286 7245.

Yours sincerely

Virginia Neighbour

Virginia Neighbour
Director, Working With Children Strategy
21 March 2013

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