



24-07-2019

Legislative Assembly of the Northern Territory
Economic Policy Scrutiny Committee

Dear Committee Chair,

Regarding the Electoral Legislation Further Amendment Bill 2019.

Please accept the following Northern Territory Electoral Commission submission to the Economic Policy Scrutiny Committee inquiry considering the Electoral Legislation Further Amendment Bill 2019.

The Commission would welcome any opportunity to provide further information to the Committee on this matter, and would be happy to contribute in person at any future hearings.

Iain Loganathan
NT Electoral Commissioner
16 July 2019

Summary

The majority of changes proposed in the Bill are supported by the NT Electoral Commission and enact a number of recommendations in the 2016 Territory election report.

A number of the proposed changes to the political disclosure laws align with the Commission's submissions to the Mansfield inquiry.

Whilst supportive of the Bill the Commission has some concerns about aspects of the proposed reforms.

Additionally other reforms proposed by the Commission are not addressed within this Bill nor previous electoral bills considered within this parliamentary term.

The proposal not to cap Third Party Campaigners' expenditure, addressing the consequences of the continuing uptrend in early voting and the risks associated with a limited trial of an electronic voting system are particular areas of concern for the Commission.

This submission outlines the Commission's concerns relating to those issues as well as bringing to the attention of the committee other areas of relevance for consideration.

Third party campaigners and expenditure caps

The Commission supports the introduction of caps on election expenditure. The Bill introduces expenditure caps for political parties, candidates and associated entities but proposed no caps for third party campaigners. Political parties, candidates and associated entities are subject to the \$40,000 cap per divisions but third party campaigners are not subject to any expenditure cap.

Third party campaigners are recognised in nearly all Australian jurisdictions.

The most recent state to define third party campaigners, Victoria, makes no differentiation between them and political parties, candidates or associated entities in terms of expenditure caps. Victoria places no cap on expenditure across the spectrum.

In New South Wales caps are placed on political parties, candidates or associated entities and third party campaigners.

While those two states provide examples of both ends of the spectrum, they are both consistent with their approach; caps or no caps for all.

Likewise in all other jurisdictions that define third party campaigners, they either have a cap or they don't, the same as parties, candidates and associated entities.

This Bill proposes that the Northern Territory introduce the only political disclosure system in Australia where third party campaigners won't be subject to a cap while political parties, candidates and associated entities will be subject to a cap.

A key recommendation of the Mansfield Inquiry is to introduce a partial public funding scheme for Territory elections, a move supported by the Electoral Commission.

In that instance it would be prudent that caps would be placed on campaign expenditure by political parties, candidates, associated entities and third party campaigners, or essentially on any individual or organisation that declares their "active" interest in an election.

Placing caps across all election "participants" would appear to create a more "level playing field".

The Bill proposes not to adopt a partial public funding model but does place expenditure caps on parties, candidates and associated entities.

It does not place caps on expenditure by third party campaigners.

It is understood that the intention is to use the 2020 Territory election as a 'trial' to determine an appropriate cap for third party campaigners for future NT elections. Such an approach would mean there won't be a level playing field at the next election, undermining core recommendations from the Mansfield inquiry.

The rationale for not placing a cap on third party campaigners is the recent High Court case *Unions NSW & Ors v State of NSW*. In this case a move to decrease third party campaigner expenditure caps in NSW Electoral Act from \$1.288 million to \$500K was ruled invalid as there was no logical rationale to justify the decrease. Following this ruling, the expenditure cap for third party campaigners at the 2019 NSW election reverted to the previous cap of \$1.288 million.

The NTEC position is that third party campaigners be subject to an election expenditure cap of \$40K.

The justification for the proposed \$40K limit is that this is the cap that applies to candidates and to political parties (who can pool their expenditure). This would create a more level playing field for the 2020 Territory election. The appropriateness of all expenditure caps will be reviewed after the election.

Granted, changes to disclosure laws would provide a more transparent insight into political donations for the public, but it would not stop, for example, well-funded organisations or individuals from spending funds well in excess of the \$40K cap to run negative campaigns against parties or candidates.

The Bill defines a third party campaigner as a person who, or entity that incurs or expects to incur more than \$1000 of political expenditure during the capped expenditure period (1 January to 30 days after Election Day) - but are not deemed to be a candidate, a registered party or an associated entity.

Political expenditure is defined as 'expenditure incurred in promoting or opposing a candidate or a registered party'.

The proposed definition of political expenditure is narrower than 'electoral expenditure' and does not capture communications or advertisements on election issues only (i.e. issues which are intended to raise awareness, education or encourage public debate).

There would be virtually nothing to stop a wealthy individual from running campaigns against parties or individual candidates and spending as much money pushing their agenda as they see fit.

The ability for a wealthy individual to have influence on the outcome of an election was evident in the May 18 Federal Election.

In a Territory election, instead of running as a candidate, Clive Palmer (or any high-profile individual) could just declare themselves as a third party campaigner and spend funds well in excess of the cap pushing their agenda.

Such a scenario in the NT would be even more problematic than a Federal election as a political party or candidate would not have the option to match expenditure by a third party that was over the cap.

The proposed non-cap model for third party campaigners in the NT also creates a risk that parties and candidates could align with third parties campaigners (i.e. industry lobby organisations, unions, friends) to run a negative campaign against their opponents to circumvent the cap.

Such behaviour is difficult to police during the election period and any prosecution action for breaching the Electoral Act would be difficult to prove and would not occur until well after the election.

Public Funding Scheme

The NT Electoral Commission (NTEC) supports a partial public funding scheme where parties and independent candidates are less reliant on donations to fund their election campaigns.

A public funding scheme mitigates the risk of undue influence, or perception of influence, from material political donations to political parties and candidates.

The Northern Territory and Tasmania are the only jurisdictions that do not have a public funding model.

A key recommendation of the Mansfield inquiry was to introduce a partial public funding scheme.

While a public funding scheme is an issue that draws criticism from some parts of the community and media, it is an important component of a mature democracy.

It is suggested that rather than not implementing this key recommendation, a partial public funding model should be implemented for the 2024 Legislative Assembly election.

Dedicated campaign account

Following the recommendation from the Mansfield inquiry, the Bill proposes that parties and candidates process all political donations and electoral expenditure through a dedicated campaign account.

This may cause some difficulties for parties and candidates when donations are given to cover both campaign expenditure and general party administrative costs.

There needs to be clear guidelines to account for funds transferred from the campaign account to cover party administrative costs.

Similarly, when the timing of federal and Territory elections are close (as was the case in 2016), donations could be received to cover both elections.

A dedicated campaign account is likely to be an administrative burden for some independent candidates, especially those in remote divisions who have limited access to banking services.

Historically, a number of independent candidates have received minor donations and have had minimal election expenditure.

To lessen the administrative burden to these candidates, it is recommended that a donation threshold be established, such as \$1000, before a dedicated campaign account be required.

Bulk candidate nominations

While many of the changes proposed in the Bill enact a number of recommendations in the 2016 Territory election report, a key component from Recommendation 3 has not been enacted.

Recommendation 3 addresses some key aspects of the Election timetable and in part states:

- Bulk nominations by parties are lodged by 5pm, the Wednesday following writ issue and other nominations by 12 noon a day later, 16 days before Election Day.
- The declaration of nominations and draw for positions on the ballot paper follow the close of nominations on the Thursday afternoon, as soon as practical.

Invariably, “as soon as practical” has been dictated by the requirements of the NT media who are keen to report on the ballot draw as soon as possible to meet various deadlines.

This fact has generally lead to the ballot draw being notionally set down for 1pm on the Thursday afternoon but in reality it has been conducted well after that time.

In order for the Commission to have sufficient time to check the qualification of candidates, especially if large numbers are included in the bulk party lodgements on the Thursday, it would need considerably more time to conduct its due diligence on candidate qualification.

Completing the due diligence process on candidate qualification may potentially save a substantial amount of money in by-election costs if it is found after the election that a winning candidate was ineligible.

The current timetable allows political parties to lodge their nominations just before the close of nominations – 12 noon Thursday. This leaves very little time to verify that the details in the nomination forms are accurate before the declaration of nominations on Thursday afternoon.

It is recommended that a deadline for bulk nominations for political parties be brought forward to 5pm Wednesday to allow additional time to check accuracy of nomination forms.

Counting of votes cast before election counted during Election Day (Saturday)

Legislative amendments in 2015 removed eligibility criteria giving all electors the option to early vote.

This change combined with the promotion of ‘convenience voting’ has seen the number of people voting early increase significantly compared to the 2012 Territory election.

In the 2016 NT election, 36,128 early votes (36 per cent of the total ballot papers) were cast.

This was an increase of 175 per cent from the 2012 Legislative Assembly election.

There were also 22,568 early mobile polling centre votes cast in the 2016 NT election.

That figure combined with the 36,128 early votes means that a total of 58,696 votes (or more than 58.5 per cent) out of the total 100,304 cast were completed prior to Election Day.

The upward trend in early voting in the NT continued at the 2019 Federal Election. This is despite the Commonwealth still having criteria to vote early.

A total of 38,554 votes (or 35.49 per cent) out of 108,611 were cast before the May 18 election day.

To ensure these votes were counted in a timely manner the AEC, at significant cost, employed 70 people to just count early votes on election night.

To complete the count those 70 people started with briefings from 4.45pm before being able to start the count of votes at 6pm.

They did not complete the count of the 38,554 early votes until 10.50pm.

At the 2016 Territory election, this shift in electors opting to vote early resulted in a significant increase in the size of these counts and delayed the release of results.

The large early vote counts from Casuarina (8,404), Darwin (6,300) and Palmerston (6,634) were not released until very late in the night.

These early vote counts are now more than twice the size of the largest election day voting centre.

After 6pm on Election Day there is significant media commentary and pressure on Electoral Commissions to provide result data in a timely manner, especially in marginal seats.

The increase in the size of early vote counts makes it difficult to release results in a timely manner, as counts do not start until after 6pm.

With the likelihood that early voting numbers will further increase at the next election there is a real risk that early voting results will not be released until close to midnight.

When reviewing other electoral jurisdiction legislation, it was noted that New Zealand has the ability to commence scrutiny of early votes prior to 6pm on Election Day. This is undertaken under stringent security conditions to ensure the results counted are not publically known or made available until voting centres have closed, i.e. 6pm on Election Day.

The New Zealand Electoral Commission (NZEC) use secure lock-down venues where scrutineers and counting staff are allowed in but cannot leave or use mobile phones or other technology to communicate, similar to a budget lock-up room.

Victoria has introduced a similar regime where ballot boxes could be opened and sorted in a secure area from 4pm on Election Day to allow counting to start at 6pm.

The NTEC supports arrangements that allows the Commission to start counting votes cast prior to Election Day (early, postal, and mobile) before 6pm on Election Day.

The timing of these counts on Election Day should be at the discretion of the Electoral Commissioner and allow results to be made public shortly after 6pm on the day of the election.

Scrutineers would be subject to the same security measures used by the NZEC and observe these counts. If this reform is supported it is proposed to conduct secure counts in Darwin and Alice Springs.

This reform would dramatically change election night coverage with about half the vote count released shortly after the polls close at 6pm.

Electronic postal voting /internet postal voting

At the 2016 Territory election 272 postal votes were sent overseas with only 56 (20.6%) returned by the deadline and admitted to the count. Sixty-six were returned late and rejected (24.3%), 22 were 'return to sender' and the remainder not returned at all.

The small number of overseas postal votes admitted to the count reflects the inadequacies of the current postal voting system for overseas voters.

The shortcomings of the postal voting system highlighted the need for the Commission to further explore electronic or automated systems for the issue and return of postal votes or, as an alternative, to investigate internet voting, which is currently in progress.

The NTEC has used NetVote, a web based system that allows for the creation, management and counting of simple referendum style elections to conduct online ballots since 2014.

It has been used for fee-for-service elections, which only require yes/no ballots including the 2017 NTPS enterprise ballot.

While this system is not designed for large elections using preferential voting, it does show that Territorians are willing to accept and use an internet based voting system and therefore have a level of trust that their votes can be cast online securely with anonymity.

The 2017 NTPS ballot saw an additional 5,000 votes cast compared to the 2013 election when this was conducted as a postal ballot; noting these are non-compulsory elections.

As a result of recent cyber security reviews and the requirement for the Commission to move its current electronic voting system, NetVote, off DCS Windows Server 2008 infrastructure, the NTEC has undertaken an evaluation with a view to upgrade the current system and expand its functionality to enable other types of elections online.

Pending cyber-security testing, the purchase of a new enhanced system, NetVote *Plus*, may provide postal voting alternatives for future parliamentary elections. Any possible trial of internet voting at the 2020 Territory election would be limited to overseas electors

The Commission will liaise with political stakeholders if NetVote *Plus* is deemed a secure and affordable solution so that overseas electors can cast their votes electronically.

Non-voter fee

The fines for not voting in the Northern Territory are inconsistent.

The 2016 Territory Election Report recommended increasing the expiation fee for failing to vote at a Legislative Assembly election from \$25 to \$50

The Commission supports this increase because it would harmonise the expiation fee in line with the *Local Government Act 2008*.