ECONOMIC POLICY SCRUTINY COMMITTEE

Electoral Legislation Further Amendment Bill 2019

DEPARTMENT OF THE CHIEF MINISTER'S RESPONSE TO WRITTEN QUESTIONS FROM THE COMMITTEE

Definitions – Cl 5 – Section 3 amended – definitions

1. The definition of third party campaigner includes a person who "expects" to incur more than $1,000 of political expenditure.

a. What evidence would be needed to prove that a person "expected" to incur more than $1,000 of expenditure?

The definition includes "expects", which is based on its everyday meaning, to incur more than $1000 of political expenditure to allow an individual or entity to register prior to reaching the expenditure threshold.

The use of the phrase "expects" in the definition operates to enable registration by third party campaigners by allowing them to register without having to monitor initial spending amounts. Without the use of "expects" in the definition, third party campaigners would need to wait until they actually incurred $1000 in expenditure. This would be cumbersome, risks a technical breach and raises the question – *if a third party campaigner cannot register before it incurs $1000 in expenditure, how does it register without committing an offence?*

The relevant offence in Clause 92 (section 175R(2)) provides:

> *A third party campaigner commits an offence if the campaigner:*
>
> *(a) intentionally fails to register under this Part in relation to an election; and*
> *(b) incurs more than $1000 of political expenditure in relation to that election.*

As the offence provision only relates to a third party campaigner who incurs more than $1000 of political expenditure, the individual or entity would not be required to provide evidence that they "expected" to incur more than $1000 of political expenditure.

b. If a person or entity registers as a third party campaigner because they expected to incur more than $1,000 of political expenditure but does not in fact incur such expenditure, what is the status of the reports they have submitted to the NT Electoral Commission and how is the Electoral Commission to deal with these?

Under the proposed amendments, all registered third party campaigners will be required to submit expenditure and donation disclosure returns as set out in the Bill. Under Clause 113, section 201 (Nil returns), a registered third party campaigner can submit a nil return if they don't incur any expenditure. Similarly, under current section 198, if a registered third party campaigner does not receive any donations, they can submit a nil donations return.

The NT Electoral Commission (NTEC) is required to publish reports from registered third party campaigners as set out in Clause 128 (section 224).

Further, in Clause 92 (section 175H), a registered third party campaigner may make a written, signed request to NTEC to cancel their registration. Once the registration is cancelled, the individual or entity would no longer be required to submit expenditure or donation disclosure returns as set out in the Bill.

Caps on Electoral Expenditure – Cl 115, Part 10, Division 4, Subdivision 3 inserted

2. Notwithstanding the findings of the High Court Case, Unions NSW & Ors and the State of NSW, the NSW legislation continues to have a cap on expenditure for third party campaigners of $1.288 million.

a. What reasons are there for not applying an expenditure cap to third party campaigners?

The Mansfield Inquiry Report did not include findings to indicate that third party campaigners are a feature, prominent or otherwise, of the Northern Territory electoral landscape. The report also did not include recommendations in relation to third party campaigners.

On 29 January 2019, the High Court found that the changes to NSW legislation that reduced the expenditure cap applied to third party campaigners in that jurisdiction were invalid as there was no evidence to support the decision to reduce the level of the expenditure cap. On that basis, the previously legislated cap on expenditure for third party campaigners continued to apply.

In the course of developing the proposed amendments, the Department of the Chief Minister (DCM) consulted with NTEC with a view to gathering evidence to determine what role, if any, third party campaigners, have had in electoral activities in the Northern Territory. In particular, DCM sought evidence based on returns submitted by "persons incurring political expenditure", as required under current section 192 of the *Electoral Act 2004*. NTEC subsequently advised that the information sought by DCM was not available.

It is noted that NTEC's submission to the Economic Policy Scrutiny Committee proposes a cap of $40 000 for third party campaigners; this is linked to the electoral expenditure cap for candidates. However, candidates and third party campaigners are different types of participants in the electoral landscape, and the rationale for applying an expenditure cap on a candidate or party does not necessarily align with the rationale for an expenditure cap for third party campaigners. For example, third party campaigners may wish to campaign across the Northern Territory, not just in one electorate. In addition, the NTEC proposal of a $40 000 cap for third party campaigners is not based on historical expenditure of third party campaigners in the Northern Territory, since, as noted above, NTEC has advised that evidence of this historical expenditure is not available.

As a result, the Bill does not include amendments to apply an expenditure cap to third party campaigners.

Although third party campaigners will not be subject to an expenditure cap under the proposed amendments, they will be required to register with NTEC, with penalties for failing to do so, and disclose donations and expenditure under the proposed scheme from 2020.

Information gathered from these returns will be used to inform a review of the scheme after the Territory 2020 General Election. The review will specifically consider whether a cap on political expenditure by third party campaigners should be introduced and, if so, the level of the cap.

3. Country Liberals and the Northern Territory Electoral Commission (NTEC) raised concerns that the absence of a cap on electoral expenditure by third party campaigners could allow the intent of the cap to be circumvented. For example, parties or candidates could align with a third party campaigners to run a negative campaign against their opponents, or wealthy individuals could have an undue influence on elections due to their ability to spend more than the capped amount.

a. Please clarify what provisions, if any, exist to safeguard against the intent of the cap being circumvented by the above examples provided by submitters?

The legislation provides for new offences for failing to register a third party campaigner, with a maximum penalty of 200 penalty units ($31 000) or 12 months' imprisonment or both if the offender is a natural person, and 1000 penalty units ($155 000) if the offender is a body corporate (Clause 92, section 175R(2) refers).

The Bill at proposed section 203D also includes a criminal offence for circumventing the expenditure cap, which carries a maximum penalty of 10 years' imprisonment.

In line with the Mansfield Inquiry Report, the amendments also extend the time to commence prosecutions for alleged breaches of provisions in Part 9A, Registration of Associated Entities and Third Party Campaigners, and Part 10, Donations and Disclosure, under the *Electoral Act 2004* from three to four years.

b. To what extent would proposed section 203D prevent parties, candidates and associated entities from circumventing the expenditure cap by informally working with third parties to oppose or promote a candidate?

AND

c. What evidence would be required as proof than an offence had been committed against proposed section 203D?

AND

d. What would be the effect on the operation of the Bill of inserting a clause that makes it unlawful for a third party campaigner to act in concert with a party, candidate or associated entity to oppose or promote a particular party, elected member or candidate?

Proposed section 203D Offence to Circumvent Expenditure Cap provides that:

> *A person commits an offence if:*
>
> *(a) the person intentionally enters into, or carries out, a scheme, whether alone or with any other person; and*
>
> *(b) the person's conduct circumvents a prohibition or requirement of this Subdivision; and*
>
> *(c) the person knows that the conduct circumvents a prohibition or requirement of this Subdivision.*

Proposed section 203D does not distinguish between whether arrangements to circumvent the expenditure cap are established by parties, candidates and associated entities working together formally or informally. Further, as set out in proposed section 8A Application of Criminal Code, Part IIAA of the Criminal Code applies to an offence against provision 175R(2) and 203D.

Inserting a clause that makes it unlawful for a third party campaigner to act in concert with others would need to be linked to exceeding the expenditure cap.

As proposed section 203D does not distinguish between whether arrangements to circumvent the expenditure cap are formal or informal, it is DCM's view that inserting a clause that makes it unlawful for a third party campaigner to act in concert with a party, candidate or associate entity to oppose or promote a particular party, elected member or candidate would make no practical difference in the outcome achieved.

Dedicated Campaign Account – Cl 125, Part 10 Division 5A inserted, proposed sections 213A to 213E

4. ***The NTEC raised concerns that parties and candidates may experience difficulties when donations are given to cover both campaign expenditure and general party administrative costs. Similarly, they note that problems could also arise when the timing of federal and Territory elections are close and donations could be received to cover both elections.***

a. **How is it envisaged that multi-purpose donations will be managed in the context of a dedicated campaign account?**

AND

b. **Have guidelines been developed, or is there an intent to develop guidelines, to ensure that parties and candidates deal with the problem of multi-purpose donations appropriately?**

The Bill includes provisions introducing a requirement for candidates and parties to use a dedicated Territory campaign account to more easily determine when and how donations are received and expenditure incurred.

These amendments have been developed with reference to interstate legislation, particularly South Australia. To ensure consistency with the *Electoral Act 1918 (Cth)* (the Commonwealth Act), the proposed amendments stipulate that Territory campaign accounts must only be used for Territory electoral purposes.

Parties and candidates will need to decide whether a gift is for Territory or Commonwealth purposes so that it is clear under which laws a gift must be disclosed. As the donation disclosure thresholds under the Commonwealth Act are higher, a Territory campaign account reduces the risk of donations being identified as for a Federal election and therefore not requiring any disclosure under the Northern Territory's electoral legislation.

It is also noted that amendments tightening key reporting obligations in Part 10 (to improve the timeliness and transparency of political donations and electoral expenditure), combined with amendments to the Commonwealth Act, have meant that reporting obligations have diverged such that it is no longer possible to use the same report to meet both Commonwealth and Territory obligations. To ensure compliance with the Commonwealth Act, the Bill also includes other amendments, such as amendments to repeal current section 195, "Returns by persons under Commonwealth Act".

The South Australian legislation is supported by guidelines, which are published by the South Australian Electoral Commission and it is envisaged that NTEC would develop similar guidelines to support the proposed amendments.

The South Australian guidelines may be a useful reference for NTEC in developing material to support the introduction of requirements for parties and candidates to use dedicated Territory campaign accounts, including the appropriate treatment of donations to cover both campaign expenditure and general administrative expenses.

5. ***The NTEC also expressed concerns that the requirement to keep a dedicated campaign account may be an administrative burden for some independent candidates, particularly those in remote divisions, noting that, historically, the amount of donations received by a number of independent candidates has been minor and they have limited election expenditure.***

a. **What would be effect on the operation of the Bill of making provision for a donation threshold that needs to be reached before a dedicated campaign account is required?**

As outlined above, the Bill includes provisions introducing a requirement for candidates and parties to use a dedicated Territory campaign account to more easily determine when and how donations are received and expenditure incurred. This is an element consistent across a number of jurisdictions with a donations and expenditure scheme, and provides a strong accountability and transparency measure.

The requirement for candidates and parties to use a dedicated campaign account is supported by the increasing use of online banking throughout Australia and is consistent with other reforms being progressed through the Bill, including the establishment of a scheme for electronic payment of nomination deposits.

On this basis, the requirement to use a dedicated Territory campaign account is not considered to be an unreasonable requirement or administrative burden for an individual or party standing for election in a modern democracy.

As outlined above, to ensure consistency with Commonwealth legislation, the proposed amendments stipulate that Territory campaign accounts must only be used for Territory electoral purposes. Introducing a donation threshold that allows certain parties and candidates to not use a dedicated Territory campaign account would have the effect of making it more difficult to ascertain whether donations were received for federal or Territory electoral purposes and ensuring consistency with Commonwealth legislation.

Disclosure and reporting requirements – Cl 102, sections 191 and 192 replaced

6. ***The Country Liberals raised concerns that 'Requiring electoral commission staff to review and publish campaign returns as frequently as every six weeks immediately before and during the election' will be significant impost on the NTEC given their heavy workload during the running of an election.***

a. **What discussions, if any, have been held with the NTEC regarding the impact on their workload of the increased reporting requirements and what was the outcome of these discussions?**

DCM held ongoing discussions with NTEC in relation to the donation disclosure requirements proposed in the Bill, including the additional reporting and publication requirements during the election period.

It is noted that all disclosures with the exception of two, are required to be published "as soon as practicable" so as not to place a strict and burdensome timeframe on NTEC. Only the donation disclosure reports prior to early voting and prior to election day are required to be published within a designated timeframe (three and two days, respectively) to provide the public with the latest possible donation reporting prior to early voting and election day.

While NTEC noted some additional workload associated with the increased returns, no significant concerns were raised during the consultation process, given that the proposed amendments do not require NTEC staff to review or audit the material prior to publication – the material is merely being uploaded on to its website in the form received.

NTEC has indicated that the proposed donation disclosure reports will be saved and loaded as pdf documents to the NTEC website as is, without review, ensuring the public is able to access the latest possible information on donations provided by political parties, candidates, associated entities and third party campaigners. Based on discussions with NTEC during the development of the proposed amendments, it is envisaged that the NTEC website will have a caveat stating that published reports have not yet been audited or compliance checked.

Examination of declaration ballot papers – Cl 66, Section 105 amended (provisional voting)

7. ***Country Liberals consider that allowing an individual to vote if they are not enrolled to vote by the date of the close of rolls puts the integrity of the electoral roll at risk. They propose that if this amendment if accepted that safeguards should be put in place to ensure that the eligibility provisions of Part VII of the Commonwealth Electoral Act 1918 (Cth) are enforced.***

a. **What provisions are currently in place to ensure that a person meets these eligibility provisions? For example, is such a person required to provide evidence of identify as set out in s98AA of the Commonwealth *Electoral Act 1918 (Cth)*?**

Implementing provisional "on the day" enrolment was a recommendation in NTEC's 2016 Election Report as a strategy for improving voter participation.

The legislation introduces a savings provision where a person who is not enrolled by the date of close of rolls is still able to cast a provisional vote during early voting or on election day, provided the person is eligible to be enrolled. This will improve the quality of the electoral roll and improve participation, which has been highlighted by NTEC as an issue.

The Bill requires a voter who is not enrolled to complete a declaration stating that the person has complied with Part VIII of the Commonwealth Act before the close of the roll; or is eligible to enrol under Part VIII of the Commonwealth Act.

In relation to eligibility provisions and providing proof of identity in accordance with Part VIII of the Commonwealth Act, the declaration is expected to conform to the Commonwealth enrolment forms. Proof of identity would therefore be provided in one of three ways:

a. Australian driver's licence number and state/territory of issue;

b. Australian passport number; or

c. have a person who is on the Commonwealth electoral roll confirm the voters identity – the person on the Commonwealth electoral roll would complete a declaration and provide their name, address and signature.

An unenrolled person will be able to cast a provisional vote, which can be admitted to the count only after their eligibility to enrol under Part VIII of the Commonwealth Act is confirmed by the Australian Electoral Commission (AEC). This is consistent with current roll management practices in the Northern Territory as this jurisdiction utilises the national electoral roll, which is managed by the AEC.

It is noted that these are 'savings' provisions which will not be promoted as a mainstream method of enrolling, but will 'save' the votes of unenrolled people who turn up to vote, provided the person is eligible to be enrolled.