

Statement of Compatibility with Human Rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Electoral Legislation Further Amendment Bill 2019

Serial No. 96

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

1.1.1 Overview of the bill

The Bill amends sections of the *Electoral Act 2004* (the Act) to establish a transparency and accountability scheme for political donations and electoral expenditure in the Northern Territory, and to streamline and contemporise the voting and electoral process.

These amendments are being introduced to create an open and accountable electoral process as part of the Northern Territory Government's restoring trust and integrity agenda.

Key amendments the Bill proposes include:

- Creating an indexed cap on electoral expenditure in the election period for unendorsed candidates and a pooled cap for political parties (and their associated entities).
- Including definitions of 'third party campaigners' and 'political expenditure', as well as updating the definition of 'gift' to include 'political donation', and the definition of 'electoral expenditure' to include contemporary examples such as social media advertising.
- Introducing a public registration requirement for third party campaigners and associated entities prior to incurring electoral expenditure or receiving political donations.
- Requiring all candidates, parties and associated entities to process political donations and electoral expenditure through a dedicated 'Territory campaign account'.
- Requiring candidates, parties, associated entities and third party campaigners to provide an expenditure return for the electoral expenditure period, in order to confirm campaign spending in accordance with the electoral expenditure cap, and as an accountability measure for third party campaigners.
- Establishing more frequent reporting and disclosure requirements for candidates, parties, associated entities and third party campaigners, particularly in election years.
- Requiring routine reporting of donations by candidates, donors and third party campaigners to increase public awareness in non-election years.
- Requiring parties and associated entities to submit annual financial returns to improve transparency with the public.
- Introducing new offences and penalties to drive compliance with the new scheme, including breach of the electoral expenditure cap.
- Extending the time to commence prosecutions under Part 9A or Part 10 of the Act from three to four years.
- Aligning the disclosure thresholds for donors to unendorsed candidates with the threshold for donors to registered political parties.
- Removing outdated provisions requiring broadcasters and publishers to lodge expenditure returns.

- Introducing a number of non-financial reforms including those relating to the extension of the election timetable, allowing provisional voting, the process of nominating for an election, witness requirements for postal voting, and clarification of campaign material requirements.

1.1.2 Human rights implications

This Bill engages with rights and freedoms outlined in the International Covenant on Civil and Political Rights (ICCPR): the right to take part in public affairs, the right to equality and non-discrimination, and the right to freedom of association.

1. *Right to take part in public affairs*

Article 25(a) of the ICCPR provides that ‘every citizen shall have the right and opportunity...without unreasonable restrictions: to take part in the conduct of public affairs, directly or through freely chosen representatives.’

Any restriction on the right to take part in public life and elections must be reasonably and objectively justified. The United Nations Human Rights Committee has stated that reasonable limitations on election campaign expenditure may be justified where necessary to ensure that the democratic process is not distorted by disproportionate expenditure on behalf of any candidate or party.¹

The Bill also introduces a cap restricting the amount of electoral expenditure incurred by candidates, parties and associated entities. The cap introduced in the Bill is a reasonable limitation on the right to take part in public affairs as it levels the playing field for candidates standing for public office. The cap has been set at a sufficiently high level, where electoral expenditure has been defined to exclude travel and accommodation expenses and volunteer labour so as to not disproportionately impact independent and regional or remote candidates. The cap also reduces any reliance on political donations and the potential for that reliance to improperly influence, or be perceived to influence, a public officer once elected.

The Bill imposes obligations on candidates, parties, third party campaigners and associated entities in relation to incurring electoral expenditure and receiving political donations. The registration, disclosure and reporting requirements are not designed to disincentivise or prevent individuals and entities from taking part in election campaigns or standing for public office, but are rather fair and consistent limitations, intended to maximise the availability of donation information to the public before they cast their vote in an election period. The requirements are reasonable for the policy objective of increasing the transparency of political donations and electoral expenditure in the Northern Territory.

The Bill also introduces a series of non-financial reforms that support the right of the individual to take part in public affairs. This includes a savings provisions to allow provisional voting on election day and removing the witness requirement for postal votes to reduce the number of votes that are rejected for avoidable mistakes. The Bill also clarifies campaign material requirements to ensure improved public awareness of the authorising and funding source of campaign material.

In terms of improving the administration of the electoral process for all participants, which indirectly encourages the right to take part in public affairs, the Bill aligns early voting and scrutiny provisions with both mobile and election day polling provisions to create a single regime for casting and counting votes. The Bill also allows for the nomination deposit to be paid electronically in recognition of the ease and widespread use of electronic banking, and extends the election timetable to allow additional time for candidates, parties and associated entities to submit

¹ United Nations Human Rights Committee, General Comment 25 (57) adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

pre-election expenditure returns, and increase the time period for nominations, postal voting and mobile voting.

These contemporary and streamlined provisions strongly encourage participation in public affairs by enhancing the voting experience and simplifying the electoral process for all participants.

2. Right to equality before the law and non-discrimination

Article 26 of the ICCPR states that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.’

However, the United Nations Human Rights Committee has identified that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the ICCPR”.²

The Bill introduces an electoral expenditure cap for candidates, parties and associated entities, however this cap does not apply to the newly defined ‘third party campaigners’. The lack of an electoral expenditure cap for third party campaigners could be considered inequality of treatment, as it leaves third party campaigners unrestricted in comparison to the legislative restrictions on the electoral expenditure of other key participants in the electoral process.

The High Court of Australia’s decision of 29 January 2019 in *Unions NSW & Ors v State of NSW* found that an electoral expenditure cap should not be applied to third party campaigners unless there is strong evidence as to what a reasonable cap would be. There is limited evidence that third party campaigners have been a feature of the Northern Territory’s electoral landscape, dominant or otherwise, in the past and as such, there is no evidence base to suggest what a reasonable electoral expenditure cap would be. A cap on third party campaigners may be introduced at a later stage, pending the collection of such evidence following the Northern Territory 2020 general election.

Third party campaigners will be subject to the same registration and reporting requirements as candidates, parties and associated entities, and will be subject to offences and penalties provisions for failure to comply with the new scheme. The differentiation of treatment between third party campaigners and other electoral participants in relation to the cap on electoral expenditure is reasonable in these circumstances, noting that this may be reviewed in the future.

² United Nations Human Rights Committee, General comment No. 18, Non-discrimination, para. 13 (1989), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.9 (2008), at 198.

3. Right to freedom of association

Article 22 of the ICCPR provides that: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'

The right to freedom of association is a broad right and can relate to both the membership and activities of an association.

The Bill introduces a shared electoral expenditure cap for registered political parties and associated entities, where an associated entity is defined as an entity being controlled by or operating to a significant extent to the benefit of a registered party. Whilst the Bill does limit the freedom of association for associated entities by regulating the amount of political expenditure they can incur in the electoral process, Article 22 states that the right can be limited if the measure is necessary in a democratic society in protecting the rights and freedoms of others.

A shared electoral expenditure cap for both parties and associated entities eliminates any potential for advantage and disproportionate expenditure between political parties and candidates (particularly independent candidates). If there were to be separate caps then political parties with multiple associated entities could circumvent the cap on electoral expenditure. Limiting political expenditure is justified in this case as it is a proportionate measure to ensure that the democratic electoral process is not distorted.

1.1.3 Conclusion

This Bill is compatible with human rights as, where it does engage with the applicable rights and freedoms, there is not an unreasonable or disproportionate limit on rights.

The Bill is for the overall policy objective of establishing a transparent and accountable political donation and electoral expenditure process as part of the Northern Territory Government's restoring trust agenda. It will also streamline and contemporise the voting process for Territorians.

The amendments comprised in the Bill support the democratic interests of the Northern Territory and its citizens, and any limitations on human rights are considered rational and proportionate in the pursuance of electoral reform under the Northern Territory Government's Integrity Framework.