



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [natalie.cooper@lawcouncil.asn.au](mailto:natalie.cooper@lawcouncil.asn.au)

Dear Dr Popple,

### **Inquiry into the 2022 Federal Election**

Thank you for the opportunity to provide input into a Law Council submission to the inquiry into the 2022 Federal Election. The Law Society's Public Law Committee contributed to this submission.

The Law Society acknowledges that while there are many issues that might appropriately be raised in the context of this inquiry, we have focused on three broad issues that can have significant consequences for the enfranchisement of voters and the integrity of elections, being accessibility of voting, election funding and truth in political advertising.

#### **Accessibility of voting**

This issue is not a new challenge, particularly for voters living in rural, regional and remote locations. However, the different emergency events that have occurred in recent years (COVID-19, bushfires, flooding) have highlighted the importance of ensuring that voters are not inadvertently disenfranchised by a lack of accessibility to polling places, particularly in circumstances when voters did not avail themselves of the early voting options because the need did not arise until the day of the election.

We note some work has been done in this regard by the Joint Standing Committee on Electoral Matters (**JSCEM**) in its inquiry on the future conduct of elections operating during times of emergency situations.<sup>1</sup> However, the recommendations made by JSCEM in its report contemplate only those methods of alternative voting that can be carried out prior to voting in person, such as early postal voting and pre-poll voting. The inquiry report does not grapple with issues presented by remoteness of locations and the challenges highlighted by the Northern Territory Electoral Commission in relation to unreliability of postal services, as well as digital infrastructure ([2.57] – [2.61]). The report also does not grapple with situations where, for example, people became infected with COVID-19, and were required to self-isolate on election day.

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<sup>1</sup> Joint Standing Committee on Electoral Matters, June 2021, Report on the inquiry on the future conduct of elections operating during times of emergency situations, here: [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc\\_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergencysituations.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024638/toc_pdf/Reportoftheinquiryonthefutureconductofelectionsoperatingduringtimesofemergencysituations.pdf;fileType=application%2Fpdf).

The inquiry report considered online voting but notes, at [3.30], that

This Committee has previously rejected the development of a universal online voting portal stating that the proposal raised: ... significant questions over the capacity of an electronic voting solution to be both cost-effective and protect the security and sanctity of the ballot in the Australian context [and concluded that] there can be no widespread introduction of electronic voting in the near term without massive costs and unacceptable security risks.<sup>2</sup>

The inquiry report goes on to note that those risks have not yet been resolved. We note that readiness for universal availability of technology is not yet the reality, and security concerns, particularly in respect of foreign interference, are very real. However, we submit that there needs to be more robust contingency planning to ensure no recurrence of those issues that arose for people who were subject to COVID isolation requirements, or who for some other reason found themselves unable to access a polling place on the day of the election.

There may be a need to expand, for example, the availability of telephone voting, or in certain situations, more extensively use mobile voting (which may not be an appropriate option in pandemic situations). We also submit that more investment should be made into investigating, on a nationally-coordinated basis, the availability of online voting.

## **Election funding**

The 2022 election provided an example of a third-party financial backer funding candidates based on particular issues (in this case, those issues were stated to be a science-based approach to climate change, integrity in politics and advancing gender equity).<sup>3</sup> The support included direct funding to candidates, but went further, including advice on strategic communications, analytics and campaign engagement. The results in the 2022 election arguably reflected the power of this approach, with six new independent MPs elected, four independent MPs re-elected, and one independent Senator elected.<sup>4</sup>

This example suggests that considerable influence on the outcomes of an election, and therefore on the integrity of democracy in general, can be exerted by wealthy individuals (in this case, together with considerable community engagement).

A balance is required between promoting political engagement and the expansion of voter choice in candidates, and ensuring that financial power is not abused to undermine the integrity of election outcomes (to be clear, the Law Society is not suggesting that this was true in this particular example). In our view, the starting point in this analysis is to consider, at a national level, the NSW legislative model for election funding, as provided for by the *Electoral Funding Act 2018* (NSW), and the NSW Electoral Commission's approach to enforcement.

The NSW framework sets out a regime for reporting political donations larger than \$1,000 or more from a donor in one year, including loans larger than \$1,000. This includes donations made to political parties, associated entities, groups and third-party campaigners in certain circumstances. Further, political donations can only be made by individuals on the electoral roll, or otherwise identified to the NSW Electoral Commission, or a company with an ABN. Political donations are also capped at publicly identified levels per year, and disclosure requirements apply.

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<sup>2</sup>JSCEM, November 2014 (44th Parliament), 'Second interim report on the inquiry into the conduct of the 2013 Federal election: An assessment of electronic voting options, p. 2 cited in Note 1.

<sup>3</sup> See Climate 200 at <https://www.climate200.com.au/about-us>.

<sup>4</sup> See Climate 200 at <https://www.climate200.com.au/2022-election>.

Crucially, certain donations are banned, including anonymous donations over \$1,000, indirect donations over \$1,000 in value (including in-kind donations), as well as donations from property developers, tobacco businesses, and liquor or gambling licensees or their close associates. This ban was ruled constitutional by the High Court in *McCloy v NSW* [2015] HCA 34.

Caps on electoral expenditure also apply and vary depending on the entity. Electoral expenditure is reportable, by way of a requirement to maintain campaign accounts and yearly reporting. NSW has attempted to provide a cap for third-party campaigners, which was held to be invalid by the High Court in *Unions NSW v New South Wales* [2019] HCA 1. Legislation to correct this has passed the NSW Legislative Assembly<sup>5</sup> and is currently being debated in the NSW Legislative Council. Debate continues in respect of, among other issues, restrictions on third parties acting in concert, taken together with caps on third party expenditure (s 35 of the *Electoral Funding Act 2018* (NSW) restricts two or more third-party campaigners from coordinating campaigns when their combined expenditure exceeds the applicable cap). The High Court held that the third-party expenditure caps were an impermissible burden on the implied freedom of political communication, but did not find it necessary to then substantively address the validity of the acting-in-concert provisions. The developments in NSW will be entirely relevant to this issue and we submit that it will be a useful starting point to inform similar considerations at the federal level.

We understand that the NSW Electoral Commission is considered “atypical” in Australia, in its robust enforcement of breaches of funding and disclosure laws, such as in the issue of fines for not using campaign accounts, withholding public funding for breaching expenditure caps, and issuing fines for illegal (banned) donations.<sup>6</sup>

### **Truth in political advertising**

We note developments internationally have highlighted the pervasiveness, sophistication and effectiveness of misinformation and disinformation campaigns to undermine and distort election outcomes. The 2022 Australian Election saw a troubling development of disinformation about the Australian Electoral Commission (**AEC**) being published. Given the very significant potential costs of misinformation and disinformation on the integrity of election outcomes, the Law Society supports the enactment of legislation to regulate the issue of truth in political advertising at a federal level.

We suggest that the South Australian legislation (s 113 of the *Electoral Act 1985* (SA)), is a useful starting point. It has withstood constitutional challenge, is supported by significant case law, has been shown to be enforceable, and we understand that it has provided an effective deterrent. In considering s 113, we suggest also reference to the chapter by Lisa Hill, Max Douglass & Ravi Baltutis, “Implementation of s 113: Lessons to Adopt, Pitfalls to Avoid and Refinements to Pursue” in *How and Why to Regulate False Political Advertising in Australia*.<sup>7</sup>

We suggest that in the federal context, the following issues would require close consideration:

- The prohibition against misleading advertising should apply not only federal elections but also referendums, the outcomes of which depend so heavily on the presentation of public information and arguments.

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<sup>5</sup> Electoral Legislation Amendment Bill 2022 (NSW).

<sup>6</sup> Damon Muller, “Election funding and disclosure in Australian jurisdictions: a quick guide”, Updated 16 February 2022, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_departments/Parliamentary\\_Library/pubs/rp/rp2122/Quick\\_Guides/ElectionFundingStates](https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2122/Quick_Guides/ElectionFundingStates).

<sup>7</sup> Available online: [https://link.springer.com/chapter/10.1007/978-981-19-2123-0\\_9](https://link.springer.com/chapter/10.1007/978-981-19-2123-0_9).

- Certain key concepts will require clearer definition, to both ensure that all mass communication, including social media, is covered and in a Constitutionally-allowable way. We note that the *Electoral Act 1985* (SA) does not define “advertising” and “publish”. For example, while the law needs to provide effective deterrents, these might not necessarily include criminal penalties which would likely increase the risk of the law being found to be unconstitutional.
- Whether the law would apply only to paid advertising.
- Responsibility for administration and enforcement. It may be, for example, that the AEC may not currently have adequate expertise or resourcing to support the enforcement of truth in political advertising laws, and a different agency, such as the ACCC, may currently be better placed. Consideration should be given to appropriate resourcing, information sharing with state and territory Electoral Commissions and training for the AEC, and transitional arrangements if required.
- Close consideration of the remedies available. For example, remedies might include injunctive relief, but, in our view, on balance it is likely to generally be undesirable that remedies should extend to affecting the outcomes of elections.

Thank you for the opportunity to contribute to the Law Council submission. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at 02 9926 0354 or [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,

A handwritten signature in blue ink that reads "Sonja Stewart". The signature is written in a cursive, flowing style.

Sonja Stewart  
**Chief Executive Officer**