

**40TH PARLIAMENT**



## **Report 47**

# **STANDING COMMITTEE ON LEGISLATION**

*Electoral Amendment Bill 2020*

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Presented by  
Hon Dr Sally Talbot MLC (Chair)  
November 2020

## **Standing Committee on Legislation**

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Hon Pierre Yang MLC

Hon Colin de Grussa MLC

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## EXECUTIVE SUMMARY

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- 1 The Legislative Council referred the Electoral Amendment Bill 2020 (Bill) to the Standing Committee on Legislation (Committee) with the power to inquire into policy.
- 2 The policy objectives of the Bill are to:
  - improve disclosure laws around political donations
  - ensure more timely disclosure of those donations
  - place a total ban on foreign donations in Western Australia
  - introduce expenditure caps for election campaigns.
- 3 The first of these objectives would mean that any donation made to a political party or associated entity of \$1 000 or above would have to be declared, with details of the donor included, in returns to the Western Australian Electoral Commissioner. The current disclosure threshold is \$2 500. The Committee seeks an explanation as to some details of the proposals, and recommends that the disclosure threshold should be amended to 'an amount above \$1 000', so as to establish a requirement that is simpler and easier to communicate.
- 4 The second objective would be achieved by introducing quarterly reporting of gifts and donations received by political parties and associated entities, instead of the current requirement for an annual report. A majority of the Committee found that the move to quarterly reporting would create administrative difficulties for political parties, associated entities and the Western Australian Electoral Commission for no material benefit, and recommend that clause 12 of the Bill be deleted. A minority of the Committee, however, found that quarterly reporting is an important step in the direction of a more transparent system of disclosure.
- 5 The placing of a total ban on the receipt of foreign donations or gifts by election participants was generally welcomed by the Committee and, subject to the receipt of satisfactory explanations from the Minister for Electoral Affairs, enactment of clause 13 should proceed.
- 6 Proposals for the introduction of expenditure caps on election participants were considered. Comparisons with such caps in other jurisdictions were made, and the contents of the Government's Tabled Paper 4104 *Explanation of the justification of the expenditure caps in the Electoral Amendment Act 2020* discussed. A majority of the Committee recommended that this measure not be passed while a minority supported the clause.
- 7 The Committee has made 14 findings and 16 recommendations.

### Findings and recommendations

**Findings and recommendations are grouped as they appear in the text at the page number indicated:**

#### **FINDING 1**

Page 12

It is the Government's stated intention that expenditure incurred by election participants before the commencement date of the *Electoral Amendment Act 2020* (should it become law) will not be counted towards relevant expenditure caps.

**RECOMMENDATION 1**

Page 12

That in clause 8(2) of the Electoral Amendment Bill 2020, the definition of 'capped expenditure period' be amended, for the purposes of the 2021 State general election, to reflect the Government's stated intention.

**FINDING 2**

Page 15

The option of complying with section 175N of the *Electoral Act 1907* (returns to be lodged by political parties) by submitting the return or part of the return required by the *Commonwealth Electoral Act 1918* (Cth) would be removed by clause 12 of the Electoral Amendment Bill 2020.

**FINDING 3**

Page 15

The new provisions proposed under clause 12 of the Electoral Amendment Bill 2020 increase the frequency of returns to be lodged by political parties, but do not change the nature of what must be disclosed and what need not be disclosed.

**FINDING 4**

Page 16

The option of complying with section 175NA of the *Electoral Act 1907* (returns to be lodged by associated entities) by submitting the return or part of the return required by the *Commonwealth Electoral Act 1918* (Cth) would be removed by clause 12 of the Electoral Amendment Bill 2020.

**FINDING 5**

Page 16

The new provisions proposed under clause 12 of the Electoral Amendment Bill 2020 increase the frequency of returns to be lodged by associated entities, but do not change the nature of what must be disclosed and what need not be disclosed.

**FINDING 6**

Page 19

A gift or donation to a political party or associated entity of \$1 000 should be permitted to be made without disclosure of the details of the gift or donation being necessary, for the sake of simplicity and ease of communication.

**RECOMMENDATION 2**

Page 19

That the definition of specified amount in clause 8(2) of the Electoral Amendment Bill 2020 be amended to 'an amount above \$1 000'.

**RECOMMENDATION 3**

Page 19

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the specified amount set out at Clause 8(2) of the Electoral Amendment Bill 2020 was not set at \$1 500 to align with the tax deductible threshold for political donations.

**RECOMMENDATION 4**

Page 19

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the specified amount set out at Clause 8(2) of the Electoral Amendment Bill 2020 would not be subject to indexation.

**FINDING 7**

Page 21

The cost of attending fundraising events will generally not meet the definition of a 'gift', and will continue not to be disclosable in returns to be lodged by political parties and associated entities.

**FINDING 8**

Page 21

The definition of a 'gift' includes 'a disposition made ... with inadequate consideration'. The interpretation of this definition as it relates to fundraising events is unclear.

**RECOMMENDATION 5**

Page 21

That the Minister for Electoral Affairs provides to the Legislative Council an explanation of how the definition of 'gifts' as it relates to fundraising events should be interpreted.

**FINDING 9**

Page 29

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, finds that the move to quarterly reporting instead of the current annual reporting requirements would create administrative difficulties for political parties, associated entities and the Western Australian Electoral Commission for no material benefit.

**FINDING 10**

Page 29

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, finds that, while some adjustment may be required, quarterly reporting is an important step in the direction of a more transparent system of disclosure.

**RECOMMENDATION 6**

Page 29

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, recommends that the Electoral Amendment Bill 2020 proposals for quarterly reporting of gifts and income received should not be supported, and that clause 12 of the Electoral Amendment Bill 2020 should be deleted.

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, recommends that clause 12 of the Bill should be enacted.

**RECOMMENDATION 7**

Page 30

That the Minister for Electoral Affairs gives further consideration to the development of an online, 'real-time' reporting system for gifts and donations received by political parties and associated entities.

**RECOMMENDATION 8**

Page 32

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the proposed ban on the receipt of gifts from foreign donors in clause 13 of the Electoral Amendment Bill 2020 does not include criminal sanctions.

**RECOMMENDATION 9**

Page 35

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why an expanded definition of 'foreign donor', as appears in the *Commonwealth Electoral Act 1918* (Cth) and the *Electoral Funding Act 2018* (NSW), was not considered for inclusion in clause 13 of the Electoral Amendment Bill 2020.

**RECOMMENDATION 10**

Page 36

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why no provision was made in clause 13 of the Electoral Amendment Bill 2020 for the minor exceptions included in the *Commonwealth Electoral Act 1918* (Cth) to the total ban on the receipt of foreign donations.

**RECOMMENDATION 11**

Page 38

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to whether an expanded range of prohibited donors was considered in the drafting of the Electoral Amendment Bill 2020 or has merit.

**RECOMMENDATION 12**

Page 38

That, subject to satisfactory explanations in relation to Recommendations 8, 9, 10 and 11, the Electoral Amendment Bill 2020 proposals for banning the receipt of gifts from foreign donors should be supported, and clause 13 of the Electoral Amendment Bill 2020 should be passed.

**FINDING 11**

Page 42

Clause 25 of the Electoral Amendment Bill 2020 would have the effect of reducing the period permitted for the lodgement of electoral returns from 15 weeks to 12 weeks from polling day.

**FINDING 12**

Page 56

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, finds that clause 15 in its current form is unsafe.

**FINDING 13**

Page 56

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, finds that the Tabled Paper establishes the ground for the claim that expenditure caps are reasonable, appropriate and proportionate, and are therefore justified.

**RECOMMENDATION 13**

Page 56

That clause 15 of the Electoral Amendment Bill 2020 not be passed.

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, recommends that clause 15 should be passed.

**FINDING 14**

Page 60

That proposed section 175ZH(b), which would be inserted into the *Electoral Act 1907* should clause 24 of the Electoral Amendment Bill 2020 be passed in full, is unnecessary.

**RECOMMENDATION 14**

Page 60

That the relevant part of clause 24, at Page 22, lines 1 to 4 of the Electoral Amendment Bill 2020, be omitted.

**RECOMMENDATION 15**

Page 60

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the heading to section 175R of the *Electoral Act 1907* is intended to be amended from 'Gifts not to be accepted from unidentified donors etc.' to 'Gifts not to be received from unidentified donors'.

**RECOMMENDATION 16**

Page 62

That the Western Australian Electoral Commission reports on the resourcing implications that have arisen from the measures in the Electoral Amendment Act 2020, should it become law, in its first annual report after its commencement.

# CHAPTER 1

## Introduction

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### Introduction

1.1 The Electoral Amendment Bill 2020 (the Bill) would, if enacted, amend the *Electoral Act 1907* (the Act) with respect to:

- disclosure laws around political donations (and the timing of those disclosures)
- the introduction of expenditure caps for election campaigns
- placing a total ban on foreign political donations in Western Australia.

It would come substantially into force the day after Royal Assent (clause 2 of the Bill).

1.2 This Bill was first and second read into the Legislative Assembly (Assembly) on 25 June 2020 by the Attorney General, Hon John Quigley MLA. It then completed its passage through that chamber on 13 August 2020 and was transmitted to the Legislative Council (Council). It was first and second read into the Council the same day by the Minister for Electoral Affairs, Hon Stephen Dawson MLC (the Minister).

1.3 During the course of his second reading speech, the Minister tabled a paper entitled *Explanation of the justification of the expenditure caps in the Electoral Amendment Act 2020* (Tabled Paper).<sup>1</sup> This explanation is intended to address concerns arising from a High Court ruling in 2019 regarding any burden on the implied freedom of political communication that might result from a limitation on electoral expenditure. A copy of the Tabled Paper may be found at Appendix 1 to this report.

### Referral

1.4 The second reading of the Bill resumed briefly on 8 September 2020, and continued on 9 and 10 September 2020, until Hon Aaron Stonehouse MLC moved without notice:

That the Electoral Amendment Bill 2020 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 9 October 2020, and the committee has power to inquire into, and report on, the policy of the bill.

1.5 Hon Simon O'Brien MLC then moved an amendment to the motion:

To delete "9 October" and substitute—12 November

1.6 The motion as amended was passed by 15 votes to 14, and the Bill was referred to the Standing Committee on Legislation (the Committee).

### Procedure

1.7 The Committee called for submissions from the stakeholders listed in Appendix 2 and advertised the inquiry in *The West Australian* newspaper on 19 September 2020. The inquiry was posted on the Committee's webpage, and the general public was notified of the commencement of the inquiry through social media.

1.8 The Committee received seven submissions, all of which were made public (see Appendix 2). Each can be viewed on the Committee's webpage at [www.parliament.wa.gov.au/leg](http://www.parliament.wa.gov.au/leg).

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<sup>1</sup> Tabled Paper 4104, Legislative Council, 13 August 2020.

- 1.9 Public hearings were held on 9 October 2020. The witnesses who appeared at these hearings are also listed in Appendix 2.
- 1.10 The Committee extends its appreciation to those who made submissions and appeared at hearings.

## Policy of the Bill

- 1.11 The referral from the Legislative Council permitted the Committee to inquire into, and report on, the policy of the Bill.
- 1.12 The policy of the Bill may be ascertained from its provisions, but is also largely evidenced by the Second Reading Speech of the Minister responsible for the Bill and the Bill's Explanatory Memorandum (EM). The Tabled Paper may also be taken into account.
- 1.13 The Committee also wrote to the Minister on 8 October 2020, seeking his advice as to the Government's policy motivations behind a number of the Bill's proposals. His replies are set out below.
- 1.14 The Minister opened his Second Reading Speech as follows:

The primary purpose of this bill is to give effect to the McGowan government's election commitments to improve disclosure laws around political donations, ensure more timely disclosure of those donations and introduce expenditure caps for election campaigns. It will also place a total ban on foreign donations in WA.<sup>2</sup>

### Disclosure laws

- 1.15 Of amendments to disclosure laws, the Minister went on to say:

This amendment is in line with the McGowan Labor government's clear commitment to increase transparency around political donations.<sup>3</sup>

- 1.16 In his response to the Committee's letter of 8 October 2020, the Minister stated:

The political donation threshold in Western Australia is currently \$2,500 per annum. All donations above this amount must record the details of the donor. However, political parties and associated entities that are registered both within the State and federally, can satisfy State requirements by providing a Federal return. Importantly, the Federal disclosure donation threshold is \$14,000.

Under this Bill, the political donation threshold will be reduced to \$1,000 and the ability to use a Federal return for State purposes will no longer be an option. The reduction of disclosure to \$1,000 is in line with other States and was deemed fair and reasonable. A donation of more than \$1,000 is significant and may have the potential to aid a political campaign.

This amendment is in line with the McGowan Government's commitment to increase transparency around political donations. By tightening the rules around financial disclosure, voters will be given greater confidence in the electoral process.<sup>4</sup>

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<sup>2</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4945.

<sup>3</sup> *ibid.*

<sup>4</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, letter, 21 October 2020, p 2.

### *Caps on electoral expenditure*

1.17 On the matter of expenditure caps, the Minister said during his Second Reading Speech:

Western Australian electors deserve to know that those with the deepest pockets should not be able to spend their way to influence an election. This bill will ensure the public have confidence in the accountability, transparency and integrity of elections in Western Australia.

...

Unlike other jurisdictions, such as New South Wales, South Australia and now Queensland, there has been no cap on expenditure in WA to date. This lack of an expenditure cap gives capacity for a single group or individual to spend large sums of money and to buy a platform that exceeds the reach of both the minor and major political parties.<sup>5</sup>

1.18 In his response to the Committee's letter, the Minister added:

During an election, political parties, candidates, community and special interest groups should all have the opportunity to express their views and have their voices heard, which is paramount to good democratic practice. It is apparent that our lack of an expenditure cap allows for a single group or individual with the financial means to spend excessive amounts of money on a campaign to effectively drown out the voices of other political opinions, and thus have an undue influence over the political debate.

Electoral expenditure caps have been introduced in other Australian jurisdictions and this Bill will bring Western Australia in line with those other jurisdictions by creating a level playing field, without unduly restricting the implied freedom of political communication.<sup>6</sup>

1.19 The Tabled Paper, intended to provide an explanation of the justification for expenditure caps which might otherwise be regarded as a burden on the implied freedom of political communication (see chapter 6 of this report) refers to the need to 'produce a more level playing field'.<sup>7</sup> It states:

Political influence in Western Australia should not be proportionate to the greatest wealth.<sup>8</sup>

1.20 It goes on to set out respective expenditures in previous State general elections. It is clear that the only political expenditure that would have been prohibited were the Bill's provisions in place in 2017 was that of the Chamber of Minerals and Energy of Western Australia (Inc) (CME) of \$4 361 870.<sup>9</sup>

1.21 It is open to the Committee to conclude that this was one of the catalysts for the policy and the draft provisions in the Bill. The Committee's attention was also drawn to an article in *The West Australian* of 15 February 2020, speculating that these proposals were aimed at

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<sup>5</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4945.

<sup>6</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, letter, 21 October 2020, p 1.

<sup>7</sup> Tabled Paper 4104, Legislative Council, 13 August 2020, p 1.

<sup>8</sup> *ibid.*, p 2.

<sup>9</sup> *ibid.*, p 3. Note that one party breached the proposed expenditure cap for a by-election in 2018 – p 6.

preventing Clive Palmer from 'bankrolling a multimillion-dollar advertising blitz at next years' State election'.<sup>10</sup>

### *Foreign donations*

1.22 On foreign donations, the Minister said:

It will be unlawful to accept a political donation unless the donor is an Australian resident or citizen, or has an Australian business number. It is intended that foreign donations will be banned on the basis that foreign donors should not be able, or have a right, to influence domestic policy.<sup>11</sup>

## **Fundamental legislative principles**

1.23 As with previous inquiries, the Committee's method of scrutinising the Bill included an assessment of whether its provisions are consistent with fundamental legislative principles (FLPs), which may be seen set out in full in Appendix 3. FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. Those principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

1.24 The Committee has routinely used FLPs as a convenient and informal framework for scrutinising proposed legislation since 2004. They are not enshrined in Western Australian law, and for some Bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs but whether a Bill has sufficient regard to them.

1.25 In this report, the Committee considered the implications of imposing expenditure caps on electoral spending in light of the implied freedom of communication on governmental and political matters in the Commonwealth Constitution.

## **Structure of the report**

1.26 The Committee's scrutiny of the Bill in this report begins in chapter 2 with a brief explanation of existing laws.

1.27 Chapter 3 details some of the statutory amendments that would be made if the Bill is passed, which in most cases set the scene for the more substantive proposals, dealing with:

- declarations of gifts and other income (chapter 4)
- a ban on foreign donations (chapter 5)
- caps on electoral expenditure (chapter 6).

1.28 Chapter 7 details minor and consequential amendments that would be made by the Bill, and chapter 8 looks at possible resourcing issues.

1.29 For the avoidance of doubt, all references to the Bill in this report are to the version of the Bill as passed by the originating House.<sup>12</sup>

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<sup>10</sup> Peter Law, 'Clive ad ban for WA poll', *The West Australian*, 15 February 2020, p 14.

<sup>11</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4946.

<sup>12</sup> Parliament of Western Australia. See: [https://www.parliament.wa.gov.au/parliament/bills.nsf/EB9E3897F7784E6A48258591002F0E5E/\\$File/Bill%2B100-2.pdf](https://www.parliament.wa.gov.au/parliament/bills.nsf/EB9E3897F7784E6A48258591002F0E5E/$File/Bill%2B100-2.pdf). Viewed 1 October 2020.

## CHAPTER 2

### Current law

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- 2.1 The stated overall aims of this Bill are threefold—to amend disclosure laws around political donations, to introduce expenditure caps for election campaigns and to place a total ban on foreign donations in Western Australia. At present, only the first of these issues is the subject of laws in Western Australia, and this chapter will outline those.
- 2.2 A ban or restriction on foreign donations would be new for political parties registered only with the Western Australian Electoral Commission (WAEC). Parties that are registered federally, with the Australian Electoral Commission, are already the subject of national laws restricting foreign donations made by the Australian Government. Those laws will also be outlined in this chapter.

### Declaration of gifts and other income

- 2.3 In February 2018, the Community Development and Justice Standing Committee of the Legislative Assembly of Western Australia (LA Committee) tabled its report *2017 WA State Election: Maintaining confidence in our electoral process*.<sup>13</sup> Amongst other issues identified, the Executive Summary stated:

*Political finance regime*

WA relies on a disclosure scheme to provide transparency to the electoral process. Yet certain aspects of the scheme limit the extent of transparency:

- Political parties registered at state and federal levels can use their federal returns to fulfil their state obligations. As the current federal disclosure threshold for donations is over five times that of the WA threshold, state-only registered parties are required to disclose considerably more than parties with dual registration.
- In the 2017 election, the disclosure period began on the day that election writs were issued (1 February), but campaigning began at least two months earlier. This means significant electoral expenditure might not have been disclosed.
- Donors who make several donations that are less than one-third of the specified amount (\$2 300 for the 2017 election) do not have to be disclosed, even if the total amount of the donations is more than the specified amount.
- The deadline for election-related returns is 15 weeks after polling day, which does not assist electors when casting their votes.<sup>14</sup>

- 2.4 The Bill deals with each of these four issues to some extent.
- 2.5 Electoral funding, and the disclosure of gifts, income and expenditure, are dealt with in Part VI of the Act.
- 2.6 Division 2A—‘Electoral funding’—deals with the State funding of election candidates following an election, in the form of reimbursement amounts (\$1.96699 per eligible vote as

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<sup>13</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018.

<sup>14</sup> *ibid.*, p iv.

from 1 July 2020).<sup>15</sup> An eligible vote is a first preference vote given in an election where there are more than two candidates, or a simple vote received where there are just two candidates.<sup>16</sup> This Division 2A would be unaffected by anything in the Bill, but it has some peripheral relevance to matters considered in this report (chapter 8).

## Gifts and other income

2.7 Division 3 of Part VI deals with the disclosure of gifts and other income.

2.8 At present, there are two types of disclosures that are required:

- under sections 175N and 175NA—annual returns by political parties and associated entities<sup>17</sup>, which must disclose the details of all gifts and other income received in the financial year (1 July to 30 June) and the relevant details of all gifts received that were equal to or above the permitted specified threshold (\$2 500). Compliance may be achieved by lodging with WAEC the return, or part of the return, that is required for the purposes of the *Commonwealth Electoral Act 1918* (Cth) (Commonwealth Act)
- under sections 175SA to 175SE—election-related returns. These contain the expenditure incurred by political parties, candidates, groups of candidates and third parties during the election period. The election period runs from the date of the issue of the writ for an election to polling day. In 2017, this was 1 February 2017 to 11 March 2017. The returns must be made before the expiration of 15 weeks after polling day.

2.9 Election-related returns will be dealt with in chapter 6 ('Caps on electoral expenditure').

2.10 The required annual returns must be lodged by the party agent or the financial controller of the associated entity by 30 November each year. Gifts and income received for purposes related to Commonwealth elections or by-elections need not be included, nor reimbursement amounts received under Division 2A (paragraph 2.6).

2.11 In respect of gifts received, the return must include:

- the amount or value of all gifts
- the relevant details of each gift which equals or exceeds the specified amount.<sup>18</sup>

2.12 For the purposes of these provisions, a 'gift' is:

any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include an annual subscription of not more than \$200 paid by a person to a political party or to a division of a political party in respect of the person's membership of the party or division.<sup>19</sup>

2.13 The 'relevant details' of each gift are the amount or value of it, the date on which it was made, and:

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<sup>15</sup> Western Australian Electoral Commission, 1 July 2020. See: <https://www.elections.wa.gov.au/about-us/media/whats-new/1854>. Viewed 30 September 2020.

<sup>16</sup> *Electoral Act 1907* s 175LA(1).

<sup>17</sup> 'Associated entity' is defined in section 175 of the *Electoral Act 1907* as an entity that is controlled by one or more political parties or operates for the benefit of one or more political parties.

<sup>18</sup> *Electoral Act 1907* s 175N.

<sup>19</sup> *ibid.*, s 175.

- in the case of a gift made on behalf of the members of an unincorporated association, the name of the association and the names and addresses of the members of the executive committee (however described) of the association
- in the case of a gift purportedly made out of a trust fund or out of the funds of a foundation, the names and addresses of the trustees of the fund or of the funds of the foundation and of the person for whose benefit the fund or funds are held, and the title or other description of the trust fund or the name of the foundation, as the case requires
- in any other case, the name and address of the person who made the gift.<sup>20</sup>

2.14 The 'specified amount' referred to in section 175N is:

\$1 500 or such greater amount as is determined and published by the Electoral Commissioner —

(a) under the regulations; and

(b) within the period of 30 days after the polling day in a general election.<sup>21</sup>

2.15 On 12 May 2017, the Western Australian Electoral Commissioner (Commissioner) published in the *Government Gazette* under regulation 3(4) of the *Electoral (Political Finance) Regulations 1996* a new specified amount of \$2 500. Thus, \$2 500 per annum is the political donation threshold at present, and all donations received by parties equal to or above this amount must have the relevant details of the donor declared.

2.16 In brief, therefore, the name and address of any donor whose gift is of \$2 500 or more will be published.

2.17 Of note is subsection 175N(4) of the Act. This reads:

For the purposes of subsection (3)(b) [details of gifts to be recorded in the annual return] the sum of the respective amounts or values of 2 or more gifts made to a political party by the same person shall be taken to be one gift but, in calculating that sum, an amount or value that is less than one-third of the specified amount need not be counted.

2.18 Thus, donors who make several donations that are less than one-third of the specified amount (\$2 500) do not have to have their names or details disclosed, even when they total more than that specified amount. A series of donations under \$833 by the same person need not have the details of the donor published.

2.19 This provision was highlighted for criticism by the LA Committee, which pointed out that this provision 'limits the level of transparency offered by the disclosure scheme.'<sup>22</sup> Should the Bill become law, however, that provision would disappear by virtue of clause 12.

### Disclosure regime

2.20 The disclosure regime, and in particular the ability to achieve compliance by lodging the Commonwealth Act return, was accused of lacking robustness by the LA Committee—it reported:

Although the Electoral Act 1907 requires political parties to disclose all donations of the specified amount, any party registered at state and federal levels can use their federal disclosure return to fulfil their state disclosure obligations. The current

<sup>20</sup> *ibid.*, s 175M.

<sup>21</sup> *ibid.*, s 175N.

<sup>22</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, 2017 *WA State Election: Maintaining confidence in our electoral process*, February 2018, p 61.

federal disclosure threshold for donations is \$13 500<sup>23</sup> — over five times that of the state threshold.<sup>24</sup>

2.21 Moreover, the LA Committee criticised the current regime on timeliness of disclosures. It stated:

Under the current regime, disclosure occurs long after polling day. The deadline for election-related returns is 15 weeks after polling day. The deadline for annual returns is 30 November. While the regime provides the transparency necessary to prevent graft and donors from gaining undue influence, it does not assist electors when casting their votes. The annual return deadline in particular reduces the timeliness of disclosure. Theoretically, if a party received a donation on 1 July 2016, disclosure might not have occurred until 30 November 2017, almost 17 months later.<sup>25</sup>

2.22 The LA Committee compared the situation regarding electoral returns with the online 'real-time' disclosure system operated in Queensland, which is considered later in this report (paragraphs 4.63 to 4.72).

2.23 Professor John Phillimore, Executive Director, John Curtin Institute of Public Policy, Curtin University also raised Western Australia's disclosure regime as an issue to be tackled. In his submission to the inquiry, he wrote:

the Bill proposes that political parties and associated entities be required to submit quarterly returns disclosing donations and gifts, rather than the current annual reporting cycle. The Bill also proposes reducing the post-election disclosure reporting period from 15 weeks to 12 weeks. While both proposals are a welcome improvement on current practice, they do not really go far enough, especially concerning election donations. Ongoing or 'real time' disclosures are quite possible – Queensland has legislated for this. Other States have much shorter reporting periods than WA – in South Australia, parties are required to disclose donations over the gift threshold every seven days, while for NSW and Victoria the reporting period is 21 days. Transparency requires that the public, the media or any person wishing to scrutinise donations, has the opportunity to do so at the time, rather than much later when votes have already been cast or a controversy has died down.<sup>26</sup>

## A ban on foreign donations

2.24 The Minister stated in his second reading speech that the provisions would ensure that:

for those parties that are registered only in WA, the ban on foreign donations already in effect federally will also apply.<sup>27</sup>

2.25 In fact, those provisions that are already applicable to parties registered with the Australian Electoral Commission amount to a restriction on the receipt of foreign donations rather than an outright ban, as is proposed for Western Australia in the Bill.

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<sup>23</sup> The current Commonwealth threshold amount is \$14 300. See: [https://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/threshold.htm](https://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm). Viewed 31 October 2020.

<sup>24</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018, p 58.

<sup>25</sup> *ibid.*, p 59.

<sup>26</sup> Submission 2 from Professor John Phillimore, Curtin University, 1 October 2020, p 2.

<sup>27</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4946.

## Commonwealth regime

- 2.26 The Commonwealth Act restricts the gifts or donations that the following entities or people can receive from foreign donors:
- a political entity (meaning a registered political party, a State branch, a candidate or a member of a Senate group)
  - a political campaigner (meaning a person or body registered as a political campaigner).<sup>28</sup>
- 2.27 Notably, this does not provide for an outright ban on foreign donations—it allows for donations of up to \$1 000 to be accepted without obtaining affirmation that the donor is not foreign. It also allows for ‘bucket donations’ of up to \$100 where the donor is known to be foreign.<sup>29</sup>
- 2.28 Under the Commonwealth Act, a ‘foreign donor’ is defined as:
- (a) a body politic of a foreign country;
  - (b) a body politic of a part of a foreign country;
  - (c) a part of a body politic mentioned in paragraph (a) or (b);
  - (d) a foreign public enterprise;
  - (e) an entity (whether or not incorporated) that does not meet any of the following conditions:
    1. the entity is incorporated in Australia;
    2. the entity’s head office is in Australia;
    3. the entity’s principal place of activity is, or is in, Australia
  - (f) an individual who is none of the following:
    - (i) an elector;
    - (ii) an Australian citizen;
    - (iii) an Australian resident;
    - (iv) a New Zealand citizen who holds a Subclass 444 (Special Category) visa under the Migration Act 1958 (or if that Subclass ceases to exist, the kind of visa that replaces that Subclass).<sup>30</sup>
- 2.29 The Commonwealth provisions regarding foreign donations are contravened (by the recipient and/or the foreign donor) if a gift of an amount or value of \$1 000 or higher is made and ‘acceptable action’ has not been taken in relation to the gift within six weeks. This means that:
- the donor must affirm that he/she or it is not a foreign donor

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<sup>28</sup> *Commonwealth Electoral Act 1918* (Cth), s 302D. A person or body (not a party or a Member of Parliament) must be registered as a political campaigner if the amount of electoral expenditure incurred by or with the authority of the person or entity during that or any one of the previous 3 financial years is \$500 000 or more, or the amount of electoral expenditure incurred by or with the authority of the person or entity during that financial year is \$100 000 or more, and during the previous financial year was at least two-thirds of the revenue of the person or entity for that financial year (section 287F).

<sup>29</sup> *ibid.*, s 302F.

<sup>30</sup> *ibid.*, s 287AA.

- the recipient must obtain appropriate donor information (section 302P sets out a list of acceptable documentation to prove the point) to establish that the donor was not a foreign donor, or must have taken reasonable steps to verify that this is the case.
- 2.30 Otherwise the recipient must return the donation. In both instances, the recipient must not, at any time during that six-week period, know, or have reasonable grounds to believe, that the donor was a foreign donor.
- 2.31 The penalty for a breach of this provision committed by the gift recipient (the agent of a political entity or the financial controller of a political campaigner) is 200 units (\$44 400, as of 1 July 2020).<sup>31</sup> The person in breach is also liable to a civil penalty of the higher amount of 200 units or, 'if there is sufficient evidence for the court to determine the amount or value, or an estimate of the amount or value, of the gift at the time the gift is made—3 times that amount or value'.<sup>32</sup> The ban also applies to third parties—a penalty of 50 units applies (\$11 000), and a civil penalty of \$22 000 or three times the amount or value of the gift if there is sufficient evidence.<sup>33</sup>
- 2.32 An associated entity for the purposes of the Commonwealth Act is defined as an entity that:
- is controlled by one or more registered political parties
  - operates wholly, or to a significant extent, for the benefit of one or more registered political parties
  - a financial member of a registered political party (or another person is a financial member of a registered political party on behalf of the entity)
  - has voting rights in a registered political party (or another person has voting rights in a registered political party on behalf of the entity).<sup>34</sup>
- 2.33 Notably, there are no separate overt restrictions on such associated entities receiving gifts from foreign donors. However anti-avoidance provisions in the Commonwealth Act prevent the channelling of foreign gifts to a political party, candidate, Senate group, political campaigner or third party via an associated entity. Those anti-avoidance measures are contained in section 287S of the Commonwealth Act. This provision simply states that the Australian Electoral Commissioner may give a person or entity (a 'relevant person') a written notice if that person enters into a scheme to avoid the restrictions on foreign donations by:
- giving a series of gifts of a value below the threshold, which added together amount to more than \$1 000
  - forming or participating in the formation of, a body corporate in Australia
  - otherwise facilitating the payment.
- The notice given by Australian Electoral Commissioner must specify the alleged conduct, and then require the relevant person not to enter into the scheme, not to begin to carry out the scheme or not to continue to carry out the scheme.
- 2.34 A relevant person who enters into conduct in contravention of the notice commits an offence punishable with a fine of 200 units (\$44 400). Again, a civil penalty also applies of the higher amount of 200 units or, if there is sufficient evidence for the court to determine the amount or value, or an estimate of the amount or value, of the gift at the time the gift is made—three times that amount or value.

<sup>31</sup> *Crimes Act 1924* (Cth) s 4AA(1A).

<sup>32</sup> *Commonwealth Electoral Act 1918* (Cth) s 302D(3).

<sup>33</sup> *ibid.*, s 302E.

<sup>34</sup> *ibid.*, s 287H.

## CHAPTER 3

# Proposed amendments for Part VI of the *Electoral Act 1907*

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### Provisions of the Bill

- 3.1 A number of clauses of the Bill would set the framework for the more substantive provisions. These are outlined in this chapter, along with a number of 'tidying-up' provisions.

#### Clause 4

- 3.2 Clause 4 of the Bill would amend one definition in section 4(1) of the Act, being that for 'Australian citizen'. This definition is relevant for the purposes of the provisions later in the Bill relating to foreign donations.

- 3.3 The proposed amendment reads:

*Australian citizen* has the meaning given in the *Australian Citizenship Act 2007* (Commonwealth) section 4.

- 3.4 That section of the *Australian Citizenship Act 2007* (Cth) reads:

(1) For the purposes of this Act, Australian citizen means a person who:

(a) is an Australian citizen under Division 1 or 2 of Part 2; or

(b) satisfies both of the following:

(i) the person was an Australian citizen under the *Australian Citizenship Act 1948* immediately before the commencement day;

(ii) the person has not ceased to be an Australian citizen under this Act.

*Citizenship under the old Act*

(2) If, under this Act, it is necessary to work out if a person was an Australian citizen at a time before the commencement day, work that out under the *Australian Citizenship Act 1948* as in force at that time.

- 3.5 The current definition in section 4(1) of the Act is 'a person who is an Australian citizen under the Australian Citizenship Act 1948 of the Commonwealth or any Act amending that Act or substituted therefor'. Footnote 1 to the Act records that the 1948 Act was:

Repealed by the *Australian Citizenship (Transitional and Consequential) Act 2007* Sch. 1 Part 2. Now see the *Australian Citizenship Act 2007* (Cwlth).

- 3.6 The amendment would therefore appear to have no practical effect as a matter of law, but is justified as an updating clarification and simplification.

#### Clauses 5 and 6

- 3.7 Minor amendments to tidy-up the Act would be made by clauses 5 and 6.

- 3.8 References to section 88(1) of the Act (in sections 87(8) and 99A(2)) are removed—this is because that provision was repealed in 1967 by section 11 of the *Electoral Act Amendment Act 1967*. Section 88(1) had, prior to its repeal, permitted candidates to withdraw their nomination after nominations had been declared. If that withdrawal left just one candidate standing, the 'last mentioned' candidate was declared to be elected.

## Clause 7

- 3.9 Clause 7 would remove the words ‘disclosure of’ from the title to Part VI of the Act, which currently reads ‘Electoral funding and disclosure of gifts, income and expenditure’. This is presumably because the Part now deals with gifts in a broader sense than just the disclosure of them (for example, the banning of foreign donations).

## Clause 8

- 3.10 Clause 8 would make changes to the definitions in section 175 (‘Terms used’) for Part VI of the Act. They are relevant for the provisions proposed later in the Bill, which are scrutinised in the following chapters of this report.
- 3.11 The present definitions of ‘election period’ and ‘specified amount’ would be deleted—‘election period’ (the period between the issuing of the writ and polling day) would be replaced for the purposes of the cap on expenditure by the ‘capped expenditure period’, which means, for the purposes of State general elections, the period between 1 October and polling day. For a by-election, the period remains that between the issue of the writ and polling day.
- 3.12 Clearly, as the Committee is not due to report until 12 November 2020, that date of 1 October will be missed in respect of the forthcoming March 2021 election. The Committee was concerned that the Government may seek to make the provisions retrospective. If that proved to be the case, the Committee could envisage a problem with parties, candidates, groups and third parties that are spending money now, in good faith, ahead of the 13 March 2020 election, only to find that this expenditure is to be included retrospectively in the expenditure cap. However, in his response to the Committee’s letter of 8 October 2020, the Minister confirmed that this is not the Government’s intention:

As the commencement date of 1 October 2020 has been missed, it is intended that should the Bill be passed, the expenditure caps will be introduced on the day after assent through to Election Day.

Expenditure incurred prior to the commencement will not be counted towards the expenditure cap.<sup>35</sup>

### FINDING 1

It is the Government’s stated intention that expenditure incurred by election participants before the commencement date of the *Electoral Amendment Act 2020* (should it become law) will not be counted towards relevant expenditure caps.

### RECOMMENDATION 1

That in clause 8(2) of the Electoral Amendment Bill 2020, the definition of ‘capped expenditure period’ be amended, for the purposes of the 2021 State general election, to reflect the Government’s stated intention.

- 3.13 ‘Specified amount’ (for the purposes of provisions regarding the declaration of donations) would be defined as \$1 000—it is currently \$2 500 (see paragraph 2.15 of this report for further details). The effect of this amendment, and a comparison with provisions in other States and Territories, may be found at paragraphs 4.1 to 4.4 of this report.

<sup>35</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, letter, 21 October 2020, p 2.

- 3.14 Other proposed additions to the definitions section are:
- 'business day'—not a Saturday, Sunday or a public holiday
  - 'CPI'—the all groups consumer price index for Perth published by the Australian Statistician referred to in section 5 of the *Australian Bureau of Statistics Act 1975* (Cth)
  - 'quarter' means the quarters beginning 1 July, 1 October, 1 January and 1 April.
- 3.15 The definition of 'broadcast' (for the purposes of what amounts to electoral expenditure) would be amended to add the Internet or another form of electronic communication to the current listed media of radio and television. In the definition of 'electoral expenditure', all references to 'election period' would be replaced with 'capped expenditure period' (see paragraph 3.11).

### **Clause 9**

- 3.16 Clause 9 would delete section 175A(6)—the Commissioner's power to determine 'specified amounts' for the purposes of the declaration of donations (paragraph 2.15). Therefore, the threshold for declaring a donation would be set at \$1 000 without a statutory ability to vary that figure.
- 3.17 References to Division 4 of the Act in section 175A ('Interpretation of this Part') have references to Division 4A added to them—this is the new Division proposed to be added to the Act dealing with caps on electoral expenditure (paragraphs 6.5 to 6.16).

### **Clauses 10 and 11**

- 3.18 The definition of 'CPI' in section 175LC(3) of the Act would be removed, as it would be dealt with in the definitions section (paragraph 0).
- 3.19 The heading to Division 3 of Part VI of the Act would be amended to 'Gifts and other income' instead of 'Disclosure of gifts and other income', following the change to the heading for the whole of Part VI (paragraph 3.9).

## CHAPTER 4

### Declaration of gifts and other income

- 4.1 As discussed at paragraph 3.13, the specified amount (for the purposes of the provisions below regarding the declaration of donations) would be defined as \$1 000. Thus, the relevant details of each gift of \$1 000 or more would have to be declared by a party or associated entity and published by WAEC. The relevant details of what must be disclosed are set out at paragraph 2.13 of this report, but essentially for ease of reference, they are the amount or value of the gift, the date on which it was made, and the name and address of the donor.<sup>36</sup>
- 4.2 This amendment to the specified amount would bring Western Australia into line with the statutory limits applicable in most other States. Tasmania has no State legislation regarding the disclosure of gifts to political parties.
- 4.3 Notably, the definition of specified amount proposed for the Bill has no provision for future indexation—it is a fixed amount. Some of the following threshold figures for other jurisdictions are subject to indexation or provision for future uplift.
- 4.4 The figures in Table 1 are those set out in statute:

Table 1. *Declarable gift threshold by jurisdiction*

WA	Cth	NSW	Qld	SA	Vic	Tas	ACT	NT
\$2 500	\$10 000	\$1 000	\$1 000	\$5 000	\$1 000	N/A	\$1 000	\$1 500
Proposed \$1 000	Provision for future uplift	Indexed		Indexed				
Fixed								

[Source: *Electoral Act 1907*, s 175; *Electoral Amendment Bill 2020*, cl 8; *Commonwealth Electoral Act 1918* (Cth), s 287; *Electoral Funding Act 2018* (NSW), s 6; *Electoral Act 1992* (Qld), s 201A; *Electoral Act 1995* (SA), s 130ZF; *Electoral Act 2002* (Vic), s 216; *Electoral Act 1992* (ACT), s 216A; *Electoral Act 2004* (NT), s 194.]

### Provisions of the Bill

#### Clause 12

- 4.5 The current sections 175N and 175NA regarding annual returns by political parties and associated entities would be replaced by two new sections with the same numbering. Paragraph 2.8 sets out the current provisions.
- 4.6 The proposed new section 175N, applicable to political parties, would read as follows:

#### **175N. Quarterly returns as to gifts and income received by political party**

- (1) The agent of a political party must, within 10 business days after the end of each quarter, lodge a return with the Electoral Commissioner in an approved form setting out the following details —
- (a) the amount or value of all gifts received by the party during the quarter;
  - (b) all other income received by the party during the quarter;
  - (c) the relevant details of each gift —

<sup>36</sup> *Electoral Act 1907* s 175M.

- (i) received by the party during the financial year in which the quarter occurs; and
  - (ii) the amount or value of which equals or exceeds the specified amount.
- (2) For the purposes of subsection (1)(c), 2 or more gifts made to the political party by the same person, whether or not in the same quarter of the financial year, are taken to be 1 gift.
- (3) The following gifts and income received by the political party do not have to be included in the return —
- (a) gifts made to the party for a purpose related to an election or by-election under the *Commonwealth Electoral Act 1918*;
  - (b) other gifts and income which the party has used, or will use, for a purpose related to an election or by-election under the *Commonwealth Electoral Act 1918*;
  - (c) income that consists of a payment received under Division 2A.
- 4.7 The list of what the returns must contain, including the relevant details of donors who donate above the specified amount (\$1 000), remains the same, as does the list of what need not be declared.
- 4.8 However, the option of complying with State disclosure provisions by lodging the return or part of the return required under the Commonwealth Act would disappear.

## FINDING 2

The option of complying with section 175N of the *Electoral Act 1907* (returns to be lodged by political parties) by submitting the return or part of the return required by the *Commonwealth Electoral Act 1918* (Cth) would be removed by clause 12 of the Electoral Amendment Bill 2020.

## FINDING 3

The new provisions proposed under clause 12 of the Electoral Amendment Bill 2020 increase the frequency of returns to be lodged by political parties, but do not change the nature of what must be disclosed and what need not be disclosed.

- 4.9 The new section 175NA, applying to associated entities, would read as follows:

### **175NA. Quarterly returns as to gifts and income received by associated entity**

- (1) If an entity is an associated entity at any time during a quarter, the financial controller of the entity must, within 10 business days after the end of the quarter, lodge a return with the Electoral Commissioner in an approved form setting out the following details —
- (a) the amount or value of all gifts received by the entity during the quarter;
  - (b) all other income received by the entity during the quarter;
  - (c) the relevant details of each gift —
    - (i) received by the entity during the financial year in which the quarter occurs; and
    - (ii) the amount or value of which equals or exceeds the specified amount.

(2) For the purposes of subsection (1)(c), 2 or more gifts made to the entity by the same person, whether or not in the same quarter of the financial year, are taken to be 1 gift.

(3) Gifts and income received by the entity at a time when it was not an associated entity do not have to be included in the return.

4.10 As for political parties, the list of what the returns must contain remains the same, as does the list of what need not be declared. Again, the current option of complying with State disclosure provisions by lodging the return or part of the return required under the Commonwealth Act would disappear.

#### **FINDING 4**

The option of complying with section 175NA of the *Electoral Act 1907* (returns to be lodged by associated entities) by submitting the return or part of the return required by the *Commonwealth Electoral Act 1918* (Cth) would be removed by clause 12 of the Electoral Amendment Bill 2020.

#### **FINDING 5**

The new provisions proposed under clause 12 of the Electoral Amendment Bill 2020 increase the frequency of returns to be lodged by associated entities, but do not change the nature of what must be disclosed and what need not be disclosed.

#### *Xamon amendments*

4.11 Amendment 1/12 placed on Supplementary Notice Paper 100, Issue No.2, (the SNP) by Hon Alison Xamon MLC would delete subsection (3) of new section 175N, the list of what need not be included in the return (that is, gifts and income received for purposes related to Commonwealth elections or by-elections and reimbursement amounts received under Division 2A).

4.12 A further series of proposed amendments by Hon Alison Xamon MLC, being amendments 8/NC11A, 9/12, and 10/12 of the SNP, would have the effect of compelling political parties to include in quarterly returns the relevant details of all other income received above \$1 000. They would amend section 175M ('Relevant details of gifts, defined'), amending the heading to 'Relevant details of gifts and income', and inserting a new subsection (2) defining the 'relevant details' of other income below the definition of 'relevant details' for gifts. Proposed amendment 8/NC11A would add a new subsection (2) to section 175M of the Act, reading:

For the purposes of this Division the relevant details of other income are —

- (a) the amount of the income; and
- (b) the date on which the income was received; and
- (c) the name and address of the person from whom the income was received.

4.13 Proposed amendment 9/12 on the SNP would insert a subsection (1)(d) to new section 175N, adding the 'relevant details' of other income to those of gifts to be included in quarterly returns by political parties, so that the following would also need to be declared quarterly:

- (d) the relevant details of other income —
  - (i) received by the party during the financial year in which the quarter occurs; and

(ii) the amount of which equals or exceeds the specified amount.

4.14 A new subsection 175N(2A) is proposed by Hon Alison Xamon MLC at proposed amendment 10/12 of the SNP. It would read:

(2A) For the purposes of subsection (1)(d), if the political party receives 2 or more amounts of income from the same person, whether or not in the same quarter of the financial year, the amounts must be aggregated and are taken to be a single amount of income.

4.15 Finally, further proposed amendments 11/12 and 12/12 on the SNP would align proposed new sections 175N and 175NA, so that the added responsibility of disclosing relevant details of other income received would apply to associated entities as well as political parties.

4.16 The Committee received no submissions or evidence regarding the form or substance of the amendments placed on the SNP by Hon Alison Xamon MLC.

### **Clause 13**

4.17 This clause would insert new provisions regarding the receipt of donations from foreign donors. This will be discussed in the next chapter.

## **Nil returns**

### **Clause 14**

4.18 In order to complete the list of the Bill's proposals regarding disclosures, clause 14 is mentioned here. It would make amendments so that associated entities would be added to the list of election participants who need to lodge returns even when no gifts or other income were received during the relevant period.

4.19 Accordingly, the clause would amend the heading to section 175S, which would become 'Additional requirements for returns under s. 175N, 175NA, 175O and 175P'. A further amendment to section 175S inserts 'or income' after 'gifts' for the purposes of a nil-return, to reflect earlier changes.

## **Issues for the Committee**

4.20 The Committee identified, with the assistance of submitters and witnesses, six key issues arising out of the proposed provisions regarding declarations of gifts and other income:

- the proposed amount of the declaration threshold (the specified amount)
- whether monies raised from political fundraising events should be declarable
- whether a general overall cap on donations from one source should be applied
- whether donors should be required to make returns, as well as recipients
- the timing and frequency of required returns
- the removal of the ability to comply with the provisions concerning State returns by submitting that required under the Commonwealth Act.

### **Amount of threshold**

4.21 Table 1 illustrates that a threshold for the declaration of the details of a donor of \$1 000 would bring Western Australia into line with most other jurisdictions.

4.22 Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, was of the view that:

The disclosure threshold should be set at a level where any donation which may have a significant impact on an election campaign is declared, while small donations can remain anonymous. Western Australia's threshold for undeclared political donations is out of kilter with disclosure thresholds in other state and territory jurisdictions across the country. The proposed disclosure threshold of \$1000 (fixed) is comparable to most other Australian jurisdictions and would appear reasonable. A donation of \$1000 or more is significant and may have the capacity to aid a political campaign.<sup>37</sup>

4.23 Honorary Professor Dr Colleen Lewis of the Australian Studies Institute, Australian National University, believed that 'the WA amendment to reduce the cap on accumulative, yearly disclosable donations to \$1000 is highly commendable. It certainly levels the playing field between the rich and powerful and interested and concerned citizens'.<sup>38</sup>

4.24 The Opposition parties in the Legislative Assembly were concerned that this lowered threshold could deter everyday 'Mum and Dad' donors who might wish to support a local candidate but would not wish to have their names published. Dr DJ Honey MLA stated:

We know from history that when people's names are revealed in the press in certain areas, those people are victimised and vilified.<sup>39</sup>

4.25 This was put to the panel of academics who appeared before the Committee. Associate Professor Drum responded:

I think that argument you could legitimately put whether that cap was \$1 000, \$5 000 or \$10 000. You could have a larger company that donated \$10 000 that likewise was subjected to some kind of unfair discrimination or criticism. Unfortunately, when you enter the political domain and seek to donate to a political party, there can be some backlash that comes with that. We would not want to see anyone bullied for their political views, but the reality is that people will take a different view and respond. I do not think that is material to whether that is \$1 000 or the current \$2 500. The same argument applies to the \$2 500 limit.<sup>40</sup>

4.26 Associate Professor Drum's view doubtless has veracity, but the fact remains that the lowering of the declaration threshold to \$1 000 will mean that more people will have their identities published by WAEC.

4.27 The Committee was concerned that the proposed amendment to make the specified amount 'the amount of \$1 000' would lead to donors to being unnecessarily captured by disclosure laws for donating one cent more than \$999.99. Amending this to 'any amount above \$1 000' would establish a requirement which is simpler and easier to communicate, whilst achieving the same Government goal.

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<sup>37</sup> Submission 5 from Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, 2 October 2020, pp 2-3.

<sup>38</sup> Submission 6 from Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University. 3 October 2020, p 3.

<sup>39</sup> Dr DJ Honey MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4977.

<sup>40</sup> Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, transcript of evidence, 9 October 2020, p 17.

## FINDING 6

A gift or donation to a political party or associated entity of \$1 000 should be permitted to be made without disclosure of the details of the gift or donation being necessary, for the sake of simplicity and ease of communication.

## RECOMMENDATION 2

That the definition of specified amount in clause 8(2) of the Electoral Amendment Bill 2020 be amended to 'an amount above \$1 000'.

- 4.28 The Committee also queried whether the 'specified amount' should be \$1 500, to match the Australian Tax Office's tax deductible threshold<sup>41</sup>, a matter raised by Hon Nick Goiran MLC during the hearing held with an academic panel on 9 October 2020. A donation to a political party or associated entity of between \$1 000 and \$1 500 would be publicly disclosable under this Bill, but not under the taxation regime.<sup>42</sup>

## RECOMMENDATION 3

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the specified amount set out at Clause 8(2) of the Electoral Amendment Bill 2020 was not set at \$1 500 to align with the tax deductible threshold for political donations.

- 4.29 Finally, the Committee noted that, in some jurisdictions, the specified amount that may be gifted or donated without disclosure provisions applying is indexed (see Table 1). As will be seen in chapter 6 of this report, it is proposed that caps on electoral expenditure will be subject to indexation should the Bill become law, and the Committee queried why the indexation measures did not apply equally to the specified amount for gifts or donations.

## RECOMMENDATION 4

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the specified amount set out at Clause 8(2) of the Electoral Amendment Bill 2020 would not be subject to indexation.

## Fundraising events

- 4.30 Whether fundraising events, such as a dinner hosted by a Member of Parliament to which tickets are purchased, might be considered a donation or 'gift', was raised during the course of the second reading debate on the Bill in the Legislative Assembly. Dr MD Nahan MLA said:

I put on a fundraiser and they show up. Is that a donation? To be clear, they are not just paying for the meal. They are paying a bit more.<sup>43</sup>

<sup>41</sup> Australian Taxation Office, 25 July 2017. See: <https://www.ato.gov.au/non-profit/gifts-and-fundraising/in-detail/fundraising/claiming-political-contributions-and-gifts/>. Viewed 1 November 2020.

<sup>42</sup> Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, Associate Professor Martin Drum, Associate Professor, Politics and International Relations, University of Notre Dame, Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, transcript of evidence, 9 October 2020, pp 20-21.

<sup>43</sup> Dr MD Nahan MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 August 2020, p 5019.

- 4.31 The Attorney General stated in reply:
- Fundraisers are dealt with separately from gifts. The definition of “gift” is defined under section 175 of the Electoral Act and states—
- means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration.
- So if someone goes to a fundraiser to buy their dinner, there is consideration.<sup>44</sup>
- 4.32 In fact, as noted at paragraph 2.12, the full definition of ‘gift’ at section 175 of the Act is:
- any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money’s worth or **with inadequate consideration**, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include an annual subscription of not more than \$200 paid by a person to a political party or to a division of a political party in respect of the person’s membership of the party or division. (emphasis added)
- 4.33 The Committee is concerned that the position regarding fundraising events is unclear on this basis.
- 4.34 In Queensland, the definition of ‘gift’ includes a ‘fundraising contribution’ (e.g. a ticket to a dinner with a Member of Parliament) above \$200, regardless of the value of any consideration received.<sup>45</sup>
- 4.35 In the Australian Capital Territory (ACT), fundraising contributions made by a person or organisation, including entry fees for a fundraising event or items purchased at an auction, are not considered a gift if the total amount is \$250 or less per fundraising event. However, any amount that exceeds \$250 is considered a gift to the beneficiary of the fundraising event.<sup>46</sup>
- 4.36 The *Electoral Funding Act 2018* (NSW) (NSW Act) requires the disclosure of gifts and donations to include, in connection with fundraising ventures or functions during the relevant disclosure period, either the net or gross proceeds of each such venture or function, and details of each such venture or function (including a brief description of its nature and the date on which or period in which it was held).<sup>47</sup>
- 4.37 South Australia takes a different approach—section 130ZL(1) of the *Electoral Act 1985* (SA) states:
- It is unlawful for a registered political party to receive an amount of money of more than \$500 for entry to a relevant event.
- 4.38 Section 130ZL(2) defines such a relevant event as an event that:
- (a) is intended to raise money for the benefit of a registered political party; and
- (b) is advertised or promoted as an event at which, or in connection with which, attendees will be given access to—
- (i) a Minister of the Crown or a Member of the Parliament of South Australia; or

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<sup>44</sup> Hon JR Quigley MLA, Attorney General, Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 13 August 2020, p 5019.

<sup>45</sup> *Electoral Act 1992* (Qld) s 201(2)(d).

<sup>46</sup> *Electoral Act 1992* (ACT) s 198AA(3)(d).

<sup>47</sup> *Electoral Funding Act 2018* (NSW) s 19(5).

(ii) a member of staff of a Minister of the Crown or a Member of the Parliament of South Australia.

4.39 Honorary Professor Lewis spoke of such fundraisers in her submission:

As welcome as the \$1000 cap is, it does not appear to extend to the costs associated with gaining entry to fundraising events held by political parties. I am not referring here to modest “sausage sizzles” where hard working party members pay \$50 to attend a fundraising barbecue. I am referring to the cost of entry to events, which for a considerable sum of money, provide an opportunity to have lunch or dinner with a minister(s) and/or premier and to spend time conversing with these powerful legislators. Opposition parties charge similar entry fees to dine with the leader of the opposition and shadow ministers. Entrance fees to these functions can be in the thousands of dollars, a sum which is well beyond the reach of the “ordinary” voter. Public interest inspired amendments are clearly required here. Attendance at such functions should not be allowed to exceed the \$1000 cap associated with disclosable donations and entrance fees must be publicly disclosed within 24-48 hours of the event taking place ... The disclosure needs to go beyond the name of the person attending. It must also include the organisation the person(s) is associated with and their position or relationship to that organisation, be it as an employee, consultant, lobbyist etc.<sup>48</sup>

4.40 Gareth Doogue, Secretary of The Greens Western Australia (Greens), submitted that:

There are a number of avenues for directing funds to political parties and candidates that do not involve ‘gifts’. We are particularly concerned about “Cash for Access” practices and other forms of fundraising dinners etc that may not be classified as gifts. The Bill should ensure that where an individual or organisation contributes above the threshold that contribution is disclosed – regardless of whether the contribution is a ‘gift’ or ‘other monies’.<sup>49</sup>

#### **FINDING 7**

The cost of attending fundraising events will generally not meet the definition of a ‘gift’, and will continue not to be disclosable in returns to be lodged by political parties and associated entities.

#### **FINDING 8**

The definition of a ‘gift’ includes ‘a disposition made ... with inadequate consideration’. The interpretation of this definition as it relates to fundraising events is unclear.

#### **RECOMMENDATION 5**

That the Minister for Electoral Affairs provides to the Legislative Council an explanation of how the definition of ‘gifts’ as it relates to fundraising events should be interpreted.

### **General cap on donations**

4.41 The recently passed *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld) has, amongst its provisions, one that will prevent a party or candidate accepting a donation that exceeds the donation cap from one person over the four-year electoral period. The cap is \$4 000 for a party and \$6 000 for a candidate. It will

<sup>48</sup> Submission 6 from Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, 3 October 2020, p 3.

<sup>49</sup> Submission 7 from Gareth Doogue, Secretary, The Greens Western Australia, 6 October 2020, p 1.

also prohibit such a person from giving more than \$10 000 over that four-year parliamentary term to registered political parties, their associated entities or to candidates.<sup>50</sup>

- 4.42 The penalty for a breach of either, by donor or recipient, is 200 penalty units (\$26 690). The amount by which a donation exceeds the cap may be recovered by the State.<sup>51</sup>
- 4.43 These provisions were not in force for the October 2020 election, but will commence on 1 July 2022.<sup>52</sup>
- 4.44 In Victoria, a general donation cap was imposed in 2018 by section 217D of the *Electoral Act 2002* (Vic), applicable to donations made to a party, candidate, group, elected member, associated entity, third party or a nominated entity of a political party. The cap is currently \$4 000 per four-year parliamentary period.
- 4.45 A similar prohibition in New South Wales restricts donations to \$6 100 for political parties and \$2 700 for elected members, candidates, third parties or associated entities.<sup>53</sup>
- 4.46 Professor Benjamin Reilly, Professor of Political Science and International Relations at the University of Western Australia, pointed out that the Bill contains no proposals for such an overall donation cap:

It thus appears possible for limitless donations to a party to be made, even if there are caps on the expenditure permitted.<sup>54</sup>

### Declarations by donors

- 4.47 Professor Reilly told the Committee that:

I remain concerned at the self-regulated nature of WA's funding and disclosure regime, which relies on the parties themselves as the beneficiaries of any donations also being the ones responsible for declaring these to the WAEC. Given that donors are not required to declare their donations, this could surely present temptations to unscrupulous parties or candidates to avoid declaration of any gifts received, in the knowledge that these would be unlikely to come to light if all participants wish to keep such donations secret.<sup>55</sup>

- 4.48 Professor Reilly is correct in this—there is no provision in the Act, or in the amendments proposed by the Bill, requiring donors to submit a return. New sections 175N and 175NA would require quarterly returns from parties and associated bodies, whilst sections 175O, 175P and 175Q already mandate returns regarding gifts received by candidates, groups and third parties during the disclosure period.<sup>56</sup>
- 4.49 Section 12(3) of the NSW Act, for example, requires disclosure of 'reportable political donations made by a major political donor who has, during the relevant disclosure period, made a reportable political donation of or exceeding \$1,000'. A reportable political donation

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<sup>50</sup> *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld) s 252.

<sup>51</sup> *ibid.*, ss 255 and 259A.

<sup>52</sup> Electoral Commission Queensland. See: <https://www.ecq.qld.gov.au/election-participants/state-election-participants/registered-political-parties>. Viewed 16 October 2020.

<sup>53</sup> *Electoral Funding Act 2018* (NSW) s 23.

<sup>54</sup> Submission 1 from Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, 1 October 2020, p 2.

<sup>55</sup> *ibid.*

<sup>56</sup> 'Disclosure period' is defined in sections 175O(2), 175P(2) and 175Q(4) of the *Electoral Act 1907* respectively, generally the period of the four-year parliamentary term.

is a donation to or for the benefit of a political party, elected member, group, candidate, associated entity or third party campaigner.

4.50 Under section 216 of the *Electoral Act 2002* (Vic), a donor must provide to the Victorian Electoral Commission a disclosure return for each political donation made during a financial year that is equal to or exceeds the threshold, within 21 days of the making of the political donation. In Queensland, gifts above the threshold figure must be declared by the donor under section 265 of *the Electoral Act 1992* (Qld) (Queensland Act).

4.51 It is correct that the relevant details of donors who make donations above the specified amount of \$1 000 will need to be declared by relevant recipients in Western Australia should the Bill become law. However, requiring the donors to make corresponding declarations would allow for cross-checking by WAEC.

4.52 The Committee asked the Commissioner, Robert Kennedy, and his colleagues about this when they appeared to give evidence on 9 October 2020. The Commissioner said:

The only observation I make about that is that it would represent an extra administrative burden on us in terms of chasing up that kind of thing. As I think I said before, our principle interest in this legislation is the impact it will have on our staff and on our stakeholders in terms of the parties ... and trying to keep things as simple and straight forward for them as it is for us.<sup>57</sup>

4.53 Louis Gargan, Manager Legislation, Communications and Human Resources of WAEC, added:

I think, Madam Chair, a bit of context to it. In New South Wales donors have to declare, but New South Wales has a comprehensive funding and disclosure team of over 30 people. The WA Electoral Commission has two people in the funding and disclosure team. It is also a question of resources, which I think is important to acknowledge.<sup>58</sup>

### **Removal of ability to comply through a unified return**

4.54 As reported at paragraph 4.7, the option for dually registered parties of complying with State provisions by lodging the return or part of the return required under the Commonwealth Act would disappear with the replacement of section 175N.

4.55 This was a matter of concern to the Liberal Party of Australia (Western Australian Division) (Liberals). It submitted:

It appears counter-intuitive to remove the current, more streamlined system that allows candidates and parties to comply with both Commonwealth and State requirements through the lodgement of a single, unified Annual Return.

...

This is a substantial change from the current requirements and there does not appear to be a clear explanation of the public benefit this seeks to provide, or an understanding of the significant administrative and financial burden this will place on candidates and parties only five months prior to the State Election.<sup>59</sup>

4.56 The Greens, on the other hand, welcomed the proposal:

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<sup>57</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 8.

<sup>58</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, p 8.

<sup>59</sup> Submission 4 from Sam Calabrese, State Director, Liberal Party of Australia (Western Australian Division) Inc, 2 October 2020, p 1.

The most important transparency measure contained in this Bill is the closure of the loophole that allows State political parties to provide their AEC disclosure as their report to the WAEC. This had the effect of allowing political parties to abide by the substantially more lax Federal disclosure requirements.<sup>60</sup>

- 4.57 Section 26 of the *Electoral Legislation Amendment Act 1996* inserted subsection 175N(5), allowing parties to submit Commonwealth returns, or the relevant portion of those returns, in satisfaction of the State requirements. In his second reading speech for the Electoral Legislation Amendment Bill, Hon NF Moore MLC, Minister for Parliamentary and Electoral Affairs, introduced the rationale for this amendment as follows:

In order to remove an anomaly whereby the reporting periods for this Act and the commonwealth Electoral Act regarding the disclosure of gifts and other income received by political parties are out of step, section 175N(1) is altered so that the annual reporting date of political parties becomes 30 November. This prevents a doubled compliance burden on entities that are already fulfilling an annual disclosure commitment. Subsections (3), (4) and (5) of section 175N are amended so that the details of gifts follow the same pattern as the commonwealth Electoral Act, specifying in subsection (5) that the return submitted under section 314AB of the commonwealth Act also satisfies the requirement of the Electoral Act.<sup>61</sup>

- 4.58 The Government confirmed during the second reading debate that it was its intention that the new clauses were designed to conform with Commonwealth legislation.<sup>62</sup> The Opposition signalled its agreement to them:

The remainder of the Minister's speech deals mainly with conforming with commonwealth provisions and not imposing new onerous disclosure requirements, and that is welcomed.<sup>63</sup>

- 4.59 In responding, Minister Moore stated:

As the second reading speech outlined, the intention of the Bill is to bring the state legislation essentially into line with commonwealth legislation on the disclosure of political donations and expenditure thereof. The reason for that is obvious. These days, most political parties in Australia are subject to both laws. It makes sense from the point of view of official administration to impose similar state and commonwealth requirements for political parties.<sup>64</sup>

- 4.60 While removing measures that facilitate administrative efficiency appears to be an undesirable way to address the lack of harmonised disclosure requirements, the effect of this Bill is that there would be substantive differences between State and Commonwealth disclosure regimes.

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<sup>60</sup> Submission 7 from Gareth Doogue, Secretary, The Greens Western Australia, 6 October 2020, p 1.

<sup>61</sup> Hon NF Moore MLC, Minister for Parliamentary and Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 July 1996, p 3954.

<sup>62</sup> Hon NF Moore MLC, Minister for Parliamentary and Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 August 1996, p 4531.

<sup>63</sup> Hon JA Cowdell, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 August 1996, p 4539.

<sup>64</sup> Hon NF Moore MLC, Minister for Parliamentary and Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 August 1996, p 4827.

## Timing and frequency of returns

- 4.61 As noted at paragraph 2.8, the legislation currently requires two sets of returns to be delivered to WAEC, an annual one in respect of gifts received and another post-election return disclosing electoral expenditure. This section looks at the first of these.
- 4.62 As related above, the Act requires the annual returns to be submitted by political parties by 30 November for the preceding financial year. This would be amended to become a quarterly requirement under the Bill.

Table 2. *Timing and frequency of returns as to gifts and income by jurisdiction (political parties)*

State	Returns as to gifts and income
<b>Western Australia</b>	Annually
<b>Western Australia (proposed under Bill)</b>	Quarterly
<b>Commonwealth</b>	Annually
<b>New South Wales</b>	Within 21 days of receipt of gift Then 6 monthly
<b>Queensland</b>	Within 7 days of receipt of gift (online) Then 6 monthly
<b>South Australia</b>	Within 21 days of receipt of gift Then 6 monthly
<b>Victoria</b>	Within 21 days of receipt of a gift Then annually
<b>Tasmania</b>	N/A – no returns required
<b>Australian Capital Territory</b>	Quarterly
<b>Northern Territory</b>	Annual

[Source: *Electoral Act 1907*, s 175N; Electoral Amendment Bill 2020, cl 12; *Commonwealth Electoral Act 1917* (Cth), s 314AB; *Electoral Funding Act 2018* (NSW), s 16; *Electoral Act 2002* (SA), s 130ZN; *Electoral Act 2002* (Vic), s 216; *Electoral Act 1992* (ACT), s 216A; *Electoral Act 2004* (NT), s 205.]

- 4.63 Associate Professor Drum regarded the proposed provisions contained in the Bill as an improvement in the standards of disclosure. But, he continued:

The Bill ... does not go far enough in reducing the timing of disclosure. The most important measure of transparency around timing involves allowing the public to know what donations a candidate or political party receives prior to voting. This standard is not met by the current Bill, which instead permits political parties to accept donations, yet not declare these until 12 weeks after polling day. An election represents the will of the people at a specific period in time, so it is essential that the public is fully informed about political donations at the time of their casting a vote. Likewise, there is still no 'real time' disclosure for donations

received outside the election period, though this is less significant given that voters are not at that time preparing to pass judgement on parties or candidates.

Best practice disclosure would be for all donations to be disclosed within a matter of days after the donation has been accepted, especially during the election period. The Queensland model, where political donations must be declared within seven days, should be considered.<sup>65</sup>

- 4.64 Professor Phillimore also spoke of the Queensland system (paragraph 2.23) whilst Honorary Professor Lewis also raised the possibility of 'real-time' disclosure of political donations:

In the technological age in which we live and have lived for many years, there is no reason why a political donation cannot be disclosed to the public in 'real-time', within 24 to 48 hours of receipt of a donation. The 12-weeks outlined in the Bill is not in the public interest nor is the disclosure period strictly 12 weeks. Ten days is allowed after the 12-week period to forward required information to the WA Electoral Commission (EC). There is then an ill-defined "soon as practicable" period allotted to the EC to publish returns. This means that the WA electorate is still being expected to cast an uninformed vote. By that I mean they will not know who donated how much to whom before they cast their ballot. For example, a donation made on the second Saturday in February during an election year would not have to be disclosed to the EC until 12 weeks and 10 days later – mid to end of May. Since 2011 WA's State elections are held every four years on the second Saturday in March.<sup>66</sup>

- 4.65 In an interesting observation, she continued:

The technology exists for more genuine real-time disclosure. A 48-hour time limit has been used in New York for many years and they sometimes disclose political donations within 24 hours. Real-time transfer of funds in the banking industry are used around the world, including in Australia and some Australian states impose real time information sharing in relation to "chemist shopping".<sup>67</sup>

- 4.66 The Greens Western Australia concurred:

We were disappointed to see that the Bill proposed a quarterly disclosure, rather than a weekly disclosure. We acknowledge that there are practicality issues that need to be resolved – however a 7 day turn around can be done and has been done in Queensland.<sup>68</sup>

- 4.67 It is clear that the system used for disclosures in Queensland (the Electronic Disclosure System) is the most advanced in Australia. It is described on the website of the Electoral Commission Queensland as:

an innovative, real-time system that allows anyone to view the disclosures provided by donors, candidates and political parties. You can view these disclosures as soon as they are lodged. You can search by name, party, donor,

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<sup>65</sup> Submission 5 from Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, 2 October 2020, p 3.

<sup>66</sup> Submission 6 from Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, 3 October 2020, p 4.

<sup>67</sup> *ibid.*

<sup>68</sup> Submission 7 from Gareth Doogue, Secretary, The Greens Western Australia, 6 October 2020, p 2.

electorate, date, gift value and much more. Then, export the report to Excel or print to PDF.<sup>69</sup>

- 4.68 In its report, the LA Committee reported Antony Green, ABC political analyst, as describing the benefit of the Queensland disclosure system as follows:

it is actually the exposure of the donation when it is occurring which is more important than getting a document six months after the event saying what the donations were.<sup>70</sup>

- 4.69 When he appeared before the Committee on 9 October 2020, Professor Reilly agreed:

I think another part of the process that is really important is actually publicising it. Getting it up on say the Electoral Commission's website or wherever the appropriate place is so that it is available and open to public scrutiny.<sup>71</sup>

- 4.70 The Committee asked the Commissioner and his colleagues, when they appeared before the Committee on 9 October 2020, whether an online reporting system for Western Australia had been considered for the Bill. The Commissioner told the Committee:

That was part of the original election commitment and as I understand it, part of the original submission to draft and at some point cabinet advised us that that was no longer proceeding.<sup>72</sup>

- 4.71 Mr Gargan added:

This all started with the Labor Party's election commitments for online disclosure and that moved to quarterly reporting, but the rationale and reasoning for it, I cannot comment on. They were just instructions given to us.<sup>73</sup>

- 4.72 The Committee is unaware of the Government's reasons for modifying this commitment.

- 4.73 Instructions to WAEC from the Office of the then Minister for Electoral Affairs for the production of Cabinet submissions shortly after the 2017 State general election reveal that an online disclosure system was in contemplation at that time.<sup>74</sup> The instructions given were for the submissions to cover the following:

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<sup>69</sup> Electoral Commission Queensland. See: <https://www.ecq.qld.gov.au/donations-and-gift-disclosure/disclosure-of-political-donations/published-disclosure-returns>. Viewed 16 October 2020.

<sup>70</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018, p 60.

<sup>71</sup> Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, transcript of evidence, 9 October 2020, p 3.

<sup>72</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 7.

<sup>73</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, p 7.

<sup>74</sup> Robert Kennedy, Western Australian Electoral Commissioner, Answer to question on notice 1 asked at hearing held 9 October 2020, dated 23 October 2020, p 2.

Figure 1. *Email attachment: WA Electoral Commission policy commitments taken to 2017 election*

WA Electoral Commission Policy Commitments Taken to 2017 Election

Policy	Source
Introduce an online electronic disclosure of donations system (establish an online electronic donation disclosure system to ensure that all political parties, associated entities, individual candidates, and groups provide timely and continuous disclosure about donations to the Electoral Commission and the public.)	WA Labor's Disclosure and Democracy in the Digital Age
Reduce public disclosure threshold for donations	WA Labor's Disclosure and Democracy in the Digital Age
Provide greater transparency around third party fundraising bodies	WA Labor's Disclosure and Democracy in the Digital Age
Implement election campaign spending caps for candidates and political parties	WA Labor's Disclosure and Democracy in the Digital Age
Promote a greater civics education in primary and secondary schools	WA Labor's Disclosure and Democracy in the Digital Age

[Source: Robert Kennedy, Western Australian Electoral Commissioner, Answer to question on notice 1 asked at hearing held 9 October 2020, dated 23 October 2020, p 2.]

4.74 Those instructions to WAEC were subsequently amended on 12 June 2018, 13 February 2020, 15 May 2020 and 8 June 2020.<sup>75</sup> The Committee was unable to ascertain when the commitment for online disclosures was replaced by proposed quarterly reporting, this being a matter of Cabinet in Confidence.

4.75 Asked whether WAEC had advised the Government that the creation of an online system would be administratively burdensome, and that had led to the Government's modification of its proposals, Mr Gargan said:

No; definitely not ... Again, the policy matter is a matter for parliamentarians and government. We just administer the Electoral Act. We have no play in making these kinds of decisions. We are just given instructions and we carry them out best we can and implement the Electoral Act as best we can. Those matters are internal matters for parliamentarians and government.<sup>76</sup>

4.76 Jack Mallick, Acting State Director – Operations of The Nationals WA (Nationals), drew the Committee's attention to the administrative issues that increased quarterly disclosure would raise for political parties:

While the increased disclosure transparency requiring quarterly returns is commended and supported by The Nationals WA, the quarterly returns required to be lodged within ten business days of the end of the quarter will represent administrative challenges for parties.

The Nationals WA is a grassroots political organisation, proudly decentralised in structure and operation across regional WA and relying on the commitment and work of its volunteer members, particularly those in local leadership positions.

<sup>75</sup> *ibid.*

<sup>76</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, p 7.

Reporting within the ten-day timeframe may present practical issues sourcing the required local party unit disclosure information from volunteer office-bearers.

Ensuring this information is accurately collated from all party units is important to correctly disclose accumulated donations from an individual meeting the disclosure threshold.

Currently SA, Queensland and NSW require half-yearly returns, due between four to eight weeks after periods ending 30 December and 30 June.

WA matching these precedents would still allow for transparent, timely and accurate disclosure of donation information compared to the current annual return requirements.

Allowing this additional timeframe for submitting returns will assist all parties and candidates to report accurately and in a timely manner, which should be an important aspect of the aim to increase transparency.<sup>77</sup>

4.77 Sam Calabrese, State Director of the Liberals submitted:

The introduction of quarterly returns will add a significant administrative burden to all candidates and political parties. In order for the WA Liberal Party to comply with such an increase in the administrative process, we would need to invest considerable resources in upgrades to financial systems and staffing. It is likely other candidates and parties would face similar challenges.<sup>78</sup>

4.78 Chapter 8 of this report will deal with the possible effects on both WAEC and political parties of the amendments to the Act that are proposed.

#### **FINDING 9**

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, finds that the move to quarterly reporting instead of the current annual reporting requirements would create administrative difficulties for political parties, associated entities and the Western Australian Electoral Commission for no material benefit.

#### **FINDING 10**

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, finds that, while some adjustment may be required, quarterly reporting is an important step in the direction of a more transparent system of disclosure.

#### **RECOMMENDATION 6**

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, recommends that the Electoral Amendment Bill 2020 proposals for quarterly reporting of gifts and income received should not be supported, and that clause 12 of the Electoral Amendment Bill 2020 should be deleted.

4.79 A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, recommends that clause 12 of the Bill should be enacted.

<sup>77</sup> Submission 3 from Jack Mallick, Acting State Director – Operations, The Nationals WA, 2 October 2020, p 2.

<sup>78</sup> Submission 4 from Sam Calabrese, State Director, Liberal Party of Australia (Western Australian Division), 2 October 2020, p 1.

4.80 The Committee was of the unanimous view, however, that further consideration should be given to the development of an online, 'real-time' reporting system. This would result in material transparency benefits, but would potentially require significant investment of resources, at least initially.

#### **RECOMMENDATION 7**

That the Minister for Electoral Affairs gives further consideration to the development of an online, 'real-time' reporting system for gifts and donations received by political parties and associated entities.

## CHAPTER 5

### A ban on foreign donations

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5.1 There has been overwhelming support from submitters for the proposed ban on foreign donations, which would be inserted into the Act by clause 13 of the Bill. Restrictions or bans on foreign donations exist in the Commonwealth Act and in Victoria. Different prohibited donor schemes operate in New South Wales and Queensland, and they will also be considered in this chapter.

#### Provisions of the Bill

5.2 A new section 175RA would be inserted by this clause, introducing a complete ban on the receipt of foreign donations, titled 'Gifts not to be received from foreign donors'.

5.3 'Foreign donor' would mean—

(a) an individual who is not—

(i) an Australian citizen; or

(ii) an Australian resident as defined in the *Social Security Act 1991* (Commonwealth) section 7(2);

or

(b) an entity that does not have—

(i) an Australian Business Number; or

(ii) any other number allocated or recognised by the Australian Securities and Investments Commission for the purpose of identifying a business.

5.4 Section 175RA(3) would make it unlawful for:

- a political party or a person acting on behalf of a political party
- a candidate in an election (including a person included in a group) or a person acting on behalf of a candidate in an election
- a person included in a group in an election or a person acting on behalf of a group in an election
- a person (not being a political party, a candidate or a group)

to receive a gift made to or for the benefit of the party or person from a foreign donor.

5.5 A person who is a candidate in an election, or in a group in an election, is taken to remain so for a further 30 days after polling day.

5.6 Liability under this section is escaped if the gift is returned within six weeks.

5.7 There is no penalty included in this provision. A person who receives an unlawful gift is merely liable to pay an equal amount to the State, enforceable in a court of competent jurisdiction. This follows the Victorian statutory model (paragraph 5.27 below), under which a donation unlawfully received is merely forfeited.<sup>79</sup>

5.8 As a result, it would appear to the Committee that none of the safeguards built in to the Commonwealth Act (the recipient must not know or have reasonable grounds to believe that

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<sup>79</sup> *Electoral Act 2002* (Vic) s 217C.

the donor is foreign)—see paragraphs 2.29 and 2.30 of this report—needed to be included in the Bill.

## RECOMMENDATION 8

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the proposed ban on the receipt of gifts from foreign donors in clause 13 of the Electoral Amendment Bill 2020 does not include criminal sanctions.

### *Xamon amendments*

- 5.9 Hon Alison Xamon MLC has placed on the SNP proposed amendments to this clause. Proposed amendment 2/13 would replace the concept of the 'foreign donor' in new section 175RA and replace it with the 'prohibited donor' as defined, being:
- (a) a foreign donor;
  - (b) a property developer;
  - (c) a liquor or gambling industry business entity;
  - (d) a mineral resources or fossil fuel industry business entity;
  - (e) a tobacco industry business entity;
  - (f) an industry representative organisation if the majority of its members are persons referred to in paragraphs (a) to (d).
- 5.10 Each would be defined in full in a suggested new section 175RB, in line with proposed amendment 7/13, and donations would be banned from those persons/entities or close associates of those persons/entities. Proposed amendment 2/13 would amend new section 175RA(1) to cross-refer to that suggested new section 175RB. References to 'foreign donors' in new section 175RA(3)(a), (b), (c) and (d) would be replaced by 'prohibited donor' should proposed amendments 3/13, 4/13, 5/13 and 6/13 on the SNP be accepted.
- 5.11 A further proposed new section 175RC (proposed amendment 7/13 on the SNP) would allow a person to apply to the Commissioner for a determination that the applicant or another person is not a prohibited donor for the purposes of these provisions.
- 5.12 These proposals will be discussed at paragraphs 5.30 to 5.37.

### **Issues for the Committee**

- 5.13 The Committee identified, again with the assistance of submitters and witnesses, three key issues arising out of the proposed provisions regarding a ban on foreign donations or, regarding the amendments foreshadowed by Hon Alison Xamon MLC, a proposed ban on donations from 'prohibited donors':
- the chosen definition of 'foreign donor'
  - whether the ban should be total
  - whether the proposed ban should be extended to a wider category of donors.

### **Definition of 'foreign donor'**

- 5.14 In his second reading speech, the Minister, announcing the proposed ban on foreign donations, said:

This ensures that for those parties that are registered only in WA, the ban on foreign donations already in effect federally will also apply.<sup>80</sup>

5.15 However, it was pointed out to the Committee that the definitions of ‘foreign donor’ are not the same. For the purposes of the Western Australian provisions, the ban would cover:

- a person who is not an Australian citizen or resident
- a company that is not Australian registered.

5.16 The Commonwealth definition for the purposes of foreign donations may be found at paragraph 2.28 of this report. Unlike the proposed definition in the Bill, it includes entities whose head office is in Australia or whose principal place of activity is in Australia. It excludes a person who is ‘an elector’.

5.17 Professor Reilly felt that the proposed definition in the Bill is ‘very loose’:

enabling for example a foreign individual with residency rights in Australia or owning an Australian business to still donate. This provision would not have stopped the kind of high-profile scandals seen in the eastern states involving millions of dollars in party donations from wealthy businesspeople aligned with the Chinese Communist Party such as Huang Xiangmo, Chau Chak Wing and Zhu Minshen (respectively an Australian resident, an Australian citizen and an Australian business owner, when they made their donations).<sup>81</sup>

5.18 Honorary Professor Lewis shared these concerns, referring to the New South Wales ‘Aldi shopping bag affair’<sup>82</sup>, on which she expanded during evidence to the Committee on 9 October 2020:

I am sure you are all familiar with what went on in New South Wales in terms of the Aldi shopping bag affair where, also, people who worked for a particular business were told to sign forms that said they donated \$5 000 or \$10 000, and they just did not have the money. They were very low-paid workers, but they were influenced, clearly, by people who wanted to influence in some way by having, I think—if I remember rightly—it was \$100 000 in the Aldi shopping bag to donate to a particular party in New South Wales. So ways have to be found, I suppose, of trying to get around that.<sup>83</sup>

5.19 Associate Professor Drum submitted:

While the justification for banning foreign donations is clear, the definition of “foreign” in the bill is less so. The Commonwealth ban on foreign donations was sparked by high profile cases of foreign business people living in Australia and donating to our political parties. Such donations would not be banned under the current Bill.<sup>84</sup>

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<sup>80</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4946.

<sup>81</sup> Submission 1 from Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, 1 October 2020, p 1.

<sup>82</sup> Submission 6 from Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, 3 October 2020, p 4.

<sup>83</sup> Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, transcript of evidence, 9 October 2020, p 6.

<sup>84</sup> Submission 5 from Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, 2 October 2020, p 4.

5.20 It was put to the Commissioner that the provision as drafted might easily be avoided, as submitted by these academics, when he appeared before the Committee on 9 October 2020. He responded:

It is one reading of the bill, I think. In terms of responding to it, I think some of your witnesses this morning made the point that it may not be the perfect solution but it is a start in terms of improving the disclosure regime and from that point of view, the commission would agree with that particular point of view.<sup>85</sup>

5.21 Professor Reilly added to his submission in evidence to the Committee:

It actually seems to me that although this a good step forward in principle, the way that the proposed legislation is drafted does not really address the sorts of real issues that we are seeing in other jurisdictions in Australia and that we could easily potentially see here. Why not follow practice in some of the other jurisdictions? Make it that someone has to be on the electoral roll, for example. That would be a more useful step forward than the way the legislation is drafted at present.<sup>86</sup>

5.22 The NSW Act would appear to be Professor Reilly's reference point. Its equivalent provision states:

It is unlawful for a political donation to a party, elected member, group, candidate, associated entity or third-party campaigner to be accepted unless the donor is—

(a) an individual who—

(i) is enrolled (within the meaning of the Electoral Act 2017), or

(ii) is enrolled on the roll of electors for federal elections, or

(iii) is enrolled on the roll of electors for a local government election, or

(iv) if not so enrolled, has supplied to the Electoral Commission identification that is acceptable to the Electoral Commission showing the individual's full name and an Australian residential address, or

(b) an entity that has a relevant business number [an ABN or any other number allocated or recognised by the Australian Securities and Investments Commission for the purposes of identifying the entity] or a principal or executive officer of which has supplied to the Electoral Commission identification that is acceptable to the Electoral Commission showing the principal or officer's full name and an Australian residential address.<sup>87</sup>

5.23 Associate Professor Martin Drum spoke of his preference for the Commonwealth definition:

We do have a model for the banning of foreign donations in commonwealth government legislation. It was passed relatively recently. It was passed following a parliamentary inquiry of this type, and people all over the country offered their thoughts. The legislation at commonwealth level is more explicit about the specific groups of people that cannot donate, and I think that is more useful than the current revisions in this bill, which as Professor Reilly said, are quite vague. They

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<sup>85</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 4.

<sup>86</sup> Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, transcript of evidence, 9 October 2020, p 6.

<sup>87</sup> *Electoral Funding Act 2018* (NSW) s 46(1).

explicitly ban people acting as conduits for donations, and that is a more useful provision.<sup>88</sup>

5.24 Of the more practical issues, he added:

The other advantage, obviously with making this congruent with federal legislation, is that a party director would have the same list of prohibited donors at state and federal level, and it would be easier for them to administer, I would imagine.<sup>89</sup>

## RECOMMENDATION 9

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why an expanded definition of 'foreign donor', as appears in the *Commonwealth Electoral Act 1918* (Cth) and the *Electoral Funding Act 2018* (NSW), was not considered for inclusion in clause 13 of the Electoral Amendment Bill 2020.

### Ban is total

5.25 Under the proposed new section 175RA, the ban on the receipt of gifts or donations from a foreign donor would be total. This is the same as most other Australian jurisdictions. However, under the Commonwealth Act, two forms of donation are permissible:

- donations of up to \$1 000 may be accepted without obtaining affirmation that the donor is not foreign
- 'bucket donations' of up to \$100 are permitted even where the donor is known to be foreign.<sup>90</sup>

5.26 The provisions proposed for Western Australia however would impose a total ban. It is based on the model adopted in Victoria. That particular provision states:

It is unlawful for a donor to make a political donation, or for a registered political party, a candidate at an election, a group, an elected member, a nominated entity, an associated entity or a third party campaigner to accept a political donation from a donor, unless the donor—

- (a) in the case of a donor who is a natural person, is an Australian citizen or an Australian resident; or
- (b) in the case of a donor who is not a natural person, has a relevant business number.<sup>91</sup>

5.27 Mr Gargan told the Committee:

This model is based on the Victorian model. The argument is that it is simple. People can understand it. Minor parties could understand it. You do not have to have a legal background or a compliance background to understand that you have to be an Australian citizen or you have to have an Australian business number to

<sup>88</sup> Associate Professor Martin Drum, Associate Professor, Politics and International Relations, University of Notre Dame, transcript of evidence, 9 October 2020, p 7.

<sup>89</sup> *ibid.*

<sup>90</sup> *Commonwealth Electoral Act 1918* (Cth) ss 302D and 302F.

<sup>91</sup> *Electoral Act 2002* (Vic) s 217A.

give a donation to a political party, whereas I think if you look at the definition in the commonwealth Electoral Act, it is a very complex thing.<sup>92</sup>

5.28 Clearly, a total ban would be easier for WAEC to administer. It may also be simpler to understand for political parties. However, the Nationals submitted that, for ease of administration for political parties, the definition in the Bill should align with the Commonwealth one, which would 'help maintain a consistency of interpretation between state and federal foreign donor rules during a period of heightened public concern over foreign influences in Australian politics'.<sup>93</sup>

5.29 Asked whether WAEC, in preparing the drafting instructions for the Bill, had considered whether the Commonwealth model should be adopted for consistency, the Commissioner said:

I think, Chair, the overriding approach that the commission took in terms of when we were asked for advice from the government in terms of the drafting instructions was to find a system that was as simple as possible but achieved the policy outcomes that the government desired. Simple not only for ourselves and my staff who are left to administer this sort of thing, but also simple for parties and those organisations that have to fill out the disclosures and provide them to us. From that point of view, that was one of the factors that was of interest to us over the AEC model. I understand in some discussions that our staff had with other jurisdictions, comments were made that the AEC model was pretty complex and extremely difficult to administer. That was one of the things that drew us to the Victorian model. As Mr Gargan said, it was fairly simple and straightforward.<sup>94</sup>

## RECOMMENDATION 10

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why no provision was made in clause 13 of the Electoral Amendment Bill 2020 for the minor exceptions included in the *Commonwealth Electoral Act 1918* (Cth) to the total ban on the receipt of foreign donations.

### Prohibited donors

5.30 The amendment to be proposed by Hon Alison Xamon MLC appears in part to have been based on the legislation in New South Wales, where it is unlawful to accept a donation or loan made by a prohibited donor or a person on behalf of a prohibited donor. A prohibited donor is:

- a property developer
- a tobacco industry entity
- a liquor or gambling industry business entity
- any industry representative organisation if the majority of its members are such prohibited donors.<sup>95</sup>

<sup>92</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, pp 2-3.

<sup>93</sup> Submission 3 from Jack Mallick, Acting State Director – Operations, The Nationals WA, 2 October 2020, p 2.

<sup>94</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 4.

<sup>95</sup> *Electoral Funding Act 2018* (NSW) s 51.

- 5.31 For the purposes of a Western Australian ban, Hon Alison Xamon MLC has included a foreign donor (adopting the definition already in the Bill), and has also proposed adding 'a mineral resources or fossil fuel industry business entity'.
- 5.32 The offence provisions in New South Wales are as follows — it is unlawful for:
- a prohibited donor to make a political donation
  - a person to make a political donation on behalf of a prohibited donor
  - a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on behalf of a prohibited donor
  - a prohibited donor to solicit another person to make a political donation
  - a person to solicit another person on behalf of a prohibited donor to make a political donation.<sup>96</sup>
- 5.33 A person or entity may apply to the New South Wales Electoral Commissioner for a determination made that they are *not* a prohibited donor (the Commissioner will not determine whether they *are* prohibited).<sup>97</sup>
- 5.34 Queensland also operates a 'prohibited donor scheme'.<sup>98</sup> It bans political donations from property developers and industry bodies which have property developers as the majority of their members. It is illegal to make or accept these prohibited donations. It's also against the law to ask for someone to make a donation on behalf of a prohibited donor. The website of the Electoral Commission Queensland contains a self-assessment tool for assistance as to whether a person is prohibited.<sup>99</sup> Note that the prohibition only covers property developers, not the range of other bodies captured by the New South Wales legislation. Nor does it cover foreign donors.
- 5.35 The Greens supported this proposed expansion from a ban on foreign donations to a wider prohibited donor regime:
- The Bill bans accepting donations from foreign donors. We would advocate that the industries that have been banned in NSW and Queensland should also be banned – namely development, gambling, alcohol and tobacco industries. We would go further and suggest that the public health and perceived conflict of interest reasons for banning alcohol and tobacco industries also apply to the extractive industries.<sup>100</sup>
- 5.36 The Nationals however pointed out to the Committee some of the possible unintended consequences of such a provision for Western Australia:
- NSW (property developers and tobacco, liquor and gambling businesses) and QLD (property developers) are states that include banned donor industries in electoral legislation.
- For regional communities in NSW in particular this has resulted in the capture of small business operators and community leaders as prohibited donors e.g. a local pub licensee or winery is considered a prohibited donor, likewise local town

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<sup>96</sup> *ibid.*, (NSW) s 52.

<sup>97</sup> *ibid.*, 56.

<sup>98</sup> *Electoral Act 1992* (Qld) s 275.

<sup>99</sup> Electoral Commission Queensland. See: <https://www.ecq.qld.gov.au/donations-and-gift-disclosure/prohibited-donors-scheme>. Viewed 16 October 2020.

<sup>100</sup> Submission 7 from Gareth Doogue, Secretary, The Greens Western Australia, 6 October 2020, p 1.

planners and surveyors lodging development applications in the course of their work may be considered prohibited donors.

Similarly, the unprecedented inclusion of “mineral resources or fossil fuel industry business entity” in the proposed amendment may capture local small business operators in mining service hubs like Kalgoorlie. Mining-related operators are a significant influence on the future development of regional cities and towns across our vast state.

By including these provisions, there will no doubt be an impact on local individuals and community leaders at the centre of our communities, not only the intended larger corporations.<sup>101</sup>

- 5.37 The Committee is not persuaded that a case has been made for an expansion of the proposed categories of donor from ‘foreign donor’ to ‘prohibited donor’.

#### **RECOMMENDATION 11**

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to whether an expanded range of prohibited donors was considered in the drafting of the Electoral Amendment Bill 2020 or has merit.

#### **Consistent with policy outlines?**

- 5.38 Despite the issues identified above, the Committee is of the view that the policy objective of prohibiting foreign donors from influencing domestic policy by making political donations to political parties, candidates or third party campaigners would be met should clause 13 be passed.

#### **Conclusion**

#### **RECOMMENDATION 12**

That, subject to satisfactory explanations in relation to Recommendations 8, 9, 10 and 11, the Electoral Amendment Bill 2020 proposals for banning the receipt of gifts from foreign donors should be supported, and clause 13 of the Electoral Amendment Bill 2020 should be passed.

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<sup>101</sup> Submission 3 from Jack Mallick, Acting State Director – Operations, The Nationals WA, 2 October 2020, p 4.

## CHAPTER 6

### Caps on electoral expenditure

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6.1 In his second reading speech on 13 August 2020, the Minister said:

Importantly, this bill will deliver expenditure caps for the first time in WA.<sup>102</sup>

6.2 The issue of restrictions on electoral expenditure was studied by the LA Committee after the 2017 State election, particularly on the matter of third-party campaigners and in light of a well-resourced campaign run by the CME. This campaign was described by the LA Committee as follows:

In the lead up to the 2017 election the Chamber of Minerals and Energy of Western Australia (CME) campaigned strongly against a proposal from the then Nationals WA leader Brendon Grylls to increase the special lease rental on iron ore from 25 cents per tonne to \$5 per tonne. Over \$4.3 million was spent on the campaign with the production of television, radio, print and digital advertisements. Approximately 50 per cent of the total expenditure was donated by BHP Billiton Iron Ore and approximately 50 per cent by Rio Tinto Ltd. The CME spent almost as much as the two major political parties. Mr Grylls subsequently lost his seat of Pilbara.<sup>103</sup>

6.3 ABC election analyst Antony Green was reported as stating that caps should be introduced for political parties and third-party campaigners. Not only would they help to 'get rid of some of the mutually assured destruction in the amount of money parties spend on the campaigns' but would assist Western Australia to avoid 'the American path' where 'the money is incalculable that gets spent on election campaigns'.<sup>104</sup>

6.4 The proposed introduction of expenditure caps was generally supported by academics who submitted to the inquiry and who appeared before the Committee on 9 October 2020. Professor Phillimore, for example, welcomed them, submitting that 'while it is vital that all have a right to political expression, it is equally important that one or two interests, with greater financial means, are not able to overwhelm and drown out other voices'.<sup>105</sup>

### Provisions of the Bill

#### Clause 15

##### *Caps on electoral expenditure*

6.5 This clause would insert an entirely new Division 4A into Part VI, titled 'Caps on electoral expenditure'. The new Division would consist of new sections 175SG to 175SO.

6.6 Section 175SG would set out definitions of the terms used in this Division, being 'adjusted amount', 'applicable expenditure cap', 'cap amount', 'endorsed candidate', 'party amount'

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<sup>102</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 13 August 2020, p 4945.

<sup>103</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018, p 56.

<sup>104</sup> *ibid.*, pp 56-7.

<sup>105</sup> Submission 2 from Professor John Phillimore, Executive Director, John Curtin Institute of Public Policy, Curtin University, 1 October 2020, p 1.

and 'party group'. The following paragraphs will explain their meaning in the context in which they appear in the Bill.

- 6.7 Section 175SH ('Certain expenditure taken to be incurred by or with authority of political party or group') would provide that, for the purposes of this Division:
- electoral expenditure incurred in relation to an election by or with the authority of an 'endorsed candidate' (a candidate in an election who has been endorsed by a registered political party), other than a candidate included in a group, is taken to have been incurred by or with the authority of the political party that endorsed the candidate
  - electoral expenditure incurred in relation to an election by or with the authority of a 'party group' (being a group all the persons included in which have been endorsed by the same registered political party) is taken to have been incurred by or with the authority of the political party that endorsed the candidates included in the group
  - electoral expenditure incurred in relation to an election by or with the authority of a candidate included in a group is taken to have been incurred by or with the authority of the group.
- 6.8 As noted in paragraph 3.11, clause 8 of the Bill, if enacted, would mean that the 'capped expenditure period' would be, for the purposes of State general elections, the period between 1 October and polling day (though it is intended that this start date will not apply for the 2021 election). For a by-election, the period would remain that between the issue of the writ and polling day. Section 175SI would set out the expenditure caps for a political party. In a conjoint election (elections to both the Council and the Assembly held together), a general election for the Council or a general election for the Assembly, the expenditure cap is:
- the 'party amount' (\$125 000) for an election held before 1 July 2021, or in any other case
  - the 'adjusted amount' (the 'party amount' adjusted in line with the CPI under section 175SM, below)
- multiplied by the number of regions (Council) or districts (Assembly) contested.
- Parties may overspend the amount of \$125 000 in a particular region or district, providing that it underspends by equivalent amounts elsewhere.
- 6.9 For a by-election, the cap for parties is \$300 000 if the election is before 1 July 2021, or the adjusted amount thereafter.
- 6.10 Section 175SJ would set out the expenditure caps for candidates not endorsed by a party or in a group, which is again \$125 000 before 1 July 2021 or the adjusted amount thereafter. Again, for a by-election, the cap is \$300 000 or the adjusted amount.
- 6.11 Section 175SK would deal with expenditure caps for a group which is not a 'party group'. The cap for the group as a whole would be the same as for individual candidates—\$300 000.
- 6.12 Section 175SL would go on to deal with the expenditure cap for any other person (i.e. not a party, candidate or group)—a third party campaigner. For a conjoint or general election, this would be \$2 million before 1 July 2021 or the CPI adjusted amount thereafter. \$50 000 (or the 'adjusted amount') would be the cap for a by-election
- 6.13 Section 175SM would set out the means by which the 'cap amount' (the party amount, the cap on party by-election spending, the cap on individual candidates, a group that is not a party group or other persons for any elections) would be adjusted for any election on or after 1 July 2021. The formula would be:

$$\frac{A \times B}{C}$$

where —6

A is the cap amount immediately before 1 July in a year;

B is the CPI number published for the March quarter in the year;

C is the CPI number published for the March quarter in the previous year.

Any adjustment that resulted in a reduction of the cap amount would be ignored and the amount not adjusted. The amount would be rounded up to the nearest \$100.

- 6.14 Section 175SN would deal with the recovery of expenditure incurred in excess of the expenditure cap. An amount equal to twice the amount by which the electoral expenditure exceeds the applicable expenditure cap is payable to the State by the political party, candidate, group or person and may be recovered by the State as a debt in a court of competent jurisdiction.
- 6.15 In addition to the recovery under section 175SN, breach of an applicable expenditure cap would be an offence under section 175SO by the agent of the party, unendorsed or non-group candidate or non-party group, or by the third-party campaigner. An offence under this section would be deemed an aggravated offence if the amount by which the electoral expenditure exceeded the applicable expenditure cap was greater than 20 per cent of the applicable cap.
- 6.16 The penalties for an offence under section 175SO would be:
- (a) in the case of an aggravated offence, imprisonment for 2 years and a fine of —
    - (i) an amount equal to three times the amount by which the electoral expenditure exceeds the applicable expenditure cap; or
    - (ii) if the amount worked out under subparagraph (i) is less than \$36 000 — \$36 000;
  - or
  - (b) in any other case, a fine of —
    - (i) an amount equal to twice the amount by which the electoral expenditure exceeds the applicable expenditure cap; or
    - (ii) if the amount worked out under subparagraph (i) is less than \$24 000 — \$24 000.

#### *Returns required for electoral expenditure*

- 6.17 Election returns are lodged after an election or by-election and must include details of specified electoral expenditure by parties, candidates, groups and third parties. Electoral expenditure must be disclosed for specified categories of spending, such as the cost of broadcasting or publishing advertisements, producing material and electoral matter, consultant's fees and opinion polling or research.<sup>106</sup>
- 6.18 At the moment, returns must be lodged with WAEC within 15 weeks of polling day. By virtue of clause 25 of the Bill, this deadline will become 12 weeks.

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<sup>106</sup> *Electoral Act 1907*, ss 175, 175SA, 175SB, 175SC, 175SD.

## FINDING 11

Clause 25 of the Electoral Amendment Bill 2020 would have the effect of reducing the period permitted for the lodgement of electoral returns from 15 weeks to 12 weeks from polling day.

### Caps on electoral expenditure in other States

- 6.19 As the Minister stated in his Second Reading Speech<sup>107</sup>, there are electoral spending caps in place in New South Wales, South Australia and Queensland. Caps also apply in the ACT.
- 6.20 The individual provisions in each State are different, and are sometimes complicated, but a shorthand comparison may be seen in the following table in respect of State general elections. Most are indexed or subject to statutory adjustment following an election—the figures in Table 3 are those set out in the statute.

Table 3. Comparison of electoral expenditure caps for general elections by State or Territory

Subject of cap	NSW	SA	Qld	ACT	Proposed for WA
Party (Assembly)	\$122 900 x number of districts contested	\$75 000 x number of districts contested	\$92 000 x number of districts contested	\$40 000 x number of candidates (maximum 25)	\$125 000 x number of districts contested
Party (Council)	\$1 288 500	\$100 000 x number of regions contested	N/A	N/A	\$125 000 x number of regions contested
Candidate (endorsed)	\$122 900	\$40 000 to \$100 000 as allocated by party	\$58 000		
Candidate (not endorsed)	\$184 200	\$100 000 (Assembly) \$125 000 (Council)	\$87 000	\$40 000	\$125 000
Legislative Council Group	\$1 288 500	\$500 000	N/A	N/A	\$125 000
Third party	No cap	No cap	\$1 000 000 generally and \$87 000 for a district	\$40 000	\$2 000 000

<sup>107</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 August 2020, p 4945.

[*Electoral Funding Act 2018* (NSW), s 29; *Electoral Act 1985* (SA), s 130Z; *Electoral Act 1992* (Qld), ss 281C-281E; *Electoral Act 1992* (ACT), s 205F; Electoral Amendment Bill 2020, cl 175SI-175SL.]

Notes:

**Legislative Council Group**—under section 80 of the *Electoral Act 1907*, two or more candidates for an election in a region may apply to be listed on the ballot paper as a group. Groups of independents may find it easier to get 4 per cent of the votes (and hence their campaign costs refunded) than an independent standing alone. The members of the group would get elected based on position in the group, unless one of the lower ranked independents gets a huge popular vote. No groups contested the 2017 Western Australia State election, but six groups did in 2013.

**Third party**—described in the Bill (proposed new section 175SL) as a person (other than a political party, candidate or group) that participates in the electoral process as a campaigner. 19 such third party campaigners lodged election returns after the 2017 State general election, notably the Council of Minerals and Energy and the Australian Nursing Federation.

## New South Wales

- 6.21 In New South Wales, there are caps on electoral expenditure for both State and local government elections, under the NSW Act.
- 6.22 New South Wales has fixed-date State general elections.<sup>108</sup> For those elections, the caps apply for roughly six months prior to polling day (the capped expenditure period being 1 October the year before an election to 30 days after the election on the fourth Saturday in March), and, for a by-election, for the period between the issue of the writ for a by-election and polling day.<sup>109</sup>
- 6.23 Caps on electoral expenditure apply to:
- political parties and their associated entities and elected members not contesting an election
  - groups of candidates
  - candidates
  - (previously, third-party campaigners. Declared invalid).
- 6.24 The caps in place for the State election scheduled for 2023, and for any by-election held in the four-year period up to 2023, are set out in the following table, published by the NSW Electoral Commission:

Table 4. *Expenditure caps for New South Wales State elections*

Category	Expenditure cap
Party with more than 10 endorsed Legislative Assembly candidates at a general election	\$132 600 multiplied by the number of electoral districts in which a candidate is endorsed by the party
Party that endorses candidates in a group for the Legislative Council but does not endorse any candidates for election to the Legislative Assembly or does not endorse candidates in more than 10 electoral districts	\$1 389 900

<sup>108</sup> *Constitution Act 1902* (NSW) s 24A.

<sup>109</sup> *Electoral Funding Act 2018* (NSW) s 27.

Independent Legislative Council group at a general election	\$1 389 900
Endorsed Legislative Assembly candidate at a general election	\$198 700
Candidate at a Legislative Assembly by-election	\$265 000
Third-party campaigner at a general election	There is no overall expenditure cap for a third-party campaigner at a general election*
Third-party campaigner at a Legislative Assembly by-election	\$21 600 for each by-election
Electoral district cap for a party	\$66 400 within the party's overall expenditure cap
Electoral district cap for a third-party campaigner	\$26 700 within the third-party campaigner's overall expenditure cap

[Source: New South Wales Electoral Commission, 22 September 2020. See: <https://www.elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/Caps-on-electoral-expenditure/What-are-the-expenditure-caps-for-State-elections>. Viewed 30 September 2020.]

\*The reason why there is no overall expenditure cap for a third-party campaigner at a general election is that on 29 January 2019, the High Court of Australia in *Unions NSW v New South Wales* [2019] HCA 1 ruled that the expenditure caps imposed by section 29(10) of the *Electoral Funding Act 2018*, applicable to third-party campaigners, were invalid.

6.25 These caps are set out in section 29 of the NSW Act. They are subject to indexation in accordance with Schedule 1 to that Act.

6.26 As noted above, there is currently no overall expenditure cap for a third-party campaigner at a State general election. Section 29(10) of the NSW Act reads:

**Third-party campaigners** For a State general election, the applicable cap for a third-party campaigner is—

- (a) \$500,000 if the third-party campaigner was registered under this Act before the commencement of the capped State expenditure period for the election, or
- (b) \$250,000 in any other case.

6.27 However, this provision is invalid.

6.28 By way of background, following a number of inquiries and reports by the Independent Commission Against Corruption, an expert panel formed by the Premier and the Joint Standing Committee on Electoral Matters of the New South Wales Parliament, it was decided that the expenditure cap on third-party participation in elections of \$1.05 million (indexed, and worth \$1 288 500 by the time of the 2015 State election) was too high, and should be reduced to \$500 000.<sup>110</sup>

<sup>110</sup> For a full background history to these provisions, see Rowena Johns, 'The High Court's decision on third-party campaign spending', *NSW Parliamentary Research Service*, March 2019.

6.29 On 29 January 2019, the High Court handed down its decision in *Unions NSW v New South Wales*.<sup>111</sup> It unanimously found that section 29(10) of the NSW Act, which later set the spending cap for third-party campaigners, is invalid because:

it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.

6.30 Following *Lange v Australian Broadcasting Corporation*<sup>112</sup>, the majority of the Court found:

It must of course be accepted that Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts. However, its position in respect of legislation which burdens the implied freedom is otherwise. *Lange* requires that any effective burden be justified. As the Commonwealth conceded in argument, the Parliament may have choices but they have to be justifiable choices where the implied freedom is concerned.<sup>113</sup>

6.31 A significant point in the High Court's decision was that it had seen no evidence to suggest that any satisfactory evidentiary analysis was undertaken by the New South Wales Government before it decided to legislate the reduced spending cap—the Joint Standing Committee on Electoral Matters had recommended that consideration be given as to whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that reduced expenditure limit of \$500 000.<sup>114</sup>

6.32 The majority of the High Court concluded:

no basis was given in the Expert Panel Report for a halving of the figure previously allowed for third-party campaigning expenses. It may have been thought to be a reasonable allowance given the level of expenditure by third-party campaigners at the 2011 election. The report recommended that the figure be checked against expenditure for the 2015 election. If that enquiry had been undertaken, a different conclusion might have been reached. And despite the recommendation of the JSCEM, no enquiry as to what in fact is necessary to enable third-party campaigners reasonably to communicate their messages appears to have been undertaken. The defendant has not justified the burden on the implied freedom of halving the cap in s 29(10) as necessary to prevent the drowning out of voices other than those of third-party campaigners. The plaintiffs' submissions in this regard should be accepted. Section 29(10) is invalid.<sup>115</sup>

6.33 At the time of writing this report, that invalid spending cap for third party campaigners has not been replaced. The previous third-party spending cap could not be reinstated because the Act in which it was included was repealed when the *Electoral Funding Act 2018* (NSW) was proclaimed.

6.34 The Tabled Paper referred to earlier in this report seeks to provide an explanation of the justification for the limits on electoral expenditure proposed by the Bill. This is discussed in more detail at paragraphs 6.51 to 6.70.

6.35 Penalties apply for breaches of the applicable expenditure caps in New South Wales. The maximum penalty is 400 penalty units (\$44 000) or imprisonment for 2 years, or both. Furthermore, an amount up to double the electoral expenditure incurred in excess of an

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<sup>111</sup> [2019] HCA 1.

<sup>112</sup> (1997) 189 CLR 250.

<sup>113</sup> [2019] HCA 1, at [45], per Kiefel CJ, Bell and Keane JJ.

<sup>114</sup> Rowena Johns, 'The High Court's decision on third-party campaign spending', *NSW Parliamentary Research Service*, March 2019, p 3.

<sup>115</sup> [2019] HCA 1, at [53], per Kiefel CJ, Bell and Keane JJ.

applicable expenditure cap may be recovered by the New South Wales Electoral Commission and paid back to the State (section 58(4)).

### South Australia

6.36 Limitations on political expenditure are dealt with in Division 6 of Part 13A ('Election funding, expenditure and disclosure') of the *Electoral Act 1985* (SA) (SA Act). The relevant parts of section 130Z are as follows:

Table 5. *Expenditure caps for South Australia State general elections*

Category	Expenditure cap
Political party—Council only	\$500 000
Political party—Assembly	\$75 000 x number of districts
Political party—both Houses	Assembly - \$75 000 x number of districts (between \$40 000 and \$100 000 per candidate) Council - \$100 000 x number of endorsed candidates (to a maximum of 5)
Independent candidate—Assembly	\$100 000
Independent candidate—Council	\$125 000
Group not endorsed—Council	\$500 000

[Source: *Electoral Act 1985* (SA) s 130Z.]

6.37 These figures are taken from the statute—they are subject to indexation.<sup>116</sup> Notably, there is no spending cap for third party campaigners.

6.38 The prohibition on political expenditure in excess of the expenditure cap during the 'capped expenditure period' is found in sections 130ZA and 130ZB. Agents must ensure that their clients do not exceed their applicable expenditure caps. Failing to comply with this obligation is an offence for which the maximum penalty is \$7 500 (section 130ZZE(6)). South Australia also has fixed-date State general elections—the capped expenditure period starts on 1 July in the year before the election, which is held on the third Saturday in March.<sup>117</sup> In the case of a by-election, it starts on the day on which the vacancy giving rise to the election is announced in the House of Assembly by, or on behalf of, the Speaker. For all elections, the capped expenditure period ends 30 days after polling day.

6.39 In addition, if a person spends in excess of their applicable expenditure cap during the capped expenditure period, their public funding payment (the amount payable by the State based on eligible votes received) will be reduced by an amount equal to 20 times the excess amount (section 130Q(4)(a)).

<sup>116</sup> *Electoral Act 1985* (SA) s 130Z.

<sup>117</sup> *Constitution Act* (SA) s 28.

## Queensland

- 6.40 Under Part 11, Division 9 of the Queensland Act, there are again caps on the expenditure that political parties and endorsed candidates can make during the ‘capped expenditure period’ for a State election.
- 6.41 Under section 280 of the Queensland Act, for a State general election, the capped expenditure period starts on the first business day after the last Saturday in the preceding March and ends at 6pm on the polling day for the election. Queensland has not had until recently fixed-date State general elections—the Legislative Assembly had a three-year term and the date for the election was set under a statutory process.<sup>118</sup> However, under amendments made to the *Constitution of Queensland 2001* (Qld), the polling day for a State general election will now be the last Saturday in October in the fourth year after the last election.<sup>119</sup> For a by-election, the expenditure cap period commences on the day the writ for the election is issued and ends at 6pm on the polling day for the election.
- 6.42 However, under a new Part of the Queensland Act inserted for the 2020 State general election by the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld), the capped expenditure period was 1 August 2020 until 6pm on 31 October 2020 (section 444(1)).
- 6.43 The expenditure caps are set out in sections 281C (registered political parties and endorsed candidates), 281D (independent candidates) and 281E (registered third parties). Note that the Queensland Parliament is unicameral, having only a Legislative Assembly:

Table 6. *Expenditure caps for Queensland State general elections*

Category	Expenditure cap
Political party	\$92 000 x number of districts
Endorsed candidate	\$58 000 (in addition to the above)
Independent candidate	\$87 000
Third party	\$1 000 000

[Source: *Electoral Act 1992* (Qld) ss 281C, 281D, 281E]

- 6.44 These figures are also taken from the State legislation, and are subject to indexation under section 281F.
- 6.45 Under section 281J of the Queensland Act, non-compliance with the caps by a participant in the election during a capped expenditure period is an offence, punishable by 1 500 penalty units (\$200 175)<sup>120</sup> or 10 years’ imprisonment.
- 6.46 In addition to potential prosecution, the Electoral Commission Queensland may recover amounts above the permitted caps as a debt to the State. The amount which may be recovered is double the value of the expenditure that exceeded the cap (section 281J(1)).

<sup>118</sup> *Electoral Act 1992* (Qld) Part 7. In 2020, the election was held on 31 October. In 2017, it was 25 November.

<sup>119</sup> *Constitution of Queensland 2001* (Qld) s 19B.

<sup>120</sup> A penalty unit from 1 July 2020 is \$133.45, so the maximum fine would be \$200 175 – *Penalties and Sentences Act 1992* (Qld), s 5A.

## Australian Capital Territory

- 6.47 Under section 205D of the *Electoral Act 1992* (ACT), the expenditure cap was set at \$40 000 for an election held in 2016, then indexed for future elections. The cap declared under section 205E for the Legislative Assembly election held on 17 October 2020 was \$42 750.<sup>121</sup> Like Queensland, the Australian Capital Territory has a unicameral parliament.
- 6.48 That amount applied across the board:
- \$42 750 per candidate for political parties (to a maximum of 25, so up to \$1 068 750 in total)<sup>122</sup>
  - \$42 750 for a non-party MLA
  - \$42 750 for an associated entity
  - \$42 750 for a non-party candidate grouping
  - \$42 750 for a third party campaigner.<sup>123</sup>
- 6.49 If the electoral expenditure exceeds the amount allowed, the party or the 'expenders' is liable to pay a penalty to the Territory equal to twice the amount by which the electoral expenditure exceeds the amount.<sup>124</sup>
- 6.50 The ACT also has fixed-date State general elections<sup>125</sup>, and the capped expenditure period is a comparatively long one—from 1 January in an election year to polling day (the third Saturday in October).<sup>126</sup>

## Justification for expenditure caps

- 6.51 The Economic and Governance Committee of the Parliament of Queensland (Queensland Committee) reported in February 2020 on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019. It looked (amongst other things) at existing expenditure cap schemes in light of the High Court judgment. A number of submitters to that inquiry had indicated opposition to reforms on the basis that they would present unnecessary constraints on rights and freedoms.<sup>127</sup> Professor Graham Orr of the University of Queensland was cited:

Over the past decade, the High Court of Australia has stressed that it looks for a rational evidence basis if you are going to justify any significant restraints or limits on freedom of political communication or on the recently implied principle of equality of opportunity to participate politically...

It is not sufficient just to assert general principle, which you and I may agree upon in terms of regulation, and to wave airily and say, 'Well, New South Wales regulates this area in this way, roughly,' or point at, say, the bogeyman of Mr Palmer and his billionaire spending as happened in the recent federal election. The High Court will look for an evidence base. They will look for things like: have you

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<sup>121</sup> Elections ACT. See: [https://www.elections.act.gov.au/funding\\_and\\_disclosure/funding\\_expenditure\\_and\\_disclosure\\_faq/electoral\\_expenditure\\_and\\_disclosure\\_faq](https://www.elections.act.gov.au/funding_and_disclosure/funding_expenditure_and_disclosure_faq/electoral_expenditure_and_disclosure_faq). Viewed 8 October 2020.

<sup>122</sup> *Electoral Act 1992* (ACT) s 205F.

<sup>123</sup> *ibid.*, s 205G.

<sup>124</sup> *ibid.*, s 205F(3).

<sup>125</sup> *ibid.*, s 100.

<sup>126</sup> *ibid.*, s 198.

<sup>127</sup> Queensland, Legislative Assembly, Economics and Governance Committee, report 37, *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, February 2020, p 12.

considered what is the Queensland media market, what is the recent level of party spending in Queensland, et cetera.<sup>128</sup>

6.52 The Tabled Paper was prepared at the request of the Minister by the State Solicitor's Office in view of the successful High Court challenge to similar provisions in New South Wales, as discussed earlier.<sup>129</sup>

6.53 In tabling the paper, the Attorney General said:

we have prepared an explanation of the justification for the expenditure caps in the Electoral Amendment Bill 2020. I now table that document called "Explanation of the Justification of Expenditure Caps in the Electoral Amendment Bill 2020".

That document is tabled and therefore, if this legislation is ever challenged, the High Court will see that the justification for the expenditure caps was before the Parliament.<sup>130</sup>

6.54 The Committee notes that the paper was tabled in the Legislative Assembly after the second reading debate, when the Attorney General replied to that second reading debate on behalf of the Government, though he informed the Assembly that he had supplied a copy of it to the Opposition prior to the second reading debate.<sup>131</sup>

6.55 The Tabled paper states on the first page:

A law imposing an expenditure cap will be justified if it is reasonable and appropriate and adapted to meet a legitimate need and there are no other equally effective means available to the achieve those purposes or objects which impose a lesser burden on the implied freedom.<sup>132</sup>

6.56 The Tabled Paper goes on to explain the factors taken into account in setting the proposed expenditure caps:

- the need to produce a more level playing field
- previous reported electoral expenditure in past Western Australian elections
- the need to adjust the cap amounts on a regular basis to offset the effects of inflation.<sup>133</sup>

6.57 Reporting the increases in overall political expenditure over the last two State general elections, the Tabled Paper opines that:

the imposition of an expenditure cap will reduce the total amount of electoral expenditure and thus slow down the "political arms race".<sup>134</sup>

6.58 Those reported figures in respect of political parties, candidates and third parties, may be found in the Tabled Paper at Appendix 1, and are set out in Table 7:

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<sup>128</sup> Queensland, Legislative Assembly, Economics and Governance Committee, report 37, *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, February 2020, p 13.

<sup>129</sup> Hon Stephen Dawson MLC, Minister for Electoral Affairs, letter, 8 October 2020.

<sup>130</sup> Hon John Quigley MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 August 2020, pp 5012-3.

<sup>131</sup> Hon John Quigley MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 August 2020, pp 5013.

<sup>132</sup> Tabled Paper 4104, Legislative Council, 13 August 2020, p 1.

<sup>133</sup> *ibid.*, p 1.

<sup>134</sup> *ibid.*, p 3.

Table 7. Total reported expenditure at 2013 and 2017 State general elections

Category	2013 general election	2017 general election
Political parties	\$8 822 894.68	\$11 325 220.55
Candidates (endorsed and independent)	\$794 041.48	\$863 014.57
Third parties	\$1 395 751.35	\$7 057 476.17

[Source: Tabled paper 4104, Legislative Council, 13 August 2020, p 2.]

6.59 The significant third party figure for the 2017 election is, of course, inflated by the expenditure of the CME in 2017 (see paragraph 6.2), and this would appear to be one of the catalysts for the creation of these expenditure caps. The Tabled paper goes on:

in the 2017 general election, there were 19 organisations (other than a political party, candidate or group) who lodged electoral expenditure returns. Eighteen organisations spent less than \$1 million. The other organisation spent in excess of \$4.3 million. The average amount of electoral expenditure was \$371,446.11 and the lowest amount of electoral expenditure was \$241.67. This means that the biggest spender spent more than 17,000 times the smallest spender and more than 11 times the average spender. This disparity in spending clearly creates an un-level playing field. Had the proposed initial expenditure cap of \$2 million been in place at the last general election, only one organisation would have been precluded from spending what it did.<sup>135</sup>

### Political parties

6.60 As reported, and for ease of reference, these would be the expenditure caps for State general elections (proposed new section 175SI):

- conjoint election—\$125 000 x the number of regions plus \$125 000 x the number of districts
- Council only election—\$125 000 x the number of regions
- Assembly only election—\$125 000 x the number of districts.

6.61 Justifying these figures by reference to previous party expenditure, the Tabled Paper states:

The maximum available expenditure cap for a political party at a general election (\$8,125,000 made up of the Council amount of \$125,000 x 6 plus Assembly amount of \$125,000 x 59) exceeds the average and highest amounts of electoral expenditure by a single political party at the 2013 and 2017 general elections.

Expenditure by a political party at a general election is clearly referable to the number of endorsed candidates so it would not be fair to impose a fixed expenditure cap which applied to every political party no matter how many candidates were endorsed. This expenditure cap increases in accordance with the number of candidates endorsed by the political party.

...

Accordingly, this expenditure cap is designed to level the playing field amongst political parties by making the total electoral expenditure of each party related to

<sup>135</sup> *ibid.*

the number of districts in the Legislative Assembly or regions in the Legislative Council in which a political party endorses candidates.<sup>136</sup>

6.62 The proposed expenditure cap for political parties at a by-election (\$300 000) is justified as being higher than the average expenditure on the last three occasions (Darling Range, Cottesloe and Vasse), though lower than the highest (\$354 566.50 by Labor at the Darling Range by-election):

This expenditure cap is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.<sup>137</sup>

### **Candidates (independent)**

6.63 The proposed cap for independent State general election candidates is again \$125 000 (proposed new section 175SJ), or \$300 000 for a by-election.

6.64 The proposed cap of \$125 000 is reported to be higher than both the average and the highest amounts spent in the 2013 and 2017 State general elections. Thus, the justification is as follows:

This cap ensures that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.<sup>138</sup>

6.65 The justification for the by-election cap is the same.<sup>139</sup>

### **Groups**

6.66 The proposed caps for a Legislative Council group (other than a party group) at a general or a by-election of \$125 000 and \$300 000 respectively are justified as being higher than the expenditure incurred at the 2013 general election. No groups contested the 2017 general election.<sup>140</sup>

### **Third parties**

6.67 The expenditure cap for a third party campaigner (described in the Bill as 'person (other than a political party, a candidate or a group') for a State general election—proposed new section 175SL—would be \$2 million.

6.68 For justification purposes for this otherwise arbitrary figure<sup>141</sup>, the Tabled Paper sets out the expenditure incurred by third parties in the last two general elections:

In the 2017 general election:

- There were 19 organisations in this category which lodged election returns

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<sup>136</sup> *ibid.*, p 5.

<sup>137</sup> *ibid.*, p 6.

<sup>138</sup> *ibid.*, p 8.

<sup>139</sup> *ibid.*, p 9.

<sup>140</sup> *ibid.*, pp 9-10.

<sup>141</sup> Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, transcript of evidence, 9 October 2020, p 21.

- The total electoral expenditure for persons (other than a party, candidate or group) was \$7,057,476.17
- The lowest amount of electoral expenditure was \$241.67
- The highest amount of electoral expenditure was \$4,361,870 (Chamber of Minerals & Energy of Western Australia Inc)
- The second highest amount of electoral expenditure was \$844,449.95 (Australian Nursing Federation, Industrial Union of Workers Perth)
- The average amount of electoral expenditure was \$371,446.11
- 17 of the 19 organisations spent less than \$500,000
- 18 of the 19 organisations spent less than \$1 million
- The percentage difference in expenditure between the 2013 election and the 2017 election was 80.18%.

In the 2013 general election:

- There were 13 organisations in this category which lodged election returns
- The total electoral expenditure for persons (other than a party, candidate or group) was \$1,395,751.35
- The lowest amount of electoral expenditure was \$825
- The highest amount of electoral expenditure was \$602,499.07 (Unions WA)
- The second highest amount of electoral expenditure was \$423,360.43 (Royal Automobile Club of Western Australia)
- The average amount of electoral expenditure was \$107,365.48
- 6 of the 13 organisations spent less than \$10,000
- 3 organisations spent over \$100,000.<sup>142</sup>

6.69 Therefore, the cap of \$2 million is justified as being higher than all but one of the sums expended, and:

is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.<sup>143</sup>

6.70 The cap for a by-election would be \$50 000 and, as there are no returns available for recent by-elections, the justification given is that:

the expenditure cap of \$50,000 for a person (other than a political party, candidate or group) at a by-election exceeds the average and highest electoral expenditure by a candidate at the 2014 and 2018 by-elections and exceeds the average expenditure by a political party at the 2014 and 2018 by-elections.<sup>144</sup>

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<sup>142</sup> Tabled Paper 4104, Legislative Council, 13 August 2020, p 11.

<sup>143</sup> *ibid.*, p 12.

<sup>144</sup> *ibid.*

## Issues for the Committee

- 6.71 The Committee identified, again with the assistance of submitters and witnesses, four key issues arising out of the proposed provisions creating the electoral expenditure caps:
- whether the expenditure caps are necessary or appropriate and, if so, set at the correct level
  - whether the Bill should include anti-avoidance measures
  - whether there should be provision voiding an election result in the event of a breach of a relevant electoral spending cap
  - whether this part of the Bill should contain a 'sunset clause'.

### Are the spending caps necessary or correct?

6.72 Professor Reilly submitted that, whilst the expenditure cap for political parties of \$125 000 per seat contested is higher than some other States, it is justified in the context of Western Australia's size and the demands that this places on parties across the State.<sup>145</sup>

6.73 Associate Professor Drum agreed:

The distances between centres in Western Australia are larger than other jurisdictions, which may [lead] to higher costs associated with political campaigning and therefore justify this higher limit.<sup>146</sup>

6.74 On the proposed cap for third parties, he continued:

The expenditure cap of \$2 million for third parties is also extremely generous, and is double the same amount recently legislated in Queensland. Again, the distances in Western Australia may justify a higher limit for third party campaigning. Whether this would justify a figure twice that of Queensland's limit of \$1 million is debatable. A figure of \$1.5 million would still provide for extensive campaigning by third parties, while providing for a more level playing field.<sup>147</sup>

6.75 The Tabled Paper states:

Consideration was given to expenditure caps imposed in other Australian jurisdictions. However, the electoral system in Western Australia is unique so it was not possible to ensure consistency with other jurisdictions in Australia which impose expenditure caps on electoral expenditure.<sup>148</sup>

6.76 The Committee's view as to the necessity or otherwise for the expenditure caps, and whether they are reasonable and proportionate to the issue to be addressed, may be found at the end of this chapter.

### Anti-avoidance

6.77 Section 144 of the NSW Act makes it an offence to enter into or carry out a scheme (including an arrangement, understanding or course of conduct) designed to circumvent the requirements set out as to electoral expenditure. The maximum penalty is 10 years' imprisonment. Likewise, it is an offence in South Australia under section 130ZC of the SA Act

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<sup>145</sup> Submission 1 from Professor Benjamin Reilly, Professor of Political Science and International Relations, University of Western Australia, 1 October 2020, p 1.

<sup>146</sup> Submission 5 from Associate Professor Martin Drum, Politics and International Relations, University of Notre Dame, 2 October 2020, p 5.

<sup>147</sup> *ibid.*

<sup>148</sup> Tabled Paper 4104, Legislative Council, 13 August 2020, p 1.

to enter into an arrangement or agreement with a third party to incur political expenditure during the capped expenditure period for the purpose of avoiding the applicable expenditure cap. The maximum penalty for this offence is \$25 000.

- 6.78 In Queensland, there is also provision (at section 307B of the Queensland Act) making unlawful the knowing participation, directly or indirectly, in any scheme to circumvent the prohibition on breaching the expenditure cap—maximum penalty, 1 500 penalty units (\$200 175) or 10 years’ imprisonment.
- 6.79 The Bill makes no proposals for such a provision in Western Australia.
- 6.80 As stated at paragraph 6.2 of this report, it appears that the expenditure of the CME of \$4.3 million at the 2017 State election was one of the catalysts for the introduction of expenditure caps in Western Australia. However, it was reported that this was contributed to by Rio Tinto and BHP in roughly equal amounts.<sup>149</sup>
- 6.81 The proposed cap on third party expenditure means that both of those entities could still contribute up to \$2 million each in a future election.
- 6.82 Should an anti-avoidance clause be inserted into the Act, it would remain difficult to prove a course of conduct or communication necessary to establish an agreement or arrangement to circumvent the expenditure caps.
- 6.83 For this reason, the Committee is of the view that the insertion into the Bill of an anti-avoidance measure of the type seen in Queensland and New South Wales is unnecessary.

### **Review of expenditure caps**

- 6.84 For the financial year beginning on 1 July 2021, the expenditure caps set out in the proposed new Division 4A of Part VI of the Bill would be subject to adjustment in accordance with the provisions of proposed new section 175SM under the formula set out in paragraph 6.13. Subsection (2) would then provide that:

If, for a particular financial year, adjustment of a cap amount would reduce the amount, the amount is not to be adjusted.

- 6.85 Thus, the expenditure caps may never be adjusted downwards. As the Tabled Paper states:

The proposed initial expenditure caps will not remain in place after 1 July 2021.

A mechanism has been inserted into the Bill which will enable each of the initial expenditure caps to be adjusted. Pursuant to proposed section 175SM, cap amounts are to be adjusted each year from the financial year beginning on 1 July 2021 in accordance with the Consumer Price Index.

However, if, for a particular financial year, the adjustment of a cap amount in accordance with that section would reduce the amount, then the amount is not to be adjusted.

...

The annual adjustment to each expenditure cap offsets the effects of inflation. However, the adjusted amount will never be less than the initial expenditure cap.<sup>150</sup>

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<sup>149</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018, p 56.

<sup>150</sup> Tabled Paper 4104, Legislative Council, 13 August 2020, pp 12-3.

- 6.86 Honorary Professor Lewis raised an interesting point regarding the amount of the expenditure caps in evidence to the Committee—the possibility of them being reduced in the future:

I take the point about the size of Western Australia and the distances having to be travelled, but we are living these days in a world that uses social media more and more for advertising, and very much so for political advertising, so I would have thought that, if anything, the expense of running an election with the use of social media is probably reducing the amount of money needed to run an election as opposed to the days of pre-social media.

...

if it proves after a few years that it needs revision, that is something that you may like to consider, putting a sunset clause in the bill that says in three or five years or whatever it is time that we have to relook these things, especially in light of the cost of social media reducing the costs.<sup>151</sup>

- 6.87 The Committee notes that matters of this type are routinely reviewed by the Government of the day.

### **Fundamental legislative principles**

- 6.88 The Committee has examined the application of FLPs to the Bill and identified one issue that raises potential concerns.

#### *Freedom of expression and political communication*

- 6.89 FLPs require that legislation has sufficient regard to the rights and liberties of individuals.
- 6.90 Clause 15 would insert the new Part VI Division 4A, imposing electoral expenditure caps on political parties, candidates, Legislative Council groups and third parties.
- 6.91 The High Court found in 2019 in its decision in *Unions NSW v New South Wales*<sup>152</sup> that the provision in New South Wales that set the spending cap for third-party campaigners is invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.
- 6.92 The Australian Constitution does not explicitly protect freedom of expression. However, the High Court has previously held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution. It operates as a freedom from government restraint, rather than a right conferred directly on individuals.<sup>153</sup> A well-established principle of statutory interpretation in Australian courts is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms. This includes freedom of expression.<sup>154</sup>
- 6.93 In *Brown v Tasmania*<sup>155</sup>, a series of tests was established by the High Court to determine whether a law offends against the implied freedom of political communication. If it is accepted that there is a burden, is the purpose of the law (i.e. ensuring public confidence that elections are not unduly influenced by the highest spenders) legitimate? If so, is the law

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<sup>151</sup> Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, transcript of evidence, 9 October 2020, p 9.

<sup>152</sup> [2019] HCA 1.

<sup>153</sup> *Unions NSW v New South Wales* [2013] HCA 58.

<sup>154</sup> Australian Human Rights Commission. See: <https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-information-opinion-and-expression>. Viewed 23 October 2020.

<sup>155</sup> [2017] HCA 43.

reasonably appropriate? The latter limb involves proportionality testing to consider whether the law is suitable, necessary and balanced.

- 6.94 As reported above (paragraphs 6.51 to 6.70), the Tabled Paper supplies the Government's explanation of the justification of these expenditure caps.

### **Consistent with policy outlines?**

- 6.95 The Committee was of the view that the provisions seek to establish a principle consistent with the Government's stated policy objective of ensuring that the most wealthy are unable to spend their way to an election victory.

### **Conclusion**

- 6.96 At paragraph 6.76, it was stated that the Committee's view as to the necessity or otherwise for the expenditure caps, and whether they are reasonable and proportionate to the issue to be addressed, may be found at the conclusion to this chapter.
- 6.97 It is, of course, a matter for the courts and not the Committee to decide whether the expenditure caps are justified. It is worth noting, however, that those caps relating to third-party expenditure in general elections and to by-elections have both been exceeded in recent years, suggesting that these are the aspects of the Bill which would be most at risk of a High Court challenge.
- 6.98 A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC took the view that the case for the establishment of expenditure caps has not been made and, taking into account the factors set out at paragraph 6.56, a more level playing field will not be created and the expenditure caps will bear little relation to previous reported electoral expenditure in past Western Australian elections.
- 6.99 The same majority also took the view that the validity of the provision introducing expenditure caps was ultimately a matter for the courts, and that the Committee was not in a position to make a comprehensive recommendation to the House on clause 15 in the absence of independent legal advice testing the proportionality of the provision and specifically whether it is suitable, necessary and balanced.
- 6.100 A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, was of the view that the establishment of expenditure caps is desirable in principle and that the Tabled Paper establishes the ground for the claims that expenditure caps are reasonable, appropriate and proportionate, and are therefore justified.

### **FINDING 12**

A majority of the Committee, consisting of Hons Nick Goiran MLC, Simon O'Brien MLC and Colin de Grussa MLC, finds that clause 15 in its current form is unsafe.

### **FINDING 13**

A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, finds that the Tabled Paper establishes the ground for the claim that expenditure caps are reasonable, appropriate and proportionate, and are therefore justified.

### **RECOMMENDATION 13**

That clause 15 of the Electoral Amendment Bill 2020 not be passed.

6.101 A minority of the Committee, consisting of Hons Dr Sally Talbot MLC and Pierre Yang MLC, recommends that clause 15 should be passed.

## CHAPTER 7

### Consequential and other amendments

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7.1 The Bill contains a number of relatively minor and consequential and other amendments, set out in this chapter.

#### Provisions of the Bill

##### Clause 16

7.2 Section 175V would be amended ('Payments due to State, recovery of') by clause 16 to add proposed new sections 175RA(5)—gifts from foreign donors, and 175SN(2)—amounts in excess of the expenditure cap. Such recovery actions may be brought by the Commissioner.

##### Clause 17

7.3 Clause 17 would amend section 175W ('Investigation powers for this Part'), which deals with the powers of authorised officers in investigating whether a breach of the Act has occurred. The investigation powers would be extended to cover offences under proposed new section 175SO ('Offence if applicable expenditure cap exceeded').

##### Clause 18

7.4 Clause 18 would delete section 175Y of the Act ('Extension of time to lodge annual return'). The Commissioner previously had the power to extend the deadline for annual returns if an election took place between 30 June and 30 November in any given year. With the move to a fixed date election and the introduction of quarterly returns, section 175Y is no longer required.

##### Clause 19

7.5 Previously, the Commissioner was only required to keep copies of:

- claims for electoral funding reimbursement (the amount per vote claimable after an election under Division 2A)
- returns regarding gifts and other income (Division 3)
- disclosures of electoral expenditure (Division 4)

at WAEC's principal office.

7.6 Section 175ZC ('Public may obtain copies of returns') would be amended with the addition of a new subsection (1A), requiring the Commissioner to publish those claims or returns on the WAEC website as soon as practicable after lodgement.

##### Clause 20

7.7 Clause 20 would insert a new section 175ZCA ('Amounts to be published on Commission website') into the Act. This would require the Commissioner, as soon as practicable after 1 July each year, to publish:

- the indexed election funding reimbursement amount under section 175LC for the financial year
- each of the indexed expenditure cap amounts, as defined in section 175SG, for the financial year.

### Clause 21

7.8 Section 175ZD ('Unincorporated body, proceedings against') deals with Part VI offences committed by an unincorporated body. Civil proceedings in respect of amounts recoverable under a number of listed sections are instituted against the agent of a party that is not a body corporate, not the party. There is therefore no need to mention proceedings against an unincorporated body in section 175ZD(1) or (2), so references to them are deleted.

### Clause 22

7.9 Section 175ZF of the Act is the provision allowing the making of regulations for the purposes of this Part. It would be amended by clause 22 in line with the new provisions set out earlier in this report, so that:

- regulations will no longer provide for the adjustment by the Commissioner of the specified amount (paragraph 3.11)
- regulations detailing the option of complying with the laws on the lodging of returns by lodging a return under the *Commonwealth Electoral Act 1918* (Cth) would be removed.

### Clause 23

7.10 The requirement under section 175ZG ('Annual report by Electoral Commissioner') is for the Commissioner to submit a report on the operation of this Part of the Act to the Minister as soon as practicable after the end of the period within which annual returns by political parties and associated entities have to be lodged.

7.11 This section would be amended by clause 23 so that the Commissioner's report must be submitted to the Minister as soon as practicable after the end of the financial year. This is merely consequential on the proposed move to quarterly returns under those sections 175N and 175NA.

### Clause 24

7.12 Clause 24 would insert a new section 175ZH ('Transitional provisions for *Electoral Amendment Act 2020*') dealing with transitional provisions for the Electoral Amendment Act 2020, should it become law, so that:

- the last annual return period (sections 175N and 175NA) would end on 30 June 2020
- political parties and associated entities would disclose their last annual returns by 30 November 2020
- the first quarterly returns including the July and October quarters of 2020 would need to be lodged by 15 January 2021
- the requirement for the Commissioner to submit a report on this Part of the Act as soon as practicable after the end of the period within which returns under sections 175N and 175NA have to be lodged in relation to a financial year would remain for 2019/20.

7.13 The administrative difficulties arising out of the third of those requirements was raised by Mr Gargan in evidence before the Committee—see chapter 8 below.

7.14 Note that 175ZH(4)(b) appears to be unnecessary. It states:

returns required under those provisions [proposed new quarterly returns by parties and associated entities] in relation to that quarter must be lodged before the end of 15 January 2021 instead of within 10 business days after the end of that quarter.

10 business days, after deleting holidays and weekends, falls on 15 January 2021.

7.15 This was put to the Commissioner and his colleagues on 9 October 2020. Mr Gargan said:

I am not a lawyer myself, but I think, basically, when you look at public holidays and all that stuff, it just works out on 15 January. That is how it works out. When you factor in public holidays, the date is 15 January.<sup>156</sup>

#### **FINDING 14**

That proposed section 175ZH(b), which would be inserted into the *Electoral Act 1907* should clause 24 of the Electoral Amendment Bill 2020 be passed in full, is unnecessary.

#### **RECOMMENDATION 14**

That the relevant part of clause 24, at Page 22, lines 1 to 4 of the Electoral Amendment Bill 2020, be omitted.

#### **Clause 25**

7.16 Clause 25 would amend all references in this Part of the Act to '15 weeks'—they would become '12 weeks'.<sup>157</sup> Thus, provisions requiring the lodging of election returns 15 weeks after polling day (gifts received and electoral expenditure) are amended to reduce the period to 12 weeks, so as (in the words of the EM) 'to further increase transparency of disclosures after an election'.

7.17 The clause, rather oddly, ends in a note amending the heading to section 175R so that it would read 'Gifts not to be received from unidentified donors'. The heading is currently 'Gifts not to be accepted from unidentified donors etc'. However, no other amendment is proposed for that section. It would appear to the Committee that this wording is being changed because 'accepted' implies a measure of acquiescence or knowledge, which are not required to fall foul of section 175R.

#### **RECOMMENDATION 15**

That the Minister for Electoral Affairs provides to the Legislative Council an explanation as to why the heading to section 175R of the *Electoral Act 1907* is intended to be amended from 'Gifts not to be accepted from unidentified donors etc.' to 'Gifts not to be received from unidentified donors'.

<sup>156</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, p 12.

<sup>157</sup> *Electoral Act 1907* ss 175O(1), 175P(1), 175Q(1), 175SA, 175SB, 175SC(1) and 175SD(1).

## CHAPTER 8

### Resourcing

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- 8.1 Resourcing of both WAEC and political parties in light of the amendments to the Act should the Bill become law was a significant matter raised with the Committee during the course of the inquiry. In chapter 4 of this report, reference is made to the evidence received concerning administrative issues that will arise for both WAEC and political parties arising out of the proposed provisions.

#### Consequences for the Western Australian Electoral Commission

- 8.2 It is clear that a number of the proposals contained in the Bill will lead to greater administrative responsibilities for WAEC—the move to quarterly disclosure instead of annual returns, a lower gift declaration threshold and checking whether a donation has been given by or accepted from a foreign donor.
- 8.3 The LA Committee reported some criticism of WAEC’s chasing of election returns following the 2017 State general election, blamed by some on inadequate resourcing. It noted that only one member of staff was responsible for funding and disclosure in September 2016, whilst the equivalent division of the New South Wales Electoral Commission fluctuated between 30 and 50 employees.<sup>158</sup>
- 8.4 The resourcing of WAEC was an issue taken up by Honorary Professor Lewis in her submission. She said:

Australians are very well served by their fiercely independent electoral commissions and WA is no exception. Its EC has and continues to serve the people of WA and its democratic political system very well. In order for the EC to continue to do so, it is imperative that it is adequately funded. There is little point in giving the Commission the powers it needs to ensure a fair and transparent electoral system if it is not provided with the resources required to operationalise those powers. I say this as ‘powers without resources equates to no powers’.<sup>159</sup>

- 8.5 Asked about resourcing issues for the Commission (paragraphs 4.52 and 4.53), the Commissioner told the Committee:

May I add to something that Mr Gargan said about resourcing? It is in the budget documents that were released yesterday. The government did support the commission in terms of its comments about administrative burden, and there were an extra two FTE identified in the budget to support us, which are going specifically to deal with the complexities that are going to arise for us from this legislation if it is passed.<sup>160</sup>

- 8.6 Asked about those envisaged ‘complexities’, the Commissioner went on:

Just in terms of the additional burden that it is going to place on reporting parties and organisations that are going to be reporting. As Mr Gargan said, there are only two people in the commission at the moment in that particular area. We envisage that particularly the foreign donation and the expenditure cap issues will

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<sup>158</sup> Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, report 2, *2017 WA State Election: Maintaining confidence in our electoral process*, February 2018, p 61.

<sup>159</sup> Submission 6 from Professor Colleen Lewis, Honorary Professor, Australian Studies Institute, Australian National University, 3 October 2020, p 5.

<sup>160</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 9.

raise a lot more questions and queries from organisations, so we approached government and said that we thought we needed more resources from that point of view, in terms of being able to support parties and others who are asking questions about that sort of thing.<sup>161</sup>

8.7 Mr Gargan added:

There are 15 registered political parties in Western Australia. Many of them are minor parties who do not have a big support network. If this legislation is passed, they will need a lot of help in doing quarterly returns instead of an annual return. That is why we need extra people to help with that if the legislation is passed.<sup>162</sup>

8.8 It is possible that, were proposals for 'real-time' online disclosure of donations to be implemented, the administrative burden on WAEC staff would be reduced in the long-term.

### RECOMMENDATION 16

That the Western Australian Electoral Commission reports on the resourcing implications that have arisen from the measures in the Electoral Amendment Act 2020, should it become law, in its first annual report after its commencement.

### Issues for political parties

8.9 As the Liberals and Nationals told the Committee in their submissions (paragraphs 4.74 and 4.77), the proposed quarterly returns would cause particular administrative issues for political parties. This will be particularly true of the coming months. Not only will preparations for the March election be in full swing, the transitional provisions will require a number of returns to be submitted at once. As Mr Gargan explained:

How the current bill is drafted is that if this legislation is passed, the political parties will have to give us two quarterly returns by 15 January. That is going to be very tight for all the political parties. That is in the current bill. The transitional arrangements are that if the bill is passed, the political parties will have to give two quarterly returns, starting from 1 July this year, to the Electoral Commission by 15 January.<sup>163</sup>

8.10 Those returns will relate to periods post 1 July 2020, meaning that parties will need to re-assess every donation of \$1 000 or more given since that date—

having to retrospectively cast back and think, "Right; we've only been collecting stuff up to \$2 500. Now we're going to have to go back to \$1 000."<sup>164</sup>

8.11 Where parties, including minor parties, fail to meet these deadlines, an offence occurs, though the Commissioner told the Committee that he exercises a measure of discretion in this regard:

I understand that I have some discretion in terms of parties, and particularly minor parties, who might not meet deadlines for submitting returns and things. Correct me if I am wrong, Mr Gargan, but I understand that in the past we have always taken an educative approach rather than penalising parties that are not able to get

<sup>161</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 10.

<sup>162</sup> Louis Gargan, Manager, Legislation, Communications and Human Resources, Western Australian Electoral Commission, transcript of evidence, 9 October 2020, p 10.

<sup>163</sup> *ibid.*

<sup>164</sup> Robert Kennedy, Western Australian Electoral Commissioner, transcript of evidence, 9 October 2020, p 11.

their information in on time. We would rather work with them to find out what is holding them up and what might be the problem—those sorts of things.<sup>165</sup>

8.12 The Commissioner went on:

I am only going on my recent experience in terms of some other matters that have proceeded to prosecutions or not. It seems that the State Solicitor's Office and the DPP work pretty closely with me in determining whether something is likely to be in the public interest and, therefore, worth pursuing through to a prosecution. Certainly my view is that if it appears and the legal advice supports the case that there is a prima facie case of someone really seriously attempting to pervert the electoral system, then obviously I am going to go through with that. But in cases of an honest mistake, I am prepared to be a bit more lenient, I suppose, particularly given that if this bill goes through, we will all be learning the new system and the hooks and things.<sup>166</sup>

8.13 It is possible that additional resources will be needed for parties in the short and longer term.

8.14 Public funding of political parties is of course available to any party that receives 4 per cent of the eligible votes (a vote given at an election in which there are only 2 candidates, or a first preference vote given at an election in which there are more than 2 candidates)—Division 2A of Part VI of the Act. The reimbursement amount per vote at present is \$1.96699 as from 1 July 2020.<sup>167</sup>

8.15 Associate Professor Drum wrote in his submission to the inquiry:

Compliance with these measures is not difficult and should not be an excuse for blocking the passage of the Bill, but there may be a case for revisiting the resources allocated to candidates and parties via public funding. Western Australia remunerates candidates and political parties who reach the vote threshold (currently set at 4%) within an electorate at a much lower rate than other jurisdictions. The WA reimbursement rate for the 2020-2021 financial year is \$1.97, while most other Australian jurisdictions provide more than \$3.00. A modest increase in reimbursement would mitigate any complaints from candidates or parties regarding the additional work required to comply.<sup>168</sup>

8.16 Indeed, the reimbursement rate per eligible vote for parties in Western Australia is comparatively low. Comparisons may be found in Table 8 (figures rounded to nearest cent). The first figures are the ones contained in statute, the second is the current indexed amount.

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<sup>165</sup> *ibid.*, p 12.

<sup>166</sup> *ibid.*, p 13.

<sup>167</sup> Western Australian Electoral Commission, 1 July 2020. See <https://www.elections.wa.gov.au/about-us/media/whats-new/1854>. Viewed 30 September 2020.

<sup>168</sup> Submission 5 from Associate Professor Martin Drum, University of Notre Dame, 2 October 2020, p 5.

Table 8. *Statutory reimbursement rate per eligible vote by jurisdiction*

	WA	Cth	NSW	Qld	SA	Vic	Tas	ACT	NT
<b>Lower House</b>	\$1.39	\$2.73	\$4.00	\$2.90	\$3.00	\$6.00	N/A*	\$8.00	N/A*
	Now \$1.97	Now \$2.83	Now \$4.66	Now \$3.30	Now \$3.31	Now \$6.25		Now \$8.62	
<b>Upper House</b>	\$1.39	\$2.73	\$3.00	N/A	\$3.00	\$3.00	N/A*	N/A	N/A*
	Now \$1.97	Now \$2.83	Now \$3.50		Now \$3.31	Now \$3.12			

[Source: *Electoral Act 1907*, s 175LA; *Commonwealth Electoral Act 1918* (Cth), s 293; *Electoral Funding Act 2018* (NSW), s 67; *Electoral Act 1992* (Qld), s 225; *Electoral Act 1995* (SA), s 130P; *Electoral Act 2002* (Vic), s 211; *Electoral Act 1992* (ACT), s 207.]

\* Tasmania and the Northern Territories do not operate a public funding scheme or administrative funding scheme for state elections.

8.17 Associate Professor Drum commented to the Committee that:

the fact that parties in Western Australia proportionately get less public funds and are therefore presumably more reliant on private donations, I think is a matter of some concern.<sup>169</sup>

8.18 Some States pay additional funding to political parties. For example, in New South Wales, 'administration funding' is paid to cover administrative and operating expenses incurred by political parties, paid quarterly. The payment is based on how many elected members the party has and is only for the amount of expenditure incurred. The amount payable for parties is between \$90 800 and \$194 300 (plus \$31 100 for each additional elected member above three, up to 22).<sup>170</sup>

8.19 Similarly, in Victoria, administrative funding is paid quarterly to independent Members of Parliament or to parties based on their representation in Parliament, and cannot be used for electoral expenditure or paid into a state campaign account. Administrative expenditure funding can be used to cover the general running costs of the office of a party or an independent Member of Parliament. This includes the cost of complying with funding and disclosure obligations. The rate (indexed) is \$200 000 annually for independents and \$200 000 annually for the first candidate elected in a party, \$70 000 for the second candidate and \$35 000 for the third through 45th candidates.<sup>171</sup>

Hon Dr Sally Talbot MLC  
**Chair**

<sup>169</sup> Associate Professor Martin Drum, Associate Professor, Politics and International Relations, University of Notre Dame, transcript of evidence, 9 October 2020, p 23.

<sup>170</sup> New South Wales Electoral Commission, 16 January 2020. See: <https://www.elections.nsw.gov.au/Funding-and-disclosure/Public-funding/Administration-Fund>. Viewed 13 October 2020.

<sup>171</sup> Victorian Electoral Commission. See: <https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation>. Viewed 1 November 2020.

# APPENDIX 1

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## TABLED PAPER 4104

# Explanation of the justification of the expenditure caps in the Electoral Amendment Bill 2020

## Part 1: Introduction

Under the Electoral Amendment Bill 2020 (WA), caps on electoral expenditure (expenditure caps) have been imposed on political parties, candidates, groups and other persons.

In *Unions NSW and ors v State of New South Wales* [2019] HCA 1 the High Court made it clear that any effective burden on the implied freedom of political communication must be justified even though Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts (at [45]).

A law imposing an expenditure cap will be justified if it is reasonable and appropriate and adapted to meet a legitimate need and there are no other equally effective means available to the achieve those purposes or objects which impose a lesser burden on the implied freedom.

## Part 2: The setting of the expenditure caps

The expenditure caps have been set having regard to:

- (a) the need to produce a more level playing field;
- (b) previous reported electoral expenditure in past Western Australian elections; and
- (c) the need to adjust the cap amounts on a regular basis to offset the effects of inflation.

Consideration was given to expenditure caps imposed in other Australian jurisdictions. However, the electoral system in Western Australia is unique so it was not possible to ensure consistency with other jurisdictions in Australia which impose expenditure caps on electoral expenditure.

### (a) A more level playing field

There have been quite significant increases in total electoral expenditure in the last few years, which has been described as the "political arms race". This is illustrated in the following tables:

**Table 1: Total Reported Expenditure at 2013 and 2017 general elections**

Category	2013 election expenditure	General total	2017 General election total expenditure	\$ increase in total expenditure between each election
Political parties	\$8,822,894.68		\$11,325,220.55	\$2,502,325.87
Candidates (endorsed and independent)	\$794,041.48		\$863,014.57	\$68,973.09
Groups (see s.80 of the <i>Electoral Act 1907</i> (WA))	No returns in this category		\$73,035.65	N/A
Persons (other than political parties, candidates or groups)	\$1,395,751.35		\$7,057,476.17	\$5,661,724.67

**Table 2: Total Reported Expenditure at 2014 and 2018 by-elections**

Category	2014 Vasse by-election	2018 Cottesloe by-election	2018 Darling Ranges By-lection
Political parties	\$189,924.79	\$67,071.55	\$496,193.65
Candidates (endorsed and independent)	\$3,500	\$17,587.08	\$6,909.66
Groups (see s.80 of the <i>Electoral Act 1907</i> (WA))	No returns in this category	No returns in this category	N/A
Persons (other than political parties, candidates or groups)	No returns in this category	No returns in this category	N/A

Political influence in Western Australia should not be proportionate to the greatest wealth. The expenditure caps which have been set in Western Australia are designed to:

*produce a more level playing field, limit the "political arms race" and prevent the "drowning out" of other voices. Unions NSW and ors v State of New South Wales [2019] HCA 1 at [18]*

Political influence will not be proportionate to the greatest wealth if:

- (a) there are not significant disparities between the lowest and highest amounts of electoral expenditure;
- (b) the highest spenders do not spend significantly more compared to all other spenders; and
- (c) measures are taken to ensure that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

The imposition of an expenditure cap will reduce the total amount of electoral expenditure and thus slow down the "political arms race".

Although the imposition of an expenditure cap restricts spending on electoral expenditure across the board, in practice it will only prevent spending by those at the highest end of the scale of spending. This is because those who spend the most on electoral expenditure often far exceed the average amount of electoral expenditure.

For example, in the 2017 general election, there were 19 organisations (other than a political party, candidate or group) who lodged electoral expenditure returns. Eighteen organisations spent less than \$1 million. The other organisation spent in excess of \$4.3 million. The average amount of electoral expenditure was \$371,446.11 and the lowest amount of electoral expenditure was \$241.67. This means that the biggest spender spent more than 17,000 times the smallest spender and more than 11 times the average spender. This disparity in spending clearly creates an un-level playing field. Had the proposed initial expenditure cap of \$2 million been in place at the last general election, only one organisation would have been precluded from spending what it did.

#### **(b) Previous reported electoral expenditure**

Expenditure caps have not previously been imposed in Western Australia so past reported electoral expenditure in this State provides the only useful guidance as to what might be a reasonable cap on expenditure.

Where information about past electoral expenditure is not available for a particular category, regard has been had to past reported electoral expenditure in a similar category.

The initial amount of each cap was designed to exceed previous reported electoral expenditure at the 2013 and 2017 general elections and by-elections held in 2014 and 2018. One of the reasons for this is that the proposed capped expenditure period (October to March) exceeds the length of the election period under the *Electoral Act 1907(WA)* (January to March).

The only exception is where the past highest electoral expenditure significantly exceeded the average electoral expenditure. Exclusion of past excessive expenditure is based upon its distance from the average expenditure rather than the political party, candidate, group or other person expending the funds. The imposition of an expenditure cap at a level below past excessive expenditure means that the highest spenders cannot spend significantly more compared to all other spenders and thus drown out the voices of those other spenders. It also means that there will not be the

same disparities between the lowest and highest amounts of electoral expenditure thus levelling out the playing field.

The initial expenditure caps will apply where polling day is before 1 July 2021. Thereafter, the expenditure cap will be an amount adjusted in accordance with inflation.

Information on past electoral expenditure has been sourced from the Electoral Commission website.

**(c) Annual adjustment**

The expenditure caps will be adjusted each year in accordance with the Consumer Price Index to offset the effects of inflation. However, the adjusted amount will never be less than the original expenditure cap and, where necessary, amounts will be rounded up to the nearest whole number multiple of \$100.

**Part 3: The proposed initial expenditure caps for political parties (proposed section 175SI)**

**(a) Expenditure cap for political party at general election**

*Proposed initial expenditure cap for political party at general election*

Conjoint election	\$125,000 x number of regions in which the party endorses 1 or more candidates in election + \$125,000 x number of districts in which the party endorses a candidate in the election
General election for Council (other than election held as part of conjoint election)	\$125,000 x number of regions in which the party endorses 1 or more candidates in election
General election for Assembly (other than election held as part of conjoint election)	\$125,000 x number of Assembly districts in which the party endorses a candidate in the election

*Past reported electoral expenditure for political party at general election*

In the 2017 general election:

- There were 16 political parties which lodged election returns
- Total electoral expenditure for all parties was \$11,325,220.55
- The lowest amount of electoral expenditure of was \$394.15
- The highest amount of electoral expenditure was \$4,939,835.80
- The average amount of electoral expenditure was \$707,826.28

In the 2013 general election:

- There were 8 political parties which lodged election returns
- Total electoral expenditure for all parties was \$8,822,894.68

- The lowest amount of electoral expenditure of was \$1,792.76
- The highest amount of electoral expenditure was \$5,141,459.31
- The average amount of electoral expenditure was \$1,102,861.80

***Explanation for proposed initial cap for political party at general election***

The maximum available expenditure cap for a political party at a general election (\$8,125,000 made up of the Council amount of \$125,000 x 6 plus Assembly amount of \$125,000 x 59) exceeds the average and highest amounts of electoral expenditure by a single political party at the 2013 and 2017 general elections.

Expenditure by a political party at a general election is clearly referable to the number of endorsed candidates so it would not be fair to impose a fixed expenditure cap which applied to every political party no matter how many candidates were endorsed. This expenditure cap increases in accordance with the number of candidates endorsed by the political party.

The fact that the electoral expenditure of an endorsed candidate is taken to have been incurred by or with the authority of the political party that endorsed the candidate means that no political party is placed at an advantage or disadvantage because of the wealth or lack of wealth of a particular endorsed candidate.

Accordingly, this expenditure cap is designed to level the playing field amongst political parties by making the total electoral expenditure of each party related to the number of districts in the Legislative Assembly or regions in the Legislative Council in which a political party endorses candidates.

**(b) Expenditure cap for political party at by-election**

***Proposed initial expenditure cap for political party at by-election***

By-election	\$300,000
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***Past reported electoral expenditure for political party at by-election***

In the 2018 Darling Ranges by-election:

- There were 10 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$496,193.65
- The lowest amount of electoral expenditure of was \$0
- The highest amount of electoral expenditure was \$354,566.50 (Australian Labor Party (WA Branch))
- The average amount of electoral expenditure was \$49,619.36
- 2 political parties spent above \$100,000
- 8 of the 10 political parties spent less than \$10,000

In the 2018 Cottesloe by-election:

- There were 4 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$67,071.55
- The lowest amount of electoral expenditure of was \$2,288.97
- The highest amount of electoral expenditure was \$53,915.98 (Liberal Party of Australia (WA) Division (Inc))

- The average amount of electoral expenditure was \$16,767.88
- 1 political party spent above \$50,000
- 3 of the 4 political parties spent less than \$10,000

In the 2014 Vasse by-election:

- There were 4 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$189,924.79
- The lowest amount of electoral expenditure of was \$6,332.99
- The highest amount of electoral expenditure was \$144,883.00 (Liberal Party of Australia (WA) Division (Inc))
- The average amount of electoral expenditure was \$47,481.20
- 1 political party spent above \$100,000
- 3 of the 4 political parties spent less than \$35,000

***Explanation for initial expenditure cap for political party at by-election***

The expenditure cap for a political party at a by-election exceeds the average amounts of electoral expenditure by a political party at the 2014 and 2018 by-elections.

The expenditure cap exceeds the highest amount of electoral expenditure by a political party at the 2014 Vasse by-election and the 2018 Cottesloe by-election.

The expenditure cap does not exceed the highest amount of electoral expenditure by a political party at the 2018 Darling Range by-election (Australian Labor Party (WA Branch)). In that by-election, the Australian Labor Party (WA Branch) spent \$354,566.50 which was \$354,566.50 more than the lowest spend, \$304,947.14 more than the average spend and 71.45% of the total electoral expenditure.

This expenditure cap is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.

**Part 4: The proposed initial expenditure caps for candidates (other than endorsed candidate or candidate in group) (proposed section 175SJ)**

**(a) Expenditure caps for candidate (other than endorsed candidate or candidate in group) for general election**

***Proposed initial expenditure cap for candidate (other than endorsed candidate or candidate in group) for general election***

Candidate (other than endorsed candidate or candidate in group) for general election	\$125,000
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***Past reported electoral expenditure for candidate (other than an endorsed candidate or candidate in a group) at general election***

In the 2017 general election:

- There were 20 Independent candidates in the Legislative Assembly who lodged returns
- The total electoral expenditure for the 20 Independent candidates was \$236,820.49
- The lowest amount of electoral expenditure by an Independent candidate was \$250
- The highest amount of electoral expenditure by an Independent candidates was \$42,179.74
- The average electoral expenditure for Independent candidates was \$11,841.02

In the 2017 general election:

- There were 8 Independent candidates in the Legislative Council who lodged returns
- The total electoral expenditure for the 8 Independent candidates was \$60,220
- The lowest amount of electoral expenditure by an Independent candidate was \$0
- The highest amount of electoral expenditure by an Independent candidates was \$33,186.84
- The average electoral expenditure for Independent candidates was \$7,527.50

In the 2013 general election:

- There were 27 Independent candidates in the Legislative Assembly who lodged returns
- The total electoral expenditure for the 27 Independent candidates was \$376,716.29
- The lowest amount of electoral expenditure by an Independent candidate was \$155
- The highest amount of electoral expenditure by an Independent candidates was \$72,539.63
- The average electoral expenditure for Independent candidates was \$13,952.45

In the 2013 general election:

- There were 13 Independent candidates in the Legislative Council who lodged returns
- The total electoral expenditure for the 13 Independent candidates was \$25,384.78
- The lowest amount of electoral expenditure by an Independent candidate was \$0
- The highest amount of electoral expenditure by an Independent candidates was \$15,478
- The average electoral expenditure for Independent candidates was \$1,952.67

***Explanation for proposed initial expenditure cap for candidate (other than an endorsed candidate or candidate in a group) for general election***

The expenditure cap of \$125,000 for a candidate (other than an endorsed candidate or candidate in a group) at a general election exceeds the average and highest amounts of electoral expenditure by such a candidate at the 2013 and 2017 general elections. The expenditure cap also exceeds the average and highest amounts of electoral expenditure by all other candidates at the 2013 and 2017 general elections.

This cap ensures that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

**(b) Expenditure caps for candidate (other than endorsed candidate or candidate in group) for by-election**

***Proposed initial expenditure cap for candidate (other than endorsed candidate or candidate in group) for by-election***

Candidate (other than endorsed candidate or candidate in group) for by-election	\$300,000
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***Past reported electoral expenditure for candidate (other than an endorsed candidate or candidate in a group) at by-election***

In the 2018 Darling Ranges by-election:

- There were 11 candidates (including 2 Independent candidates) who lodged by-election returns
- The total electoral expenditure for all candidates was \$6,909.66
- The average amount of electoral expenditure for all candidates was \$628.15
- The total electoral expenditure for the Independent candidates was \$818
- The average amount of electoral expenditure for the Independent candidates was \$409

In the 2018 Cottesloe by-election:

- There were 7 candidates (including 3 Independent candidates) who lodged by-election returns
- The total electoral expenditure for all candidates was \$17,587.08
- The average amount of electoral expenditure for all candidates was 2,512.44
- The total electoral expenditure for the Independent candidates was \$8,290.12
- The average amount of electoral expenditure for the Independent candidates was \$2,763

In the 2014 Vasse by-election:

- There were 6 candidates (including 2 Independent candidates) who lodged by-election returns

- The total electoral expenditure for all candidates was \$3,500
- The average amount of electoral expenditure for all candidates was \$583.33
- The total electoral expenditure for the Independent candidates was \$3,500
- The average amount of electoral expenditure for the Independent candidates was \$1,750

***Explanation for proposed initial expenditure cap for candidate (other than an endorsed candidate or candidate in a group) for by-election***

The expenditure cap of \$300,000 for a candidate (other than an endorsed candidate or candidate in a group) at a by-election exceeds the average and highest amounts of electoral expenditure by such a candidate at the 2014 and 2018 by-elections. The expenditure cap also exceeds the average and highest amounts of electoral expenditure by all other candidates at the 2014 and 2018 by-elections.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for the same category of candidate.

**Part 5: The proposed initial expenditure caps for groups (other than party groups) (proposed section 175SK)**

Note: section 80 of the *Electoral Act 1907* (WA) permits 2 or more candidates nominated in an election for a region (where more than one person is to be elected) to make a claim to the returning officer to have their names included in a group in the ballot papers to be used in that election and to have their names included in that group in the order specified in that claim. A claim may be made where all the candidates in the group are the subject of a party nomination by a particular registered political party or where the candidates in the group have been endorsed by different registered political parties. The groups are often referred to as Legislative Council groups.

**(a) Expenditure cap for group (other than party group) at general election**

***Proposed initial expenditure cap for group (other than party group) for general election***

Group (other than party group) for general election	\$125,000
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***Past reported electoral expenditure of group (other than party group) at general election***

In the 2013 general election:

- There were 6 Legislative Council groups which lodged election returns
- The total electoral expenditure for all groups was \$73,035.65
- The lowest amount of electoral expenditure was \$0
- The highest amount of electoral expenditure was \$60,566
- The average amount of electoral expenditure was \$12,172.08
- 4 of the 6 groups spent less than \$2,000

There were no returns for groups in the 2017 general election.

***Explanation for proposed initial expenditure cap for group (other than party group) for general election***

The expenditure cap of \$125,000 for a group (other than a party group) at a general election exceeds the average and highest amounts of electoral expenditure by a Legislative Council group at the 2013 general election.

This cap ensures that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

**(b) Expenditure cap for group (other than party group) at by-election**

***Proposed initial expenditure cap for group (other than party group) for general election***

Group (other than party group) for general election	\$300,000
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***Past reported electoral expenditure for group (other than party group) at by-election***

There are no returns available for this category for the 2014 and 2018 by-elections.

***Explanation for proposed initial expenditure cap for group (other than party group) for by-election***

The expenditure cap of \$300,000 for a group (other than a party group) at a by-election exceeds the average and highest amounts of electoral expenditure by a group at the 2013 general election.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for a group (other than a party group).

**Part 7: The proposed initial expenditure caps for persons (other than a political party, a candidate or a group) (proposed section 175SL)**

**(a) Expenditure cap for person (other than a political party, a candidate or a group) for general election**

***Proposed initial expenditure cap for person (other than a political party, a candidate or a group) for conjoint election or general election***

Person (other than a political party, a candidate or a group) for general election	\$2 million
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***Past reported electoral expenditure for person (other than a political party, a candidate or a group) at general election***

In the 2017 general election:

- There were 19 organisations in this category which lodged election returns
- The total electoral expenditure for persons (other than a party, candidate or group) was \$7,057,476.17
- The lowest amount of electoral expenditure was \$241.67
- The highest amount of electoral expenditure was \$4,361,870 (Chamber of Minerals & Energy of Western Australia Inc)
- The second highest amount of electoral expenditure was \$844,449.95 (Australian Nursing Federation, Industrial Union of Workers Perth)
- The average amount of electoral expenditure was \$371,446.11
- 17 of the 19 organisations spent less than \$500,000
- 18 of the 19 organisations spent less than \$1 million
- The percentage difference in expenditure between the 2013 election and the 2017 election was 80.18%.

In the 2013 general election:

- There were 13 organisations in this category which lodged election returns
- The total electoral expenditure for persons (other than a party, candidate or group) was \$1,395,751.35
- The lowest amount of electoral expenditure was \$825
- The highest amount of electoral expenditure was \$602,499.07 (Unions WA)
- The second highest amount of electoral expenditure was \$423,360.43 (Royal Automobile Club of Western Australia)
- The average amount of electoral expenditure was \$107,365.48
- 6 of the 13 organisations spent less than \$10,000
- 3 organisations spent over \$100,000

***Explanation for proposed initial expenditure cap for person (other than a political party, a candidate or a group) for general election***

The expenditure cap of \$2,000,000 for a person (other than a political party, candidate or group) at a general election exceeds the average amount of electoral expenditure by such a person at the 2013 and 2017 general elections.

The expenditure cap exceeds the highest amount of electoral expenditure at the 2013 general election. The expenditure cap exceeds all but the highest amount of electoral expenditure at the 2017 election (the amount spent by the Chamber of Minerals & Energy of Western Australia Inc). The Chamber of Minerals & Energy of Western Australia Inc spent \$4,361,870 which was \$4,361,628.40 more than the lowest spend, \$3,999,0423.90 more than the average spend and 61% of the total electoral expenditure.

The expenditure cap of \$2 million is 5 times more than the average electoral expenditure for the 2017 general election. The expenditure cap also takes into

account that all but one person in this category spent less than \$1 million on electoral expenditure in the 2017 general election.

This expenditure cap is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.

**(b) Expenditure cap for person (other than a political party, a candidate or a group) for by-election**

*Proposed initial expenditure cap for person (other than a political party, a candidate or a group) for by-election*

Person (other than a political party, a candidate or a group) for by-election	\$50,000
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*Past reported electoral expenditure for person (other than a political party, a candidate or a group) for by-election*

No returns are available in respect of electoral expenditure by persons (other than a political party, candidate or group) for the 2014 and 2018 by-elections.

*Explanation for proposed initial expenditure cap for person (other than a political party, a candidate or a group) for by-election*

The expenditure cap of \$50,000 for a person (other than a political party, candidate or group) at a by-election exceeds the average and highest electoral expenditure by a candidate at the 2014 and 2018 by-elections and exceeds the average expenditure by a political party at the 2014 and 2018 by-elections.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for a person (other than a political party, candidate or group). However, the expenditure cap is lower because this category of persons invariably spends less at by-elections.

**Part 8: Annual adjustment of cap amount (proposed section 175SM)**

The proposed initial expenditure caps will not remain in place after 1 July 2021.

A mechanism has been inserted into the Bill which will enable each of the initial expenditure caps to be adjusted. Pursuant to proposed section 175SM, cap amounts are to be adjusted each year from the financial year beginning on 1 July 2021 in accordance with the Consumer Price Index.

However, if, for a particular financial year, the adjustment of a cap amount in accordance with that section would reduce the amount, then the amount is not to be adjusted.

In addition, if the adjustment of a cap amount results in an amount that is not a whole number multiple of \$100, the amount is rounded up to the nearest whole number multiple of \$100 and that rounded amount is the cap amount for the financial year.

The annual adjustment to each expenditure cap offsets the effects of inflation. However, the adjusted amount will never be less than the initial expenditure cap.

The annual adjustment of expenditure caps will ensure that the "political arms race" proceeds at a more leisurely pace in the future when compared with past increases in total electoral expenditure.

## APPENDIX 2

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### STAKEHOLDERS, SUBMISSIONS RECEIVED AND PUBLIC HEARINGS

#### Stakeholders contacted

Number	From
1	The Animal Justice Party
2	The Australian Christians (WA)
3	The Australian Labor Party
4	The Daylight Savings Party
5	The Health Australia Party
6	The Liberal Democratic Party (WA)
7	The Nationals (WA)
8	Pauline Hanson's One Nation
9	The Shooters, Fishers and Farmers Party (WA)
10	The Small Business Party (WA)
11	The Socialist Alliance WA
12	The Flux Party WA
13	The Greens Western Australia
14	The Liberal Party of Australia (Western Australian Division)
15	The Western Australian Party

#### Submissions received

Number	From
1	Professor Benjamin Reilly
2	Professor John Phillimore
3	The Nationals WA
4	The Liberal Party of Australia (Western Australian Division)
5	Associate Professor Martin Drum
6	Honorary Professor Colleen Lewis
7	The Greens Western Australia

## Public hearings

Number	From
9 October 2020	<p>Academic Panel</p> <p>Honorary Professor Colleen Lewis, Australian Studies Institute, Australian National University</p> <p>Professor Benjamin Reilly, Political Science and International Relations, University of Western Australia</p> <p>Associate Professor Martin Drum, Politics and International Relations, Notre Dame University</p>
	<p>Western Australian Electoral Commission</p> <p>Robert Kennedy, Western Australian Electoral Commissioner</p> <p>Louis Gargan, Manager Legislation, Communications and Human Resources</p> <p>Sabrina Durham, Senior Electoral Liaison Officer</p>

## APPENDIX 3

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### FUNDAMENTAL LEGISLATIVE PRINCIPLES

#### **Does the Bill have sufficient regard to the rights and liberties of individuals?**

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

#### **Does the Bill have sufficient regard to the institution of Parliament?**

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

## GLOSSARY

Term	Definition
<b>Act</b>	The <i>Electoral Act 1907</i>
<b>Amendment Act</b>	The <i>Electoral Amendment Act 2020</i> , should the Bill be made and receive Royal Assent
<b>Bill</b>	The Electoral Amendment Bill 2020
<b>CME</b>	The Chamber of Minerals and Energy of Western Australia (Inc)
<b>Commissioner</b>	The Electoral Commissioner, Western Australian Electoral Commission
<b>Commonwealth Act</b>	The <i>Commonwealth Electoral Act 1918</i> (Cth)
<b>EM</b>	Explanatory Memorandum
<b>FLPs</b>	Fundamental Legislative Principles—the principles relating to legislation that underlie a parliamentary democracy based on the rule of law
<b>LA Committee</b>	The Community Development and Justice Standing Committee of the Legislative Assembly of Western Australia
<b>Minister</b>	The Minister for Electoral Affairs, Hon Stephen Dawson MLC
<b>NSW Act</b>	The <i>Electoral Funding Act 2018</i> (NSW)
<b>Queensland Act</b>	The <i>Electoral Act 1992</i> (Qld)
<b>Queensland Committee</b>	The Economic and Governance Committee of the Parliament of Queensland
<b>SA Act</b>	The <i>Electoral Act 1995</i> (SA)
<b>SNP</b>	Supplementary Notice Paper
<b>Tabled Paper</b>	Tabled Paper 4104, tabled in the Legislative Council on 13 August 2020 Tabled Paper 3567, tabled in the Legislative Assembly on 13 August 2020
<b>WAEC</b>	The Western Australian Electoral Commission



## **Standing Committee on Legislation**

### **Date first appointed:**

17 August 2005

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **'4. Legislation Committee**

- 4.1 *A Legislation Committee is established.*
  - 4.2 The Committee consists of 5 Members.
  - 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
  - 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'
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