

## Local Government Electoral and Other Legislation (Expenditure Caps) Amendment Bill 2022

**Submission No:** 20  
**Submitted by:** Queensland Council of Civil Liberties  
**Publication:**  
**Attachments:**  
**Submitter Comments:**



Committee Secretary  
State Development and Regional Industries Committee  
Sdric@parliament.qld.gov.au

Dear Madam

**LOCAL GOVERNMENT ELECTORAL AND OTHER LEGISLATION (EXPENDITURE CAPS) AMENDMENT BILL 2022**

Kindly accept this submission, in relation to the above Bill.

The QCCL is an organisation of volunteers established in 1967 to promote and protect the individual rights of Queenslanders

As an organisation of volunteers our time and resources are limited. Consequently, this submission will be directed to only a few parts of this Bill. Our failure to comment on some aspect of the Bill should not be taken as approval of those provisions.

**1. Principles**

This legislation applies reforms made in relation to state elections to local government elections. This submission then reflects our position has taken in relation to that legislation<sup>1</sup>

The right to vote is arguably the most important civil liberty. Discussion of public issues and debate on the suitability of candidates is fundamental to the exercise of that right. Freedom of association is also a fundamentally important right, essential to the ability of civil society to organise and campaign.

The Council has long supported a broad right to freedom of speech and freedom of association. But it is not our position that either of these rights is absolute. Interference with those rights may be justified where the state can demonstrate a sufficiently important interest it needs to protect, and it uses means to secure those interests that do not unnecessarily restrict those freedoms.

The interest here is clear – that elections are free and fair. Citizens must have a fair opportunity to contest elections and influence the outcome of political decisions.

While restrictions on electoral expenditure are restrictions on freedom of speech and association, it is clearly mistaken to argue that freedom of expression means the government cannot restrict the speech of some in order to allow others a better chance to be heard.<sup>2</sup>

Restrictions on electoral expenditure are akin to the rules of debate in a meeting which restricts the length of speeches and provide for rights of reply. In the context of political speech, the restrictions are essential to fairness, in that the arms race between various political players is continuously increasing the cost of elections, which results in an

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<sup>1</sup> this is a link to our submission on that legislation - <https://www.qccl.org.au/newsblog/queensland-campaign-finance-law-reform-2019-bill>

<sup>2</sup> "Content regulation reconsidered" in TM Scanlon *The Difficulty of Tolerance: Essays in Political Philosophy* Cambridge University Press 2003, at page 166.

increasing number of people being excluded from the political process. Capping expenditure would also help to create closer financial equality between candidates at elections.<sup>3</sup>

There are a number of other arguments against expenditure caps.

The first criticism is that expenditure caps entrench the position of incumbents. Obviously, the existing members of Parliament and political parties have an advantage against new entrants given that their name is already known and they have all the benefits of office. This is a criticism that be made of any campaign finance reform. We make three responses to this criticism.

First, there is evidence that in fact expenditure limits reduce reelection rates and increase political competition by attracting more candidates<sup>4</sup>.

Secondly, we have adopted the position that there should not be caps on donations as a means of ensuring new entrants have access to funds. Rather, there should be comprehensive and continuous up-to-date disclosure of donations. In this regard, we note the comments of Simon Holmes a Court one of the principal figures behind the so-called Teal independents, who has noted that without access to donations that movement would not have succeeded as they did in last year's Federal election.<sup>5</sup>

Thirdly caps on electoral expenditure for independent candidates ought to be proportionally higher than those for endorsed candidates to account for the effects of general party advertising<sup>6</sup>. We would also suggest that new political parties should also get proportionately more because the existing parties clearly have an advantage in name recognition.

The principal argument against expenditure caps is that they may be ineffective and encourage methods of circumvention. However, the evidence<sup>7</sup> is that caps clearly have had an effect of reducing political expenditure as intended. The Council recognises and appreciates the concern about circumvention, but nevertheless accepts that it is better to make *an* attempt than *no* attempt given the interests at stake.

## 2. Definition of expenditure

Electoral expenditure is defined as particular types of expenditure incurred for a campaign purpose. For third parties, expenditure is not classified as electoral expenditure if the dominant purpose for which the expenditure is incurred is not a campaign purpose, even if the expenditure is *also* incurred for, or achieves, a campaign purpose. The definition specifically delineates educating or raising awareness about an issue of public policy as a non-campaign purpose.

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<sup>3</sup> Young and Tham, *Political Finance in Australia; a Skewed and Secret System* – School of Social Sciences, Australia National University Report Number 7 at page 93.

<sup>4</sup> Avis et al *Money and Politics: The Effects of Campaign Spending Limits on Political Entry and Competition* (2022) 14 *American Economic Journal* pp 167-99 (a study using data from Brazil)

<sup>5</sup> interview with Philip Adams Late Night Live ABC Radio National 18 October 2022

<sup>6</sup> "A farewell to arms" Centre for Public Integrity October 2022 page 18

[https://publicintegrity.org.au/research\\_papers/a-farewell-to-arms-the-case-for-commonwealth-expenditure-caps-part-1/](https://publicintegrity.org.au/research_papers/a-farewell-to-arms-the-case-for-commonwealth-expenditure-caps-part-1/)

<sup>7</sup> *Ibid* pages 11-16

Central to this definition is the concept of a campaign purpose. Proposed Section 109B (1) provides that expenditure is incurred for a campaign purpose if the expenditure is incurred to:

- a) Promote or oppose a political party in relation to an election
- b) Promote or oppose the election of a candidate; or
- c) Otherwise influence voting at an election.

Proposed s 109B(2), provides that, without limiting the previous subsection, expenditure is deemed to have been incurred for one of these purposes (and is therefore a campaign purpose) if material produced as a result of the expenditure does any of the following in relation to an election:

- a) Expressly promotes or opposes -
  - a. Political parties or candidates who advocate, or do not advocate, a particular policy or issue; or
  - b. Political parties or candidates who have, or do not have, a particular position on a policy or issue; or
  - c. Candidates who express a particular opinion;
- b) Expressly or impliedly comments –
  - a. About a political party, elected member or candidate in the election; or
  - b. In relation to an electoral district;
- c) Express a particular position on a policy, issue or opinion –
  - a. If the position is publicly associated with a political party or candidate; and
  - b. Whether or not, in expressing the position, the party or candidate is mentioned.

The Queensland Council for Civil Liberties remains concerned that this definition of electoral expenditure is too broad. Campaign purpose is defined as including the purpose to influence voting at an election, which we consider could potentially capture the promotion of any policy which may be supported by one political party or candidate but opposed by another.

This is specifically envisaged by s 109B(2)(c), where advocacy for a policy that is 'publicly associated' with a political party is deemed to be expenditure for a campaign purpose. On its face, the notion of a policy being publicly associated with a party is vague. How close must the nexus between a party and policy be? Would simple endorsement be sufficient? If there are multiple parties which have endorsed a policy, would that effect the extent to which a policy is associated with a particular party? What about a particular side of politics?

Furthermore, it is difficult to see how the deeming provisions do not defeat the purpose of the exception made in s 109A for third parties. By requiring that a campaign purpose be the dominant purpose of an expenditure by a third party for it to be considered election expenditure, the legislation appears to be attempting to accommodate the needs of advocacy and awareness-raising groups. But by *deeming* expenditure that supports a policy that happens to be 'publicly associated' with a political party as expenditure for a campaign purpose, the legislation renders the work of advocacy groups almost certain to be classified as electoral expenditure. This subverts the intended operation of the exception for third parties and leaves advocacy groups effectively unable to advocate for policies that may happen to be associated with a political party, without having to become registered and therefore risk serious criminal penalties for non-compliance.

In our view, defining electoral expenditure in this way goes too far. Expenditure by third parties should only be considered electoral expenditure if it promotes or opposes (directly or indirectly) the election of a political party or candidate.

We note that this would not replicate the position under American law. Under the American Constitution, disclosure laws can only apply to political communication which expressly advocates for the election or defeat of candidates. This approach leaves “issue ads” essentially unregulated. “Issue ads”, whilst missing any statement expressly advocating for the election of a candidate, are functionally equivalent to an ad containing such a statement. This situation has been criticized, and rightly so in our view.

It is our submission that including expenditure for advertisements that indirectly promote or oppose the election of a candidate or party in the definition of campaign expenditure by third parties is sufficient to prevent a replication of the situation in the United States. It simultaneously does not go so far as to make it impossible for an organisation to continue to advocate for a particular policy, which also happens to be the same policy advocated for by a political party or candidate.

Alternatively, it is submitted that the legislation should be amended to make it clear that expenditure will only be considered electoral expenditure if it is the actual intention of the person incurring the expenditure that a party or candidate be elected. This could be achieved by amending the definition of electoral expenditure as follows:

Expenditure, incurred *with a view to*

- a) Promoting or opposing a political party in relation to an election; or
- b) Promoting or opposing the election of a candidate; or
- c) Otherwise influence voting at an election.

Such a definition has two important benefits. Firstly, it focuses the legislation on its intended target, which is the problem of third parties running proxy campaigns and wielding disproportionate influence in elections. Second, it is consistent with the principles of criminal responsibility usually advocated by this organisation, which is that criminal responsibility should usually be limited to the intentional conduct of a person. The deeming provisions erase the intentionality of conduct from consideration and should be thus amended.

### **3. Capped expenditure period**

In the United Kingdom, a recent review considered what the capped expenditure period should be.<sup>8</sup> It was and remains 12 months. The review found that most voters were unlikely to be influenced by campaigning 12 months prior to the election, and so recommended the period be reduced to 4 months. We can identify no reason for why Queensland voters would be any different to UK voters in this regard, and so submit that the capped expenditure period should be reduced from 7 to 4 months prior to the election.

### **4. Registration of third parties**

While the Council supports the registration of third parties above a certain threshold, it is important that the threshold is not so low as to impose unacceptable burdens on advocacy groups, particularly small advocacy groups. Given the extremely serious criminal penalties that failures in compliance could attract, it is important that the administrative burdens are only imposed on appropriate parties.

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<sup>8</sup> Lord Hodgson of Astley Abbots CBE *Third Party Election Campaigning – Getting the Balance Right* (March 2016) para 4.89.



Ultimately, the question is what amount a third party would need to expend to influence the outcome of an election, and further, what is the appropriate balance between securing the necessary transparency and imposing an unfair regulatory burden on organisations.

## 5. Proposed caps for registered and unregistered third parties

The expenditure cap for third parties should strike a fair balance between respect for freedom of speech and association, and the importance of preventing third parties exercising disproportionate influence in elections and being used to circumvent expenditure caps.

In England, the applicable cap for a third party is set at 2% of the maximum campaign expenditure limit for political parties.<sup>9</sup> In NSW, the applicable cap for a third party is the applicable cap for a candidate.<sup>10</sup>

The Council considers that the proposed caps for registered third parties seem to be appropriate as they are equal to the amount of an individual candidate's expenditure, which is the same as the position in New South Wales.

Presumably the low threshold for unregistered organisations is intended as an incentive to register. Whilst that may be a legitimate consideration, it remains our view that \$6000 is too low and the threshold should be set much closer to that for registered organisations in order to better respect the right to freedom of association.

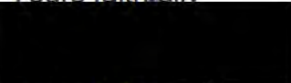
## 6. offences

The Council generally opposes the application of criminal sanctions to conduct that is not intentional. To that extent, the Council opposes the criminalisation of conduct based on what the perpetrator *ought* to have known but was not *in fact* aware of. This is particularly concerning considering that breach can be punished by 10 years imprisonment as provided for in proposed section 123N.

We welcome that there is no penalty of imprisonment for breaches of expenditure caps by unregistered third parties

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope  
President  
For and on behalf of the  
Queensland Council for Civil Liberties  
20 January 2023

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<sup>9</sup> Lord Hodgson of Astley Abbots CBE *Third Party Election Campaigning – Getting the Balance Right* (March 2016) para 6.3.

<sup>10</sup> Economics and Governance Committee, Queensland Parliament, *Inquiry into the feasibility of introducing expenditure caps for Queensland local government elections* (2020), p. 36.