Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Qld)

Inquiry by Queensland Parliament, Economics and Governance Committee

Submission by Professor Graeme Orr, University of Queensland

This submission covers the electoral law aspects of the Bill. Namely, its:

1. Rewrite of campaign finance law.
2. Ban on most signs within 100 metres of polling places.

1. Rewrite of campaign finance law in *Electoral Act* Part 11.

Principles

I have long and publicly supported expenditure and donation limits, where designed to enhance political equality and integrity.[i] There are various regimes now, both interstate and in comparable countries (eg Canada, New Zealand and UK) to draw on, and a growing literature on them. That said, not all cap both expenditure and donations. Canada and NSW do. But the UK focuses on expenditure; whereas the US focuses on capping donations.

Given I generally support expenditure and donation caps, I will confine the rest of my submission to technical and legal issues. One overarching legal issue is constitutional law in the area.

The High Court has been pragmatic in upholding both donation caps and reasonable expenditure limits. See *McCloy's Case* (2015) and *Unions NSW (#2)* (2018). It has done so by implying a principle of 'equality of opportunity to participate in political sovereignty', alongside the implied freedom of political communication. In *Unions NSW (#2)* a majority of the Court also said that, in applying these principles of political 'equality' or 'freedom' of communication, parties cannot be given an unduly privileged position at election time.

Parliament can impinge on those constitutional principles, provided it does so for good reasons or aims. These aims must be compatible with representative government and the law's burdens and means must be proportionate to those aims. I offer further comment on the constitutional aspects of the Bill below. *The proposed expenditure limit on independent candidates may be constitutionally suspect.*

Expenditure Caps - Technical

What is Capped

Section 199 provides that only certain types of expenditure are capped. And then only if related to an electoral purpose such as influencing voting or promoting or opposing a party or candidate.

Election campaigns are increasingly driven by expenditure on data, especially data skimmed from people's online activities, creating profile of them for social-marketing purposes. As currently drafted, I doubt that s 199(2)(a) captures such expenditure. It should be clarified to cover it. The first two, major categories are focused on traditional expenditure: 'designing', through to 'broadcasting or publishing' material, and the 'direct cost' of distribution. 'Opinion poll or research' is the third category. It is not very clear what 'research' here means: it would probably be read down to only cover research into electoral opinion (eg focus groups).

Capped Period

The capped period is to be 1 year prior to a general election, assuming a fixed election date (s 280). That is quite long even by world standards. It is particularly long given that the actual cap on parties is not a single set figure. That cap depends on how many seats a party contests (s 281C). For some parties that is not something they can be sure of knowing a year out from polling day.

Level of the Caps

The party cap is to be $92 000 times the number of seats contested (s 281C). According to the Attorney-General's introductory speech on the bill, this is also subject to an internal cap of $92 000 per electoral district. This should be explicitly clarified in the legislation.

However the true limit on parties is higher. It is $92 000 x 93 seats, that is $8.56m for the party cap, *plus* up to $58 000 of spending by each endorsed candidate. This totals almost $14m in effectively party-controlled expenditure. In contrast, the limits in NSW for 2023 will be $132 600 x 93 seats, that is about $12.3m for the party cap, *plus* up to $132 600 of spending by each endorsed candidate. This totals almost $24.6m in effectively party-controlled expenditure for NSW. It should be remembered that NSW is a much more populous state, and has two elected houses.

This committee needs to consider three things in relation to the levels of the caps:

- *Why are the caps set around these amounts?* To insulate caps against High Court challenge, there must to be some rationale for the levels set. This is something the government, parliament *and* this committee need to consider. The Court will want to see some evidence base. For instance: (1) Is $14m for party-controlled spending generous, realistic or niggardly, compared to recent spending patterns and what is required to mount a reasonable campaign? If that overall cap does not take money out of the system, it does not really address the integrity and equality aims. (2) If particular caps have been borrowed from interstate, has there been any allowance for differences in systems, enrolments and media markets? (3) Is the figure of $1m for a third party sufficient to permit it to present its case to Queensland voters?[1]

- *Are the relativities between the caps – especially for independents and third parties – fair and justifiable*? If not, they are liable to be struck down by the High Court under the constitutional principles mentioned above: reasonable freedom of political communication and a relative equality of political opportunity, without undue privileging of parties for their own sake.

  The cap of $1m on registered third parties seems to be drawn from pre-existing NSW law. Assuming that figure is reasonable for NSW (a third party cap of $0.5m was overturned in the *Unions NSW (#2)* case, but the earlier cap of $1m was not challenged) it should be

[1] A test used by Justice Gageler in *Unions NSW (No 2)* (at paragraph 102).

constitutionally okay for Queensland. Admittedly, the NSW capped period is much shorter – a bit under seven months whereas this Bill proposes one year. On the other hand, Queensland elections are for one house, not two, so $1m may go further. Also, $1m will represent more spending power, *relative to the proposed party cap*, in Queensland than in NSW.

Independents, however, are only to be allowed $87 000 in Queensland. Yet a party can effectively spend up to $150 000 in a seat-targeted campaign against an independent candidate; *plus* enjoy the wash of the generic promotion of the party and its leaders as a whole. In contrast, in NSW, an independent lower house candidate will have a cap of almost $200 000. That is early two-and-a-half times the cap for an independent in Queensland, and equal to the effective party cap in NSW (which is $66 400 for the party directly and $132 600 for the party's candidate).

The proposed cap on independents in Queensland is therefore constitutionally vulnerable. It unduly privileges political parties, something the majority of the High Court says is not permitted.[2]

- *Unregistered third parties*. They are to be capped at just $1000. In NSW, an unregistered third party can spend much more. Is there a justification for such a big difference, especially as the Queensland capped period will be five months longer than in NSW? There may also be a practical problem with the $1000 figure, because it will apply to the whole of the year before an election. A group could innocently spend over $1000 before it even twigs that an election is 10 or 11 months away and that registration rules apply.

Aggregation

The Attorney-General's speech suggests the election spending of associated entities will be included (or aggregated) within the cap of the associated political party. This is an important anti-avoidance principle. In NSW, it is explicit that an associated entity's electioneering is automatically aggregated to the party cap.[3] This is not necessarily a measure about trade unions affiliating with the ALP. An 'associated entity' is narrowly defined, in NSW as one that 'operates solely' for the benefit of a party and in Queensland as a body either controlled by the party or operating 'wholly or to a significant extent' for the party's benefit.[4]

The Queensland Bill is not quite so clear that associated entity spending is automatically aggregated to the relevant party, because it is convoluted. The intention is expressed: s 283(3)(b) requires parties to report spending by an associated entity as if it was 'incurred by that party'. But a reporting rule is not the same as an offence of breaching the cap. The offence is in s 281G: it covers spending by 'the participant', including spending 'with the participant's authority'. The definition of 'participant' in s 197A does not state that a party includes associated entities. Instead, s 204 is headed 'Associated entity to be treated as part of a registered party for particular purposes'. Section 204 then seems to say the spending cap regime applies 'as if … the party and the associated entity constitute the political party (the *recipient party*)'. So a new term 'recipient party' is created, yet it is never used outside s 204. In any event 'recipient party' is an odd term to use to refer to spending. It may also create confusion as s 281A talks about a 'recipient' of the benefit of electoral

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[2] See *Unions NSW (# 2)*, both the joint judgment of Chief Justice Kiefel and Justices Bell and Keane, and the judgment of Justice Edelman.
[3] *Electoral Funding Act 2018* (NSW) s 30(4).
[4] *Electoral Funding Act 2018* (NSW) s 4; *Electoral Act 1992* (Qld) s 197.

spending by another. But s 281A is not an automatic aggregation rule for associated entity spending; it is a rule about co-ordinated spending where the 'recipient' has authorised/consented to the spending, or has 'accepted' electoral material. In short the Bill should more clearly state that associated entity spending is automatically aggregated to the party cap.

Enforcement

The bill has two explicit enforcement mechanisms for breaches of expenditure caps. One is a civil penalty of forfeiture: for instance, forfeiting double the excess expenditure. The other is a criminal offence.

The bill is silent however on the effect, if any, of over-expenditure on an election outcome. It is something worth considering. In Courts of Disputed Returns, any breach of the Electoral Act that was likely to have affected the outcome in a district, is petitionable. Egregious overspending state-wide, or in particular seats, could be seen by a judge as tainting the outcome in very marginal seats. There would be no requirement that the excessive expenditure was by the winning party or candidate: it could be by a supportive third party. (Although a judge is more likely to think it just to unseat a party or candidate if they were been responsible for the overspending).

On the other hand, Queensland law only gives electors seven days from the return of the writ (so only a few weeks from polling day) to lodge a petition to challenge the result in an electoral district. Under this Bill, disclosure of expenditure will not occur for a considerable time after that. So the over-spending would have to be blatantly obvious for someone to risk the costs of pursuing a petition. In addition no group or party can challenge the whole of an election, but merely lodge separate petitions seat by seat.

Donation Caps - Technical

The revised definition of 'gifts' in s 201 does not include party subscriptions or affiliation fees. I presume this is to permit a party structured like the ALP to continue to receive membership-based union affiliation fees. This may seem like a loophole if every party creates 'organisational' membership, eg a 'platinum business' category with high annual membership rates. In contrast, the ongoing prohibition on contributions from property developers limits them to a $1000pa subscription or affiliation fee (see s 274).

I realise that such fees cannot be paid into the State campaign period account. But they can still buy influence or access with a party and its leadership, and can be used to pay for campaigning outside the capped year before a State election. If this avenue – inflated party subscriptions – is exploited, this will increase cynicism, and undermine the integrity aim of the Bill.

A second, actual loophole may arise in s 255, covering the aggregation limit on donations to candidates. No-one is to donate more than $6000 to a candidate across the capped period (which backdates to the last election). The intention of s 255(3) is to stop anyone spreading *multiple* donations across candidates of the same party, thereby making a mockery of the cap on donations to parties (of $4000 across the term). However s 255(3) only aggregates donations to candidates who, at the time of the donation, have been 'endorsed' by the same party. The loophole would be to spread donations across yet-to-be endorsed candidates. Like new candidates at a time just before they receive party endorsement. That kind of inside information is available within parties.

The Bill proposes quarterly indexing for donation caps. That could prove clunky. Why not set a round figure, subject to some modest adjustment (eg a $500 increase per term)? A round and

stable figure for donation caps is desirable, because it is easier for the public – and hence potential donors, as well as smaller parties and candidates – to remember and abide by.

Donation caps are not to come in until after the 2020 general election. Yet the enhanced public funding kicks in earlier. This too may arouse public cynicism. What is the rationale for delaying one, but not the other? Is it because the future capped donation period is the whole four year term and parties have not had enough notice to build up a war-chest for the coming election?

Public Funding - Technical

It is good that the Bill ameliorates existing discrimination against smaller parties and independent candidates. One way it does this is by lowering the threshold of votes needed to receive payment of public funding after elections, so it fits the Australian norm of 4% of the formal vote (the figure long needed to recover nomination deposits).

Independent MPs will also now receive 'policy development' payments. I note the term 'policy development funding' remains an empty label. That is, it is not earmarked for particular party activities that are actually policy related, or for that matter party administration, membership development or parliamentary related costs (compare NSW). It is true that policy development funding cannot be paid into a State election campaign account (see proposed s 216). But nothing will stop it being used for either national or local electioneering, or for that matter state political campaigning outside the 1 year capped electioneering period. Is that really intended?

However the Bill does not fully eliminate discrimination against independents in election funding. Earlier I noted the constitutionally suspect difference between an independent candidate's spending cap and the cap for a party and its candidate. When it comes to public funding, the Bill provides that candidates who are not with a registered party will only receive funding at half rate ($3 per vote versus $6 per vote for parties). This is perverse. Independents lack economies of scale, party office expertise and the wash of a party's statewide campaign. In complete contrast, in South Australia, candidates who are independent or endorsed by micro-parties without MPs receive public funding at a *higher* rate per vote than party candidates.[5]

This is not just a matter of perceived unfairness. The High Court will look at the lower spending caps for independent candidates, *together with* the lower public funding. It will not conclude 'well, independents need less money'. But ask 'what is the rationale for discriminating against independents on two fronts?' It cannot be an integrity measure: independents have the same donation caps as party candidates. And it looks like the opposite of a level-playing field measure.

2. Ban on signage within 100 metres of polling places

Principles

Only registered parties fielding candidates, or candidates, are permitted signage. Then only 2 signs smaller than 900mm x 600mm.

[5] About 50 cents more per vote, up to 10% of the vote in their electorate: see *Electoral Act 1985* (SA) s 130P.

The question of the constitutionality of this ban arises. Here, the government's Explanatory Note says the policy objectives behind the new rules are: (1) fairness, by avoiding 'crowding out'; (2) protecting property, by limiting potential damage from the mass affixing and removal of signs; and (3) electoral decorum, by having 'more neutral' polling zones for harried voters and by minimising the race to set up and space squat prior to election morning.

Fairness and concern for property are clearly constitutionally legitimate aims. Decorum, although less compelling, probably is also – certainly it justifies older rules that polling booths are free of any propaganda within 6m of their entrance or inside. The Explanatory Note is curiously silent on a fourth possible benefit: minimising waste, especially of plastic bunting. (I say curiously as the Attorney-General has cited waste as an additional aim of the ban). Environmental concerns on their own would not usually trump political freedoms. But here it is an *extra* public value for the committee and parliament to acknowledge. Indeed such concerns have long been muttered by electors themselves about the mass of how to vote material and plastic unlike paper is … forever.

According to the High Court, the law's burdens on either political communication, or equality of political opportunity, must be proportionate to its aims. Proportionate means:

- Sufficient, in the sense of rationally connected to the aims. Here the limits on signage are rationally connected to the aims, especially of fairness and decorum.
- Necessary, in the sense that there is no obvious or compelling practicable and better alternative. This does not mean that the new rules have to be essential, in the sense of the only reasonable means available to Parliament.
- Adequate, in its balance.

On these last two issues, I would imagine the law will be challenged constitutionally at some point. Perhaps not directly by a Get Up or similar group. But when a non-party activist or group is prosecuted for setting up a couple of signs. They will argue that the law is unbalanced, in not allowing *any* non-party/non-candidate signage. A reasonable alternative, they may argue, would allow say one sign for individuals or groups who are not candidates or parties.

The law however can withstand such a challenge. It still permits non-party activists or groups to set up a table, including with an umbrella in colours or with a slogan, and to distribute leaflets and engage in political conversations. The proposed regime is fairly narrowly tailored to a particular type of material on particular days. The alternative of allowing non-party/non-candidate signage would risk a big loophole, because such an individual or group could easily be a front for a party, and the entire regime would be easily undermined.

That said, there is a middle way that would be less burdensome on political freedom. That would be to let registered third parties (a new category established by the bill) to have one sign at each polling place. Since signs must be 'accompanied', a registered third party would have to have real supporters to take advantage of that allowance – unless they were willing to pay mercenaries to stand at polling places during voting hours *purely* to accompany signs, which seems unlikely.

Technical

1. Every sign must be accompanied (s 185F(2)(f)). Presumably this means at least one party or candidate activist nearby the sign at all times. The term 'accompany' is fuzzy, but we can trust the Electoral Commission of Queensland to interpret it rationally. So, for example, an activist popping off to buy lunch nearby or for a toilet break does not 'de-

accompany' the sign. But an activist who clocks off without a replacement does 'de-accompany' the sign, which would have to be taken down until that activist is replaced. Still, as a matter of principle, is it necessary to create further barriers between parties able to man all polling places all the time, and those without? Such a provision might further encourage parties with money to hire mercenaries. Why isn't the limit of two signs per party/candidate sufficient to do the work here?

2. Signs must be freestanding (s 185F(2)(e).) The only justification for this could be to eliminate any risk of marking or damage to property. But it may increase costs or wastage (by necessitating metal stands) and generate trivial disputes, eg about corflutes that are tied to a tree.
   As drafted, a party or candidate will still be allowed an unlimited number of 'umbrellas or portable shade structures' that display electoral and party slogans or images (s 185B(2)). So expect innovation and costs to increase on that picturesque front.

3. Nothing in the new rules will stop a party paying a nearby resident or building proprietor to display unlimited signs, publicly, on those premises including during voting days (see s 185C). Obviously we do not want to be policing nearby houses that say fly flags that are politically expressive. But the exemption for nearby residences or other buildings, which is carved out from the offence of 'display' in a 'restricted signage area' on voting days (s 185F) does not appear to apply to the other offence against the early-set-up of displays on election day (s 185G).

   Is this a drafting oversight? If so, the problem seems to arise because of a multiplication of similar concepts about the physical area being regulated. 'Restricted signage area' (ss 185C and 185F) becomes 'area around the polling booth' in the s 185G offence. To make confusion worse, a third concept, 'designated area' appears in the s 185F offence. Does the Bill really need *three* different geographical terms, all riffing on the concept of a 100 metre cordon around where polling is occurring?!

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End of Submission

[i] See *The Law of Politics* (1st edn 2010, 2nd edn 2019) chapter 11; 'Political Finance Law in Queensland: One Step Forward, Two Steps Back' (2015) 40 *Alternative Law Journal* 40, pages 70-81, or 'Investment Guide to Democracy', The Courier-Mail, 12/3/2008, page 30.