

Submission

on

Electoral Reform: Donations, Funding and Expenditure

to the

Electoral Reform Secretariat

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1. Introduction

The Australian Government is considering changes to Australia's electoral funding and financial disclosure requirements. The *Electoral Reform Green Paper: Donations, funding and expenditure* was released in December 2008.¹ Public comment has been invited on the issues raised in the Green Paper. Submissions are due by 23 February 2009.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Democratic principles

The funding of political candidates and parties in elections is an integral element of a democratic system of government. The way in which elections are funded is of critical importance to the integrity of the electoral process and the strength of parliamentary democracy as a whole. Consequently, election funding law should facilitate the kind of representative democracy cherished by the Australian people.

2.1 Individual freedom

As Professor Lumb points out in his book *Australian Constitutionalism*, the roots of the modern Australian system of government lie in the debates and battles in earlier centuries over providing a system of effective constraints on government power.² The idea of the rule of law, or limited government, overturned the earlier doctrine of unlimited sovereignty under which people were subject to the arbitrary will of the ruler.

The core idea of the Australian system of government is recognition of the right of the citizen to freedom under the law. This fundamental freedom is expressed in many ways, including the right to stand for election and vote, and also through the right of a citizen to use his financial resources to further his political objectives. Any constraint on the freedom of a citizen to fund political candidates or parties needs to be fully justified.

Reasonable measures to encourage citizens who wish to fund political candidates or parties, respects and fosters political freedom.

This recognition of individual freedom emerges from the Judaeo-Christian understanding of mankind being made in the image of God and therefore being entitled to respect and dignity.³

2.2 Freedom of association

Another central element of the dignity of mankind is the recognition that people are inherently relational and naturally join with others in groups of various kinds.

In a political context this involves "recognition of the fact that between the ruler and the mass of the citizenry there are a variety of groups to which the citizens belong. They may be occupational (guild, union, association), religious (church), educational (school, university), cultural and social. Certainly, in earlier periods, battles over authority and allegiance were often fought between an overweening State (Monarch) and the Church anxious to preserve the rights of its members but also at times

encroaching on such rights. The concept of limited sovereignty recognises that claims to allegiance or obedience may arise from a number of groups...”⁴

Political parties are among the kinds of association which citizens should have the freedom to form or to join. Furthermore, political parties should have the freedom to raise funds and use them in political campaigns, subject only to constraints which have strong justification.

2.3 Civil society

Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

*Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*⁵

The links between civil society and democracy were explored by Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.⁶ They argued that many civil society organisations facilitate better awareness and a more informed citizenry, who make better voting choices, participate in politics, and hold government more accountable as a result. Such organisations also accustom participants to the processes of democratic decision making.

Consequently, election funding arrangements should facilitate, not hinder, the organisations which constitute civil society, including political parties, trade unions, business associations and advocacy groups.

2.4 Representative democracy

Australia's system of representative democracy must be distinguished from direct democracy on the one hand and totalitarian democracy on the other.

Representative democracy is characterised by elected representatives who form a parliament charged with the responsibility of making decisions and acting in the public interest – without direct consultation with the electorate. This enables swift and resolute action in the face of changing circumstances.

Direct democracy involves decisions being made either by referendum or by delegates to a ruling body bound to vote in accordance with decisions made by a majority of their electors. Such a system is inherently slow and can be dominated by sectional interests.

In a totalitarian democracy, elected officials are bound to support an ideology independently of the views of the electorate. The ideology may be considered beyond the understanding of the electorate. The duty of the officials is to ensure that any inconsistent public or private activities are eliminated.⁷

Representative democracy works best when elected representatives maintain a close relationship with their constituents. While not being bound by their electorate, representatives are then able to take the views of the electorate into consideration when decisions are made in parliament.

Election funding arrangements should be designed to facilitate a close working relationship between representatives and their constituents.

2.5 Political freedom

A detailed study of political finance in Australia, undertaken at the School of Social Sciences of the Australian National University for the Democratic Audit of Australia, made the following observation about private political funding.⁸

The foremost democratic virtue of funding of Australian political parties and its regulation is, perhaps, the fact that citizens, companies and trade unions are legally free to contribute politically in whatever manner they like and parties are free to receive any contribution. Insofar as political contributions are a form of political expression, freedom of political speech is then preserved. Moreover, the ability of parties to receive whatever contributions they see fit buttresses the freedom of political association.

3. Public funding

The Green Paper states (at 4.10) that “The aims of introducing a public funding scheme were to provide a greater equality in the opportunity to present policies to the electorate and to reduce the risk of corruption and undue influence.” The latter was to be achieved indirectly by reducing the reliance of political parties on private donations to raise sufficient funds for an election campaign.

There is no evidence that either of these aims has been achieved despite the massive investment in public funding

The main effect of public funding has been to increase the amount available for election campaigning by all parties.

This is acknowledged in the Green Paper (at 1.15):

“The amount of private funding raised by political parties to contest elections has increased to the extent that critics argue that the public funding and financial disclosure scheme is not effective in reducing political parties’ and candidates’ reliance on private funding. It would appear that public funding has been integrated into campaign budgets as an additional stream of funding that has in turn helped support expanded and lengthened election campaigns.”

An analysis of New South Wales data reveals⁹ that the public funding each party received in 2003 was roughly proportional to the amount of political donations each party was able to raise on its own. For four of the five parties receiving public funding this had no significant effect on their relative overall funding compared to each other.

Those who support public funding are now arguing that it should be accompanied by significant restrictions on private donations, such as upper limits, and caps on election expenditure.

Such demands presume that government, rather than civil society, is responsible for ensuring that parties and candidates are adequately funded. This well-intentioned presumption has the potential to undermine the strength of political parties by reducing their dependence on supporters.

The notion that candidates should be entitled to public funding might be expected in a ‘top-down’ totalitarian democracy but not in a “bottom-up” representative democracy.

Recommendation 1:

Public funding has failed to achieve its original objectives of creating equality between parties and reducing reliance on private donations. Support for public funding is increasingly coupled with calls for upper limits on private donations and caps on election expenditure. These measures cannot be justified in a free society. In order to avoid undermining the important relationships between citizens and political candidates, public funding of political parties and candidates in elections should be discontinued.

4. Disclosure of political donations

Mandatory public disclosure of financial contributions to political parties and candidates and their campaign expenditures is an important safeguard against inappropriate influence on the political system.

Disclosure thresholds should be set to achieve an appropriate balance between encouraging participation in the democratic process through financial support to political parties and candidates, and the public interest in knowing the source of political donations, especially larger donations.

Factors supporting the higher threshold for disclosure include:

- (a) preserving the privacy of citizens (and their businesses) who choose to make political donations, and
- (b) limiting the compliance costs of political parties in reporting the sources of donations over the threshold.

The disclosure threshold should be high enough to allow political parties to attract adequate private donations without an undue administrative burden of disclosure. This administrative burden could fall disproportionately on smaller political parties particularly if the disclosure threshold is set too low.

The major factor that should limit the threshold is the public interest of enabling the public to be aware of the major supporters of political parties. A robust democracy requires openness and accountability in the contributions to political parties, since those contributing large amounts could have significant influence over candidates who are elected to positions of responsibility and authority. The disclosure threshold should be set at a level that will allow the public knowledge of the source of the larger donations to political parties and candidates.

The three criteria for determining an appropriate threshold are:

- preserving reasonable donor privacy,
- limiting compliance costs, and
- safeguarding the public interest.

One approach to determining the threshold would be by reference to a fixed proportion of the total donation income raised. This would:

- (a) safeguard the public interest by ensuring that a fixed proportion of the donation income raised is subject to public disclosure; and
- (b) adjust the threshold to compensate for changes in donor generosity affected by changing salaries, living costs and other economic factors.

In order to balance all the factors, it could be appropriate to use a fairly high percentage of total annual donations – somewhere between 90 and 95% - to determine the monetary threshold required to ensure disclosure of this percentage of donations.

In 2005 the Joint Standing Committee on Electoral Matters of the Commonwealth Parliament reported that “88% of the value of disclosed donations to the major parties is greater than \$10,000”.¹⁰

Young and Tham¹¹ point out that this percentage refers only to receipts classified as “donations”, whereas if the total receipts were used instead then only an average of 64.1% of total receipts would have been disclosed from 1998/99-2004/05 with a threshold of \$10,000. The earlier threshold of \$1500 would have resulted in an average disclosure of 74.7% of all receipts.

If the definition of “donation” is too narrow to include some large financial contributions to political parties and candidates, for example payments for attendance at private events with political leaders, this should be addressed by reviewing the definition of “donation”. Any extension in disclosure obligations should be balanced against the need for the compliance burden to be reasonable and justifiable.

An analysis of New South Wales data on political donations¹² suggests that a disclosure threshold between \$4000 and \$5000 would ensure that the source of 80% of total donation income was disclosed.

The *Political Donations Bill 2008* would amend the *Electoral Act 1918* to drop the disclosure threshold from its current level of \$10,900 down to \$1,000. Additionally returns from political parties would be required every six months rather than annually.

The proposed Commonwealth threshold of just \$1000 could be too low and impose an unreasonable and unjustifiable compliance burden on political parties and candidates.

Recommendation 2:

The laws governing mandatory public disclosure of financial contributions to political parties and candidates should be designed:

- (a) to target those kinds of contributions that could be associated with undue or inappropriate influence on political parties and candidates;***
- (b) to achieve a reasonable balance between disclosure of a high proportion of the total donation income, limiting compliance costs and preserving reasonable donor privacy; and***
- (c) to ensure that the public disclosure is timely.***

5. Bans and caps on private donations

The democratic principles outlined above suggest that any restriction on private donations to political parties or candidates would need to be justified on the basis of verifiable concerns that could not be adequately addressed by other means such as disclosure requirements.

Given the peculiar nature of the gaming industry and its already disproportionate influence on government in Victoria due to the size of its net contribution to revenue, the existing limitation in section 212 of Victoria’s Electoral Act on donations from the holders of casino and certain gaming licenses is entirely appropriate and should be maintained.

In the absence of any specific concerns about other inappropriate sources of donations there is no justification for either setting a maximum limit as applies in Canada or excluding or imposing limits on other categories of donors. Appropriate disclosure requirements should adequately meet the need for transparency.

The *West Australian* has reported on one big donor to the Liberal party for the 2007 election campaign, Mrs Josephine Armstrong.¹³ Mrs Armstrong, a private citizen, donated a total of \$600,000 to the campaign because “it sounded as if John Howard could do with some extra money”. There is no case in a free society for restricting Mrs Armstrong’s freedom to make such a donation.

Recommendation 3:

Limits on private donations should only be imposed when there is clear and specific evidence for a specific concern. Otherwise there should be no limits on private donations.

6. Caps on expenditure

The democratic principles outlined above suggest that in the absence of a clear justification any caps on election expenditure would be inappropriate.

The case for caps on election expenditure has not been made out. It is either merely a sentiment that “too much” is being spent on elections or, when coupled with proposals to increase public funding and limit private donations, an attempt to “socialise” election campaigning.

Recommendation 4:

There is no case for capping expenditure on election campaigns.

7. Endnotes

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 3. Genesis 1:27.
 4. Lumb, *op cit*, p 5.
 5. *What is civil society?* Centre for Civil Society, London School of Economics, 1 January 2004.
 6. Almond, G, & Verba, S; *The Civic Culture: Political Attitudes And Democracy In Five Nations*, Sage, 1989.
 7. See the 1952 book *The Origins of Totalitarian Democracy* by Israeli historian J. L. Talmon.
 8. Young, S. and Tham, J.-C. *Political finance in Australia: A skewed and secret system*, Australian National University, 2006, p 20; http://democratic.audit.anu.edu.au/papers/focussed_audits/20061121_youngthamfin.pdf .
 9. Festival of Light Australia, *Submission on Electoral and Political Party Funding to the Select Committee on Electoral and Political Party Funding* (NSW), 2008, p. 4;

[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/c3f03a66b6c79a64ca2573f70005913c/\\$FILE/Submission%2040.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/c3f03a66b6c79a64ca2573f70005913c/$FILE/Submission%2040.pdf) .

10. Joint Standing Committee on Electoral Matters (JSCEM), 2005, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, para 13.71;

<http://www.aph.gov.au/house/committee/em/elect04/report/chapter13.pdf>.

11. Young, S. and Tham, J.-C. *Political finance in Australia: A skewed and secret system*, Australian National University, 2006, p 20;

http://democratic.audit.anu.edu.au/papers/focussed_audits/20061121_youngthamfin.pdf .

12. Festival of Light Australia, *Submission on Electoral and Political Party Funding to the Select Committee on Electoral and Political Party Funding* (NSW), 2008, p 6-7;

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13. Banks, A. “Libs’ big donor ‘just helping out’”, *West Australian*, 9 January 2009, p 5.