Panel of Experts – Political Donations

Submitted by Ros Everett
The Law Society

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Expert Panel on Political Donations
GPO Box 5341
SYDNEY NSW 2001

By email: donationsreform@dpc.nsw.gov.au

Dear Panel Members,

Submission to the Panel of Experts: political donations and election funding

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia’s obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee has an interest in legislation affecting freedom of expression and the allied freedom of communication on political and governmental matters, the latter of which is implied in the Australian Federal Constitution. In pursuit of this interest, it has examined the new s 96D of the Election Funding, Expenditure and Disclosures Act 1981 ("the Act") which was recently amended to deal with the invalidity recognised in that Act by the High Court of Australia in Unions NSW and others v New South Wales ("Unions NSW v NSW") [2013] HCA 58, handed down on 18 December 2013.

Given the High Court’s findings in Unions NSW v NSW, the Committee is concerned that this provision is problematic from both a Constitutional and human rights law perspective.

The terms of s 96D are as follows:

96D Restrictions on persons from whom donations can be accepted

(1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is:

(a) an individual who is enrolled on the roll of electors for State elections, on the roll of electors for federal elections, or on the roll of electors for a local government election, or
(b) an entity that has a relevant business number.

(2) A relevant business number is:

(a) an Australian Business Number (ABN), or
(b) any other number allocated or recognised by the Australian Securities and Investments Commission for the purposes of identifying the entity.
The Committee's concerns are outlined below.

1. **Constitutional Issues**

   1. All members of the Court expressly decided¹ that individuals who are not enrolled as electors cannot be excluded by legislation from making a political donation; and

   2. The section excludes entities other than individuals from capacity to make a political donation unless they have an Australian Business Number (ABN) or similar number allocated or recognised by ASIC. However, the word "entity" is defined in the Act (ss 3 and 84) as an incorporated or unincorporated body, or the trustee of a trust. The Committee notes that many non-trading unincorporated bodies would not have an ABN or similar number, and would therefore appear to be excluded from making a donation. As a result, the section may have the effect of excluding a group, as against an individual, from donating. Many trustees would also have no relevant business number.

   When considering the validity of the provisions in question in *Unions NSW v NSW*² the High Court applied the *Lange* test³ to find those provisions invalid as they impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution. The Committee submits that if the High Court's reasoning is observed in the consideration of s 96D, this provision is similarly:

   a) a burden on the freedom⁴; and

   b) not reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government.⁵

2. **Human Rights Issues**

   In addition to the potential difficulties from a Constitutional perspective, the Committee also submits that s 96D may breach the *International Covenant on Civil and Political Rights* (*ICCPR*), which, as a result of that treaty having been ratified by Australia, is required to be observed by the NSW Parliament under international law.

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¹ *Unions NSW and others v NSW* [2013] HCA 58 at [30] and [144]
² Note 1 at [44]
³ The Committee notes that in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court set out the test to determine the validity of a law which infringes upon the freedom of communication on political and governmental matters:

   First, does the law effectively burden freedom of communication about government or political matters, either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

⁴ Point (a) applies the first limb of the test set out in the *Lange* test.
⁵ Point (b) applies the second limb of the *Lange* test: *Unions NSW v NSW* at [44].
In particular, under Article 25 of the ICCPR, citizens are required to be able to take part in the conduct of public affairs directly or through freely chosen representatives "without unreasonable restrictions". The exclusions from being political donors of many (perhaps most) unincorporated bodies, and some trustees and other individuals, appear unreasonable within the meaning of this Article.

Further, under Article 26 of the ICCPR, persons have entitlements to equality before the law and not to be discriminated against in law. The exclusions referred to in the last paragraph of the proposed provision appear to deal differentially with persons so excluded, and may also discriminate against them on the basis of a status arising from the form or nature of their association.

In these circumstances, the Committee respectfully submits that s 96D should be urgently amended so that it avoids the likelihood of constitutional invalidity, and inconsistency with Australia’s international human rights law obligations.

The Committee consents to the publication of this submission. If your office has any questions, please contact Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

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President