Panel of Experts – Political Donations

Submitted by Colin Barry
NSW Electoral Commission

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Dr Kerry Schott
Chair
Expert Panel on Political Donations
By email donationsreform@dpc.nsw.gov.au

Dear Dr Schott

Submission to the Panel of Experts – Political Donations

Thank you for the opportunity to make a further submission to the Panel. This submission is to supplement my letter of 23 July 2014.

There can be no review of election funding law without first considering the purpose of such law. It must sound simplistic to lead with such a statement; however, it is often the case that basic principles are forgotten in our haste to find solutions to our problems. Indeed, ad hoc, successive amendments to the Election Funding, Expenditure and Disclosures Act 1981 ("the EFED Act") have created the greatest mischief in election funding law today. We have rushed to find short term solutions to a variety of issues and, in doing so, have failed to consider how those "solutions" affect the regime as a whole and whether they actually deliver real solutions to real problems.

I submit that there must be a comprehensive review of the EFED Act and that such a review must go back to basic principles:

1. Define the "mission"
   What is the purpose of the election funding regime? This discussion includes consideration of the scope of the legislation, as well as the scope of the Election Funding Authority and NSW Electoral Commission (and any other agency involved in the administration and regulation of election funding law).

2. Set objectives / deliverables
   These are the specific, measurable goals of the regime. Objectives and deliverables should provide the detail and the direction of what the regime is to achieve, what purposes it will serve and how it will do so.

3. Analyse and formulate policies to reach those objectives
   This starts with a realistic evaluation of the past and current position of election funding law, what worked and what did not. Only then can we determine and evaluate alternatives that support the objectives and select the best alternative.

4. Implement policies through a considered, root and branch reform of the current law.
I attach a copy of my submission to the Joint Standing Committee on Electoral Matters ("JSCEM") Inquiry into Public Funding of Election Campaigns dated 9 December 2009. In my submission, I refer to four pillars\(^1\) on which a democratic election funding regime can rest. Those pillars are:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions; and
4. Respect for political freedoms.

The four pillars are, in my view, the mission or the "vision" of the new election funding regime.

In my letter to the Panel dated 23 July 2014, and in my submission to the JSCEM Inquiry into the Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981, I stated that I support the policy objectives and the broader processes within the EFED Act. I reiterate my support for processes that provide for the registration of participants at State and local government level, the disclosure of their political donations and electoral expenditure, the provision of public funding for election campaign, policy and administration expenses for eligible participants, and the independent regulation of the law and all electoral participants. If the four pillars are the mission of the election funding regime, these processes represent the objectives of the regime.

Once again, I thank you for the opportunity to address the Panel.

Yours sincerely

Colin Barry
NSW Electoral Commissioner

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\(^1\) The four pillars were first discussed by Dr Joo-Cheong Tham in his 2008 submission to the NSW Legislative Council's Inquiry into Electoral and Political Party Funding: http://www.parliament.nsw.gov.au/pred/parlment/committee.nsf/0/7e50893a96c88112ca257401008013b4/$FILE/Submission%20154.pdf
INTRODUCTION

I am pleased to be invited to make a preliminary submission to the Committee on this important Inquiry.

I should state that this submission is from me in my capacity as Chair of the Election Funding Authority and Electoral Commissioner. The views that I express in this submission are my own and do not represent the views of the NSW Government or the responsible Minister, in this case the Premier.

This Inquiry is an important opportunity for NSW to once again take a lead in establishing a comprehensive and integrated scheme of public funding and disclosure that is fair, transparent and enhances the quality of democracy in our State. I note that the terms of reference are wide ranging and provide the Committee with scope to look at all aspects of funding and disclosure including the possibility of extending the regime into four important areas which have previously not been covered by the existing legislation:

- Public funding of political parties;

- Caps on election expenditure by parties, candidates and third parties;

- Regulating government advertising; and
• The application of a scheme to Local Government elections and stakeholders.

The time frame for the report will be demanding as the Committee is required to report by 12 March 2010.

I want to use the opportunity today by way of a preliminary submission to deal with some higher level principles that in my view should underpin the regime of public funding and disclosure and to provide ideas for a framework for establishing a comprehensive and integrated system.

Background

As members are aware, NSW was the first Australian electoral jurisdiction to introduce public funding and disclosure legislation in 1981. This was avant-guard legislation at the time and preceded the Commonwealth introducing similar legislation in the mid 1980s. The legislation has stood the test of time with only minor amendments until 2008 when there were major amendments to the Act.

The 2008 amendments, amongst other things, sought to strengthen the integrity of the disclosure requirements. There have been a number of challenges and difficulties in giving effect to the anticipated policy outcomes in connection with the 2008 amendments. This is well documented and I don’t propose to revisit this issue today other than to make the observation that, in my view, some of the difficulties associated with implementation of the 2008 amendments arise from the amendments not fitting well into the existing scheme.

I would submit that, considering the wide terms of reference, any recommendations that the Committee makes in connection with the sixteen specific matters under consideration, the most significant is that you recommend that a completely new Act is
now required to fix the weaknesses in the present Act and to
give effect to the recommendations from this Inquiry.

**Governing Principles of a Democratic Political Finance Scheme**

In considering the nature of any scheme that deals with the
issues contained in the terms of reference, I submit that the
Committee should first and foremost turn its mind to the
underlying principles or governing aims if you like that any
scheme should embody.

In dealing with these issues up front it should provide a
framework for the Committee to test policy options in each of
the sixteen areas in the terms of reference.

In the absence of considering and establishing appropriate
principles, the Committee will have no guiding beacon to aim
for and, as such, policy options and models that are proposed
will only be tested in the public debate over perceived partisan
outcomes.

I submit the following four governing principles for a truly
democratic political finance scheme.

They are the four foundation pillars on which any integrated
scheme can confidently rest.

1. **Protecting the Integrity of Representative Government**

It is fundamental in our system of representative democracy
that elected Members of Parliament and Local Government
councillors are accountable to the citizens who they represent.
They are expected to act in the interests of those citizens. This
is often assumed or taken for granted but it should be
acknowledged as the cornerstone of our democracy.
The legislative framework which governs the arrangements for their election to office, their behaviour in office and the regime of funding and disclosure must have as its principal objective to protect the integrity of the system of representative government and consequently it must prevent corruption.

When any election officials compromise their duty to act in the public interest, the integrity of the democratic system is weakened.

There have been many attempts to define corruption and I am not going to enter this definitional debate other than to refer to the analysis of “political corruption” provided by Dr Joo-Cheong Tham where he argues that corruption can be manifest in at least four ways:

- First, **Corruption of the electoral process** occurs when the electoral laws are disregarded by participants. There have been a few well publicised examples where creative campaigning strategies have resulted in participants found to be in breach of electoral laws. Fortunately, we have few cases of outright disregard for electoral laws.

- Second, **Graft** is the most obvious and simplest concept to understand. This occurs when the receipt of money or gifts or a promise to advantage the recipient results in an elected official using their position to improperly advantage the contributor.

- Third, **Undue influence** is more insidious and occurs when there is an act of delivering preferential treatment to financial donors rather than acting in the public’s interests. Typically, such behaviour involves giving preference to financial backers rather than acting in the public interest. The insidious nature of this form of corruption is that it is not necessarily linked to a specific transaction but is rather a culture of delivering preferential treatment to donors.
Undue influence also arises when financial backers have preferential access to an elected official.

- Fourth, **Misuse of public resources** is where an elected official uses resources provided from the public funds for personal advantage or political advantage. There have been a number of cases where elected officials have been found to have used resources and funds (provided for a specific purpose) for some other purpose which may be for personal or political advantage.

The system that the Committee recommends should, in my view, aim to protect the integrity of the system of representative government by making it clear that corruption of the type outlined above will attract the most severe consequences such that the public can have every confidence in the integrity of our system of government.

2. Promoting Fairness in Politics

It has been argued that political equality is at the heart of democracy. Indeed the Australian Constitution has an underlying principle that citizens have, ‘each a share, and equal share, in political power’.¹

The principle of political equality insists not only that political freedoms be formally available to all citizens but also that they have ‘a genuine chance to make a difference’.²

They must have ‘leverage’.³ In our complex democracy such leverage is the ability to act as a group. There are very few cases at the State parliamentary level where a citizen of ordinary means can have political leverage on their own. It is only through groups or parties in a formal sense that a citizen can muster political power.
In order to have leverage citizens need access to the public space and forums in which public opinion is voiced. Nowadays leverage is achieved by having access to the mass media— which in itself is finite space. We have seen instances where the financial strength of some can drown out the voice of others. The objective of having a ‘genuine chance to make a difference’ is weakened where the financial mite of a few make it impossible for others to be heard.

The political finance regime should attempt to address this risk.

I am not suggesting that every voice should be given equal space. I am supporting the idea that the Committee should be mindful of the power of access to the “public notice board” and that any regime should recognise this.

The political finance scheme should have as an objective to promote ‘fair rivalry’ between the main parties. It should act as a stopper to serious imbalance in campaign funding.

At the State level citizens will make a choice between a single party and a coalition as to who will form the Government. For citizens’ choices to be meaningful there needs to be something akin to an equality of arms.

It is also important to deal with the role of third parties in promoting fairness in politics. The role of third parties has become complex and the system of political finance should recognise the increasing importance of these players. Third parties, for instance, should not get under the radar. They need to be seen as major players. They must not drown out the voice of the real players, the candidates and political parties. Consequently, they need to be regulated and subject to rules.
3. Supporting Parties to Perform Their Functions

There is no doubt that political parties are the major players in the Australian representative democracy. They are the main opinion framers and the agenda setters. At the Federal and State level the Parliaments are party chambers. The lawmakers are party members and without doubt the majority of people who participate in politics in Australia do so through the party system. The parties are central to our system of representative democracy and in moving forward they will remain as such well into the future.

Consequently, the political finance framework that the Committee recommends should acknowledge the key role played by the political parties. The parties need to be appropriately funded in order for them to fulfil their functions as a party. This does not translate into giving parties what they think they need. It is more fundamental than this. It is to provide parties with adequate funding in order for them to do what parties ‘ought’ to perform.

The question for the Committee is “What ought parties do?” I again refer to Dr Tham’s discussion of the functions of political parties in our representative democracy.

He suggests that parties in a modern representative democracy should:

- First, play a **representative function** by representing the diverse opinions in NSW. The party platforms should offer genuine choice and cater for different opinions.

- Second, the parties also should perform the function of **agenda setting** by raising issues for debate and presenting ideas for consideration.


• Third, play a **participatory** role by being a vehicle for citizens to become involved in the political process, debate and agenda setting.

• Fourth, parties perform a **governance** role when their members are elected to office. If the party is the government then the members may be part of the executive.

In all of these functions the principle of pluralism is implicit. The parties should provide citizens with a variety of opportunities to participate in the process. At the macro level for pluralism to exist parties will be based on diverse structures. The diversity of party structures should be respected.

If this is accepted as the legitimate functions of political parties, then parties should be financed to do the things that are considered important to the health of our representative democratic system. The funding regime will need to be sufficiently flexible to enable parties to be financed on the basis of their activities in these key areas not just on what the parties themselves consider is necessary.

Simply, funding parties only on the basis of votes received at the most recent election may not be appropriate. It may be too restrictive. The Committee may wish to consider including in the mix of funding such things as membership numbers and special grants for policy development, training of officials and public information. All of which would assist parties fulfil their functions.

4. **Respect for Political Freedoms**

In our representative democratic system it should not be the case that the winner takes all. Political competition is the joust of ideas, policies and ideologies. Who ever wins has to govern for all. Deliberation is the basis for citizens to become involved
in the process of law making. Deliberation involves justifying, arguing for various positions and seeking to influence. In our system many citizens will be bound by laws with which they disagree. Deliberation is an important process for justifying laws and policies to the citizens.

Democratic deliberation operates as a constraint on regulation. Free political communication is integral to democratic deliberation. Regulation of political funding should not unduly restrict political communication.

This is not an argument in favour of no regulation as the absence of regulation will lead to the loudest voice drowning out others. Respect for political freedom does require careful calibrated regulation based on legitimate outcomes.

A political finance scheme should promote democratic deliberation by promoting informed voting. A key to informed voting is the citizens having access to information about the funding activities of the parties and candidates at the time of the election and in the case of parties in between elections. Continuous and timely disclosure is important to deliberation, especially for elected officials and parties.

So these are the four pillars upon which a scheme should sit:

1. Protecting the integrity of representative Government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions; and
4. Respect for political freedoms.

**Integrated Reform**

It is essential that any reforms are an integrated package which includes comprehensive dealing with all areas of political funding including:
• Private donations;
• Public funding;
• Spending by parties, candidates and third parties; and
• Government advertising.

The Election Funding Authority

I submit that now is the appropriate opportunity for a review of the Authority, especially the composition and whether it is indeed necessary to have an Authority. As Members know, the Authority is comprised of:

• The Electoral Commissioner (Chair);
• Member on the recommendation of the Premier; and
• Member on the recommendation of the Leader of the Opposition.

The composition of the Authority was considered by the Select Committee on the Inquiry into Electoral and Political Party Funding in 2008. No recommendation was made regarding the composition of the Authority in the Report.

Based on the four principles that I have outlined above regarding the test for a healthy funding and disclosure regime, the current composition of the Authority would not meet that standard. I want to state that I have at no time had concerns regarding the way the current two members have performed their duties. They have at all times acted with integrity and absolute impartiality. Having said that, the structure as required by law is political in composition.

It is important that the Authority has the confidence of all key stakeholders and that the appearance of impartiality be seen to be reflected in the composition.

In my view, the functions of any new political funding and disclosure regime should be administered by a body that is at
arms length from the political debate. As well as being competent to undertake the responsibilities, the body should be independent and, more importantly, be seen to be independent of the political parties.

I would encourage the Committee to consider this important matter in its recommendations.

**Local Government**

I would like to offer some preliminary thoughts on how a publically funded political finance scheme could be applied to the important area of Local Government parties and candidates.

Considering the very tight time frame in which the Committee is required to consider many complex issues, it might be wise to allow any new scheme recommended for State parties and candidates to be implemented before any final recommendation regarding Local Government.

There are a number of additional issues that will need to be considered in implementing public funding at Local Government including how to deal with single issue local parties, the size and immaturity of Local Government parties compared to State registered parties as well as parties registered for both State and Local Government purposes.

These interconnecting issues are very important and any deliberation on recommendations would be advantaged if there was an opportunity to review the implementation of a political finance scheme at the State election.

**Scope of the Inquiry**

As I said, the scope of this Inquiry is the first comprehensive review of funding and disclosure in NSW since the Act was first
introduced some 28 years ago. Notwithstanding the 2008 Select Committee Inquiry which provides an excellent platform for this Inquiry, this Committee will deliberate on many more complex matters especially relating to:

- Full public funding of political parties;
- Possibly restricting who can donate to campaigns and parties;
- Possible caps on campaign expenditure; and
- Regulating Government advertising.

It is important that all these key issues are considered in a holistic manner as they each connect. To disregard any one or to set it aside for consideration will expose any scheme to possible abuse.

A way forward for the Committee in the time available may be to achieve three key outcomes:

1. Determine a framework or principles on which a comprehensive public funding scheme should be based;

2. Consider policy outcomes which a scheme should achieve under each of the terms of reference; and

3. Settle on a framework for a comprehensive scheme (without getting into the detail) that will meet 1. and 2.

Further Submission

I will make a more detailed submission on the terms of reference in the new year. We are working on models and options at the moment.


3 Joo-Cheong Tham, Submission to NSW Inquiry Into Electoral and Political Party Funding (2008) Submission 154

4 Keith Ewing, *The Funding of Political Parties in Britain* (1987) 182


23 July 2014

Dr Kerry Schott
Chair
Political Donations
Panel of Experts

By email donationsreform@dpc.nsw.gov.au

Dear Dr Schott

Comments on reforms to NSW campaign finance legislation and procedures

Thank you for the opportunity to meet with the Political Donations Panel of Experts to discuss reforms to election funding, expenditure and disclosure legislation in New South Wales. This is a subject that is of high import to the NSW Electoral Commission (“NSWEC”), and indeed to the community. The NSWEC has, for the past year, been working closely with the Department of Premier and Cabinet (“DPC”) and the Parliamentary Counsel's Office (“PCO”) to review election law in NSW. Much is still to be done; however, I am confident that the work to date will be of assistance to your inquiry.

I must state from the outset that I support the policy objectives and the broader processes within the Election Funding, Expenditure and Disclosures Act 1981 (“the EFED Act”). The problem lies, in my view, with the implementation and enforcement of those policies and procedures. To achieve greater compliance with the legislation, reform must focus on simplifying and unifying its provisions, modernising processes to reflect current practices and participants, and increasing enforcement and penalty options. I will discuss each of these subjects briefly below.

Review of the Election Funding, Expenditure and Disclosures Act 1981

The EFED Act is self-defeating in that it impedes compliance by political participants. The introduction of successive and major reforms to the EFED Act in recent years has resulted in an unbalanced, inaccessible and convoluted Act. Ironically, the series of amendments have done little to modernise the expenditure, funding and disclosure regime.

The deficiencies in the EFED Act affect compliance in a number of ways. Firstly, non-compliance occurs where participants find it difficult to understand exactly what is required of them under the Act. The vast majority of participants want to comply with their statutory obligations. Often; however, it cannot be easily determined what
those obligations are. Secondly, inconsistencies and omissions within the Act have led to failed enforcement attempts, which not only hamper the Act's deterrence effect, but also the perception of the Election Funding Authority ("EFA") as a regulator. If it is known that the EFA cannot enforce the Act's provisions, some participants will deliberately flout the law. Thirdly, due to outdated offence provisions, participants are avoiding liability for responsibilities and obligations that should rightly fall on them. Instead, the position of "agent" has become a scapegoat for others' misdeeds. Finally, offence provisions and penalties do not reflect the particular environment and culture of modern elections and campaign finance. Soft penalties and unattainable burdens on the prosecution fail to support compliance and achieve the objectives of deterrence, protection and punishment.

For example, in 2010 the EFA abandoned prosecutions of elected members and candidates due to inconsistent provisions concerning the role of the official agent and the duty to lodge declarations of disclosures. This inconsistency meant that the EFA could not prove who was responsible for the breach. In 2012, the EFA was forced to abandon prosecutions for Failure to lodge declarations due to the inconsistent use of the terms "declaration" and "disclosure" in the relevant provisions. This inconsistency meant that whilst a declaration of disclosures had to be lodged by a particular date, a declaration that did not contain disclosures had no time limit for lodgement. On both occasions, legislative amendment was required to enable the EFA to prosecute such breaches in the future (that is, the amendments were not retrospective).

As a further example, whilst certain offence provisions apply to parties (such as s.96I EFED Act), because parties are unincorporated associations, they cannot be prosecuted in their own right. Section 112 of the EFED Act allows for proceedings under the Act to be instituted against an officer(s) of the party as a representative(s) of the members of the party. However, this provision has never been relied upon by the EFA as, firstly, it would be extremely difficult, if not impossible, to prove a party's intent, and secondly, as the party is not a legal entity each party member would have standing in such a proceeding. This situation results in the wrong people being held accountable for breaches of the EFED Act. Often the party agent bears sole responsibility, which does little to deter parties from breaching the legislation.

In its report "Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981", the Joint Standing Committee on Electoral Matters ("JSCEM") recommended a comprehensive review of the EFED Act and the Parliamentary Electorates and Elections Act 1912 ("PEE Act") with a view to incorporating both Acts into a holistic, modern Electoral Act. In its response to the JSCEM's report, the Government supported this recommendation.

Please see the NSWC's submission to the JSCEM on the "Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981" (pp 69-100)¹.

The NSWEC has worked with the DPC and PCO to reform both the PEE Act and the EFED Act with the object of creating a consolidated, consistent and simplified Electoral Act. Achieving this object will go a long way to increasing compliance with

¹ [Link to the submission]

the legislation. Due to the enormity of this task, and constraints imposed by the 2015 State general election, review of the EFED Act was suspended so that amendments to the PEE Act could be passed in time for next year’s election. Once the review of the PEE Act was finalised, we intended to resume our review of the EFED Act with the aim of incorporating the “new” expenditure, funding and disclosures provisions into the Electoral Act by mid-2015.

Appendix 1 is a copy of my memorandum to Rachel McCallum, Deputy General Counsel, dated 3 April 2014, in which I discuss the need for a comprehensive review of the EFED Act.

As mentioned during our meeting, the NSWEC has engaged a business analyst to document the current business processes in the EFED Act from each participant’s point of view (including the EFA). This is to enable a review of the current processes, identify gaps and aid in the creation of new processes. The object is an integrated solution from each participant’s perspective, as well as a tool for use in evaluating policy change. I would be pleased to provide you with copies of the analyst’s work upon completion of the project.

Legislative Reforms

Reforms that will achieve greater compliance with the legislation include:

Increased penalties

This involves increasing the maximum monetary penalty for certain offences and increasing penalty options under the Act.

For offences against the EFED Act, the maximum fine which can be imposed by the local court is $4,400. This amount does not reflect the gravity of the conduct constituting the offence, and is not a sufficient deterrent. It is true that proceedings can be brought in the Supreme Court where the maximum monetary penalty for certain offences is $22,000; however, the local court is the more appropriate jurisdiction for most summary offences. Consideration may also be had to introducing penalties that attach to an elected member’s pension and participants’ funding under the Act (that is, withholding these monies if there has been a breach of the Act).

Online “Real time” disclosure

Under the current system, there are significant intervals between the receipt of donations and the incurrence of expenditure and the disclosure of same. Participants are required to lodge a declaration of disclosures of donations received and expenditure incurred during the previous relevant disclosure period (a relevant disclosure period runs from 1 July to 30 June the following year). Participants must lodge declarations with the EFA by the end of September and the end of October each year. Accordingly, disclosures can occur more than 12 months after the receipt of donations or the payment of expenditure.

We support the introduction of online “real time” disclosure. All electoral participants, including donors, would be required to disclose expenditure and donations using an online facility within a certain, limited period of time. A stricter time limit could apply to the election campaign period. Real time disclosure will allow for greater
transparency when it comes to political expenditure and donations. The NSWEC will be assisted in its investigation of instances of possible non-compliance, as evidence will be more readily available and more easily obtained without delay. In addition, online, real time disclosure affords the community opportunity to assess participants’ disclosures. Finally, online, real time disclosure can assist participants by making the disclosure process easier to navigate and by streamlining their record keeping and administrative obligations.

Additional costs for compliance with such a scheme can be met by participant’s Administration Fund payments. In addition, the cost of creating and implementing the application could be met by the State.

**Donation and expenditure caps and thresholds**

In my view, the reduction of caps on political donations and electoral communication expenditure is unwarranted. Current caps (indexed yearly) are conservative, and it is only the major parties that incur expenses up to the applicable electoral communication expenditure cap. The vast majority of participants do not spend anywhere near the cap.

**Appendix 2** is a list of the current political donations and electoral communication expenditure caps.

Consideration should be had, however, to the thresholds for reporting donations, as there is some inconsistency here that can lead to non-compliance. Donors are required to disclose “reportable political donations”; that is, donations exceeding $1,000. Parties, candidates, elected members, groups and third-party campaigners are required to disclose “political donations”; that is, donations of any amount.

However, parties, elected members, candidates and groups are only required to disclose full particulars of a donation and donor for reportable political donations. Therefore, to facilitate greater transparency and aid in compliance, thought could be had to lowering the threshold for donor disclosures, and, consequently, the threshold for participants’ disclosure of full particulars of donations.

I understand that election funding, disclosure and expenditure at the local government level is beyond the scope of your terms of reference; however, I must press that the introduction of donation and expenditure caps to local government elections and elected members of councils is essential. To ensure compliance with election funding, expenditure and disclosure provisions in NSW, and to support the EFA as its regulator, greater safeguards must be applied at local government level.

**Abolition of role of official agent**

I recommend abolition of the role of official agent for elected members, candidates and groups that were/are not endorsed by a party at a general election or by-election. I understand that the policy behind the creation of the role of official agent was to take away from elected members, candidates and groups the power to deal directly with money. This object has not prevailed in the case of independent elected members who, because elected members do not have to appoint an official agent (s.46A(1) EFED Act), are designated by the EFA to be their own official agents.

In my view, those who stand for public office and those who are elected to Parliament (or local government) should be responsible and accountable for their expenditure, funding and disclosure obligations. Greater compliance can be achieved if elected
members, candidates and groups are liable for breaches under the Act. Further, in certain situations it does not make sense for a third party who was not elected and does not benefit from office to be held accountable for breaches of the Act.

**Strict liability offences**

All but one offence under the EFED Act require the prosecution to prove, beyond reasonable doubt, that the accused was "aware" of the circumstances constituting each element of the offence (that is, that the accused acted knowingly). This requirement impedes enforcement of the legislation for two main reasons. Firstly, it is difficult to prove awareness when dealing with regulatory offences, and secondly, it is difficult to prove awareness when the accused is an agent who is responsible for the acts and omissions of others. Prosecutions under the EFED Act have been withdrawn or abandoned after advice received from the Crown Solicitor's Office ("CSO") that there was insufficient evidence to prove "awareness" on the part of the accused.

To increase deterrence and to support the EFA's enforcement function, I recommend the introduction of strict liability offences for certain breaches of the legislation. A strict liability offence does not require proof of fault (or in our case "awareness"); however, a defence of "mistake of fact" is available to those charged with strict liability offences.

In its discussion paper "Strict and Absolute Liability", the Legislation Review Committee commented that strict and absolute liability offences are generally "of a regulatory nature and where it is particularly important to maximise compliance (eg public safety or protection of the environment)".

In its Report "Application of Absolute and Strict Liability Offences in Commonwealth Legislation", the Commonwealth Standing Committee on the Scrutiny of Bills enunciated principles relating to the merits of strict liability and criteria for its application which included:

1. Strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation;

2. Strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent; and

3. Strict liability may be appropriate where its application is necessary to protect the general revenue.

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The ACT Attorney General gave a similar statement of criteria to the ACT Standing Committee on Legal Affairs\(^4\) with the following addition:

4. “In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can be justifiably excluded. The rationale is that professionals engaged in [the matter being regulated] as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations”.

In my view, political parties, elected members, candidates, groups and third party campaigners should be held to the same standard as other professionals such as doctors, company directors and accountants. The community is entitled to expect elected members, parties and other political participants to be aware of their duties under the EFED Act and to be held accountable for breaches of those duties.

Appendix 3 is a copy of “The Application of Strict Liability to Funding and Disclosure Offences” by Alison Byrne, Principle Legal Officer, NSWEC.

Liability of parties and party agents

There are a number of issues of concern from a compliance perspective in relation to the liability of parties and party agents.

Firstly, it is often the party agent who bears responsibility for breaches by the party’s office bearers and members. This model does little to deter parties from non-compliance, as the party agent is personally liable and the party and its members have no obligation to support the agent. Further, the party agent may legitimately claim to be “unaware” of the acts or omissions that found the offence.

Secondly, parties bear no responsibility for breaches by their endorsed members. This presents a problem when parties can obtain public funding by endorsing members, but share no responsibility for their acts or omissions.

Thirdly, the EFED Act fails to accommodate the fundamental differences between the major political parties and their internal structures. As a consequence, party agents and the parties proper cannot, at times, carry out their responsibilities under the EFED Act.

As mentioned previously, whilst parties can be prosecuted under the EFED Act, for a number of reasons this rarely occurs, not the least of which are the complexities involved in prosecuting unincorporated associations.

Consideration should be had to recognising parties as legal entities under the expenditure, funding and disclosure legislation. If parties have a distinct legal identity under the Act, similar to the recognition of companies as legal entities, they would be responsible for the actions of their members and office bearers, could be prosecuted.

in their own right and be required to keep financial records (beyond existing requirements). In my view, this would have a considerable deterrent effect.

Recognising political parties as distinct legal entities has already been considered at the Commonwealth level.

**Current ICAC Inquiries**

It is difficult for me to comment on the current Inquiry whilst it is still on foot. Suffice to say, the activities of the Free Enterprise Foundation and the Millennium Forum lend further support for a comprehensive review of the EFED Act. Consideration should be had to introducing the concept of “affiliated entities”, or similar, to capture entities that have a financial relationship with parties, elected members, candidates, groups and third party campaigners, but do not qualify as third party campaigners or lobbyists.

The case of EightbyFive is very different. This entity was allegedly established to subvert the legislation. If true, EightbyFive’s conduct breached the EFED Act and/or the Crimes Act 1900 and was corrupt conduct. This is not a situation where the legislation is deficient; this is a case of criminals deliberately conspiring to break the law. In my view, much learning can come from past events, and the lessons from Operation Spicer should be considered during the review of the EFED Act.

**Reforms in response to ICAC revelations**

**The introduction of “full public funding”**

Academics have raised a number of objections to the wholesale prohibition on political donations and the implementation of full public funding of elections, one of the main concerns being its constitutionality. I agree with the academics and do not support a wholesale ban on political donations. In my view, it is unwarranted, it would not eliminate corruption and it would entrench existing political parties.

As stated previously, I support the policy objectives and the broader processes under the current election funding, expenditure and disclosure model. I am not of the view

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5 Electoral Reform Green Paper: Donations, Funding and Expenditure, December 2008 (para 9.10 - 9.18)


that the model should be replaced with that of another jurisdiction. In fact, the current NSW model is more stringent than those of its Australian and international counterparts. The main area where we are deficient is timing of disclosures, which, as stated, can be improved by the provision for online, real time disclosures.

Other jurisdictions

In our meeting, the model of the New York City Campaign Finance Board was raised. In my view, this model could be of some assistance when considering implementing real time disclosure; however, I do not necessarily advocate their system of “matching” expenditure claims. The New York model is predicated on a candidate receiving a certain dollar amount of public funding for each dollar raised in donations. For example, candidates running for city council must lodge disclosures and the program then matches each $1 a New York resident gives, up to $175, with $6 in public funds, for a maximum of $1,050 in public funds per donor. The total amount each candidate can receive in matching funds is capped at 55% of the spending limit. Such a scheme may not suit the Australian political environment.

The comprehensive review of the EFED Act must include consideration of other jurisdictions’ models; however, this would be with a view to incorporating best practices from those models into a modernised NSW model.

Lobbyist register

The NSWEC has recently been conferred with the responsibility for regulating lobbyists in NSW. In my view, the comprehensive review of the EFED Act should include consideration of the regulation of lobbyists and its interplay with expenditure, funding and disclosure provisions.

Increased disclosure obligations

Consideration could be had to the introduction of disclosure obligations for businesses that engage in any commercial transaction with parties, elected members, candidates, groups and third-party campaigners. The object is to see where participants are spending their money. The downside of this innovation; however, would be the considerable burden on businesses.

Prohibited donors

The prohibited donor provisions are complex and precarious. They do little to assist participants to comply with the legislation. Further, it is questionable whether the definitions of “property developer” and “close associate” in s.96GB of the EFED Act actually capture the people and entities sought to be prohibited.

Prohibited donor provisions within the EFED Act pre-date the introduction of donations caps at State level. I am of the view that the existence of donation caps negates the need to prohibit certain entities and individuals from making political

http://www.nyccfb.info/
donations. Donation caps do not apply at local government level, however, and until such time as they do, prohibited donor provisions (in a revised form) should be retained to protect the integrity of the political system at local government level.

**Increased penalties and support for regulator**

The recent Inquiry shows a real need for general deterrence. Deterrence can be achieved by the introduction of strict liability offences, increased penalties and range of penalties, and recognition of parties as legal entities under the Act with consequential increased liability.

It is my view that the vast majority of electoral participants endeavour to comply with their statutory obligations. It is often difficult, however, for them to understand exactly what is required under the EFED Act. The greatest deterrent of crime is a statutory framework that is comprehensible, comprehensive and enforceable. The EFED Act is, unfortunately, none of these things.

A comprehensive review of the Act must be undertaken. This review should be guided by the objectives that are soon to be inserted into the EFED Act by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* and by the lessons learnt from past failures and recent ICAC inquiries.

Thank you once again for the opportunity to address the Panel and do not hesitate to contact this Office should you require further assistance.

Yours sincerely

[Signature]

Colin Barry
Electoral Commissioner