Panel of Experts – Political Donations

Submitted by Professor Anne Twomey
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Dr Kerry Schott  
Chair  
Expert Panel on Political Donations  
GPO Box 5341  
Sydney, NSW, 2001  

Dear Dr Schott,  

Submission to Expert Panel on Political Donations  

As the Panel is aware, I have prepared an update of my 2008 paper which considered the constitutional and practical issues concerning reform of political donations, expenditure and public funding. This submission, in contrast, addresses my personal views, but draws in part upon the research presented in the update of my 2008 paper.  

Full Public Funding of Elections  

In my view full public funding of elections in NSW is not practically feasible, is unlikely to be effective and would be likely to be held constitutionally invalid. For these reasons, I oppose it.  

Practicality  

In terms of practicality, it would be extremely difficult to devise a system that provides full public funding to all parties and candidates, and distributes it equitably amongst them. Fairness in the distribution of funding is usually assessed by reference to public support for candidates and parties. That public support is only accurately assessed by the election itself. Yet, it is not practical for parties and candidates to have to wait to find out how much they can spend upon their campaign until after the campaign is over, especially if they cannot raise funds by way of donations to cover any gap. The consequence is that each candidate and party would have to have their level of funding set in advance of the election.  

If this was done on the basis of votes received at the previous election, we know that the High Court rejected such an approach in the Australian Capital Television case on the ground that it favoured incumbents. In some jurisdictions the level of
public support is assessed by reference to the number of supporters who have made small donations to the party or candidate. However, if donations are to be banned, that is not a feasible approach either. Reliance upon opinion polls is impractical as they are notoriously inaccurate. Reliance on party membership simply promotes branch-stacking and manipulation. Reliance upon the number of elected members of a party disadvantages new and upcoming parties.

At the moment a threshold is applied to exclude public funding for those parties and candidates that have very little public support. They must fund their campaigns from their own resources, including donations. If all donations were banned, then they would have to be publicly funded. The likely consequence would be a significant increase in the number of parties and candidates running for Parliament, as it could be done at public expense with no need for fund-raising or any real public support. This would exacerbate problems with the size of the ballot paper, voter confusion and informal votes.

It would also be more expensive for tax-payers. Indeed, at the moment tax-payers reimburse 75% or more of electoral communications expenditure by parties during the capped 6 month period. If political donations were banned, tax-payers would not only have to fund 100% of electoral communications expenditure, but all other types of expenditure by parties and candidates, including expenditure outside of the capped period. This would significantly increase the burden on tax-payers.

Other practical issues would arise concerning the dual role of political parties in NSW in supporting both Commonwealth and State elections. State laws could not ban donations to State branches of political parties that are intended to support expenditure in relation to Commonwealth elections. Equally, it is doubtful that State laws could ban donations for the purposes of funding the administration of a political party, as that party will also have a role at the Commonwealth level of government and its financial arrangements could not be controlled by State laws. This means that State branches of political parties will still be able to receive political donations, no matter what State laws provide, undermining the whole point of the scheme. It would also raise difficult questions in terms of how much administrative funding of political parties must be supported by State public funding.

Assuming that public funding would not be given to third-party campaigners, then banning political donations to third-party campaigners would most likely be constitutionally invalid. If corporations, unions, clubs and others that previously donated to parties and candidates were now banned from doing so, it is likely that they would funnel a significant portion of this money into third-party campaigns or engage in direct campaign expenditure themselves, as happens in the United States. In NSW, while third-party campaigners would still presumably be subject to expenditure caps, it is likely that there would be a significant increase in the number of third-party campaigners (eg each union would be likely to run its own campaign, because it could not donate to the Labor Party), with the consequence that the political debate would be dominated by third-party campaigners and their agendas, rather than by the policies of political parties or candidates. A similar
problem has arisen in the United States since the *Citizens United* case, with direct expenditure by third-parties dominating political campaigns.

**Effectiveness**

In my view, it is unlikely that any law that banned political donations would be effective in achieving the desired end of the reduction or elimination of the risk or perception of corruption or undue influence. Those who breach current laws regarding bans or caps on donations would most likely also breach other laws banning donations (unless they were caught and prosecuted). If anything, the form of corruption is more likely to shift to the area of personal influence over decision-makers (e.g., by gifts to them, holidays and jobs for relatives), making it more difficult to expose.

**Constitutional validity**

In my view, it is doubtful that a law banning political donations to parties and candidates would be constitutionally valid. Such a law would necessarily involve a burden on the implied freedom of political communication, as it would at the very least include expenditure caps that limit spending by parties and candidates on political communication. Hence the first stage of the *Lange* test would be satisfied.

Next, one must assess what the legitimate end of the legislation would be. As currently proposed, it is an ‘anti-corruption’ end, which would be a legitimate end. However, as in *Unions NSW*, it would be very difficult to establish why a $5000 donation under the current law would be more likely to give rise to corruption and undue influence than a complete ban on donations. If a cap of $5000 for parties and $2000 for candidates (as adjusted for inflation) is low enough to prevent anyone from buying special access or gaining undue influence, then there is no obvious reason why banning donations outright would make any difference. How would such a ban be proportionate to the legitimate end?

In *Unions NSW*, the majority noted at [59] in relation to a complete ban on political donations that ‘if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source’. The only way of doing so is to focus not upon legal conduct under the law, but rather, upon breaches of the law. The premise would have to be that while political party officials and Members of Parliament will act corruptly in accepting illegal donations if they perceive the need to raise money, they will not do so if they receive full public funding and the advantage in behaving corruptly has therefore been diminished.

Two observations may be made about this argument. First, it is a repugnant proposition that we must appease corruption in our political institutions in this manner. The approach more conducive to representative and responsible government would surely be to root out and punish the corrupt, rather than to reward them. Secondly, from a constitutional point of view, a law would be more
likely to be regarded as reasonably appropriate and adapted to serve the legitimate end of preventing or reducing the risk or perception of corruption if it dealt directly with corruption by deterring it through more severe sentences, more rigorous enforcement and laws that facilitated more effective prosecution of offences. This is bolstered by the fact that those who are corrupt are unlikely to be converted to virtue by the enactment of such a law, and will therefore be open to being corrupted by offers of advantage in other ways. Hence, the law would be unlikely to serve an anti-corruption end.

Finally, the law would also be vulnerable in relation to any formula established for providing public funding to candidates and parties, if it was perceived as benefitting a particular party or disadvantaging new parties, small parties or independents.

**Enforcement measures**

The most urgent and effective measures that should be undertaken in the short-term are:

1. the amendment of s 111(4) so that proceedings for offences in relation to campaign finance laws may be commenced within ten years of the offence being committed;
2. a significant increase in penalties for offences, including imprisonment, so that they are commensurate with the seriousness of crimes that involve a breach of public faith and the undermining of public confidence in the democratic system;
3. the use of strict liability offences as well as offences requiring particular knowledge and guilty intent, with appropriate penalties for each type of offence, so that prosecutions are not rendered ineffective due to technical problems in proving intent in relation to all elements of an offence;
4. the enactment of a broad anti-circumvention offence; and
5. the enactment of offences regarding the acceptance of certain types of gifts (rather than relying on codes of conduct and pecuniary interest registers).

**Another suggestion**

One way of improving transparency and making corruption more difficult would be for all donations to political parties in NSW to be paid through the NSW Electoral Commission. Donors would fill in a simple form, identifying:

1. who the donor is – eg by reference to an ABN or the donor’s name on the electoral roll;
2. to which candidate or party the donation is to be made; and
3. the purpose for which it is to be made – eg for party administration, funding a Commonwealth election campaign or funding a State election campaign.
This form and the donation would be sent to the Electoral Commission which would immediately record donations and could then provide real-time and accurate public disclosure. It could also cross check to ensure aggregate limits are not breached and that caps are not breached. Any excess donations could be rejected and returned, avoiding any risk to parties or candidates of accepting illegal donations.

The Electoral Commission would then deposit the amount in the relevant account of the party or candidate – eg the State campaign account. No other money could be deposited in the State campaign account, and only money from that account could be spent upon election campaign expenditure.

While this would significantly increase the administrative burden on the Electoral Commission, there would be economies of scale and efficiencies in receiving the information once (instead of it currently being received from both donors and recipients) and permitting it to be accurately recorded. It would also significantly reduce the administrative burdens and stress on parties and candidates who would no longer have to account for donations and disclose them. It would also mean that donors would not be obliged to prepare their own disclosures. The funding currently given to parties to pay for these additional administrative burdens could be transferred instead to the Electoral Commission.

I hope that you find these comments useful.

Yours sincerely,

Anne Twomey
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