Panel of Experts – Political Donations

Submitted by John Roberston MP
NSW Opposition Leader, Member for Blacktown,
Shadow Minister for Western Sydney

Date: 17 September 2014
Dr Kerry Schott  
Expert Panel on Political Donations  
GPO Box 5341  
Sydney NSW 2001  

Dear Dr Schott  

I write to make a submission on behalf of the NSW Opposition in relation to the investigation of the potential for further reforms to election funding laws.  

I share the community's disgust at reports emerging from the Independent Commission Against Corruption's recent inquiries into unlawful political donations. Like most people, I am appalled at the extent to which a 'donations for decisions' culture seems to have emerged and become entrenched in NSW.  

The community wants major change. Honest and hardworking people expect and deserve better from their elected officials. They are right to be calling for wholesale, root and branch reform to our donations and election funding laws.  

I have placed on the public record my strong support for a full public funding model of campaign finance laws. I take the common sense view that the simplest way to stamp out the 'donations for decisions' culture from NSW politics is to get rid of private donations altogether.  

However, in the event that it is not possible to implement a workable model of full public funding before March 2015, I have put forward a number of short-term alternatives for the Panel's consideration.  

I have publicly expressed my disappointment that the Premier's approach to this issue has effectively removed the possibility that the public will see such reforms in place before the next election. I implore the panel to act as swiftly as possible. The people of NSW need confidence in our election donations system. Only decisive action in this area will ensure that the next election is the cleanest ever.  

Should you require any further information relating to this submission, please feel free to contact my office on (02) 9230 2310.  

Yours sincerely,  

John Robertson MP  
NSW Opposition Leader  
Member for Blacktown  
Shadow Minister for Western Sydney  

[Signature]  
17/9/14
NSW OPPOSITION SUBMISSION

PANEL OF EXPERTS – POLITICAL DONATIONS

Investigation into the potential for further reforms to election funding laws

September 2014
Full public funding of election campaigns

The NSW Opposition has placed on the public record its strong support for a full public funding model of campaign finance laws. Labor takes the common sense view that the simplest way to stamp out the ‘donations for decisions’ culture from NSW politics is to get rid of private donations altogether.

The NSW Opposition recognises, however, that while such a solution is simple in its approach, implementation may not be easy. As the Panel would be all too aware, there are significant – though in our view not insurmountable – legal hurdles stemming from the provisions of the Commonwealth of Australia Constitution Act (‘the Constitution’).

What’s required is constitutional creativity. It is imperative that the Panel maintain a focus on what can be done, rather than producing a list of what can’t. The Panel must harness the resources of the Department of Attorney General and Justice and the state’s finest legal minds that should be tasked to work towards a single goal – the removal of private political donations and the introduction of a workable and fireproof model of full public funding.

If it is necessary to undertake more focussed and detailed consideration of legal and constitutional hurdles in the way of full public funding, then the Panel should consider recommending the establishment of a dedicated Taskforce. Such a Taskforce should assemble the state’s sharpest and most experienced legal minds with a single and straightforward commission – to bring about a workable model of full public funding and a ban on private donations.

The Panel should also consider recommending a voluntary ban on private donations. A voluntary model would not require legislation to prohibit private donations and therefore, could potentially avoid the constitutional obstacles to implementing this reform. The major parties should work together and simply agree to stop accepting private donations. A formal and public Memorandum of Understanding (MOU) could provide a mechanism for achieving this.

National reform

If the Panel considers it impossible to overcome legal roadblocks in the way of introducing full public funding and banning private donations, then it should be remembered that our constitutional framers intended the Constitution to be a living document. The Constitution can, and should, be amended when and as events and public opinion demand.

Conducting a national referendum to allow meaningful reform of campaign financing laws clearly has the potential to be a complex and arduous task. However, the NSW Opposition believes the strong public desire for real change in this area would, with cross-party support, surely guarantee the passage of such a referendum.

If Labor is elected at next year’s election, and if the Panel finds constitutional change necessary to bring about full public funding and a ban on private donations, then Labor will present a referendum proposal to the Prime Minister and other Premiers at our first meeting of the Council of Australian Governments (COAG).

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There would be tremendous benefit in having a nationally consistent set of election funding laws, and therefore, Labor also intends to present this as a proposal to COAG should Labor be elected to government at the 2015 election.

**Safeguards to enhance the integrity of the current system**

In the event the Panel recommends maintaining a funding system in which private donations can be made, in whatever form, then the following suggestions are designed to maintain the existing safeguards and build additional safeguards that support and enhance the integrity of any such system:

- Support caps on private donations and capped expenditure by candidates, parties and third-party campaigners in the election period;
- Maintain current bans on certain categories of prohibited donors;
- Full disclosure and real-time reporting of all donations – one possible option for achieving this would be to require donations to be paid to candidates and parties through the Election Funding Authority [or the NSW Electoral Commission when the provisions of the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Bill 2014* commence] and then distributed to the respective recipients. This would ensure that donations are immediately recorded and checked off as being lawful and disclosed on the public record in real-time. This would also guarantee greatly improved compliance with the Act;
- The EFA should be properly resourced and given the powers it needs to properly monitor, investigate and enforce the laws on donations and campaign expenditure.

**Increasing maximum penalties for offences under the Act**

There are also measures that could be taken to ensure that donors, intermediaries or recipients of donations comply with election funding laws.

The *Election Funding, Expenditure and Disclosures Act 1981* currently provides for the following offences and maximum penalties which relate to breaches of donation and expenditure requirements:

<table>
<thead>
<tr>
<th>Section</th>
<th>Offence description</th>
<th>Max Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>s96H(1)</td>
<td>Failure to fulfil donation disclosure requirements</td>
<td>$22,000 fine</td>
</tr>
<tr>
<td>s96H(2)</td>
<td>Making false/misleading statement to EFA concerning disclosures</td>
<td>12 months prison $22,000 fine</td>
</tr>
<tr>
<td>s96H93</td>
<td>Withholding information from or giving false information to a Party agent</td>
<td>$22,000 fine.</td>
</tr>
<tr>
<td>s96HA</td>
<td>Breach of donation cap or communication expenditure caps.</td>
<td>$22,000 fine.</td>
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<td>-------</td>
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<tr>
<td>s96I</td>
<td>Knowingly receiving, making or soliciting prohibited donations (eg, from property developers, unenrolled individuals etc.) Breaching record-keeping requirements</td>
<td>$22,000 fine.</td>
</tr>
</tbody>
</table>

In proceedings currently before the ICAC, evidence has emerged of alleged breaches of donation and disclosure laws involving several Liberal Party identities. In particular, it is alleged that laws introduced by Labor in 2009 prohibiting donations from property developers have been deliberately and systemically evaded.

If ICAC finds that such breaches have occurred, there is likely to be significant community concern that those who have engaged in such conduct face no more than 12 months imprisonment if convicted under the EFED Act.

The NSW Opposition submits that penalties under the EFED Act should at least be doubled to provide a further disincentive for individuals to break these laws, and to give the people of NSW confidence that those who have engaged in such conduct will receive an appropriate sentence.

It is worth noting that in Canada, which is widely recognised as having one of the most thorough and effective campaign finance regulatory regimes in the world, persons convicted of offences relating to donation caps, disclosure and other finance reporting requirements face maximum penalties of five years' imprisonment.\(^1\)

In light of the fact that this investigation is responding to public concerns about illegal political donations which have arisen in the context of current and ongoing ICAC investigations, the Panel should also consider whether any changes to maximum penalties should have limited retrospective application.

**Removing statutory time limit for prosecutions for offences**

There are currently a number of offence provisions under the EFED Act relating to political donations. This includes offences involving breaches which involve:
- Soliciting, making or receiving prohibited donations;
- Failing to disclose donations; and
- Providing false information in relation to donations.

Constitutional law expert, Professor Anne Twomey, recently stated on ABC’s 7.30 program that persons found by ICAC to have breached donation laws might escape prosecution altogether.\(^2\) This is because proceedings for offences under the EFED Act must be commenced within 3 years of the offence being committed (s111(3)).

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\(^2\) “Do corruption hearings put political party reform on the agenda?”, www.abc.net.au, 8 May 2014

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While anyone found to have acted in breach of donation laws could also face charges for more serious indictable offences that are not subject to a limitation period – such as fraud, for example, which carries a maximum penalty of fourteen years imprisonment – such offences are typically harder to establish, often requiring proof of additional mental elements.

Accordingly, it is recommended that the Panel propose amendments to the Act to provide that no limitation period applies with respect to prosecution for offences under the Act. If this is not accepted, the limitation should be extended to no less than 8 years – the terms of two parliaments.

In light of the fact that this reform would respond to public concerns about illegal political donations which have arisen in the context of current and ongoing ICAC investigations, the proposed changes should also have limited retrospective application.

**Access to donation and expenditure disclosure information**

The Sydney Morning Herald recently reported that:

> Under a little-known change to legislation governing how donations must be declared, access has been cancelled to "papers and correspondence" underpinning declarations made by parties and donors. The change means material such as invitations to fundraisers and donation receipts are no longer able to be scrutinised. Instead, the NSW Election Funding Authority is required only to grant access to disclosure forms which contain the bare minimum of information.³

The EFED Act requires the EFA to keep copies of "disclosures made in a declaration" to it for a period of six years. Copies of such disclosures must be published on the web and be made available for public inspection at the EFA office anytime during business hours. The EFA also has the discretion to provide copies of such information in exchange for a "reasonable fee".⁴

Prior to amendments to the Act in 2008, the Act required the EFA to keep records of "papers and correspondence" relating to disclosures, as well as the actual disclosure declarations themselves, and make provision for their availability to the public.⁵ Following the 2008 amendments, the text of provisions under the Act relating to the EFA’s record-keeping obligations (section 95) refers only to "copies of disclosures made in a declaration". The term "papers and correspondence" no longer appears.

The Herald’s report suggests that the EFA has adopted an overly narrow and restrictive interpretation of this provision. The post-2008 Act requires declarations to be made in a

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³ "Legislation change keeps information about political donors private as Mike Baird vows reform", The Sydney Morning Herald, May 21, 2014
⁴ See section 95, EFED Act.

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form and manner approved by the EFA. The EFA’s website states that disclosed donations and expenditures must be “correctly vouched for” with relevant materials submitted with biannual declarations. This is to give effect to requirements under the EFED Act and Regulation that donations be “vouched for” through the provision of detailed information to the EFA, such as donation receipts.

The EFA, it appears, has chosen to separate material vouching for donations to be excluded from disclosure declarations for the purposes of its record-keeping requirements, despite the fact such material is required to be submitted with the requisite disclosure forms.

This is despite the fact that when introducing the Bill on behalf of the Premier in the Legislative Council, the then Attorney General the Hon John Hatzistergos MLC stated: “It is important to note that the authority will simply publish the information that it receives. In the interests of giving the public timely access to information about donations, the authority will not be required to engage in a time-consuming validation process before publication.”

The NSW Opposition submits that the Panel should recommend amendments to the Act which will require the EFA to give public access to vouching material provided with a disclosure declaration.

Local Government consistency

Finally, the NSW Opposition submits that the Panel recommend consistent reforms to Local Government elections.

Just as this submission recommends nationally consistent laws, uniformity should be extended to the Local Government level. If the laws that arise from this process are considered the best response to strengthen anti-corruption measures, they should also apply to the level of government that deals with the re-zoning of land and approval of individual development applications.

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6 Section 91, EFED Act.
8 See section 91(6) of the EFED Act and Div 1, Pt 3 of the EFED Regulation 2009.