Panel of Experts – Political Donations

Submitted by Dr David Solomon AM
Acting Queensland Integrity Commissioner

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Dr Kerry Schott  
Chair  
Expert Panel on Political Donations  
GPO Box 5341  
SYDNEY NSW 2001  

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

Dear Dr Schott  

I wish to respond to the invitation by your panel to the public to make submissions in relation to political donations.  

This submission addresses only one small but extremely important area of the terms of reference, namely item 5(b) – “the appropriate frequency and timing of disclosure obligations under election funding laws”. In doing so it addresses indirectly the question raised in 3(b) – “the appropriate regulation of third party campaigners”. Essentially these are matters referred to by the Premier when he announced your panel’s task when he referred to “the appropriate frequency and timing of disclosure obligations”.  

Yours sincerely  

[Signature]

Dr David Solomon AM  
Acting Queensland Integrity Commissioner
Submission re: Terms of Reference 5(b): The appropriate frequency and timing of disclosure obligations under election funding laws

There is widespread agreement about the desirability of, and need for, the disclosure of donations to political parties and candidates. Among the main reasons for disclosure are:

1. Transparency\(^1\) is an important element of the now well-accepted requirement that governments should be open and accountable to citizens for their activities. It is important to know who is providing funding so that it can be seen whether they are getting any benefits in return.

2. Transparency contributes to informed voting. Electors should be able to make decisions based on full and accurate information, including information about who is providing financial support to parties and candidates. As the United States Supreme Court put it in a decision in 1976, “[t]he sources of a candidate’s financial support” may “alert the voter to the interests to which a candidate is most likely to be responsive, and thus facilitate predictions of future performance in office.”\(^2\)

3. Transparency requirements “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election favours that may be given in return”.\(^3\)

4. Transparency helps promote integrity in the electoral process and enhance public confidence in it.

These aims are not fully achieved or achievable when the disclosure of political donations does not take place until after voting has occurred. Indeed, when disclosure takes place after the election, the elector is necessarily completely in the dark about the sources of campaign donations at the time he or she is voting. The delay at the Commonwealth level can be as long as 19 months (depending on the date of the election) because the Commonwealth Electoral Office only releases data once a year, on 1 February. The delay in NSW can be almost as long. “Disclosures during the period from 1 July 2012 to 30 June 2013 were not made available to the public until 25 November 2013”\(^4\)

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1 Transparency – “one of the key principles of public life”, (UK) Committee on Standards in Public Life, “Political Party Finance”, November 2011, p. 78.
2 Buckley v Valeo 424 U.S. 1, at p. 67.
3 At p. 68.
In my view there should be continuous (which needs to be defined) disclosure during the election period (and it is necessary also to define this period clearly) while at other times, disclosure could be more periodic (say, as infrequently as every six months, as is the case in Queensland at the moment). But it is important to recognise that the issue is not just about campaign funds. Donations to political parties and to third party groups such as GetUp!, to industry organisations such as the one set up by the big tobacco companies to campaign against plain packaging of cigarettes, and to so-called think tanks, also need to be made public between elections, because those groups have the ability to influence political parties and their policy making, in government and in opposition. It should not be thought that the provision of funds to a political party necessarily precedes the adoption by it of a policy that favours the donor. Sometimes the party may take the initiative and seek to win financial support by adopting a policy that it knows a potential donor wants to have adopted.

Transparency is not, however, the whole story. Making information available does not necessarily result in voters being fully informed. Most voters will not be undertaking their own research. They will rely on others to bring information to their attention, particularly the media, though political parties, political activists and others may also become involved in providing information to voters. Arguably, the role of the media is crucial. But so too is the role of the Electoral Commission. As well as receiving information from relevant sources (parties, donors etc) under the requirements of the Electoral Act, if transparency is to be achieved it needs to make these public and available rapidly and in a readily understood and accessible form. Nationally, the Australian Electoral Commission publishes much of its data on its website, making it available on the first working day of each February.

**The election period**

There are many ways of defining the election period. Some suggest that it should be from when the election is announced as that, some experts suggest, is when the caretaker conventions come into effect.

Where, as in NSW, there are fixed term elections and the election date is known, it is a matter of assessing (in advance) when campaigning relevant to the election is likely to begin. This could be the time when Parliament is dissolved, or it could be earlier. In my view the period should be at least two months before election day.

**Continuous disclosure**

Two academics, Professor Graeme Orr, from the University of Queensland, and Professor Brian Costar, from Swinburne University, have proposed what can accurately be described as continuous disclosure:

What is needed is an internet-based graduated, real-time accounting system of disclosure similar to those that have been in operation in jurisdictions in the United States for many years. If a large lobby group takes the plunge during an election
campaign, there is no reason why voters shouldn’t – and many reasons why they should – be made aware of this fact at the time, rather than months later.\(^5\)

In a separate article, Costar has argued that the best system is that used by the New York City Campaign Finance Board.

Candidates must progressively report donations via the internet using a software package provided free of charge by the board. The submissions are then displayed on the board’s web page, almost in real time, for all to see.\(^6\)

On the other hand, Associate Professor Joo-Cheong Tham has proposed that registered political parties and associated entities should be required to provide donation reports weekly during the election period beginning on the day the election is called and ending at the close of the ballot.\(^7\)

**How continuous?**

My office has introduced changes to that part of its website that constitutes the Lobbyists Register, at a relatively small cost (about $60,000). Lobbyists have been issued with passwords that enable them to access their own records on the site and to make changes to their entries (e.g. adding new clients or removing former clients). The office is able to monitor all changes that are made.

Since May last year, lobbyists have also been required to notify the Integrity Commissioner by the 15\(^{th}\) of each month of all lobbying contacts they had in the previous month. They do so by entering their information directly on another section of the website (using their passwords) where it is immediately accessible by the public. It cost a small additional amount to upgrade our system to cope with this additional requirement.

I understand that the NSW Electoral Commissioner, who is now responsible for lobbying matters in NSW, is in the process of updating his computer systems to allow a similar process to occur in NSW.

This system could be used to allow political parties, candidates and other relevant recipients of donations to register those donations on the day they are received, so that anyone accessing the relevant part of the Electoral Commission’s website can be immediately aware of any donations.

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\(^6\) Brian Costar, “Election funding transparency: Australia has a lot to learn” *Inside Story* 10 August 2010, p. 2.

\(^7\) Joo-Cheong Tham, Money and politics. The democracy we can’t afford, UNSW Press, 2010. P. 260.
Political donation disclosure between election periods

The New York City Campaign Finance Board requires candidates to disclose details of the money they have raised and spent every six months during the first three years of the four-year election cycle. In the final year they file increasingly frequently: every second month, then monthly, then every two weeks, and finally daily disclosure during the two weeks preceding the election. That system is suited to an electoral process with fixed terms.

Ideally, as in New York, reporting should become more frequent in the period before the election period formally begins, possibly every month in the election year, with continuous disclosure over the last two months.

Summary

The key integrity issue involved in considering the desirability of continuous disclosure of donations to political parties is transparency. It is important for the reasons set out at the beginning of this paper. Under existing arrangements, transparency is only partly achieved. Voters are not as informed as they could be. Adopting continuous disclosure in some form, particularly during the election period, would contribute significantly to overcoming this democratic and integrity deficit. Ideally, a system approximating that adopted by the New York City Campaign Finance Board would do most to overcome the failings of the present system.

As you will have seen, this part of the submission is concerned with the disclosure of donations, and not with expenditure.

Terms of Reference 3(b): The appropriate regulation of third party campaigns

In contrast to the previous section, this is primarily concerned with the reporting of campaign expenditures. However while I consider that third party campaigners should, like political parties, candidates etc. be required to disclose their funding sources, it is particularly desirable that they should disclose their electoral campaign expenditures.

For the purposes of this submission I would adopt the relevant definitions in the UK Act, set out in the second paragraph on page 8 of the Panel’s Working Paper: “Update on International Campaign Finance Laws and Full Public Funding Models” (2014).

Issues will arise both for political parties, candidates etc. and for third party campaigners about when an expenditure has occurred: when an order is issued/advertisement ordered; when the advertisement or other service is delivered; when an invoice is received. I think the

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public manifestation of the expenditure (eg., the appearance in print or on air of the advertisement) should be the trigger for disclosure.

In my view, continuous disclosure (as set out for 5(b) above) should apply to expenditures by third party campaigners and by parties, candidate etc.

If the same timing rules apply there will be less possibility of confusion about when disclosures must be made.

Dr David Solomon AM
Acting Queensland Integrity Commissioner

16 September 2014