Panel of Experts – Political Donations

Submitted by Professor Graeme Orr
University of Queensland

Date: 31 August 2014
31 August 2014

Expert Panel on Political Donations
GPO Box 5341
Sydney NSW 2001

Dear Dr Schott and Mssrs Watson and Tink

*Expert Panel on Political Donations in NSW - Submission*

**Background**

Reform should be informed by principles and evidence. If it is, its constitutional validity is likely not to be an issue. The question of reform ought not commence with ‘what might the High Court say? Legislators and inquiries who work squeamishly in the shadow of assumptions about what the courts may or may not veto, work under unnecessary constraints.

In terms of principles, a balance is needed between:

- Political liberty / participation
- Political equality / fairness
- Political integrity / anti-corruption
- Realistic resourcing of party activity

None of these are simple issues or linear concepts. For instance limits on donations are broadly believed to enhance equality generally but at a cost to liberty. However depending on how the limits are designed they may impact unequally on different parties, yet enhance participation by encouraging parties to seek out smaller supporters and citizens to see party politics as a less elite affair.

In particular, integrity and corruption concerns (real and perceived) span a range, encompassing both focused problems (individual ethics and distorted decisions) and systemic risks. At one end is
quid pro quo bribery; in the middle is buying access; and at the other end is more diffuse corrosion of processes including diverting politicians away from representative activities into fund-raising.

Between 1981 (the first public funding scheme) and today, NSW has evolved a matrix of electoral and political finance laws. Those laws are now fairly comprehensive, with the reintroduction of expenditure limits, and introduction of general donation limits, in 2010.

Recent revelations are cause for concern, but not despair. Indeed they present a paradox:

1. the system is working. NSW is not uniquely corrupt. Rather, it has a tighter political finance system and more robust anti-corruption mechanisms than other Australian jurisdictions. ICAC’s powers and influence, and the purgative response from the political system, demonstrate this.
2. But the system can never work completely. No form of finance regulation, political or otherwise, is beyond gaming. This risk cannot be managed via more complex regulation.

If history is a guide, regardless of reform NSW politics will enjoy a more circumspect period, although the ethical impact of such scandals wanes after time.

In short, the current round of reform needs to be:

- considered and not knee-jerk
- positively focused rather than overly distracted by constitutional ‘maybes’.

Public Funding and Donations

Full public funding, in theory, is a fine idea. It implies clean money, political equality and relative simplicity of enforcement.

Its first hurdle, of course, is the accusation of ‘overkill’. Truly ‘full’ public funding implies a donation limit of $0. Whilst offering relative administrative simplicity to enforce, such a complete ban is unreasonable. Aside from membership, no-one could associate themselves financially with a party or candidate. Small scale donations are not corrupting, but represent a certain level of grass-roots connectedness.

I know of nowhere in the world, certainly not at parliamentary level, that purports to achieve full public funding of parties or elections. Norway likely comes closest: in 2010 three-quarters of party income was from public funding. Norway is quite statist – like the UK and NZ it bans paid electioneering on tv/radio. Worldwide, whilst public funding is very common, normally it contributes in the range of 30-50% of party incomes.

The ACT may soon come close to full public funding of election campaigns, at least for parties which meet the 4% vote threshold. An ACT Legislative Assembly report recently recommended quadrupling public funding per vote received, to $8 per vote (see pages 36-39 of that report). Assuming similar vote tallies and expenditure to 2012 (Libs 39: ALP 39: Greens 11) that would be
represent close to 70% of the proposed expenditure cap for the major parties, and 9 % of actual Liberal expenditure, of Labor and 80% of Greens expenditure.

The real Achilles heel of the concept of full public funding is practicability and design, more so than the principle of participation. After all, full funding of parties or campaigns would still leave a host of opportunities for political liberty: individuals and organisations could still directly and hence more accountably run their own ‘third party’ political campaigns, and individuals could still volunteer labour to political parties and candidates, or join and be active within political parties.

The practical and design difficulties of full public funding are caught in the Kiplingesque questions: full funding of who, when, how and at what levels?

The ‘who’ might roughly be said to be all registered political parties, and all candidates.

The ‘when’, ‘how’ and at ‘what’ levels are more problematic:

- It would be very difficult to estimate what a fair or necessary level of overall party funding is needed over a four year term. Every party is different in size, modus operandi, ambition and even geographic reach.
- It is also nigh on impossible to devise a metric to allocate money fairly on an annual basis (Admittedly the current law attempts this with administrative funding for parties based, eg, on number of MPs: these provisions are generous and seek to assist small as well as established parties).

Assuming we abandon any attempt at full funding of parties the focus then is on the level and rationale for funding of formal election campaigns.

I recommend reforming and tightening NSW law with:

(a) a donation cap of $1500pa to a party or its candidates or branches. The figure of $1500 is suggested as it is the maximum amount deductible under Commonwealth taxation law (itself a form of indirect public subsidy of parties). It is also a figure - $30pw – at the outer limit of affordability for the average wage earner, and so balances the legitimate interest in making ideologically motivated donations and the concern for equality of political influence.

(b) retention of reimbursement of audited campaign expenditure for registered political parties and for independent candidates. Payments would be capped at the maximum permitted party expenditure, and the scale could slide in two ways. First, proportionately to the number of candidates fielded. A threshold of say 4% of the vote could also remain, to deter opportunistic organisations registering a party to field tickets simply to subsidise left-field causes (eg the transcendentalist Natural Law Party of the 1990s). Some of that deterrence is already built into party registration provisions in NSW, which are the tightest in the land. The level of funding for upper house campaigning should also be lower than for lower house campaigning.
The current sliding scale offers a maximum of 75% public funding of election campaigns. This would need to be increased to offset the loss of funding from the lower donations cap, whilst retaining an incentive to parties to seek small scale donations.

Indeed the scale could be increased to 100% - a system of full public funding of election campaigns by parties and candidates. But donations of up to $1500pa would still be permitted to parties only, with the law corralling them: that is the law could mandate that such contributions be paid only into a party’s administration account. Donors could therefore support their party of ideological preference, but only in its ongoing work including policy development and non-election time advocacy, but not directly in terms of buying a party or candidate electoral campaign power. Donors would thus retain freedom of political association, via modest donations at a non-corruptible level. At the same time, freedom of political communication would be preserved as parties could still mount non-election period advocacy, as could citizens and other organisations, whilst parties would be equally funded up to an expenditure cap and citizens and other organisations could also electioneer up to their own cap.

Either form of this model represents a competitive stimulus to minor parties who, if they are performing well in opinion polling, may be able to secure loans or overdrafts to fund their campaigns (as the major parties do) with the legal entitlement of reimbursement as a kind of collateral. This indeed is how this model functioned in Queensland in 2011 (increasing competition by permitting the Katter and Greens parties to run significant campaigns. The Queensland model, which drew heavily on the NSW public funding model was in the Electoral Reform and Accountability Amendment Act 2011 (Qld) Part 9A Division 4).

The downside of the reimbursement model is the possibility that it may encourage overspending up to the limit, especially amongst smaller parties. This is the flipside of the competitive stimulus it provides to all parties. It might also be said to not encourage well-targeted spending. But since voters are a ‘finite market’ so to speak, much campaign expenditure is a zero-sum game, especially given compulsory voting, and parties therefore have an incentive to husband and target their spending. Alternatively, if election campaign funding were not 100%, parties would still have an incentive to not waste money, and smaller parties would have an incentive to not over-spend.

An alternative model would be the ACT model of ramping up funding per vote, which provides less incentive to smaller parties. In either model, the current expenditure caps could also be reduced (as the ACT is effectively recommending) to enhance inter-party equality, focused campaign expenditure and even minimize risk of party insolvency.

The Union ‘Problem’

The O'Farrell reforms struck down in the Unions NSW case highlighted the issue of trade unions (or other entities) funding parties, notably Labor, based on affiliation fees. Typically in Australia, this issue has been left in the too hard basket or ignored by purporting that such affiliation fees represent the will of a political collective. There is no easy answer to the question of political equality and association raised by the issue.
The simplest solution is to insist that any such affiliation fee be based on membership, be subject to a tight cap, and be channeled into party administration and quarantined from any electioneering activity.

**The ‘Palmer’ Problem**

Unlike in the US, millionaire candidates have not, until recently, been a feature of Australian politics. Mr Palmer is an exception – although the issue should remain less significant here than in the US where parties are weaker, the focus is more on individual candidatures and directly elected executive offices, and the culture permits less regard for political equality. (Millionaire candidacies are seen as incorruptible).

Donation limits in NSW must apply to any transfer by an MP or party member/leader to ‘their’ party or any candidate of their party.

It is difficult otherwise to prevent a wealthy person funding their own personal campaign, eg if they run as a legislative candidate. But at least in NSW such constituency campaigns are subject to expenditure limits.

Nor do donation limits prevent a wealthy person in control of several proprietary entities using those entities as campaign vehicles. But at least those vehicles in NSW are subject to the third party electioneering limits.

**Disclosure Law**

NSW once led Australia in introducing political disclosure laws. NSW could implement a system of continuous disclosure of political donations. That said, if donations were capped at say $1500pa then the purpose of disclosure becomes less that of shining light onto influence and more to do with auditing. South Australia is moving to a form of continuous disclosure in 2015, via the *Electoral (Funding, Amendment and Disclosure) Amendment Act 2015* (new Part 13A Div 7). The New York City Campaign Finance Board also *oversees such a system*.

Disclosure should also extend to audited accounts of all registered political parties, and (subject to privacy law) membership numbers. Parties after all enjoy significant public subsidies, so they should at a minimum be subject to the kind of financial oversight required of say trade unions. The UK Election Commission oversees a reasonably comprehensive system of party (including constituency level party) disclosure.

**Offences – Time Limitations and Penalties**

Revelations in ICAC about prohibited donations will not necessarily lead to charges, even in cases of confessed wrongdoing. This is because the NSW *Election Funding, Expenditures and Disclosure Act* contains a blanket 3 year time limitation on offences committed under it.
This does not mean there can be no charges. But any charges may only rest on more serious offences in the general criminal law, of bribery or conspiracy – evidence of which is, by its nature, extremely difficult to obtain.

A three year time limit might make sense in cases of mere accounting errors. But it makes no sense for offences significant wrongdoing, such as the knowing acceptance or making of prohibited donations or expenditures. Especially when, with behind the scenes gifts and spending, evidence takes time to bubble to the surface.

Those found to be knowingly involved in such offences should risk not just more significant fines than those currently provided, they should also trigger a period in which the person is prohibited from any formal high level political role (eg being an MP, local government officer-holder or candidate, or being a registered party office holder) or office-holder or director in any trade union or business organization registered under state law.

There is also a case for having two tiers of offences. At present, a politician or political operative acts ‘unlawfully’ if she accepts a prohibited donation, or one that exceeds the cap: section 95B(1). However no offence is committed unless the Crown can prove knowledge of all the relevant facts (s 96HA). A prohibited donor commits no offence unless ‘aware of the facts that result in the act being unlawful’. A donor breaching the monetary cap commits no offence unless ‘intention’ to break the cap is proven (s 96HA): a difficult subjective element to prove. It would be advisable to have:

(a) more serious offences and extended time limits for knowing or reckless breaches, or attempts to circumvent the prohibitions or caps, including via conduits.

(b) strict liability offences for breaches without such evidence of state of mind, but with lesser penalties than the more serious offences. Strict liability puts the onus on all concerned to abide by the law.

It is worth observing that press attention around ICAC has tended to focus on the political rather than business figures. Whilst that is partly due to their higher profile, it also shows an unfortunate level of cynicism about politicians. At a minimum it takes two to tango and in some cases the breaches are ‘supply’ driven, ie the donor seeking influence off their own bat.

Yours

Graeme Orr
Professor of Law
University of Queensland 4072

g.orr@law.uq.edu.au


and *Ritual and Rhythm in Electoral Systems (A Comparative Legal Account)* (2015, forthcoming)
Summary of Recommendations

- Lowering the donation limit to ~$1500pa.

- Increased public funding via a reimbursement model, with a sliding scale based on the expenditure limit. (Failing that, by increasing funding per vote).

- Public funding could be increased to 100% of the election expenditure limit: if so, capped donations ought by law be limited to parties’ general accounts and corralled away from their election campaign account.

- Consider reducing the election expenditure limit.

- Ensuring organisational affiliation fees to parties are based on membership, capped and quarantined to non-campaign activity.

- Ensuring that ‘millionaires’ can only fund their own personal candidature.

- Consider instituting a continuous disclosure regime, especially if donation limits remain at $5000.

- Increasing the time limits for charges for offences that involve culpability.

- Reviewing penalties for offences of culpability to: (a) provide for disqualifications from political and similar positions, (b) extending time limitations for prosecuting and having a two tier set of offences (knowing/reckless vs strict liability) and (c) ensuring donors as well as political figures are equally subject to penalties.