Panel of Experts – Political Donations

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SUBMISSION TO THE PANEL OF EXPERTS – POLITICAL DONATIONS

From: Gregory Piper
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INTRODUCTION

I am pleased to have the opportunity to contribute my opinions to this Expert Panel on Political Donations.

In 2010, I made the following statement to a parliamentary inquiry into public funding of election campaigns: “It is possible to create new rules, but it is impossible to legislate for the integrity to follow their spirit.”

While supporting reform of the electoral funding system to address concerns about party donors being beneficiaries of government decisions, I warned then of the prospect of “creative bypass” of any new laws.

Three years later, those words have proven more prophetic than I could have imagined, given recent revelations in the Independent Commission Against Corruption (ICAC) about the labyrinthine system of money handling that allegedly directed hundreds of thousands of illicit dollars into the campaigns of select Liberal Party candidates at the 2011 State election.

I do not believe it is possible to create watertight electoral funding laws. As we sit here discussing ways to tighten the regulations, there will be other people trying to conjure ways to circumvent them.

However, we can improve the transparency of the system, and I think this is the key to effective reform. Imposing regulations that will allow voters, in a timely way, to know who has contributed to a campaign and how much they have donated, at least arms those voters with the knowledge to make an informed decision.
I also believe the ramifications of the current ICAC investigations and hearings into electoral funding irregularities will result in a changed environment, certainly for the 2015 State election, in which parties and candidates will take a far more conservative and law-abiding approach to campaign funding. The challenge for this panel, and all concerned about ensuring ethical practices in electoral funding, is to determine how to best make that culture endure.

I offer my suggestions and experiences on selected aspects of electoral reform drawing from the experience of having run two State electoral campaigns (and currently entering a third) as an Independent candidate. I will expand on these individual aspects of reform in the body of this submission and I trust my reflections and recommendations will assist the panel in its deliberations.

1. REAL-TIME REPORTING OF DONATIONS

I believe the introduction of real-time disclosure provisions is the single most effective measure that could be introduced to improve the transparency of the electoral funding system. I note this issue is also addressed in Chapter 15 of the *Issues Paper – Political Donations.*

The current system of electoral funding disclosure is antiquated and does not serve to inform voters in a constructive manner. When technology exists – and is in use in other jurisdictions – to allow donations to be logged online and made publicly available within hours of receipt, there can be no justification for continuing with a system that only makes donations public months after a ballot has been decided.

Currently, electoral funding disclosures in NSW are generally not made public until three to five months from the end of the reporting period. During election campaign periods – generally regarded as the six months prior to a polling date – we should be more proactive in informing the voting public of the donations made to a candidate’s campaign.

It is reasonable to give candidates some months to reconcile all incomings and outgoings of a campaign before lodging their final disclosure to the Election Funding Authority (EFA), but I can see no reason why donations cannot be declared as they are received. This practice would give voters the benefit of knowing who is contributing to a candidate’s campaign before they go to the polls.

One of the global advocates for more widespread use of real-time disclosure is the Sunlight Foundation, an American non-profit organisation dedicated to fostering open government. In an article under its name published on *The Huffington Post* online site in November last year, titled *Real-Time Disclosure – One Simple Fix for a More Informed Public,* it wrote the following:

“Transparency’s impact is diminished when information about campaign funding is delayed by weeks or months. A less informed public and less accountable system may be the goal of opponents of more disclosure, but it is unacceptable in
the Internet era where information about everything other than government is publicly available everywhere, with the tap of a screen or click on a mouse.”

The article commented further:

“Disclosure of money in politics . . . is a critical tool to inform the electorate, deter corruption and the appearance of corruption, and aid in enforcement of campaign finance laws.”

The article was commenting specifically on the use of near real-time disclosure in American elections, but the sentiment is equally applicable to our own jurisdiction. In tandem with the implementation of near real-time online donation disclosures during election campaign periods, I would also recommend the imposition of a donation reporting deadline – perhaps one week or several days ahead of the election day – to deter last-minute donations intended to avoid pre-poll scrutiny.

2. CAPS ON ELECTORAL EXPENDITURE

I support limitations on campaign expenditure, but with the current caps set as high as $166,700 for individual candidates at the 2015 election, the system still favours those with significant financial resources.

More modest caps would help ensure candidates were elected on their merits rather than the size of their bank balances. My two State election campaigns cost between $40,000 and $60,000 each, and I largely used my own resources to fund them, supplemented by small donations.

I appreciate, however, that not all candidates have the capacity to do that, and the cost of mounting an effective campaign in some areas is much higher than in others, due to considerations such as considerable travelling distances some candidates are required to cover, and differences in advertising requirements and costs.

I make no specific recommendation on what the ideal caps for campaign expenditure should be but note that the major parties have created an environment in which electoral funding has become an arms race, and high expenditure on campaigns the norm. My personal experience suggests extravagant spending is not necessary, but rather has become an unwelcome culture that encourages the sort of questionable fund-raising activity that has been exposed by the ICAC.

3. CAPS AND BANS ON DONATIONS

The current caps on donations of $5,700 to parties and groups and $2,400 to candidates are appropriate if applied in association with improved transparency of donation activity.
I have in the past argued for a smaller cap – and still believe something approximating $1,000 per year of term is adequate. I believe it is important to allow individuals to participate in the political process by making a gesture to the campaign of a candidate or politician whose polices or actions they support. The figure of $1,000 is a reasonable amount of money that can feasibly assist a campaign, but not enough to buy influence or favour. However, the current cap of $2,400 per individual contributing to a candidate’s campaign is also reasonable, as long as there are adequate means to ensure the limit is enforced.

I do not see the need for an annual limit to be placed on donations. I think the time frame of a parliamentary term is a more appropriate measure. Whether donations are provided to a candidate in four instalments or one over the course of a four-year term has no real bearing on the accountability or transparency of the process.

I support the current industry-specific bans in principle but am concerned by the potential for them to be successfully challenged, given the precedent set in the High Court in Unions v State of New South Wales [2013] HCA 58.

I believe donations should be restricted to natural persons, and am of the view a uniform ban on donations by corporations, organisations and groups might be applied more successfully than selective prohibition. I do not believe unions, interest groups or other organisations have the right to contribute funds to a campaign on behalf of their membership. Certainly, they are entitled to encourage members to make contributions as individuals to the campaign of a party or candidate whose principles they support, but those contributions should be voluntary.

4. DISCLOSURE OF PARTY FUNDING

Electoral funding legislation should make it compulsory for party candidates to reveal all funding or benefit they receive from global party funds. While Chapter 12 of the Issues Paper notes that "Transfers from a party to its endorsed candidates are also caught by the [donation] caps", in practice the disclosures of party candidates often do not reflect the actual expenditure on their campaigns, particularly funds or in-kind resources directed to their campaign from central party sources.

I believe any funds directly provided by a central party organisation for a local or regionally based campaign, including for advertising, should be reported on the disclosures of the candidates who benefit, and counted towards their overall campaign expenditure. If more than one candidate benefits from a campaign, then the expenditure should be apportioned pro-rata between all of those candidates.

Similarly, any overall campaign expenditure by a party, advocating generally for a vote for a party or its leader, should be apportioned between all upper and lower house candidates that party is standing in that election. For instance, if a party spends $1 million on general advertising for an election, and is standing 100
candidates, each of them should have to declare $10,000 from global party spending on their returns.

Transparency is critical in the current environment and I believe voters become very cynical when they see disclosures indicating very little income or outlay from party candidates who have run high-profile campaigns. Including in those returns the proportion of global party funds spent on a candidate’s campaign would result in a more accurate representation of actual campaign expenditure.

5. FULL PUBLIC FUNDING

I believe full public funding is an unfair imposition on the public purse which, if introduced, would financially penalise taxpayers for the failure of politicians and candidates to observe electoral funding laws. I do not see it as an acceptable solution to the ills of the current system and believe it has a number of inherent faults.

Full public funding has the potential to encourage parties to use dummy candidates in order to manipulate preference exchange. In the last local government election in Port Stephens, a calculated campaign involving 32 conservative-leaning ‘independent’ candidates resulted in members of this undeclared alliance securing seven of the 10 seats on the council and shoring up the vote of the mayor. It was only after EFA returns were made public that the collusion between candidates – involving preference swapping and direct contributions to some of the campaigns by the mayor’s team – became common knowledge. I refer to this occurrence to provide just one cautionary example of how easily ballots can be manipulated. I believe full public funding would provide parties and shrewd candidates with more opportunity to exploit the system in similar ways.

Full public funding also encourages candidates whose motives for entering into an election campaign are questionable. This includes those seeking promotion for a niche cause, for themselves or their personal ‘brand’, with the inevitable result being tablecloth-sized ballot papers.

I respect the right of any eligible candidate to stand for public office, but I also believe a candidate should have some personal investment in his or her campaign in order to demonstrate their legitimacy as a contender. If NSW is to move towards a system of public funding, I would recommend legislating that a candidate be obliged to personally contribute the first component of their campaign in order to be eligible for public funding of the remainder.

An amount of between $20,000 and $30,000 would be enough to deter opportunistic and disingenuous candidates without being too much of a financial obstacle to genuine candidates. In my experience as an Independent, running modest campaigns, the minimum funding a candidate needs to run an effective campaign for a State seat is about $40,000. A genuine candidate should be prepared
to invest something close to that amount themselves, either from personal funds or through fund-raising.

I am also concerned that full public funding denies members of the voting public the right to offer financial support to a candidate whose policies they support, or whose record as an elected representative they appreciate. I think it is important to allow the voting public to participate in the campaign of their candidate of choice, if that is the way they wish to express their support. Some people offer support by assisting with doorknocking, handing out leaflets or engaging in other promotional activities, while others prefer to support a candidate by way of making a modest donation to campaign costs. Each contribution is a legitimate way of participating in the democratic process, as long as the rules of engagement are observed.

Ensuring the cap on personal donations is modest allows donors to exercise their right to offer financial support, but not to a degree that will unduly influence the poll outcome. If the cap on donations is too high, the system favours candidates with wealthy supporters and effectively disenfranchises those candidates whose popularity and standing is based on strong grassroots support.

6. COMPLIANCE

As stated in the Issues Paper, compliance with electoral funding laws can be difficult, especially for Independents, who cannot draw on the kind of ‘institutional knowledge’ of campaigning that inevitably exists within a political party. Typically, too, Independent candidates run more modest campaigns and cannot afford to enlist professional assistance, so the complex tasks of monitoring donations and expenditure and ensuring compliance with regulations often falls to someone unqualified in these fields.

I believe it would be advantageous to all candidates if some proportion of public funding were available to them for the purpose of enlisting the services of qualified financial or other specialists to assist with campaign compliance. Party candidates who already have this expertise at their disposal need not be obliged to use the funding, but the onus for ensuring compliance should fall to them if they choose to forgo this option.

Determining accountability for the acceptance of illegal donations and other actions contrary to electoral funding laws can be problematic, as has been seen during the Operation Spicer ICAC hearings, with many of the politicians and party representatives who have appeared having shown a reluctance to accept responsibility. Legislation needs to articulate clear lines of accountability, but also ensure that candidates are offered sufficient support to comply with regulations.

It would be useful to Members and candidates to be able to obtain rulings from the EFA, or a similar authority, on issues such as the legality of a donation or the appropriateness of campaign expenditure, before the donation is accepted or the
money spent. Traditionally, I have found the EFA reluctant to offer rulings on specific requests of this nature, but I believe it would assist with compliance and accountability if politicians and candidates could receive definitive advice. Having the capacity to consult the EFA for a ‘yes’ or ‘no’ response would also negate the defence often used by those who knowingly manipulate the system – that they were unaware their actions were illegal.

CONCLUSION

It is important that we reform the electoral funding system, but equally imperative that in doing so we do not make it so complex and intimidating that we deter good candidates from standing. One thing the events of recent months have demonstrated is that the watchdog system does work in identifying and calling to account those who act contrary to the legislation. We cannot mandate integrity, and I doubt we can ever eliminate corrupt practices from electoral funding entirely, but the revelations that have come out of the ICAC only reinforce the value of that institution.

This panel has been convened in response to the inability or unwillingness of some people to comply with the law. As legislators, we do not rush to change the laws every time they are contravened, but rather look to strengthen our capacity to enforce them.

I believe this principle should guide the panel’s deliberations as it considers the best ways to reform electoral funding legislation and practices. I do not think we need to go back to the drawing board, but measures to improve transparency of donations and discourage the ‘arms race’ in election funding are clearly required.

Again, I extend my gratitude for the opportunity to contribute to this review and look forward to discussing these issues further when I appear before the panel.

Yours sincerely,

[Signature]

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