Deepening Democracy

Submission to the Australian Government in response to the Electoral Reform Green Paper

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on Electoral Reform

During 2008 PIAC made submissions to the NSW Legislative Council Select Committee Inquiry into Electoral and Political Party Funding[1], to the Victorian Electoral Matters Committee Inquiry into Political Donations & Disclosure[2], and the Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election.[3] PIAC has previously made submissions to electoral reform inquiries including the Inquiry into the 2004 Federal Election. This paper draws on the material contained in those submissions.

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1 Kerrie Tucker, Deirdre Moor and Robin Banks, *For the Sake of Democracy: Submission to the NSW Legislative Council Select Committee Inquiry into Electoral and Political Party Funding* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008021_20080215.html> at 20 February 2009.

2 Deirdre Moor and Kerrie Tucker, *Funding Democracy: Submission to the Victorian Electoral Matters Committee Inquiry into Political Donations and Disclosure* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008065_20080627.html> at 20 February 2009.

3 *Submission to Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008051_20080516.html> at 20 February 2009.

Executive Summary

PIAC congratulates the Federal Government for initiating a review of the federal electoral system and welcomes the opportunity to comment on the *Electoral Reform Green Paper: Donations, Funding and Expenditure* (the Green Paper).

PIAC is concerned, however, that while opening up discussion on reform of electoral law through the Green Paper, the Federal Government has chosen to proceed with legislation—Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008—that goes to the heart of the matters in the Green Paper. In PIAC's view, it would be better to defer legislation relevant to the Green Paper until the community has had an opportunity to comment and those comments has been considered.

PIAC is of the view that reform of Australian electoral law is long overdue. Canada and other countries have shown such reform is possible and have working models from which Australia can learn. Democracy benefits from having diverse views represented in parliaments, public debates and campaigns. It is through the presence of different voices that new agendas can be developed, that vested interests can be challenged, and that governments can be held to account. The notion of community review of and contribution to public decision-making, which lies at the heart of democracy, requires this pluralism. Therefore the principles of equal representation, and equal opportunity for citizens and parties to participate in political life must be central to any consideration of political financing, as must the principle of ensuring that elected members are free to work in the public interest, unencumbered by undue influence, conflict of interest or corrupt practice. Any arrangements that compromise these principles must be regarded as serious threats to the public interest and representative democracy.

Clearly there is significant concern in Australia that current arrangements for the financing of the political process are failing to meet basic standards required in a healthy representative democracy. While the relationship between big business and politicians grabs many headlines, so increasingly do allegations of inappropriate use of public funds for partisan purposes by parties controlling government. It is important to avoid a piecemeal approach, and review all aspects of political financing mechanisms because different players are privileged through different funding sources and disclosure requirements. For example, if measures to limit private funding were agreed to and implemented but inappropriate spending of public money through electoral allowances and government advertising and funding programs were not also better regulated, incumbents would remain inappropriately privileged.

PIAC notes that the Green Paper does not deal with the financial benefits of incumbency. PIAC is of the view that this aspect of political finance must be included in any debate if a fairer system is to be developed. PIAC has, therefore, provided comment and recommendations in this submission regarding use of public funds through incumbency and PIAC also recommends that the second Green Paper include discussion of the benefits of incumbency.

Recommendation

That the second Green Paper include discussion of the electoral benefit of incumbency.

In summary PIAC submits that:

- only individual citizens should be able to make financial contributions that support political parties and candidates, and such donations should be capped;
- expenditure of political process participants should be capped;

- public funding should contribute to the ongoing operational costs of political parties and independent members of parliament;
- limits to financial contributions and expenditure should apply across the electoral term and on an annual basis;
- the financial and other privileges of incumbents and governments must be better regulated to minimise politically partisan use;
- citizens have a right to full information regarding the financial activities of governments, political parties, candidates and any other entities that have significant political influence;
- public funding should be provided to parties and candidates at local, state and federal levels in order to give greater financial equivalency, and that this funding should be tied to compliance with electoral law;
- any changes to electoral law should have evaluative mechanisms structured into their design;
- Australian legislation and electoral support practices should give effect to the Article 25 of the *International Covenant on Civil and Political Rights*, which provides for universal suffrage and secret ballots 'without unreasonable restrictions';[4]
- public funding should be provided to parties and candidates who receive 4% of the first preference vote
- in order to achieve greater financial equivalency, public funding should be subject to a sliding scale, after a threshold of votes has been reached;
- all measures must be taken to ensure the independence and appropriate resourcing of the Australian Electoral Commission (AEC) or any other future agency charged with ensuring free and fair elections.

[4] Australia is a State Party to the *International Covenant on Civil and Political Rights*, having ratified it on 30 November 1980.

Overview of Australia's funding and donation regime

If the current arrangements are assessed against the principles listed in the Green Paper, it is clear that reform of both public and private political financing and electoral processes is necessary. Spiralling costs of political activity, reliance on large corporate donations by the major parties, the purchase of access to political representatives, relaxing of disclosure provisions, and inadequate independent scrutiny of political financial arrangements all make for an unequal and unaccountable political playing field threatening the fundamental representative role of parties. A lack of transparency and the perception of conflict of interest and corrupt practice create distrust in the community and loss of confidence in Australian democratic systems. Care also needs to be taken that regulatory systems are reasonably easy to understand and comply with, in order to avoid the regulations themselves becoming a barrier to participation.

Some argue that privacy and civil liberties are impinged upon by the imposition of strong disclosure requirements and bans or limits on donations and expenditure.

Article 21 of the *Universal Declaration of Human Rights* states:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> (2) Everyone has the right of equal access to public service in his country.
> (3) The will of the people shall be the basis of the authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[5]

While the protection of the freedoms of expression, association and assembly is critical in ensuring the enjoyment of this right, equally important to protect is the central principle of the equality of citizens. PIAC is of the view that to create a healthy representative democracy, the equality of citizens must be seen as the essential underpinning principle. This is reflected already in the principles of 'one person one vote' and relatively equal electoral districts.[6]

The implied right of freedom of political and governmental expression in the Australian *Constitution* can be properly protected in a system that limits the impact of donations and expenditure on the integrity of the political and electoral process.

Important in this discussion is the precedent set by the Supreme Court of Canada in *Harper v Canada (Attorney General)*[7] concerning election advertising spending limits by electoral participants other than candidates and parties. The court determined, in the context of the *Canadian Charter of Rights and Freedoms*[8], that electoral fairness was an essential component of Canada's democratic society. The *Canadian Charter of Rights and Freedoms*, provides at Article 2 that:

> 2. Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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5 *Universal Declaration of Human Rights* (1948) United Nations General Assembly <http://www.un.org/Overview/rights.html#a21> at 14 February 2009.

6 Diane R Davidson and Miriam Lapp, *Political Financing in Canada: Achieving a Balance*, (Paper presented at the Annual Meeting of the Law and Society Association, Humbolt University, Berlin, Germany, 25-28 July 2007).

7 *Harper v Canada (Attorney General)* [2004] 1 SCR 827, 2004 SCC 33.

8 Enacted as Schedule B to the *Canada Act 1982* (UK) 1982, c.11.

c) freedom of peaceful assembly; and
d) freedom of association.

PIAC urges the Australian Government to follow the lead of other established and emerging democracies and reform its system of political finance as well as create a precedent that can be followed by all other levels of government in Australia. PIAC presents comment and recommendations in the hope that the Government will be a strong advocate for electoral reform through the Council of Australian Governments (COAG) and other fora.

Any new regulatory systems, including those that apply to incumbents and government must have structured evaluative mechanisms included in their design. The purpose of such evaluation is to assess how effective amendments and changes to practice are in: (a) improving the integrity, accountably and fairness of the system; (b) strengthening public confidence in the system; and (c) facilitating their participation in it.

Recommendation

That any proposals for amendment to electoral law include independent evaluative mechanisms.

PIAC recognises that funds are required to actively engage in the democratic processes. The question is not whether there should be funding but how can the risks to effective representative democracy of funding arrangements be minimised.

There is currently inconsistency in electoral funding arrangements between federal, state and territory and local government levels. In most jurisdictions there are various forms of both private and public funding of political activity. As noted in the Green Paper, the current system of political financing has resulted in high and increasing costs of campaigns, political inequality, perception of and/or actual corruption and voter disenchantment. The increased spending on campaigns has been made possible through increased private contributions and public funding. The system is also characterised by a lack of transparency and inadequate regulation, monitoring and accountability mechanisms.

In this regard, Australia does not compare well to other developed countries such as Canada and New Zealand where measures have been introduced to improve accountability, transparency and fairness in financing arrangements.

The main concerns expressed about the impact of current private and public political financing arrangements on our democracy include that there is a lack of accountability, the perception of/or actual corruption, the potential purchase of undue influence, and political inequality.

Public funding

Direct public funding

It was in NSW, in 1981, that the first attempt was made in Australia to avoid the potentially corrupting influence of private money on politics through the introduction of public funding of elections. The Federal Government followed NSW in 1984. The Commonwealth Joint Select Committee on Electoral Reform 1983 said that public funding would:

1. assist parties in financial difficulty;
2. lessen corruption;
3. avoid excessive reliance upon 'special interests' and institutional sources of finance;
4. equalise opportunities between parties; and
5. stimulate political education and research.[9]

Effectiveness of direct public funding

Unfortunately, however, direct public funding has supplemented continuing and increasing private contributions and has done little to reduce the influence of wealthy and powerful individuals or interest groups. It has not resulted in financial equivalency between parties or markedly improved accountability and transparency. Neither does it appear to have stimulated research, policy evaluation nor programs to support an informed electorate, as anticipated or hoped for in the original 1981 NSW parliamentary debate.[10]

In 2004, the AEC commented that public funding did not appear to have achieved the goals of reducing party reliance on funds from sources other than public funding and equalising the opportunities between parties and it may be appropriate for the scheme to be reviewed. The AEC's comments included the suggestion that a degree of funding could be paid yearly to assist with administration costs.[11]

Current direct public election funding is inequitable because the flat payment per vote to parties that receive 4% of the vote favours established parties. It is also inequitable because the retrospective nature of the payment disadvantages new entrants. PIAC sees merit in the NZ model where measures of public support beyond votes such as opinion polls leading up to an election[12], and the number of members in the party are used to calculate the entitlement to non-monetary support, such as through free broadcasting time.

Recommendations

That measures of public support beyond votes should be utilised to calculate entitlement to public electoral funding in the lead up to an election.

That Political Parties that qualify should receive non-monetary support such as free broadcast time support before the election.

A separate but important point is that direct public election funding is not currently tied to anything other than very broad political outcomes.

9 Australian Electoral Commission, *Submission to Joint Standing Committee on Electoral Matters Inquiry into Disclosure of Donations to Political Parties and Candidates* (2004) 10.

10 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 April 1981, 6318 (DP Landa).

11 Australian Electoral Commission, above n9, 11.

12 Australian Government, *Electoral Reform Green Paper* (2008) 4.26.

PIAC supports the tying of at least a portion of any public electoral funding to particular social objectives, such as occurs in other countries.[13] This could support a refocusing on grass-roots democracy and deliberative democracy including community consultation and campaigns, policy development, and party building; countering the current tendency in Australia for political parties to spend the majority of their funds on election advertising in the election period. PIAC submits that accountability and representative and deliberative democracy would be enhanced if parties were required to earn at least a proportion of their public electoral funding through such activities.

PIAC advocates for public funding to support the ongoing operations of political parties and independents members of parliament. PIAC also submits that tying regulatory requirements to the election period is problematic, particularly as there are no fixed terms at the Federal level. Some potential loopholes in the regulatory framework could be avoided by making requirements apply across the whole term. This would not exclude the possibility of imposing extra requirements during the election period where appropriate, such as more frequent reporting.

Recommendation

That a proportion of direct public electoral funding should be required to spent on agreed broader social objectives.

Inconsistency across different levels of government is problematic and can reduce accountability. The different regulatory environments at state, territory and federal levels can create opportunities for participants to avoid disclosure and compliance.

Local government in many regards stands separately from the other levels of government and it does not currently attract public funding. PIAC is of the view that the regulatory environment of local government should be a matter of federal interest so as to ensure high and uniform standards across Australia.

PIAC submits that equitable funding arrangements for local government must be part of any reform of political financing. The fact that candidates for local government elections cannot attract any public election funding can result in a narrowing of the field of candidates, as only wealthy individuals or those who attract donations can run effective campaigns. The need to remove sources of potential conflict of interest or undue influence through donations and other means is very important at the local level.

Unlike the state and federal spheres, local government is not made up of a ministry heading up the executive, and a legislature. At state and federal level the expectation is that Ministers do not usually make decisions on individual applications. Such decisions are delegated to the appointed officials, and if those decisions are set aside, it is usually of interest to the community, and the legislature. However, at local government level, there is greater involvement of councillors with individual constituent proposals. It is therefore particularly important that accountability and transparency is strongly mandated and enforced.

PIAC submits that there is democratic merit in maintaining responsibility for planning and local development matters at a local level. Local Councillors are able to better understand and represent the needs of local communities. The presence of this different level of decision-making can also provide a check on the power of the State Government. However, having said that, the potential for corrupt practice is as much a threat to representative democracy at local level as it is at the state level, and improvements in performance transparency and accountability are much needed at both levels.

[13] Sally Young and Joo-Cheong Tham, *Political Finance in Australia: a skewed and secret system* (2006) 46.

The Independent Commission Against Corruption (ICAC) commented, in a summary of its activities for 2006-07, that the most frequently represented government sector for all allegations from the public was local government.[14] It was suggested by ICAC that this was an indication of the interest and 'high level of interaction' citizens have with local government. Development applications were the most frequently complained about public sector activities. While such high complaint levels are of concern and may be used to argue that the role of local government in planning should be removed, the comment from ICAC regarding the 'high level of interactions' supports the democracy argument that it is at local level that people are able to engage in decision-making processes.

Recommendation

That the Federal Government should work with the states and territories and local government to establish a uniform system of electoral law that ensures high standards of integrity and accountability.

Formula for calculating direct public funding

As noted above, current direct public election funding is inherently inequitable because the payment is calculated in a way that favours the major parties. If the rationale for public funding is to assist political parties and candidates to participate in the democratic system then there is no justification for such a wide disparity in funding.

A solution to this disparity in funding would be to create a sliding scale of payment per primary vote, with a higher payment for the first bracket of votes won and then progressively decreasing. Such a measure would contribute to financial equivalency between parties and candidates. PIAC does not accept the argument that the funding is relative to support and therefore parties have earned it. The current predominance and therefore larger earning capacity of the larger parties is as much the result of previous partisan decisions about electoral law as it is about community support.

Recommendation

That consideration should be given to introducing a sliding scale of public election funding based on the number of primary votes achieved.

Reimbursement Scheme

PIAC is supportive of a scheme for reimbursement of electoral expenditure because it can enhance transparency and accountability. However, if such a scheme is limited to a short campaign period, and is too restrictive in terms of what types of expenditure may be reimbursed, the viability of new or small parties and independent participants may be at risk. This is particularly the case if restrictions on expenditure and donations are in place.

PIAC notes that, in its report on the Electoral Amendment (Political Donations and Other Measures) Bill (2008) (Cth), the Joint Standing Committee on Electoral Matters recommended that the definition of 'electoral expenditure' be expanded to include reasonable costs incurred for the rental of campaign of dedicated campaign premises, the hiring and payment of dedicated campaign staff and office administration.[15] However, PIAC remains concerned that this arrangement will not facilitate the ongoing development and operations of political parties/independents. In particular, the capacity to undertake ongoing policy development, consult with the community and engage with party members may be adversely impacted. As already noted in this

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14 Independent Commission Against Corruption, *ICAC Annual Report 2006-2007* (2008) [16] <http://www.icac.nsw.gov.au/index.cfm?objectID=D417D33B-AF94-E700-D142DFC2DFC2E7C6&NavID=2425EAA9-D0B7-4CD6-F99B8C05413B1748> at 17 February 2009.

15 Joint Standing Committee on Electoral Matters, Commonwealth, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) [xiv].

submission, PIAC supports the educational and social role of political parties in a participatory democracy. PIAC notes that Canada provides annual funding for the ongoing expenses of political parties and candidates. If the new scheme is to be informed by the principle of fairness[16], and commitment to participatory democracy, PIAC submits that consideration must be given to a broader funding scheme.

Recommendation

That an election expenditure reimbursement scheme should be introduced that is informed by the principle of fairness, a commitment to participatory democracy and that takes into account the ongoing reasonable expenses of political participants.

Indirect public funding

Indirect funding occurs through:

- parliamentary entitlements of incumbents;
- the privileges of government;
- tax subsidies, through tax deductibility of private donations;
- generous tax concessions to elected representatives, not available to other Australian workers.

PIAC is of the view that the advantages of incumbency must be included in any analysis of the 'fairness' or 'integrity'[17] of the current system.

While some parliamentary entitlements such as superannuation only benefit the individual elected representative, many other entitlements such as salaries, allowances for staff, postage and printing are of benefit to the parties more generally. The more members elected, the greater is this advantage.

PIAC commends the current Federal Government for responding to concerns about the benefits of incumbency through statements, such as *Restoring Integrity to Government*[18], and guidelines, such as those applying to government advertising.[19]

Governments have the responsibility of managing the public purse and they have an ethical responsibility to ensure that it is the public interest that informs all decisions about expenditure of funds. For an attempt to prevent the misuse of entitlements to be credible, it must be system wide and regularly evaluated. Misuse can take many forms including not only the use of government advertising for partisan purposes and the misuse of parliamentary entitlements, but also through other means such as the delaying of official campaign launches in order to prolong access to parliamentary entitlements, disregarding the caretaker convention, creating large public relations and media units with increased use of consultants, and the allocation of project funding for electoral gain in marginal seats. A system-wide approach may require reform at all levels of decision-making.

The Auditor General in his 2007-08 Performance Audit of the Regional Partnerships Program commented that the flexibility in the application assessment and Ministerial approval process created problems in ensuring accountable, transparent and equitable public administration.[20]

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16 Australian Government, above n12, 2.1.

17 Ibid.

18 Senator John Faulkner, 'Restoring Integrity to Government' (Ministerial Statement, 4 December 2008) <http://www.smos.gov.au/transcripts/2008/tr_20081204_ministerial_statement.html> at 17 February 2009.

19 Senator John Faulkner and Lindsay Tanner MP, 'New Advertising Guidelines' (Joint Media Release, 2 July 2008) <http://www.smos.gov.au/media/2008/mr_222008_joint.html> at 17 February 2009.

20 The Auditor General, *Audit Report No 14 2007-08 Performance Audit of the Regional Partnerships Programme: Volume 1—Summary and Recommendations* (2008) 19.

In 2005, the Federal Government undertook an advertising campaign on its industrial relations policies before it had introduced the relevant legislation. This campaign was not in the context of a general election, but was undertaken to offset non-government sector advertisements that criticised the intended legislation.

Harry Evans, Clerk of the Senate, pointed out in 2006 that the lack of transparency in such public spending was the result of the current financial system.

> … the financial system now in place makes it extremely easy for government to find large amounts of money for virtually any purpose, including new advertising campaigns for new projects…
>
> … illegalities and serious problems in the management of special appropriations and special accounts had been pointed out in reports of the Australian National Audit Office and that these problems were not the product of poor management alone, but of a financial system which by its nature leads to loose dealings with money. The Department of Finance and Administration has promised better management, but the Parliament is still not in the position properly belonging to a legislature, of actually approving the expenditure.[21]

PIAC acknowledges that the new Federal Government has made some progress in this area, in particular through its 'Operation Sunlight'[22], a reform agenda 'to improve the openness and transparency of public sector budgetary and financial management and to promote good governance practices' as well as through the Murray report.[23] However, if the worthy objectives articulated in these documents are to be realised there must be ongoing evaluation and monitoring of the effectiveness of any reforms introduced, possibly through the Finance and Public Administration Committee.

PIAC also acknowledges that the current Federal Government has gone some way in addressing other concerns such as through the introduction of the Guidelines for Advertising.[24] PIAC notes that Senator John Faulkner has made a number of Ministerial Statements on this matter, such as 'Restoring Integrity to Government'[25], and that some initiatives have been introduced while others are yet to be debated or passed by parliament.

PIAC supports moves to better regulate the use of parliamentary entitlements so as to ensure that they are not used for politically partisan purposes.

Recommendation

That there should be mandatory, detailed, regular and easily accessible public reporting of parliamentary entitlements and the use by individual Members of Parliament of those entitlements.

That regulations dealing with the use of parliamentary entitlements be developed to ensure that they cannot be used for politically partisan purposes and that any reforms be subject to independent evaluation.

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21 Harry Evans, 'Government advertising – funding and the financial system', *Parliament Matters,* February 2006, [8-9] <http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/key/library.html> at 18 February 2008.

22 Australian Government, *Operation Sunlight Enhancing Budget Transparency* (2008) <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/operation-sunlight/index.html> at 17 February 2009.

23 Senator Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (2008) <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/operation-sunlight/index.html> at 17 February 2009.

24 Department of Finance and Deregulation, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (2008) <http://www.finance.gov.au/Advertising/docs/guidelines_on_campaign_advertising.pdf> at 17 February 2009.

25 Faulkner, above n18.

That there be ongoing evaluation of any reforms related to improving the transparency of public sector budgetary and financial management.

The use of government resources for establishing large public relations and media units and the employment of consultants to undertake political work for government is also a matter of concern. This creates another problem for transparency and disclosure as consultants can claim that information is protected from disclosure on the basis that it is 'commercial in confidence' and thus create even more secrecy than if public servants were responsible. While PIAC notes that the current Federal Government is moving to improve access to information through amendments to freedom of information (FOI) legislation, it is important where consultants are employed that procurement guidelines are of a high standard and that full compliance is achieved.

It has been argued that while the opportunity to obtain under FOI legislation documents relating to the contracting out to consultants of political and other work functions is a check on financial improbity and a means of quality control[26], government accountability through FOI diminishes in direct proportion to the element of commerciality involved, such as to have serious implications for public sector accountability in general.

Even though it is rare for such arrangements to include a great deal of information that would be regarded as confidential under the general law[27], it is not uncommon for government-private sector agreements to set out contractual obligations of confidence, such as to elevate the FOI exemption in section 45 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) beyond any obligation that the Courts would otherwise be likely to recognise.[28] Where a statute imposes—as many do—an obligation to receive information in confidence, this is sufficient to establish the claim of confidentiality[29], such as to exempt the underlying material from the scope of an FOI application. PIAC proposes to make a submission on this issue to the current Australian Law Reform Commission review of Secrecy Laws, as to the appropriate interplay between free-standing secrecy provisions in other statutes, and their incorporation as a ground of exemption under the FOI Act.[30]

Shortcomings also exist under the business affairs exemption in subsection 43(1) of the FOI Act, which includes an exemption based on the risk that disclosure will lead to diminution in the commercial value of the information concerned (say, for example, information relating to charge-out rates or contract pricing). The test can be satisfied with relatively slight evidence, irrespective of the fact that there may be a far stronger countervailing public interest in transparency[31], as there is no public interest override. Courts have also app a relatively broad interpretation to the 'Trade Secrets' exemption in paragraph 34(1)(a) of the FOI Act[32], a provision that again lacks any public interest override.

The lack of a public interest override in relation to business affairs exemptions, which is frequently exploited by government to avoid disclosing details of consultancy or Public Private Partnership agreements, is a matter that PIAC intends to take up in the context of the Federal Government's current review of FOI laws.

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26 M Patterson, *Freedom of Information and Privacy in Australia* (2005) 259 at [6.56].

27 Senate Finance and Public Administration Reference Committee, *Contracting out of Government Services Second Report* (1998); Australian National Audit Office, *The Use of Confidentiality Provisions in Commonwealth Contracts, Report 38* (2001).

28 *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

29 *Re Woodward v Ombudsman* (2001) 18 VAR 64.

30 Australian Law Reform Commission, *Review of Secrecy Laws, Issues Paper 34* (2008) 7.15 - 7.32; *Freedom of Information Act 1982* (Cth) s 38.

31 Patterson, above n26, [6.59]; *Freedom of Information Act 1982* (Cth) s 43(1)(b); cf *Official Information Act 1982* (NZ) s 9(1), which includes a public interest override.

32 See, for example, *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.

PIAC notes that, in a 2007 media release from Lindsay Tanner MP[33], the Federal Labor Party announced a $3 billion (over four years) savings plan, which included a cut of $350 million of 'Howard Government political advertising' and a cut of $395 million in the use of consultants in the Commonwealth public service.

In this media release it was also stated:

> … complacency and lack of discipline by the Howard Government has allowed unnecessary spending to flourish. Splurges of taxpayers' dollars on political advertising and high cost consultants are proof of this fact.[34]

While PIAC shares the concerns expressed in this media release, it notes recent comment from Gary Banks, the Rudd Government's Chief Economic Advisor, reported in *The Australian*:

> Mr Banks claimed budget cuts over a long period have downgraded the ability of the public service to conduct the research required to develop policy. As a result, there has been a big increase in contracting out policy-related research to business consultants. Although this has been going on for years, he indicates it has changed in character under the Rudd Government, with consultants developing entire policies, rather than providing input. Mr Banks cites the contracting out to the Boston Consulting Group of the Government's early childhood policy and developing a business plan for a global institute for carbon sequestration. And he says accountancy firm KPMG is developing government infrastructure policy. Mr Banks says the cost of some of the interventions by consulting firms has been 'surprisingly large', and that their involvement carries risks. 'Consultants often cut corners,' he says. 'Their reports can be superficial. And more fundamentally, they are typically less accountable than public service advisers for the policy outcomes.'[35]

PIAC also notes recent media and Opposition concern about the $11 million–plus cost of consultants employed to advise the Federal Government on the national broadband network[36] and the allegations made regarding conflict of interest against Ministerial advisors in the Rudd Government who have connections with consulting firms.[37]

The questions highlighted by these comments go not only to a lack of integrity in public administration, the loss of expertise within the public service, and the quality of policy work undertaken by consultants, but also to the influence of political agendas on policy development. If major policy work is handed over to the private sector then it must be made clear that claims that material is commercial-in-confidence cannot be made to avoid a transparent policy development process and that conflicts of interest must be declared. Claims that policy is based on evidence are not credible if the process is closed and the evidence is not able to be tested by experts and community members. A closed system can allow political agendas to inappropriately influence the direction of policy development.

This issue has been also been raised as a matter of concern at local government level by the ICAC 2007 Position Paper, *Corruption risks in NSW development approval processes*.[38]

The engagement of consultants is also an area in which local government need to take steps to deal with possible conflicts of interest. Such steps can include using competitive processes to select consultants, rotating consultants regularly, and considering the nature of the work assigned to them. Contracts can include

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33 Lindsay Tanner, 'Labor's 3 billion savings plan' (Press release, 2 March 2007).

34 Ibid.

35 David Uren, 'Cuts hit policy warns Rudd Government's chief economic advisor Gary Banks', *The Australian,* 6 February 2009.

36 Stephanie Peatling, '$11 million-plus for broadband consultants', *Sydney Morning Herald*, 29 January 2009.

37 Senator Michael Ronaldson, Shadow Special Minister of State, 'Culture of greed flourishes in Rudd Government', (Media Release, 15 October 2008).

38 Independent Commission Against Corruption, *Corruption Risks in NSW development approval processes* (2007) 62.

provisions designed to manage conflicts of interest, for example, provisions requiring that conflicts of interest be declared, or prohibiting the consultant working on other contracts that would present a conflict during the term of the contract.

There needs to be greater regulation, transparency and scrutiny of the use of government resources. There is a critical role for the parliament in this matter as well as for independent bodies such the offices of the Auditors General.

Recommendations

That the Commonwealth should not be permitted to claim a 'commercial in confidence' exemption of documents from freedom of information legislation in relation to documents relating to consultancies unless there is compelling financial sensitivity. That the Federal Government actively support the role of the Auditor General in assessing the credibility of commercial-in-confidence claims, including through appropriate resourcing for the task.

That governments should be required to provide annual reports outlining expenditure on advertising, public relations and public opinion research

Tax subsidies

Tax deductibility of donations to political parties was increased from $100 to $1,500 in 2006 and widened to include corporate donations. This has resulted in a significant increase in public subsidy to political parties through tax revenue foregone.

PIAC does not believe that such an increase and widening of eligibility is in the public interest. While tax deductibility of small donations (up to $100) may stimulate involvement of citizens in political activity and therefore serve a good public purpose, this argument cannot be applied to donations made by corporations whose mission is to maximise profit and which—quite properly—do not have the same rights as individual citizens in a democracy. Increasing the threshold to $1,500 also does not meet the requirements of good taxation policy as it is regressive, unfairly advantaging those who are already well off. PIAC notes that the current Federal Government has introduced legislation[39] to remove tax deductibility for political donations.

Recommendation

That tax and electoral laws should be amended in order to permit tax deductibility of donations to political parties up to a maximum of $100 and to remove tax deductibility of donations made by corporations and entities other than natural persons to political parties.

39 Tax Laws Amendment (2008 Measures No.1) Bill 2008, Political Contributions and Gifts.

Private funding

Donations and other contributions (monetary or non-monetary)

PIAC supports concerns about the negative impact of private funds on the Australian electoral system. Whatever the source of funds, the capacity of the larger parties to attract support creates an unequal playing field, particularly disadvantaging minor and new parties, and independents.

Concerns include:

- through large donations, donors purchase access that is not available to ordinary citizens or to smaller, particularly not-for-profit, organisations that have only limited resources, and this access can result in actual or the perception of undue influence;
- reliance on private donations can create a conflict of interest for parties and candidates and can influence them to make decisions that keep donors on side, rather than serve the public interest;
- the perception of corruption in the political system;
- a negative impact on grass-roots democracy both within parties and with the broader community.

The recommendations in this submission support increased transparency and accountability in the spending and receipt of both public and private political funding. However, greater reporting and transparency will not in itself remove the potential for the perception and/or reality of undue influence being purchased by large donors. It is only through limiting expenditure and donations that the objectives of probity and fairness can be met.

Sources

As pointed out in the Green Paper, private funds to political participants can come from many different sources.[40] Currently disclosure requirements do not adequately cover the various sources of income that can reasonably be seen to be supporting political activity.

Limiting donations/other contributions

The notion of limiting or banning all donations/contributions from corporations, unions and organisations to parties and candidates goes to the heart of current concerns about the influence of private money on politics and democracy.

Options for restricting donations/contributions include:

- banning anonymous donations /contributions;
- banning donations / contributions from particular groups or individuals who have a particularly strong interest in government decisions;
- banning donations / contributions from individuals or companies that have contracts with government;
- banning donations / contributions from foreign entities and individuals;
- imposing limits on all donors / contributors, including individuals;
- limiting donations by heavily taxing donations over a certain limit.[41]

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40 Australian Government, above n12, Chapter 5.

41 Young and Tham, above n13, 122.

Of these, PIAC prefers a model that prohibits donations/contributions from any entity and caps individual donations. PIAC also supports a ban on anonymous donations[42], donations/contributions from individuals or companies that have contracts with government, and supports the ban on donations/contributions from foreign entities and individuals.

PIAC supports the level of any cap on individuals being low. While it is argued by some that a low level cap will place unreasonable fundraising requirements on political parties and candidates, PIAC is of the view that if there is a fair and ongoing reasonable system of public funding and caps on expenditure in place, low-level caps could facilitate greater grass roots democratic participation and reduce the likelihood of undue influence from large donors.

An alternative approach to a system-wide ban on donations is to only limit or ban donations from particular groups or individuals who have a particularly strong interest in government decisions. Such a limit exists currently in Victoria where, under the *Electoral Act 2002* (Vic), there is a cap on donations of $50,000 each financial year to each political party for holders of gambling and casino licences. There have also been calls for the banning of donations from developers, such as through the Private Members Bill tabled by NSW MLC Lee Rhiannon.[43] While PIAC has sympathy with the intent of these measures, limiting only particular interest groups does not provide a whole-of-system protection against possible influence and corruption. At different times there will be strong interest from various quarters: other industries, forestry, mining, faith groups and so on.

Some argue that trade unions should be treated differently from commercial corporations because they are internally democratic, and therefore could have a derivative right to participate in the democracy.[44] However PIAC is of the view that organisations cannot have a direct claim to democratic representation as they are not citizens.

Given that donations represent only one quarter of private funding[45], it is important to catch other forms of private income in the scope of any law regulating political finance. Contributions through third parties and associated entities need to be covered as do currently less transparent contributions such as 'gifts', membership fees and investment income. In Canada, further development of rules regarding political loans has occurred and could usefully be examined.[46] Similarly, credit underwriting and guarantees need to be considered.

While limiting other financial contributions such as income from investments may be problematic, if limits on expenditure exist there can still be an effective capping.

Rather than imposing a ban on all donations from corporations, unions and organisations some argue that limits should instead be imposed on all donors, including individuals, as occurred originally in Canada.[47] Young and Tham also propose that donations could potentially be limited by heavily taxing over a certain limit.[48]

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42 PIAC notes the recent recommendation from the Joint Standing Committee on Electoral Matters (accepted by the Government) that an exception be allowed for anonymous donations of up to $50 at events such as fetes or trivia nights, where attendees might donate small sums of money, and would be prepared to support this approach. (Senator John Faulkner, 'Amendments to the Commonwealth Electoral Amendment (Political Donations and Other Measures Bill 2008', Transcript, <http://www.smos.gov.au/transcripts/2008/tr_20081203_electoral_amendments.html> at 17 February 2009.

43 In 2003, Greens MP Lee Rhiannon introduced the Anti Corruption (Developer Donations) Bill to the NSW Parliament.

44 See, for example, Joo-Cheong Tham, Submission No 154 to the NSW Legislative Council Select Committee Inquiry into Electoral and Political Party Funding (2008) 53-61.

45 Australian Government, above n12, 7.11.

46 Davidson and Lapp, above n6.

47 *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, SC 2003, c 19.

48 Young and Tham, above n13, 120.

PIAC supports the adoption of the Canadian model because it is stronger and simpler. Any attempt to only limit particular interest groups, while understandable, is inequitable and rather ad hoc. Such an approach will result in ongoing and prolonged debates about which new interest groups may need to be included or removed on prohibited lists. PIAC favours a whole-of-system approach because it is more equitable. A whole-of-system approach also will more effectively control election spending and create greater financial equivalency among parties and candidates, which in turn will create a more level political playing field and an enhanced system of representative democracy.

A simpler system arguably also results in simpler compliance requirements, which in turn could result in reduced possibility of loopholes being found. This is another important equity issue because the major players are better resourced to find such legal loopholes.

Constitutional Law

While this submission does not address the constitutional issues in detail, PIAC is of the view that the recommendations of this submission are necessary to protect Australia's constitutionally prescribed system of representative and responsible government. As mentioned above, arguments against limits to financial participation that are based on the assertion that they represent a burden on freedom of political association fail to recognise the serious damage done to our system of representative democracy by a reliance on private sources of funds.

Recommendation

That there be a ban on all donations to political parties, candidates and associated entities from corporations, unions and organisations and that individual donations be capped at a low level.

That if the above recommendation is not agreed to that there be a low-level cap set on all donations / contributions directed to the political activity o parties, candidates, influential third parties and associated entities.

That any entity that has contracts with state or federal governments, and foreign citizens be prohibited from making donations to political parties, candidates and influential third parties and associated entities.

That anonymous donations of over $50 to political parties, candidates and associated entities be banned.

Introducing limits on expenditure

Limiting donations/other contributions and expenditure

Expenditure and donations and other contributions can be limited through caps or through total bans. Many European countries have introduced regulation to control election spending in order to level the playing field and enhance representative democracy. Even though it can be argued that the right to political association may be adversely affected by such measures, PIAC supports limiting donations, other contributions and expenditure of political participants. Such measures support fairness and integrity in the electoral system. The public interest is served by ensuring that the risk of corruption or undue influence is minimised and that there is a reasonable degree of financial equivalency between participants. PIAC also notes that such regulation has been successfully introduced in jurisdictions with much clearer expression of the freedoms of expression and of association.

Caps on Expenditure

PIAC supports introducing limits on expenditure as one of several measures that address concerns about the spiralling costs of campaigns and political activity, and the unequal fund-raising capacity of minor parties and new entrants compared to the major parties. There were expenditure caps in place in Australia for many years at the federal level and in some states, although they were not well enforced. They were finally abolished at federal level in 1980 after the Tasmanian Supreme Court enforced the spending limits.[49] Tasmania is currently the only place in Australia where a limit on election spending exists: $11,500 (increasing each year) per candidate to the Tasmanian Legislative Council.[50]

Limiting spending will not completely address the concerns about the potential undue influence of large donors, or prevent conflict of interest situations arising. This is because, if for example there was a limit of $100,000 on a party's election spending, there is no reason the whole amount or large proportion of it could not come from one donor.

If, however, a cap on expenditure was accompanied by:

- bans or limits on donations from corporations, organisations and individuals, including through currently less transparent transactions such as fees for fund-raisers and other private sources of income;
- greater regulation and monitoring of use of public funds including by candidates, parties and incumbents; and
- better coverage of influential third parties and associated entities;

then indeed there may be greater equality in the political environment, a more participatory political culture, as well as less potential for undue influence and corruption.

While the UK scheme[51] that limits expenditure by political parties and third parties could usefully be considered in developing a model for Australia, PIAC recommends consideration be given to creating a system that applies over each year of the whole term. This would avoid excessive expenditure just before the campaign period commences. As noted in the Green Paper there is currently a climate of 'continuous campaigning'.[52] If this campaigning were to take the form of genuine engagement with party members and the community, it may

49 Young and Tham, above n13, 94.
50 Tasmanian Electoral Commission, *Tasmanian Legislative Council Election Information for Candidates* (2007) 15.
51 Australian Government, above n12, 8.18.
52 Australian Government, above n12, 8.30.

be more favourably received by the community. Limits could be determined for each year with items listed to describe 'campaign expenditure' incurred for 'election purposes' as is the case in the UK scheme.[53]

There are some key issues to be resolved if capping of election expenditure is to be effective. Issues of enforceability have to be addressed. The AEC, in its submission to the Joint Standing Committee on Electoral Matters, made the point that no specific legislation could effectively close down all possible future disclosure loopholes, but that tax law provides an example of an approach that could be applied to electoral law. That is, that:

> … disclosure provisions in order to deal with future avoidance schemes as they arise need a general provision prohibiting arrangements contrived with a purpose of circumventing disclosure arrangements and that any such arrangements 'should be punishable by a fine that is sufficient to act as a deterrent'…[54]

Another issue to be overcome is the lack of clarity regarding when election campaigns start; an issue particularly arising where there are not fixed dates for elections. A call for fixed terms was included in many of the submissions to the Australia 2020 Summit, and referred to in the *Initial Report*, clearly making this an issue for the general Australian community.[55] Previous Federal Governments have been unwilling to commit to four-year fixed parliamentary terms as it would mean the loss of the right to call 'snap elections', subject to the Constitutional right of double dissolution.

PIAC supports fixed four-year terms to provide political certainty, to give the party or parties in power time to deliver on their election promises, and to remove the ability of incumbent Governments to call elections at politically opportune times. PIAC opposes the introduction of four-year terms that are not fixed, as this does not provide much in the way of greater certainty.

Recommendation

That the Federal Government should introduce fixed four-year parliamentary terms.

Election expenditure can also be restricted through imposing limits on political advertising. In New Zealand, Canada and the United Kingdom, regulation of political advertising is used to limit election spending. In Canada there are also limits on advertising by third parties.

An overall cap on expenditure would be more effective and would probably result in a decrease in advertising anyway. PIAC is supportive of free broadcast time being provided to all candidates who have reasonable support in the community. PIAC also believes that the commercial media corporations have a responsibility to provide at least some free or subsidised airtime. Such a public service could be included in license agreements.

In Canada, there is limit on the amount spent as well as the time period during which advertisements can be broadcast. A candidate's election expenses limit will vary from one electoral district to another, based on a formula set out in the *Canada Elections Act*. Under that Act, an election expense includes any cost incurred or in-kind contribution received by a registered party or a candidate that is used 'to promote or oppose a registered party, its leader or a candidate during an election period'.[56]

While there are certainly challenges in implementing expenditure limits, the purpose of creating a fairer political environment is important enough to warrant taking on that challenge. While there may be an 'enforcement gap' in any political finance regulation system, other countries such as Canada and the United Kingdom have

53 Ibid, 8.17 – 8.26.
54 Australian Electoral Commission, above n9, 17.
55 Australian Government, *Australian 2020 Summit Initial Report* (2008) 32.
56 *Canada Elections Act*, SC 2000, c9, s 407.

shown that it is a workable system. Public funding should be made dependent on compliance with expenditure reporting requirements and limits being met.

Disclosure

As already stated in this submission, while strong disclosure and transparency requirements cannot stop the potential purchase of undue influence by donors, they at least ensure that citizens can see who is giving money to which political participants and when this occurs. Transparency is an essential tool in curbing corruption. Without transparency or access to information, accountability becomes an impossible goal. Access to information is an important democratic principle and a right of all citizens.

This principle was confirmed as a priority for Australian citizens at the Australia 2020 Summit. The Future of Australian Governance stream listed as desired outcomes: 'Open access to government information and strengthen protections of free press in order to facilitate a more open and publicly accountable government.'[57]

Current disclosure requirements are inconsistent and inadequate, in terms of what is required to be reported, when it is required to be reported and how it is to be reported. Disclosure laws should require detailed reporting of both donations and expenditure that is timely, frequent, accurate and easily comprehended. Such disclosure laws should also apply to all significant political actors.

Not only must there be wider capture of the various sources of funding in disclosure and other electoral laws, but where possible there must be consistency in the requirements across all states and territories and federally.

Countries such as the United Kingdom, the United States of America and Canada all require much more frequent reporting and some countries, such as New Zealand, require returns (at least from parties with significant income) to be checked for accuracy by an independent auditor.[58] Canada requires particular standards in reporting to ensure easy comprehension and an independent review of a political entity's books and records.[59]

The AEC made recommendations in 2004 to the Joint Standing Committee on Electoral Matters, commenting that as a result of the poor record keeping of some parties the AEC had difficulty in determining the degree of compliance with electoral laws. The 1996 post-election report suggested that annual returns be accompanied by a report from an accredited auditor attesting to the correctness of the return.[60]

Inadequate disclosure requirements in current electoral law have resulted in perceptions of a culture of secrecy, undue influence and corruption. Critical to the effectiveness of any disclosure requirements is whether or not they result in the true source and total amounts of donations being disclosed.

There are three key areas of concern regarding accountability in the current system:

- the use of influential associated entities and third parties;
- reporting requirements are inconsistent and inadequate;
- a weak enforcement system.

PIAC notes that the Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth) addresses some of these issues, including through the reduction of the threshold above which donations must be

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57 Australian Government, above n55, 33.
58 Young and Tham, above n13, 119.
59 Davidson and Lapp, above n6.
60 Australian Electoral Commission, above n9, 12.

disclosed from $10,900 (indexed to the CPI annually) to $1000 (non-indexed) and the requirement to treat related political parties as one entity.[61]

However, there is still much work to be done regarding the use of fundraisers and influential 'associated entities' and 'third parties', which can be used to hide the identity of donors. Disclosure requirements must cover all significant political actors and mechanisms for donation, such as trusts, gifts and so on.

Under disclosure schemes 'third parties' refer to entities other than registered parties, their associated entities, candidates, donors with disclosure obligations and broadcasters and publishers.

Third parties can be a significant source of private funds to political participants. If donations are restricted and expenditure is regulated for political parties and associated entities, third parties could become an even greater focus of political activity. Regulatory frameworks therefore must capture such third parties. Associated entities are usually defined as an entity that is either controlled by one or more political parties or operates wholly or to a significant degree for the benefit of one or more political parties. The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) extended the definition to include entities that are financial members or have voting rights in a political party.

PIAC is of the view that influential 'third parties' and 'associated entities' must be covered by disclosure and other electoral law and by any legislated limits on expenditure. The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) increased reporting requirements of third parties; including requiring detailed reporting of expenditure, even though this is not required of political parties. It is argued by Young and Tham that the wide definition of 'electoral matter' under the *Commonwealth Electoral Act 1918* results in activities that are not reasonably related to politics, government or election being caught.[62] This has created an unreasonable administrative burden on some organisations.

Equally, the broadening of the definition of 'associated entity' to include entities that are financial members or have voting rights in a registered party imposes reporting requirements that are not necessarily reasonable. As suggested by Young and Tham, a 'threshold of influence' could be used to determine when reporting requirements should be imposed. Young and Tham also argue that voting rights and financial membership are not the only ways that influence can be brought to bear on political parties, and therefore the above requirement creates an inequitable disclosure regime.[63]

The *Canada Elections Act* covers registration, financial and reporting requirements for third parties.[64] 'Third party' is defined as a person or a group, other than a candidate, registered party or electoral district association of a registered party. Third-party election advertising spending is limited[65], and every election advertising expense incurred on behalf of a third party must be authorised by its financial agent.[66]

Including third parties in political financing regulation raises particular issues that must be carefully considered. Issue-advocacy organisations play an important role in a democracy as they can often raise issues that mainstream political parties may choose not to raise. Regulations must ensure as much as possible that election spending limits are not undermined by the activities of third parties but equally that third parties are not prevented from genuine issue advocacy.

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61 Senator John Faulkner, 'Amendments to the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, transcript, <http://www.smos.gov.au/transcripts/2008/tr_20081203_electoral_amendments.html> at 19 February 2008.

62 Young and Tham, above, n13, 99.

63 Ibid 116-117.

64 *Canada Elections Act*, SC 2000, c 9, s 349.

65 *Canada Elections Act*, SC 2000, c 9, s 350.

66 *Canada Elections Act*, SC 2000, c 9, s 357.

Ease of comprehension is also a very important aspect of transparency. The NSW Greens have set up a website to provide clear information regarding donations to political parties, including the sectors and interests from which donors have come.[67] This website is used by media and the wider community and provides important information to inform public debate. It is unfortunate that it has been left to a political party to provide this information, as it should be an essential aspect of the public reporting of political finances.

PIAC is of the view that the internal financial dealings of political parties should also be subject to full disclosure, as is the case for corporations. Any political financing regime that is based on the principles of fairness and accountability must recognise the advantage accrued wealth can give political parties and should therefore require full disclosure of financial circumstances of parties including capital assets.

PIAC believes there is an urgent need for the introduction of stronger disclosure requirements for both receipts and expenditure of political parties, candidates and other significant political participants.

Western Australia has strong expenditure reporting requirements even though that State does not have public election funding. Categories of election expenditure that are required to be reported on include:

1 broadcast advertisements;
2 published advertisements;
3 advertisements displayed at theatre or place of entertainment;
4 production costs for advertisements;
5 production of election-related material;
6 production and distribution of electoral matter that is addressed to particular persons or organisations (direct mail);
7 consultants or advertising agent's fees; and
8 opinion polls or other research.[68]

PIAC believes that detailed and timely reporting of expenditure should be the least that is expected and, as discussed, such reporting is a critical aspect of any proposed reimbursement scheme.

Recommendation

That political parties should be required to provide full disclosure of their financial status, similar to the requirements for listed companies under the Corporations Act 2001 *(Cth).*

That all political parties, candidates and influential third parties and associated entities should be required to publicly report on all donations in a timely manner and at least annually.

That political parties and Independent members of parliament / candidates should be required to have their returns independently audited.

That reporting requirements of political parties and candidates should include the disclosure of details of donors.

That all reporting should be informed by the objective of ensuring easy access and comprehension by citizens.

That all parties, candidates, and influential third parties and associated entities should be required to report on details of political expenditure.

That during an election period, political parties should be required to report at least weekly on all donations received.

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67 NSW Greens, <http://www.democracy4sale.org/> at 17 February 2009.
68 Young and Tham, above n13, 45.

That the Australian Electoral Commission should be adequately resourced to enforce current reporting requirements.

The definition of 'associated entities' and third parties should be broadened to include activities that qualify under a 'threshold of influence' test.

Enforcement of the funding and financial disclosure scheme

In whose interest?

Accountably is dependent not only on strong disclosure requirements but on the capacity to have strong electoral law enforced. This requires adequately resourced electoral authorities, enforcement provisions clearly set out in legislation, a penalty regime that can act as a deterrent, and a willingness of decision makers to evaluate the effectiveness of schemes and amend them where necessary.

There is a reasonable concern that political parties prioritise partisan interests over democratic principles when resourcing, creating, amending or neglecting electoral law.

Concern that 'dependence on the state' through public funding 'may or may not be perceived as a threat to the political process' needs to be situated in the broader question of how to ensure partisan interests do not adversely impact on our democracy. This raises questions that deserve further serious consideration.[69]

Brendan McCaffrie argues that consideration could be given to establishing a non-parliamentary body to which authority regarding electoral law is delegated.[70] Emerging democracies such as Jamaica and Costa Rica have created such non-parliamentary bodies in order to protect the integrity of their democracies. Setting up such a body and delegating authority to it is not a threat to the proper authority of parliament as the parliament always retains the right to oversee and abolish such a body. While the authority to determine electoral boundaries is already delegated to the AEC, McCaffrie does not see the AEC as the appropriate body for further delegation of development of electoral law.

Recommendation

That a review of the role of electoral commissions should be undertaken to determine whether consideration ought be given to the establishment of a non-parliamentary body with delegated authority to develop electoral law.

Resourcing and powers of the AEC

Any new scheme must be accompanied by a comprehensive review of the budgetary requirements of the AEC to ensure resourcing is adequate for the task. For compliance to be properly monitored it is not only necessary to require participants to disclose sufficient information, it is necessary for the AEC to be adequately resourced to do the monitoring.

Related to this is the need to ensure the AEC is adequately empowered to investigate possible non-compliance. The AEC points out that while it is empowered to have fairly broad investigative powers, it is not able to go on 'fishing expeditions' and that the Commission must have 'reasonable grounds' before undertaking an investigation into a matter. It does not have powers on par with the Australian Competition and Consumer Commission as some appear to expect and amendments would need to be made to electoral laws if this were to be the case.[71]

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69 See for example, Dr Anne Twomey, *The reform of political donations, expenditure and funding*, <http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform> at 19 February 2009.

70 Brendan McCaffrie, *Removing partisan bias from Australian electoral legislation: A proposal for an independent electoral law committee* (2008).

71 Australian Electoral Commission, above, n9, 15.

It is also important that preventative work such as through education and technical support is offered to political participants. By way of example, Elections Canada is able to assist with training, software tools, legal and administrative support.[72]

Recommendation

That a review of the resources and powers of the Australian Electoral Commission be undertaken in order to ensure an effective regulatory and enforcement regime.

Penalties

PIAC is supportive of the use of administrative incentives as well as of criminal penalties for serious breaches.

PIAC supports the Canadian system where enforcement provisions are set out in legislation and a range of offences, from trivial to severe are defined.[73]

PIAC also supports administrative sanctions, such as the withholding of election funding if reporting requirements are not met and the suspension of registered political parties for non-compliance. Such measures could be useful in enhancing compliance and potentially reduce more serious offences.

However, PIAC does not support an opt-out option as is the case in the US, but rather that disclosure requirements and caps on expenditure and donations exist concurrently with such administrative sanctions.

While political parties are categorised as voluntary associations there are obvious problems in imposition of penalties. As long ago as 1934, it was held in *Cameron v Hogan*, a case brought by former Victorian Premier, Edmund Hogan, seeking redress for his expulsion from the ALP that:

> The organization is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interest suitable for protection by injunction.[74]

It was in the course of a Royal Commission on Electoral Reform and Party Financing in Canada in the early 1990s that it was recognised that for much of their history Canada's parties had enjoyed the status of private organisations. It was suggested that they should remain so 'for very good reasons', the Commission being of the view that citizens had 'the right to associate freely for political purposes', and that any legislation to control parties must therefore 'be careful not to invade their internal affairs or jeopardize the right of individuals to associate freely'.[75]

The status of political parties as merely private organisations under *Cameron v Hogan* was re-visited in 1993 in *Baldwin v Everingham*. It was held, following the alternative line of authority in *Edgar and Walker v Meade*[76], that a private member of a body registered under legislation has the right to take that body to court, such that 'disputes concerning the rules of political parties registered under the Commonwealth Electoral Act are now justiciable'. *Baldwin* has since been followed in two South Australian cases, and the South Australian Legislature has given statutory recognition to political parties.

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72 Davidson and Lapp, above n6, 12.

73 Australian Government, above n12.

74 *Cameron v Hogan* (1934) 51 CLR 358.

75 Royal Commission on Electoral Reform and Party Financing, *Final Report Volume 1 - Reforming Electoral Democracy* (1991) 2312 cited in Parliamentary Library of Australia, *Research Paper no. 21 2001-2002 - Australia's Political Parties: More Regulation?*.

76 1917 CLR

It has also been noted that both the *Commonwealth Electoral (War-time) Act 1917* (repealed 1919) required voters to specify that their vote be allocated to one of two 'parties'. Both the *Commonwealth Electoral Act 1918* and the *Broadcasting Act 1942* (Cth) refer to 'parties', as does the *Constitution*, which provides[77] that a vacating Senator who had been elected as an endorsed candidate of 'a particular political party', must be replaced by 'a member of that party'. The *Commonwealth Electoral Act 1918* sets out detailed requirements, which must be satisfied in order for a 'party' to be entitled to receive electoral funding.[78]

PIAC submits that the status of political parties needs to be clarified in legislation, probably through amendment to the *Commonwealth Electoral Act 1918*. While it might seem a relatively straightforward matter to add a requirement that in order to be eligible for election funding, a party must be a body corporate limited by guarantee, able to sue and be sued; and to incorporate requirements relating to public reporting and audits as a condition of electoral funding, the Constitutional implications of such a step would require careful consideration; not least in relation to any potential breach of the implied freedom relating to matters of political communication.[79] As noted above, however, these arguments need to be balanced against the public interest in a strong representative democracy, where citizens participate in the political process and elected members are free to work unencumbered by undue influence, conflict of interest or corrupt practice.

In the interim, perhaps the most appropriate course, consistent with the existing law and the present (somewhat anomalous) juridical status of parties, is for penalties to apply by way of deduction from, or withholding or repayment of funding provided under the *Commonwealth Electoral Act 1918*.

Recommendation

That the Commonwealth Electoral Act 1918 *should be amended to give a registered political party (or state branch) standing before a court for prosecution and recovery purposes.*

77 *Australian Constitution* s 15.
78 *Commonwealth Electoral Act 1918* (Cth) ss 4, 123,125,126, 129, 135, 136, 137.
79 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.