



Public funding: preserving democracy

**Submission to the NSW Joint Standing Committee on
Electoral Matters inquiry into public funding of election
campaigns**

27 January 2010

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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 (then) Law Foundation of New South Wales, with support from the (then) 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 Industry and Investment NSW for its work on energy and water, 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 Funding¹, to the Victorian Electoral Matters Committee Inquiry into Political Donations & Disclosure², 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. In 2009, PIAC made submissions to the first and second Federal Electoral Reform Green Papers.⁴

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 14 January 2010.

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 14 January 2010.

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 14 January 2010.

⁴ Deirdre Moor and Kerrie Tucker, *Deepening democracy: Submission to the Australian Government in response to the Electoral Reform Green Paper* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009022_20090223.html> at 14 January 2010; Brenda Bailey, Deirdre Moor and Robin Banks, *Accessing democracy: Submission to the Australian Government in response to the Electoral Reform Green Paper - Strengthening Australia's Democracy* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009112_20091127.html> at 14 January 2010.

General comments

PIAC is of the view that reform of electoral law is long overdue, particularly the adoption of alternative funding programs for election campaigning. There is significant concern in NSW that current arrangements for the financing of the political process are failing to meet basic standards required in a healthy representative democracy. Reforms should be based on governing principles and include all aspects of political financing mechanisms. PIAC has based this submission on the following underlying principles and encourages the Joint Standing Committee to also review its recommendations to ensure these principles are strengthened and not compromised:

- equal representation;
- equal opportunity for citizens and parties to participate in political life;
- elected members to be free to work in the public interest.

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. Any arrangements that compromise these principles must be regarded as serious threats to the public interest and representative democracy.

Elected members, to be free to work in the public interest, must be unencumbered by undue influence, conflict of interest or corrupt practice. 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 and independent members of parliament. 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.

Response to the Terms of Reference

Section 1: Structure of a public funding scheme

In this section, PIAC considers and responds to the following terms of reference:

- criteria and thresholds that should apply for eligibility to receive public funding;
- the manner in which public funding should be calculated and allocated, including whether it should take into account first preference votes, parliamentary representation, party membership subscriptions, individual donations and/or other criteria;
- the impact of any proposed measures on the ability of new candidates, including independent candidates and new political grouping to contest elections;
- any caps that should apply, including whether there should be an overall cap on public funding and/or caps on funding of each individual party or candidate either absolutely or as a proportion of their total campaign expenditure or fundraising.

The mechanisms for paying public funding, including the timing of payments

Allocation of a flat payment per vote to parties that receive 4 percent of the vote is inequitable because it 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 election⁵, and the number of members in the party, are used to calculate the entitlement to non-monetary support, such as through free broadcasting time.

Considering local government

Local government in many regards stands separate from the other levels of government and it does not currently attract public funding for elections.

PIAC submits that equitable funding arrangements for local government elections 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 important for all levels of government.

Formula for calculating direct public funding

Direct public election funding is inherently inequitable if 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 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.

Reimbursement Scheme

PIAC supports 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 dedicated campaign premises, the hiring and payment of dedicated campaign staff and office administration.⁶ However, PIAC remains concerned that this arrangement will not facilitate the ongoing development and operations of political parties/independent candidates. In particular, the capacity to undertake ongoing policy development, consult with the community and engage with party members may be adversely affected. PIAC supports the educational and social role of political parties in a participatory democracy. PIAC notes that Canada provides

⁵ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (2008) [4.26].

⁶ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) xiv.

annual funding for the ongoing expenses of political parties and candidates. In keeping with the principles on which this submission is based, PIAC submits that consideration must be given to a broader funding scheme.

Recommendations: Section 1 – Structure of a public funding scheme

Recommendations

1. *That a public electoral funding scheme be established with public funding to be granted on a sliding scale based on the number of primary votes achieved.*
2. *That measures of public support beyond votes should be utilised to calculate entitlement to public electoral funding in the lead up to an election.*
3. *That an election expenditure reimbursement scheme should be taken into account the ongoing reasonable expenses of political participants.*
4. *That political parties and independent candidates that qualify should receive non-monetary support such as free broadcast time support before the election.*

Section 2: Limits on Expenditure

In this section, PIAC considers and responds to the following terms of reference:

- whether any restrictions should be imposed on the expenditure of public funding and, if so, what restrictions should apply and how should the expenditure of public funding be monitored;
- whether any restrictions should be imposed on the expenditure by political parties and candidates more generally, and, if so, what restrictions should apply and how should the expenditure be monitored;
- whether there should be any regulation of expenditure by third parties on political advertising or communication.

Caps on Expenditure

PIAC supports introducing limits on expenditure of public and private funding 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 abolished at the federal level in 1980 after the Tasmanian Supreme Court enforced the spending limits.⁷ 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.⁸

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.

However, greater equality in the political environment, a more participatory political culture and less potential for undue influence and corruption would be possible if a cap on expenditure was accompanied by:

- application of expenditure limits regardless of the source of funds (not limited to public funding);
- 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 the use of public funds by candidates, parties and incumbents; and

⁷ Sally Young and Joo-Cheong Tham, *Political Finance in Australia: a skewed and secret system* (2006) 94.

⁸ Tasmanian Electoral Commission, *Tasmanian Legislative Council Election Information for Candidates* (2007) 15.

- improved monitoring and disclosure of influential third parties and associated entities.

While the UK scheme⁹ 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 and would address the current climate of ‘continuous campaigning’.¹⁰ If this campaigning were to take the form of genuine engagement with party members and the community, it may 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.¹¹

There are some key issues to be resolved if capping of election expenditure is to be effective. Issues of enforceability have to be addressed. For example, election expenditure could 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 broadcasting license agreements.

In Canada, there is limit on the amount that can be spent as well as the time period during which advertisements can be broadcast. A candidate’s election expenses limit varies from one electoral district to another, based on a formula set out in the *Canada Elections Act*.¹² 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’.¹³

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

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.

PIAC supports the tying of at least a portion of any public electoral funding to particular social objectives, such as occurs in other countries.¹⁴ 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.

⁹ Australian Government, above n 5, [8.18].

¹⁰ Ibid n 5, [8.30].

¹¹ Ibid [8.17 – 8.26].

¹² *Canada Elections Act*, SC 2000, c9.

¹³ *Canada Elections Act*, SC 2000, c9, s 407.

¹⁴ Young and Tham, above n 7, 46.

Monitoring

Reporting and monitoring should be important components of electoral funding processes, regardless of the source of funds. This issue is further explored in the section below on the term of reference dealing with preventing avoidance and circumvention of imposed limits on funding and expenditure.

Recommendations: Section 2 – Limits on Expenditure

Recommendations

5. *That limits be imposed on campaign expenditure for public and private funding.*
6. *That a proportion of direct public electoral funding should be required to spent on agreed broader social objectives.*
7. *That monitoring should occur of all distributed funds, for state and local elections.*

Section 3: Applying funding reforms

In this section, PIAC considers how public funding should apply as part of the broader scheme under which political donations are banned or capped.

PIAC supports concerns about the negative impact of private funds on the NSW 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. As noted above, limits on expenditure should be accompanied by controls over donations to political parties.

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.

PIAC's 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.

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.

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 entities 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.¹⁵

Of these, PIAC prefers a model that prohibits donations/contributions from any entity and caps individual donations. PIAC also supports a ban on anonymous donations¹⁶, donations/contributions from individuals or entities 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.¹⁷ 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.¹⁸ However PIAC is of the view that organisations cannot have a direct claim to democratic representation as they are not citizens.

¹⁵ Young and Tham, above n7 122.

¹⁶ PIAC notes the recent recommendation from the Australian Government, 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 14 January 2010.

¹⁷ In 2003, Greens MP Lee Rhiannon introduced the Anti Corruption (Developer Donations) Bill to the NSW Parliament.

¹⁸ 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.

Given that donations are only one source of funding, 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 dealt with 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.¹⁹ 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.²⁰ Young and Tham also propose that donations could potentially be limited by heavily taxing over a certain limit.²¹

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. Arguments against limits to financial participation that are based on the assertion that they represent a burden on freedom of political association or freedom of political and governmental communication fail to recognise the serious damage done to our system of representative democracy by a reliance on private sources of funds. This issue is discussed in more detail later in this submission.

Recommendations: Section 3 – Applying funding reforms

Recommendations

8. *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.*
9. *That if the above recommendation (8) is not adopted that there be a low-level cap set on all donations/ contributions directed to the political activity of parties, candidates, influential third parties and associated entities.*
10. *That any entity that has contracts with state or federal governments, and foreign citizens and entities be prohibited from making donations to political parties, candidates and influential third parties and associated entities.*

¹⁹ 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).

²⁰ *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, SC 2003, c 19.

²¹ Young and Tham, above n7, 120.

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

Section 4: Monitoring and penalties

In this section, PIAC considers and responds to the following terms of reference:

- what provisions should be included in order to prevent avoidance and circumvention of any limits imposed by a public funding scheme;
- whether there should be any additional regulation to ensure that government public information advertising is not used for partisan political purposes.

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. 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.

Regulating 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 regulating a public funding scheme. 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.

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, 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 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.

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

Disclosure

Monitoring and disclosure should apply to all sources of funds, both private and public funding.

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.

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.²² Canada requires particular standards in reporting to ensure easy comprehension and an independent review of a political entity's books and records.²³

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.

An effective accountability system must include three key components:

- controlling the use of influential associated entities and third parties;
- reporting requirements are inconsistent and inadequate;
- an effective enforcement system.

Disclosure laws should require detailed reporting of both donations and expenditure that is timely, frequent, accurate and easily comprehended. Disclosure requirements must cover all significant political actors and mechanisms for donation, such as trusts, gifts and so on. Monitoring should include fundraisers and influential 'associated entities' and 'third parties', in order to identify all donors. 'Third parties' should 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.

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 *Canada Elections Act* covers registration, financial and reporting requirements for third parties.²⁴ '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 limited²⁵, and every election advertising expense incurred on behalf of a third party must be authorised by its financial agent.²⁶

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.

²² Young and Tham, above n7, 119.

²³ Davidson and Lapp, above n19.

²⁴ *Canada Elections Act*, SC 2000, c 9, s 349.

²⁵ *Canada Elections Act*, SC 2000, c 9, s 350.

²⁶ *Canada Elections Act*, SC 2000, c 9, s 357.

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 the 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.²⁷

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.

Enforcement of the funding and financial disclosure scheme

Accountability is dependent not only on strong disclosure requirements but also 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.²⁸

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.²⁹

²⁷ Young and Tham, above n7, 45.

²⁸ See for example, Dr Anne Twomey, *The reform of political donations, expenditure and funding* (2008) NSW Department of Premier and Cabinet <http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform> at 14 January 2010.

²⁹ Australian Government, above n 5.

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.³⁰

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'.³¹

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*³², 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.

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.³³ 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*.

³⁰ *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358 (3 August 1934), per Rich, Dixon, Evatt and McTiernan JJ at 378.

³¹ Royal Commission on Electoral Reform and Party Financing, *Final Report Volume 1 - Reforming Electoral Democracy* (1991) 2312 cited in Scott Bennet, *Research Paper no. 21 2001-2002 - Australia's Political Parties: More Regulation?* (2002) Parliament of Australia Parliamentary Library <<http://www.aph.gov.au/library/pubs/rp/2001-02/02rp21.htm>> at 14 January 2010.

³² *Edgar v Meade* [1916] HCA 70; (1916) 23 CLR 29 (9 November 1916).

³³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Recommendations: Section 4 – Monitoring and penalties

Recommendation

12. *That there be mandatory, detailed, regular and easily accessible public reporting of parliamentary entitlements and the use by individual Members of Parliament of those entitlements.*
13. *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.*
14. *That there be ongoing evaluation of any reforms related to improving the transparency of public sector budgetary and financial management.*
15. *That government be required to provide annual reports outlining expenditure on advertising, public relations and public opinion research.*
16. *That political parties be required to provide full disclosure of their financial status, similar to the requirements for listed companies under the Corporations Act 2001 (Cth).*
17. *That all political parties, candidates and influential third parties and associated entities be required to publicly report on all donations in a timely manner and at least annually.*
18. *That political parties and Independent members of parliament / candidates be required to have their returns independently audited.*
19. *That reporting requirements of political parties and candidates include the disclosure of details of donors.*
20. *That all reporting be informed by the objective of ensuring easy access and comprehension by citizens.*
21. *That all parties, candidates, and influential third parties and associated entities be required to report on details of political expenditure.*
22. *That during an election period, political parties be required to report at least weekly on all donations received.*
23. *That a review of the role of electoral commissions be undertaken to determine whether consideration ought be given to the establishment of a non-parliamentary body with delegated authority to develop electoral law.*

Section 5: Constitutional issues

In this section, PIAC considers the compatibility of any proposed measures with the freedom of political communication that is implied under the *Commonwealth Constitution*. 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.³⁴

³⁴ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, [Art 21], UN Doc a/810 at 71 (1948) (1948) <<http://www.un.org/Overview/rights.html#a21>> at 14 January 2010.

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.³⁵ It is also central to the *Universal Declaration of Human Rights* and subsequent international treaties giving force to the *Declaration* rights, such as the *International Covenant on Civil and Political Rights*³⁶ and the *International Covenant on Economic, Social and Cultural Rights*.³⁷ The first paragraph of the preamble to the *Universal Declaration of Human Rights* states:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.³⁸

Article 1 of the *Universal Declaration of Human Rights* states:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.³⁹

The implied right of freedom of political and governmental expression in the *Commonwealth 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)*⁴⁰ concerning election advertising spending limits by electoral participants other than candidates and parties. The Supreme Court determined, in the context of the *Canadian Charter of Rights and Freedoms*⁴¹, 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;
 - c) freedom of peaceful assembly; and
 - d) freedom of association.

³⁵ Davidson and Lapp, above n19.

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

³⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

³⁸ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, [Preamble], UN Doc a/810 at 71 (1948) <<http://www.un.org/en/documents/udhr/index.shtml#preamble>> at 14 January 2010.

³⁹ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, [Art 1], UN Doc a/810 at 71 (1948) <<http://www.un.org/en/documents/udhr/index.shtml#a1>> at 14 January 2010.

⁴⁰ *Harper v Canada (Attorney General)* [2004] 1 SCR 827, 2004 SCC 33.

⁴¹ Enacted as Schedule B to the *Canada Act 1982* (UK) 1982, c.11 <<http://laws.justice.gc.ca/en/charter/1.html?noCookie>> at 14 January 2010.

Recommendation: Section 5 – Constitutional issues

Recommendation

24. *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, accountability and fairness of the system; (b) strengthening public confidence in the system; and (c) facilitating participation in it.*