New South Wales Government
Department of Premier and Cabinet

- 6 MAY 2009

TCO/22139 - LB

Ms Cherie Burton MP
Chairperson
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Burton

Thank you for your letter inviting the Department of Premier and Cabinet (the "Department") to make a submission to the inquiry into the 2008 local government elections.

Under the Committee's terms of reference, the Committee may inquire into and report on matters relating to:

(a) *The following electoral laws:*

(i) *Parliamentary Electorates and Elections Act 1912 (other than Part 2);*
(ii) *Election Funding Act 1981; and*
(iii) *Those provisions of the Constitution Act 1902 that relate to the procedures for, and conduct of, elections for members of the Legislative Assembly and the Legislative Council (other than sections 27, 28 and 28A);*

(b) *The administration of and practices associated with the electoral laws described at (a).*

The Premier has referred all matters that relate to (a) and (b) above in respect of the 2008 local government elections to the Committee for any inquiry the Committee may wish to make. I understand that, due to the operation of section 21AA(2) of the PE&E Act, the Committee is entitled to inquire into matters arising under the *Local Government Act 1993* insofar as it provides for the system of election for local government.

As the administration of the *Local Government Act 1993* falls within the portfolio responsibilities of the Minister for Local Government, the Department does not at this stage wish to make a submission with respect to matters arising under that Act.

Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
GPO Box 5341, SYDNEY NSW 2001 | T: (02) 9228 5555 F: (02) 9228 5249
www.dpc.nsw.gov.au

The Department does, however, have an interest in electoral legislation which falls within the Premier's administration, in particular, the *Election Funding and Disclosures Act 1981* (the "EFD Act").

As Committee members are aware, in 2008 the Government introduced two Bills to increase transparency and accountability in relation to the making and acceptance of political donations, both at the State and local government level. As a result of these reforms, New South Wales has the most robust disclosure regime in Australia.

A detailed summary of the reforms and their purpose is set out in the Department's submission to the Select Committee on Electoral and Political Party Funding (the "Select Committee") dated 3 April 2008. A copy of the Department's submission, along with a copy of the Government's response to the final report of the Select Committee, is enclosed for the Committee's reference.

I trust that the enclosed information will assist the Committee with any inquiry it may wish to make into the operation of the EFD Act at local government elections.

Yours sincerely

Leigh Sanderson
Deputy Director General (General Counsel)

NEW SOUTH WALES GOVERNMENT

SUBMISSION TO THE SELECT COMMITTEE ON ELECTORAL AND POLITICAL PARTY FUNDING (THE "COMMITTEE")

INTRODUCTION

The Government welcomes the opportunity to make a submission to the Committee on the important issue of political funding in New South Wales.

The NSW Government recognises that the laws governing political donations must change. To this end, the Premier announced a package of reforms in his address to Parliament on 28 February 2008 (see **Annexure A**).

The aims of the proposed reforms can be summarised as follows:

- Increasing the amount of information that must be disclosed.
- Improving the quality of disclosure.
- Preventing the improper use of donations.
- Reducing the risk of undue influence and corruption.
- Improving transparency in NSW planning and approval processes.

The proposed reforms will improve transparency and accountability in relation to political donations and promote public confidence in the electoral system.

The following submission focuses on the Government's current proposals for reform, which are discussed in turn below.

1. INCREASING THE AMOUNT OF INFORMATION TO BE DISCLOSED

The Government firmly believes that voters have a right to know about the financial relationship between donors and elected representatives. Mandatory disclosure requirements therefore apply to parties and candidates who receive political donations under the *Election Funding Act 1981* (the ***Election Funding Act***).

The disclosure regime under the *Election Funding Act* is based on the principle that the integrity of the electoral system can be preserved despite the presence of private contributions if the public is made aware of the sources of such contributions and of any possible influence.

Increasing the frequency of disclosure and reporting

Under the current disclosure rules, parties, groups and candidates are required to lodge declarations of political contributions every four years following a general election.[1] Donors must also disclose 'electoral expenditure', including donations made to parties and candidates, every four years following a general election.[2] Persons who do not comply with the disclosure requirements or deliberately withhold relevant information are guilty of an offence punishable by pecuniary penalties.[3]

The Government wants New South Wales to have the best system in the country. The Premier has therefore proposed a system of *biannual disclosure*, with full reports for the six months to June and December in each calendar year. The Commonwealth Government has also announced that it proposes to move to biannual disclosure at the federal level, consistent with the New South Wales approach.

Currently, the Election Funding Authority (*EFA*) is required to include details of "gifts" including political donations in its annual report to Parliament, and must make disclosure returns and associated records available for public inspection. Under the new arrangements, details of donations reported by parties, groups, candidates and donors will be published by the EFA on its website and updated twice every calendar year.

These changes to the disclosure regime are significant and will provide the community with more timely updates on donation activity.

Lowering the disclosure threshold

In 2005, the Howard Government amended the *Commonwealth Electoral Act 1918* to increase the federal disclosure threshold to 'more than $10,000'. This amount is indexed with effect from 1 July each year based on movements in the consumer price index. Currently, parties, groups and candidates are not obliged to disclose details of gifts and donations received unless they exceed $10,500.

In New South Wales, it is unlawful for a party, group or candidate to receive any political contribution that exceeds the 'applicable threshold' on an anonymous basis. The applicable thresholds are $200 for candidates, $1,000 for groups, and $1,500 for parties. The *Election Funding Act* also makes provision for the aggregation of contributions made by one body, person or organisation where the total amount of those contributions exceeds the applicable monetary thresholds.[4]

The NSW Government has pledged that, "If the Commonwealth Government adopts a disclosure limit below $1,500, the NSW Government will apply the same lower limit".[5] The Rudd Government has since announced that the federal disclosure threshold will be reduced from $10,500 to $1,000.

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[1] *Election Funding Act 1981*, section 87(1).
[2] *Election Funding Act 1981*, section 85A.
[3] *Election Funding Act 1981*, section 96.
[4] *Election Funding Act 1981*, section 87(5).
[5] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 2008, page 23.

Consistent with the Premier's announcement, a reduced monetary threshold of $1,000 will apply to parties in New South Wales.

The reduced disclosure threshold will make the details of a broader range of donations available for public scrutiny. This will ensure that electors have access to more information about donations when casting their vote.

2. IMPROVING THE QUALITY OF DISCLOSURE

The Government recognises that, in addition to improving the frequency and timeliness of disclosure, the *quality* of disclosure can also be improved. This will ensure that electors have access to more accurate and complete records of donation activity engaged in by parties and candidates.

To this end, the Government will:

- ban individual Members of Parliament (*MPs*), councillors and candidates from having personal campaign accounts;
- limit the involvement by MPs, councillors and candidates in the fundraising process, by ensuring all donations are organised, received, handled and administered by the central party office;
- recommend that the EFA, or another independent body, provide a similar service for independent MPs and councillors; and
- legislate to ensure that loans and other credit facilities provided to parties, MPs, councillors and candidates must be disclosed under the *Election Funding Act*.

Under the proposed changes, the current system of multiple individual disclosures will be replaced by a more centralised approach. Responsibility for private donations will be shifted to organisations with the expertise and resources to properly manage and account for them. Inaccuracies and non-compliance with reporting requirements will be reduced, thereby improving the integrity of the disclosure system. The proposed arrangements will also reduce the administrative burden on individual candidates.

Importantly, the new structure will also address, to some extent, public perceptions of bias by distancing individual politicians from the process of soliciting and accepting private donations, at least for those who are members of political parties.

In order to further strengthen the quality of disclosure, the *Election Funding Act* will be amended to clarify that the provision of loans and other credit facilities to parties, MPs, councillors and candidates are subject to the disclosure requirements under Part 6 of the *Election Funding Act*. This reform will remove any uncertainty in the existing provisions which may allow parties and candidates to avoid disclosure of loans. These changes are consistent with the Commonwealth approach.

The Government believes that the arrangements outlined above will promote more complete and accurate disclosure of political donations.

3. PREVENTING THE USE OF DONATIONS FOR PERSONAL GAIN

Individuals and organisations provide financial support to parties, groups and candidates for the purposes of assisting election campaigns.

The Government believes that donors are entitled to expect that any money donated by them will be used by the party, group or candidate primarily for the purposes of contesting an election and not for the personal private gain of a candidate. The current legislation is unclear on this point.

The Government therefore proposes to legislate to provide greater certainty that funds raised for campaign purposes are used exclusively for those purposes. This will remove any doubt about whether funds raised by parties and candidates will be used for personal or other non-election purposes.

4. REDUCING THE RISK OF UNDUE INFLUENCE AND CORRUPTION

Most countries, including Australia, Canada, the United Kingdom and the United States, rely to some extent on private donations as a source of funding for election campaigns. A high degree of transparency must attend the making of private donations in order to counter the risk of undue influence and corruption.

In New South Wales, elected representatives and public officials are subject to a number of controls which seek to minimise the risk of undue influence, including criminal law sanctions, codes of conduct, formal guidelines, and anti-corruption laws. These controls are outlined in more details at **Annexure B** and apply in addition to the disclosure requirements that are already in place under the *Election Funding Act*.

In order to further reduce the risk of private funding affecting the decisions of public officials, the Government proposes to ban the making of 'in kind' donations, including the provision of offices, cars and telephones to candidates.

A ban on the payment by third parties of campaign expenses incurred by candidates will also be introduced.

Finally, and as noted above, the Government will introduce measures to limit the involvement of MPs, councillors and candidates in the fundraising process.

These changes will promote a more 'arms length' approach to private funding by limiting the involvement of politicians in the process of soliciting and accepting donations.

5. SPECIFIC MEASURES TO PROMOTE INTEGRITY IN THE NSW PLANNING AND APPROVAL PROCESS

In September 2007, the Independent Commission Against Corruption (*ICAC*) released *Corruption risks in NSW development approval processes – Position Paper* (the ***ICAC Position Paper***) following a period of consultation with industry stakeholders. The ICAC Position Paper contains 24 corruption prevention recommendations, a

number of which specifically relate to political donations in the context of planning and approval processes.[6]

A number of the reforms announced by the Premier are specifically aimed at minimising corruption risks arising from the making of political donations in the planning context. These reforms include:

- Mandatory reporting of donations made by applicants for development approvals, with the details to be made public at the time of lodging the development application.
- New guidelines for councils to help address situations where there might be a perceived conflict of interest arising from donations, to be developed and implemented in consultation with the ICAC.
- Mandatory reporting by all councils on the voting history of individual councillors on development applications.

Each proposal is discussed in turn below.

Mandatory reporting of donations by developers

The Premier has announced that:

> [The Government] will seek a system of disclosure by applicants for development approvals by which they detail their donations at the time they lodge [their] development application. The Government agrees that disclosure should be publicly available as part of the development application.[7]

The *Environmental Planning and Assessment Regulation 2000* currently provides that development applications must be accompanied by detailed information about proposed developments. Under section 12(1) of the *Local Government Act 1993*, interested persons are "entitled to inspect the current version of... development applications... and associated documents... free of charge".

In relation to development applications lodged under Part 3A of the *Environmental Planning and Assessment Act 1979* where the Minister for Planning is the consent authority, section 75E(2) provides that the development application must describe the project, and contain any other matter required by the Director General.

Under the new arrangements, information about political contributions made by the proponents of developments will be required to accompany all development applications. This information will include the amount and recipient of political donations made by the applicant and the property developer (where that developer is not also the applicant) in a designated period before the development application is lodged.

New 'conflict of interest' guidelines for councils

Consistent with Recommendation 20 of the ICAC Position Paper, the Premier has announced that:

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[6] See Chapter 11 – 'Political Donations', page 70.
[7] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 2008, page 23.

> The Government will also make clearer the requirements for councillors to deal with these situations where a perceived conflict of interest might arise from donations. That will be done in consultation with the Independent Commission Against Corruption.[8]

Currently, clause 6.15 of the Model Code provides that "Councillors should note that matters before council involving campaign donors may give rise to a non-pecuniary conflict of interests". More detailed guidance on non-pecuniary conflicts of interest is contained in the *Guidelines for the Model Code*, which are non-binding.

Under the proposed reforms, the current provisions of the Model Code will be expanded to incorporate more detailed guidance for councillors in relation to political donations. Using the Guidelines as a reference, the Model Code will be amended to include clear instructions for councillors on the circumstances in which political donations will give rise to non-pecuniary conflicts of interest, and how such conflicts should be managed. The necessary amendments will be formulated in consultation with the ICAC.

Mandatory reporting of voting histories

Currently, under Part 10 of the *Local Government (General) Regulation 2005* the general manager must ensure that the names of those who vote for the motion and those who vote against it are respectively recorded in the council's minutes when a division on a motion is demanded. Otherwise, councils are not obliged to record the voting patterns of individual councillors.

A system which requires local councils to document the individual voting decisions of councillors on planning matters would reinforce public confidence in Local Government decisions, discourage factional or block voting, and ensure that rate payers know how their representatives are performing on key issues.

Under the new arrangements, the votes of each councillor will be recorded and made public.

CONCLUSION

The NSW Government is committed to maintaining a fair and transparent electoral system. The reforms outlined above are the first step.

In its discussion paper, the Committee identifies a number of other possible areas for reform including bans, caps and other restrictions on private political funding. These options raise broader questions about the role that private funding should play, if any, in our electoral system.

The NSW Government considers that there is considerable merit in the option of a ban on private donations along with increased public funding of elections. The Government therefore welcomes further discussion and debate about the advantages and disadvantages of this approach.

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[8] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 2008, page 24.

ANNEXURE A

disease and fitting in medical visits and treatment, he battled through. I am pleased to advise that this year he is studying a Bachelor of Engineering and a Bachelor of Business at the University of Technology, Sydney. I am sure that the House will want to acknowledge the outstanding achievements of Samantha and Andrei.

Mr ANDREW STONER (Oxley—Leader of The Nationals) [2.19 p.m.]: On behalf of the Opposition I am pleased to join the Government in congratulating this year's recipients of the Brother John Taylor award. These young people, Samantha Dickson, formerly of Bega High School, and Andrei Gudas, formerly of Sydney Technical High School, have made enormous achievements despite very considerable personal difficulties. In so doing they have inspired not only fellow members of their generation but also the wider society. Their achievements send a very strong message to us all about the importance of education and the opportunities that education provides to us all, regardless of circumstance or background. I am sure that Samantha and Andrei, despite the significant obstacles they faced and perhaps will continue to face, have very bright futures ahead of them. I wish them the very best in the future—in their studies and in their careers. They are indeed an inspiration to us all.

QUESTION TIME

MINISTER FOR PLANNING AND DEVELOPER POLITICAL PARTY DONATIONS

Mr BARRY O'FARRELL: My question is directed to the Premier. With yet another developer getting the nod from the Minister for Planning after thousands of dollars were donated to Labor, why has the Premier failed to implement the Independent Commission Against Corruption's six-month-old recommendations that development applications lodged by political donors with the Minister for Planing should be subject to a commission or inquiry, expert report or other arm's length safeguards? Is the Premier under orders from Sussex Street fundraisers?

Mr MORRIS IEMMA: That is a bit rich, Barry, coming from a former State director of the Liberal Party whose main responsibility was raising funds.

Mr Barry O'Farrell: Point of order—

The SPEAKER: Order! The Premier has barely started his answer.

Mr Barry O'Farrell: Point of clarification: We do not run our party—

The SPEAKER: Order! The Leader of the Opposition will resume his seat. The Premier has the call.

Mr MORRIS IEMMA: As with an ever-increasing number of issues, the Leader of the Opposition, firstly, has got it wrong. Secondly, the Minister for Local Government in his address to the Local Government and Shires Associations in fact outlined that the Government was considering these measures and was providing a response.

The SPEAKER: Order! The Leader of the Opposition will cease interjecting.

Mr MORRIS IEMMA: In the reforms that are in draft by the Minister for Planning he in fact picks up—

[*Interruption*]

The SPEAKER: Order! The behaviour of the Leader of the Opposition is grossly disorderly. I ask the Leader of the Opposition to resume his seat.

CAMPAIGN FINANCE LAWS

Dr ANDREW McDONALD: My question is to the Premier. What direction will the Government take to improve campaign finance laws in New South Wales?

Mr MORRIS IEMMA: In relation to the previous question, the establishment of an assessment commission is consistent with what the ICAC said and, secondly, independent panels. The Leader of the

Opposition might read the draft reforms that the Minister has released. As I said last week, donations laws need to change, and for the better. We will make that happen. The Government does support the upper House inquiry into donation reform and the Australian Labor Party has already made a submission. The Government has been doing further work on this issue. I am pleased to inform the House of the work that has been going on to ensure that reform takes place, contrary to what the Leader of the Opposition just said. We will ensure that the reforms work—that there is reform, not just change. These will be a carefully considered series of measures to improve the donations laws and accountability and transparency—

The SPEAKER: Order! The member for Willoughby will cease interjecting.

Mr MORRIS IEMMA: The member should worry about the Greiner fundraiser that she is busy organising for Friday.

The SPEAKER: Order! The House will come to order.

Mr MORRIS IEMMA: What is it—$10,000 a table? Is the member on the organising committee?

The SPEAKER: Order! I call the member for Willoughby to order.

Mr MORRIS IEMMA: The first of the measures, requiring disclosure on a more regular basis rather than the current system of every four years, will make our system more transparent. Annual disclosure would be equal to best practice in Australia.

The SPEAKER: Order! The members for Bathurst and Coffs Harbour will cease interjecting.

Mr MORRIS IEMMA: The first measure is to change the disclosure system for this State from every four years to an annual basis. We will go further. In the interests of having the best system in the country, New South Wales will move to a system of twice-yearly disclosures with full reports in June and December. The Government has also given consideration to the issue of lowering the level of disclosure. The level of disclosure in New South Wales is currently $1,500 for donations to State members of Parliament or candidates and $200 for council members. That figure is consistent with other Australian jurisdictions and far stricter than the $10,500 donation limit that John Howard introduced federally. But rather than undertake unilateral change, the New South Wales Government will give a commitment that if the Commonwealth Government adopts a disclosure limit below $1,500, the New South Wales Government will apply the same lower limit. ICAC has made a number of recommendations—

[*Interruption*]

The member can say that, but we are going from four-yearly disclosure to twice-yearly disclosure. ICAC has made a number of recommendations regarding the potential for conflict of interest between development applications and donations. My Ministers for Planning and Local Government, as I just outlined to the Leader of the Opposition, have been reporting on these issues—the Minister for Local Government reported to the Local Government and Shires Associations. As a result, we will seek a system of disclosure by applicants for development approvals by which they detail their donations at the time they lodge that development application. The Government agrees that disclosure should be publicly available as part of the development application.

The Government will also make clearer the requirements for councillors to deal with these situations where a perceived conflict of interest might arise from donations. That will be done in consultation with the Independent Commission Against Corruption. Another proposal I want considered is mandating that all councils record the voting history of individual councillors on development matters. The Minister for Planning is already proposing changes to the Environmental Planning and Assessment Act to enable him to delegate his decision-making powers, and ICAC's recommendations are being considered in this current planning reform process.

The Government will formalise these recommendations and proposals and put them before the upper House inquiry. I will also be proposing measures that result in all fund-raising efforts for members of Parliament, councillors and candidates being handled through their relevant central party office—that is, members from each side will not be permitted to organise or collect donations or hold their own campaign accounts. Instead they will refer all contributions to their party headquarters, the registered agents under the

Electoral Funding Act that will be responsible for collating and disclosing all donors. We will also consider the disclosure of donations on a website hosted through the party organisation or the Electoral Commission.

[*Interruption*]

Opposition members might put the Greiner fundraising efforts on that website.

Mr Barry O'Farrell: No. That was—

The SPEAKER: Order! The Leader of the Opposition will resume his seat.

Mr MORRIS IEMMA: I will be asking the parliamentary inquiry to look specifically at how we can make the fundraising efforts of Independent councillors and members of Parliament more transparent. Initial advice from the Electoral Commissioner suggested that the Electoral Funding Authority could assist Independents with that task. I have often spoken of the need for State and Federal uniformity when it comes to donation laws.

The SPEAKER: Order! The member for Coffs Harbour and the member for Murray-Darling will cease interjecting.

Mr MORRIS IEMMA: With Labor in power in Canberra and in all the States there is a great opportunity for cooperation to achieve national uniformity in these laws. To that effect I will be meeting the Special Minister of State, Senator John Faulkner, to progress further reform in this area. The measures that I outlined today are the first step. There will be further reforms in this area of donations, disclosure and accountability when it comes to electoral funding.

MINISTERIAL ACCOUNTABILITY

Mr ANDREW STONER: My question is directed to the Premier. Following his decision to sack Port Macquarie-Hastings Council for a cost blow-out, will he now apply the same scrutiny and sack the Deputy Premier for losing more than $100 million on the Tcard contract, the Minister for Water for a $500 million desalination blow-out, the Minister for Planning for being compromised, the Minister for Ports for conflicts of interest, the Minister for Health for mismanagement, including Bathurst hospital, and the Minister for Community Services when a child known to the Department of Community Services dies every nine days?

Mr John Aquilina: Point of order—

The SPEAKER: Order! The House will come to order.

Mr John Aquilina: The Leader of The Nationals has been here long enough to know that question time is a time for members to seek facts.

The SPEAKER: Order! I call the member for Murrumbidgee to order. I ask members to cease interjecting.

Mr John Aquilina: Question time is a time for members to seek facts. Clearly, the Leader of The Nationals is being argumentative. He asked an argumentative question that in no way aims to seek facts. If the member wishes to ask a question that seeks facts relevant to the matter that he has raised he should reword his question appropriately.

Mr Adrian Piccoli: To the point of order: The question that was asked contained some facts but the Leader of the Nationals clearly asked the Premier whether he would apply to Ministers in this House the same standards he applied to Port Macquarie-Hastings Council. His question contained some items of fact, but I think most questions have to do so. He asked the Premier a simple question about applying the same standards.

The SPEAKER: Order! There is no doubt that the question is argumentative. However, there is enough substance in the question for me to allow it. Given that it is such a broad-ranging question, I will not entertain points of order in relation to relevance.

Mr MORRIS IEMMA: The question asked by the Leader of The Nationals sums up the Opposition. It is interesting that the Leader of The Nationals started in Port Macquarie.

ANNEXURE B

In order to maintain public confidence in the integrity of the electoral process, stringent disclosure requirements apply to candidates, groups and political parties who receive political contributions under the *Election Funding Act.*

The disclosure requirements under the *Election Funding Act* are part of a broader framework of laws, codes of conduct and guidelines which are designed to protect Government and statutory decision-making from being influenced by improper considerations, including political donations.

Common law and Criminal Law Offences

Corruptly receiving a gift or benefit is an offence at both the common law and under New South Wales criminal law. These laws apply to political contributions which are made specifically in exchange for a Member taking particular action to favour a person or group.

The common law offence of bribery is defined as receiving or offering any undue reward by, or to, any person in public office in order to influence his or her behaviour in that office, and to incline that person to act contrary to the known rules of honesty and integrity.[9]

The *Crimes Act 1900* includes wide-ranging offences in relation to the provision of corrupt commissions or rewards. These include:

- corruptly agreeing to receive or solicit any benefit for doing something (or not doing something), or showing (or not showing) favour or disfavour to any person in the exercise of official duties; and

- corruptly receiving or soliciting any benefit to do something (or to not do something), or show (or not show) favour or disfavour to any person in the exercise of official duties.[10]

The maximum penalty for a conviction under section 249 of the *Crimes Act 1900* is seven years imprisonment. Section 249J of the *Crimes Act 1900* also provides that custom is not a defence to the receiving, soliciting, giving or offering of any benefit.

Section 13A of the *Constitution Act 1902* provides for the disqualification of any Member of Parliament who is convicted of an 'infamous crime' or an offence punishable by a term of 5 years or more. While the precise definition of 'infamous crime' is still uncertain, it is likely that bribery of a Member of Parliament would fall within this category.[11]

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[9] *R v Glynn* (1994) 71 A Crim R 537, 541-42.
[10] *Crimes Act 1900*, section 249B. See also ICAC, *Bribery, Corrupt Commissions and Rewards – Tip Sheet for NSW Public Officials*, February 2008, page 1.
[11] Twomey, Anne, 'The Constitution of New South Wales', The Federation Press, 2004, page 428.

Codes of Conduct and Guidelines

Code of Conduct for Members of Parliament

In recognition of their special responsibilities as public officials, Members of the Legislative Assembly and the Legislative Council reached agreement on a *Code of Conduct for Members of Parliament* (the "Members' Code") in 1998.[12] The Members' Code applies to Ministers of the Crown in their capacity as Members of Parliament.

The Preamble to the Members' Code states that:

> *Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.*

Clause 2 of the Members' Code contains a prohibition against bribery. Specifically, it provides that:

> *A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the Member has received, is receiving or expects to receive.*

In line with the Government's proposal, this clause was amended by Parliament in June 2007 to capture the receipt of non-pecuniary benefits.[13] Clause 2 is aimed at the most serious instances of undue influence (i.e. where political contributions are solicited or received by a Member directly in return for that Member taking particular action in Parliament).

In addition, under the clause 3 of the Members' Code, Members must:

- "declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests" (clause 3(a)).
- "...not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties" (clause 3(b)).
- "...only accept political contributions in accordance with Part 6 of the *Election Funding Act 1981*" (clause 3(c)).

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[12] Legislative Assembly, Parliament of New South Wales, *Code of Conduct for Members and the Pecuniary Interests Register*, Reprinted June 2007, No. 18.

[13] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 June 2007, p1430 to p1431.

Subsection 9(d) of the *Independent Commission Against Corruption Act 1988* (the ***ICAC Act***) was introduced as part of amendments made in 1994. It provides that an act by a Minister or a Member of Parliament can amount to corrupt conduct under the *ICAC Act* if it also amounts to "a substantial breach of an applicable code of conduct", such as the Members' Code. This provides a nexus between Members' obligations under the Members' Code and the statutory anti-corruption regime under the *ICAC Act*, which is discussed in further detail below.

Code of Conduct for Ministers of the Crown

In addition to the Members' Code, Ministers are also subject to the *Code of Conduct for Ministers of the Crown* (the "Ministerial Code").

The Ministerial Code consists of a set of principles to guide Ministers in the resolution of ethical issues, and is designed to ensure that Ministers "pursue, and [are] seen to pursue, the best interests of the people of New South Wales *to the exclusion of any other interest*" (emphasis added).

The introduction to the Ministerial Code states that the conduct of Ministers should be consistent with two main principles, the first being that "Ministers will perform their duties impartially, disinterestedly and in the best interests of the people of New South Wales".

Under Part 1 of the Ministerial Code, Ministers are under a general obligation to "exercise their office honestly, impartially and in the public interest" (clause 1.1). The following clauses of the Ministerial Code are also relevant to the extent that they minimise the risk of undue influence:

- "Ministers should avoid situations in which they have, or might reasonably be thought to have, a private interest which conflicts with their public duty" (clause 1.2).

- "A Minister shall not use his or her position for the private gain of the Minister or for the improper gain of any other person" (clause 3.2(a)).

- "A Minister shall not solicit or accept any gift or benefit the receipt or expectation of which might in any way tend to influence the Minister in his or her official capacity to show or not to show favour or disfavour to any person" (clause 6.1).

Model Code of Conduct for public agencies: policy and guidelines

To ensure that the above principles also apply to non-elected public officials, the then NSW Premier's Department in conjunction with the ICAC developed the *Model Code of Conduct for NSW public agencies: policy and guidelines* (the "Model Code") in 1997.

The Model Code provides detailed guidance on the standards of behaviour expected of public employees. It states that all conflicts of interest that could lead to partial decision-making by public sector employees should be avoided. The phrase 'conflict of interest' is described in the Model Code as any situation where it is likely that an employee could be influenced, or could be perceived to be influenced, by a personal interest in carrying out their public duty.[14]

The Model Code attempts to limit the prospect of political donations impacting upon agency decision-making processes by providing that:

- "Employees are to promote confidence in the integrity of public administration and always act in the public interest and not in their private interest"; and

- "Employees should not accept a gift or benefit that is intended to, or is likely to, cause them to act in a partial manner in the course of their duties".[15]

Model Code of Conduct for Local Councils in New South Wales

At the Local Government level, the *Model Code of Conduct for Local Councils in New South Wales* sets the minimum requirements of behaviour for council officials in carrying out their functions. The *Local Government Act 1993* requires every council to adopt a code of conduct that incorporates the provisions of the *Model Code of Conduct for Local Councils in New South Wales.*

Of particular relevance is clause 6.15 – Political Support, which provides that "Councillors should note that matters before council involving campaign donors may give rise to a non-pecuniary conflict of interests".

Guidelines for Managing Lobbyists

The *Guidelines for Managing Lobbyists* were developed in recognition of the fact that, where Ministers or public officials are exercising statutory decision-making functions, care should be taken to ensure that lobbying activities do not compromise objective decision-making.[16]

The Guidelines provide, among other things, that Ministers, Ministerial staff and public officials who are lobbied should:

- be aware of which person, organisation or company a lobbyist is representing;

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[14] New South Wales Premier's Department, *Model Code of Conduct for NSW public agencies: policy and guidelines*, 1997, page 3.
[15] New South Wales Premier's Department, *Model Code of Conduct for NSW public agencies: policy and guidelines*, 1997, pages 2 to 4.
[16] See Premier's Memorandum 2006-01, *Guidelines for Managing Lobbyists and Corruption Allegations Made During Lobbying.*

- ensure that the making of a statutory decision is not prejudiced by the giving of undertakings to an interested party prior to the decision-maker considering all relevant information;

- ensure as a decision-maker that, as far as possible, competing parties are treated fairly and consistently - for example, it may be necessary to provide a group with an opportunity to make submissions in relation to a proposed decision in circumstances where another group with a different view has been afforded an opportunity to make representations on the proposed decision; and

- ensure that no action is taken which involves a breach of a relevant code of conduct (such as the Ministerial Code of Conduct), for example, by accepting inappropriate hospitality or gifts from lobbyists.

Anti-Corruption Laws

The disclosure requirements under the *Election Funding Act* are complemented by an anti-corruption regime administered by the ICAC under the *ICAC Act*.

Under the *ICAC Act*, 'corrupt conduct' is defined broadly as:

- any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or

- any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or

- any conduct of a public official or former public official that constitutes or involves a breach of public trust; or

- any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Section 9 of the *ICAC Act* provides that, to constitute 'corrupt conduct', the relevant conduct must also involve or constitute:

- a criminal offence; or

- a disciplinary offence; or

- reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official; or

- in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

The *ICAC Act* applies to all public officials including Ministers, other Members of Parliament, and New South Wales local government councillors. Section 9 of the *ICAC Act* makes clear that conduct which involves a contravention of the *Crimes Act 1900* or a substantial breach of the Members' Code (discussed above) will constitute 'corrupt conduct' and be capable of triggering the ICAC's broad investigative powers. In this way, the New South Wales anti-corruption regime further limits the potential for private donations to influence legislative and executive behaviour.

Other Safeguards

In addition to the specific measures discussed above, a range of other safeguards aim to protect Government decision-making from being influenced by the giving of political donations and other extraneous matters.

Administrative decisions made by public officials are generally subject to judicial review. The principles of administrative law prevent irrelevant considerations being taken into account (e.g. whether or not a political donation was made) and prevent decisions being made with an improper motive or purpose. The principles of natural justice prevent decision makers from acting with bias.

Similarly, many statutory decisions are subject to full appeal rights, and in many instances third parties are permitted to bring appeals if it is considered that decisions have been improperly made.

The availability of independent scrutiny by the courts and bodies such as the Administrative Decisions Tribunal reduces the risk of political contributions compromising the integrity of statutory decision-making processes in New South Wales.

NEW SOUTH WALES GOVERNMENT

RESPONSE TO THE REPORT OF THE SELECT COMMITTEE ON ELECTORAL AND POLITICAL PARTY FUNDING

The Government has considered the report 'Electoral and Political Party Funding in New South Wales' tabled on 19 June 2008 by the Select Committee on Electoral and Political Party Funding (the "Committee") and provides the following response.

RECENT DEVELOPMENTS

On 18 June 2008, the Government introduced the *Election Funding Amendment (Political Donations and Expenditure) Bill 2008* and the *Local Government and Planning Legislation Amendment (Political Donations) Bill 2008* to increase transparency and accountability in relation to the making and acceptance of political donations.

The Bills, which received assent on 30 June 2008, constitute the most significant reform of NSW campaign finance law since the enactment of the original *Election Funding Act* in 1981, now renamed the *Election Funding and Disclosures Act 1981* (the "EFD Act"). As a result of these reforms, New South Wales has the most robust funding and disclosure regime in Australia.

The *Election Funding Amendment (Political Donations and Expenditure) Act 2008* introduced, among other things:

(a) new rules for the management of campaign finances that prevent elected members and candidates from having personal campaign accounts, and from having direct involvement in the receipt and handling of political donations;

(b) a uniform disclosure threshold of $1,000 for parties, groups, elected members and candidates to simplify the disclosure process and improve compliance;

(c) biannual disclosure of political donations (including membership fees and affiliation fees paid by trade unions) and electoral expenditure, rather than disclosure once every four years following state or local government elections or following a by-election;

(d) a reduced time period of eight weeks for the disclosure of political donations and expenditure to the EFA, consistent with the Commonwealth's proposal;

(e) a requirement that donations that exceed the disclosure threshold of $1,000 must come from either individuals or entities with an Australian Business Number to improve transparency;

(f) new powers to enable the EFA to recover double the amount of any unlawful political donation that has been knowingly accepted;

(g) increased penalties for breaches of the law;

(h) disclosure of the terms and conditions of loans of $1,000 or more which are not from a bank or other financial institution;

(i) a requirement that all donations must be paid into the campaign account of the party, group or candidate, and a requirement that all electoral expenditure must be paid from the campaign account, to ensure that political donations are used for legitimate purposes; and

(j) a ban on certain 'in kind' donations valued at $1,000 or more (excluding volunteer labour).

The amendments introduced by *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* were designed to improve transparency in the planning approval process, consistent with a number of the recommendations made by the Independent Commission Against Corruption (the "ICAC") in its September 2007 Position Paper - *Corruption Risks in NSW Development Approval Processes.*

The *Local Government Act 1993* (the "Local Government Act") and the *Environmental Planning and Assessment Act 1979* (the "EP&A Act") were amended to:

(a) require the General Manager of each council to record how each councillor votes on planning decisions and maintain a public register of those votes, helping to improve transparency in the local government planning approval process;

(b) require the General Manager of each council to refer to the Director General of the Department of Local Government any reasonable suspicion that a councillor has breached the Model Code of Conduct relating to the disclosure of, or management of any perceived conflict of interest arising from, political donations;

(c) enable the Director General of the Department of Local Government to refer any such allegation to the Pecuniary Interest and Disciplinary Tribunal; and

(d) require public disclosure of all reportable political donations made to the Minister for Planning (or his or her party) and local councillors, and all gifts made to local councillors and council staff, at the time certain planning applications are made.

In response to a Question Without Notice on 13 November 2008, the Premier, the Hon Nathan Rees MP, reinforced the Government's commitment to pushing for further reform of laws governing political donations in New South Wales.[1]

Earlier this year, the Government commissioned Associate Professor Dr Anne Twomey, a leading expert in constitutional law, to prepare a paper on the issues that are relevant to further reform of election campaign financing, including bans, caps and public funding. The Premier announced the release of Dr Twomey's paper in early November 2008 and has called for public submissions by 5 December 2008.

A key message emerging from Dr Twomey's paper is that in order for fundamental reform of the State's donations laws to be effective, a co-ordinated national approach is vital. To this end, the NSW Government is working closely with the Commonwealth and other States as part of the Commonwealth Government's Electoral Reform Green Paper process. The Green Paper process is examining electoral reform generally. Any submissions received in response to Dr Twomey's paper will inform New South Wales' contribution to the Green Paper process.

To date, the Government has implemented, in whole or in part, 19 of the Committee's recommendations for reform. Most of the remaining recommendations relate to bans, caps and other restrictions on donations and expenditure and are being examined by the Government in the course of the Green Paper process.

RECOMMENDATIONS IMPLEMENTED BY THE GOVERNMENT

Recommendations 11 and 17, which both support a ban on certain 'in-kind' donations, have been implemented through the new section 96E of the EFD Act. This section prohibits the making or acceptance of certain indirect campaign contributions, including office accommodation, vehicles, computers or other equipment, valued at $1,000 or more. Consistent with Recommendation 17, section 96E(3) ensures that the ban on indirect campaign contributions does not apply to the provision of volunteer labour, or the incidental or ancillary use of vehicles or equipment of volunteers.

Recommendation 11 of the Committee's report recommends that the Premier ban 'in-kind' donations as part of a broader ban on all but small donations. As noted above, bans, caps and other restrictions on political donations are being examined as part of the Commonwealth Government's Electoral Reform Green Paper process.

[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2008, page 36.

Recommendation 20 supports measures to ensure that funds raised for elections are used exclusively for campaign purposes. This recommendation is reflected in section 96 of the EFD Act which makes it unlawful for political donations to be used for the personal use of an individual acting in a private capacity. In addition, section 96A(6) of the EFD Act now provides that it is unlawful for political donations to an elected member, group or candidate to be used otherwise than to incur electoral expenditure (or to reimburse a person for incurring electoral expenditure), or for any other purposes authorised by the EFD Act.

Recommendation 21 highlights the need for better donor identification requirements so that the links between donors and political entities are transparent. The EFD Act now provides that it is unlawful for a person to accept a political donation unless the donation is made by an individual, or an entity that has an Australian Business Number (section 96D). Further, section 96F of the EFD Act makes it unlawful for a person to accept a reportable political donation unless the name and address of the donor are known to the person accepting the donation.

Recommendation 25 supports the lowering of the disclosure threshold to $500 for all donations, and recommends that the Government initiate discussions with the Commonwealth to encourage it to introduce the same threshold.

Earlier this year, the Commonwealth Government announced that its disclosure threshold would be reduced from $10,500 to $1,000. Queensland also reduced its disclosure threshold to $1,000 in September 2008. In the interests of harmonising State and Commonwealth disclosure regimes, the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* also reduced the disclosure threshold to $1,000. Before this legislation was passed in June 2008, different disclosure limits applied to parties, groups, candidates and donors. In order to simplify the disclosure process and improve overall compliance with disclosure obligations, the uniform disclosure limit of $1,000 applies to parties, groups, candidates and donors.

Recommendation 25 of the Committee's report recommends that the disclosure threshold be lowered to $500 as part of a broader ban on all but small donations. As noted above, bans, caps and other restrictions on political donations are being examined as part of the Green Paper process.

Recommendation 27 supports biannual disclosure of political donations and expenditure. This was a major part of the Government's June 2008 reform package, which requires parties, groups, candidates and donors to lodge full reports of all donations and expenditure for each six month period ending in June and December. Under the previous disclosure rules, parties, groups and candidates were only required to lodge declarations of political contributions once every four years following a general election, or following a by-election.

Recommendation 28 suggests that the disclosure scheme be amended to require biannual returns to be published on the website of the EFA within one month of being submitted. The Government considers that a fixed deadline for the publication

of disclosures could put the EFA in the unacceptable position of having to publish returns before it is administratively practicable for it to do so. For this reason, the Government opted to amend the EFD Act in a manner consistent with the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008.* This Bill proposes to change the current Commonwealth provisions governing public inspection of returns by inserting a new subsection 320(4), which provides that:

> "Nothing in this section requires the Electoral Commission to make a copy of a claim or return available for inspection or perusal, or to provide a copy of a claim or return, sooner after lodgment of the claim or return than is reasonably practicable".

Recommendation 30 is consistent with the Government's reform to make compulsory the disclosure of loans and other credit facilities. Section 96G(1) of the EFD Act now provides that it is unlawful for a person to receive a loan valued at $1,000 or more (other than a loan from a financial institution) unless the person makes a record of the terms and conditions of the loan, and the name and address of the entity or other person making the loan. The EFD Act also requires the amount and lender of any reportable loan to be disclosed (section 92(6)).

Recommendation 32 of the report recommends that the Department of Local Government implement the ICAC's recommendation to amend the Model Code to:

(a) include clear instructions to councillors on the circumstances in which political donations will give rise to non-pecuniary conflicts of interest and how to manage such conflicts; and

(b) require councillors to refrain from discussion and voting on matters involving campaign donors who have donated $1,000 or more. If to do so would deprive the meeting of a quorum, councillors may declare the interest and vote, but consideration should be given to making the resulting decision subject to third party appeal to the Land and Environment Court if approval depended on the vote of a councillor or councillors who had a conflict of interest.

The Department of Local Government released a revised *Model Code of Conduct for Local Councils in NSW* in June 2008. Part 7 of the revised Model Code was drafted in consultation with the ICAC, and requires councillors to declare any political donations received by them or their official agent in the last four years that exceed $1,000 where the donor (or a related entity) has a matter before the council. Councillors are required to declare the donation and refrain from debating or voting on the issue.

Under the Model Code, a councillor who has disclosed a conflict of interest arising from a donation may participate in a decision to delegate council's decision-making role to council staff, or appoint another person or body (such as an Independent Hearing and Assessment Panel) to make the decision in accordance with the law. This

applies regardless of whether or not the council would be deprived of a quorum if one or more councillors were to refrain from voting on a matter involving a political donor.

Recommendation 33 recommends that the Minister for Local Government implement the ICAC's recommendation to amend the Local Government Act to provide that a failure to declare a non-pecuniary interest relating to a political donation is a matter falling within the jurisdiction of the Pecuniary Interest and Disciplinary Tribunal (the "Tribunal"). Part 8A of Chapter 10 of the Local Government Act, introduced as part of the Government's reforms, already provides for the referral by the Director General to the Tribunal of alleged breaches of the Model Code arising from a councillor's failure to declare a non-pecuniary interest relating to a political donation.

Recommendations 34 and 38 relate to the disclosure of political donations by persons lodging certain planning applications. The Government's reforms to the EP&A Act provide for public disclosure of donations made by persons who stand to gain financially from certain types of developments. The same disclosure obligations apply to anyone who makes a written public submission either supporting or opposing a development.

Under the amended EP&A Act, a person who makes a 'relevant planning application' to the Minister for Planning or the Director General of the Department of Planning is required to disclose all donations of $1,000 or more given to the Minister or the Minister's political party in the two year period before the application is lodged by any person with a 'financial interest' in the application. In this context:

(a) a 'relevant planning application' includes a request to the Minister or the Director-General to initiate the making of an environmental planning instrument, and a request for development on a particular site to be made State significant development;

(b) persons with a 'financial interest' in an application include the applicant or the person on whose behalf the application is made, the owner of the site, or other persons who are 'associated' with the applicant or owner, and are likely to obtain a financial gain if the relevant application is approved (*N.B.* A financial gain made by a person in their capacity as a shareholder is specifically excluded from this provision); and

(c) persons are taken to be 'associated' if they carry on business together in connection with the application, or if they are related companies.

Similar changes to the EPA&Act were made with respect to planning applications at the local council level. A person who makes a relevant planning application to a council, including an application for development consent, will be required to disclose all donations of $1,000 or more given to a local councillor of the council in the two year period before the application is lodged by anyone with a financial interest in

the application. Any gifts made to a local councillor, or an employee of the council, are also caught by this provision.

Where a planning application is made to the Minister, the EP&A Act requires the disclosure of all reportable political donations made to the Minister for Planning and his or her political party. Where an application is made to a local council, only donations made to individual councillors must be disclosed.

In many cases, councillors will not necessarily know about donations that have been made to the political party by which they are endorsed. Requiring public disclosure of donations made to political parties in the course of the planning approval process could therefore have the unintended consequence of drawing councillors' attention to the fact that donations to their parties have been made - donations which councillors may not otherwise know about. There is a risk, therefore, that disclosure of party donations in the context of local government planning processes could raise probity concerns.

On 18 June 2008, the Government wrote to the ICAC seeking its views on this issue. On 7 July 2008, after the amending legislation had received assent, the ICAC advised that it favours requiring applicants to disclose donations made to parties when submitting planning applications to local councils. This view is based on the assumption that some councillors, particularly those from larger councils, are likely to be aware of donations made to their party, and that the benefits in terms of increased transparency outweigh the potential risks to probity.

The relevant changes to the EP&A Act commenced on 1 October 2008. The Government intends to review their operation when they have been in place for a reasonable period of time, and will then consider whether amendments to the disclosure rules for persons submitting planning applications to local councils are necessary. In the meantime, information about donations received by parties from developers and other donors is disclosed on a six-monthly basis and made available to the public by the EFA.

It is also noted that, consistent with **Recommendation 8** of the report, the Government did not support the *Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008*, a Private Members Bill, which sought to insert a new section 148A into the EP&A Act banning developer donations.

Recommendation 35 of the Committee's report recommends that the Government implement the ICAC's recommendation that the Minister for Planning include, in the list of designated development, development in respect of which a declaration as to the making of a donation has been made. This would increase third party appeal rights in relation to such developments.

The Government appreciates the need for independent scrutiny of decisions made in relation to development applications lodged by political donors. It does not, however, consider that the court system is the appropriate forum for this purpose.

The planning reforms recently introduced by the Government establish two new bodies which will act as independent and alternative decision-making authorities for certain planning applications: the Planning Assessment Commission (the "Commission") and Joint Regional Planning Panels ("Regional Panels"). On 6 November 2008, the Minister for Planning, the Hon Kristina Keneally MP, announced details of the functions that will be exercised under delegation by the Commission and the Regional Panels to 'de-politicise' the planning system.[2]

It is proposed that the Minister for Planning will delegate to the Commission those project applications in relation to which a statement is required to be made disclosing a 'reportable political donation', being a political donation of $1,000 or more made within the past two years. The Commission will also determine project applications which relate to the carrying out of development in the Minister for Planning's electorate, or project applications in relation to which the Minister has a pecuniary interest.

The Commission and the Regional Panels will not, however, determine project applications for critical infrastructure projects or and other key projects of State significance. Should any critical infrastructure or State significant project involve a political donation, it will be open to the Minister to refer the proposal to the Commission to conduct a review and provide independent advice or to hold public hearings on the proposal and report back to the Minister.

The Commission commenced operation on 3 November 2008. While the Regional Panels are scheduled to commence operating in mid-2009, the functions of the Regional Panels may be carried out by the Commission if the Minister for Planning directs. The establishment of the Commission and the Regional Panels is consistent with the ICAC's recommendation, which calls for greater transparency in relation to developments for which the Minister is the approval authority.

Recommendation 37 recommends that individual councillors' voting histories be recorded and made public. The new section 375A of the Local Government Act, introduced as part of the Government's reforms, requires general managers to keep a register containing, for each planning decision, the names of the councillors who supported the decision and the names of any councillors who opposed (or are taken to have opposed) the decision.

In relation to **Recommendation 39**, the Electoral Commissioner has advised that 30 candidate information sessions were held in the lead up to the September 2008 elections. The EFA has also published the 'Funding and Disclosure Guide, Local Government Candidates, Groups and Official Agents' to inform candidates of their disclosure obligations and to remind them of the EFA's power to conduct random audits to monitor compliance.

[2] NSW Department of Planning, 'Delegation and 'Depoliticisation' to Deliver Better Planning Decisions', (Media Release, 6 November 2008).

Recommendation 42 recommends that the EFA's powers to identify suspected breaches of the electoral funding scheme be reviewed, and that suspected breaches should be referred to a designated reference point for investigation. The Government's recent amendments to the EFD Act give new enforcement powers to the EFA. Specifically, the EFA now has the power to conduct compliance audits, and is able to require any person to provide it with relevant information for this purpose.

Recommendation 43 of the Committee's report supports tougher penalties for breaches of the electoral funding scheme, using the *Commonwealth Electoral Act 1918* for guidance.

The EFD Act retains offences for failing to lodge a declaration, and deliberately giving or withholding information knowing that it will result in a false declaration being made. The maximum monetary penalty for these offences has been increased from $11,000 to $22,000 to reflect the severity of non-compliance. It is noted that the maximum monetary penalties imposed under the EFD Act are now higher than the penalties imposed under *Commonwealth Electoral Act 1918* for equivalent offences.[3]

In addition, the penalty for knowingly making a false statement in a declaration is subject to a maximum penalty of $22,000 or 12 months imprisonment or both, while lodging a false declaration to obtain election funding attracts a maximum penalty of $22,000 or 2 years imprisonment or both. Any person who knowingly contravenes the new rules for managing campaign finances is also guilty of an offence and liable for a penalty of $22,000, in the case of a party, or $11,000, in any other case.

A number of other new offences are created, namely for accepting a donation or loan of more than $1,000 without recording the relevant details and providing a receipt; failing to keep the prescribed records of reportable donations for a period of 3 years; accepting a donation of more than $1,000 other than from an entity that has an ABN or an individual; and making or accepting certain indirect campaign contributions. The penalties for these offences are $22,000 in the case of a party, and $11,000 in the case of any other person.

Finally, consistent with **Recommendation 47** of the Committee's report, the Government has granted significant additional funding to the EFA to ensure that it can fulfil its new functions over the long term. Extra funds were also allocated to enable the EFA to conduct a widespread education campaign in the lead up to the September local government elections. The Government will continue to consult with the Electoral Commissioner about the funding needs of the EFA now that the new disclosure and reporting requirements have commenced.

OTHER RECOMMENDATIONS

Recommendation 5 of the Committee's report recommends that the Auditor General be given oversight responsibility for government advertising. It is noted that two

[3] See, for example, section 315 of the *Commonwealth Electoral Act 1918*.

members of the Committee opposed recommendation 5 on the basis that "the Auditor General cannot accept responsibility for oversight for government advertising without impugning his role. It is against all accepted audit practices for an auditor to oversight expenditure that they then are responsible for auditing".[4]

On 22 August 2008, the Premier issued Memorandum No. 2008-15, 'NSW Government Advertising Guidelines', which introduced updated guidelines to implement the recommendations of the Auditor-General following the Performance Audit of Government Advertising in 2007. The guidelines establish a clear set of principles and procedures to be observed by NSW Government agencies when undertaking advertising activities.

The effectiveness of government advertising is continuously monitored and reviewed in the interests of achieving best practice, value for money, and greater community access to public information. The guidelines update and improve existing Government advertising policy by:

(a) introducing detailed criteria to ensure that publicly-funded advertising does not inappropriately serve party political interests;

(b) advising agencies to consider including an audit of compliance with the guidelines as part of their internal audit processes;

(c) requiring agencies to publish the cost of, and information about, completed advertising activities on their websites;

(d) requiring the Department of Commerce to publish the total advertising media expenditure (indicating campaign and non-campaign spend) in its annual report;

(e) clarifying the criteria by which public awareness campaigns may be approved under delegation by the Minister; and

(f) confirming that a two-month quarantine period applies before State elections, subject to certain exceptions.

A copy of the guidelines is available from the Department of Commerce website (http://www.advertising.nswp.commerce.nsw.gov.au/Home.htm).

The balance of the Committee's recommendations can be summarised as follows:

(a) Bans and other restrictions on political donations (**Recommendations 7, 9, 10, 12, 13, 14, 15** and **16**).

[4] Dissenting Statement by the Hon Amanda Fazio MLC & the Hon Michael Veitch MLC in the Report of the Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales* (June 2008), page 258.

(b) Caps and other restrictions on political donations and electoral expenditure (**Recommendations 18, 19** and **36**).

(c) Public funding of election campaigns (**Recommendations 2, 3, 4, 6** and **31**).

(d) Further disclosure and oversight mechanisms (**Recommendations 5, 22, 23, 24, 26** and **29**).

(e) The functions of the EFA (**Recommendations 40** and **45**).

(f) Specific matters to be raised with Minister Faulkner as part of the Green Paper process (**Recommendations 1** and **44**).

(g) Other machinery recommendations (**Recommendations 41** and **46**).

Most of these recommendations raise broader questions about the role that private funding should play, if any, in the electoral system, and who should bear the costs of election campaigns if private funding is banned or limited.

Bans and caps on private donations and expenditure raise complex constitutional, jurisdictional, and practical issues that must be dealt with if the statutory regime is to survive constitutional challenge and be workable.

The Premier has expressed the view that, "political donations and similar contributions should be a thing of the past. Election campaigns should be publicly funded, not only to ensure that our system is corruption resistant, but that it is also seen to be corruption resistant".[5]

Earlier this year, the Government commissioned Dr Anne Twomey to prepare a paper on the legal and policy issues that are relevant to the further reform of political funding in Australia. Ms Twomey's paper examines the legal and practical issues raised by bans, caps and other restrictions on donations and expenditure, and provides guidance on how such measures could be adapted to survive constitutional challenge and remain effective.

In particular, the paper concludes that:

(a) a ban on donations over a certain amount may be valid under the Constitution, depending on the amount of the cap and its relationship with other measures such as public funding;

(b) a total ban on political donations would probably be invalid under the Constitution;

[5] Letter from Premier dated 7 November 2008 in Dr Anne Twomey, 'The reform of political donations, expenditure and funding' (November 2008).

(c) an expenditure limit may also be valid under the Constitution, depending on the level of the limit and its relationship with other restrictions;

(d) limits on expenditure by third parties (eg, unions) are also capable of being imposed under the Constitution, but the risk of constitutional issues arising is higher;

(e) public funding can be introduced and will assist the validity of other measures such as bans or caps;

(f) co-ordinated, national reform will reduce the risk of bans, caps and other restrictions on donations and expenditure from being invalid under the Constitution; and

(g) any NSW reforms must be compatible with the maintenance of a system of responsible and representative government, and must not inappropriately burden Commonwealth political speech.

The issues raised in Dr Twomey's paper, among others, are being considered as part of the Green Paper process.

The reform of political donations requires intergovernmental action. As Dr Twomey's paper indicates, jurisdictional issues arising from bans and caps on donations in New South Wales could be overcome by a co-ordinated, national approach to campaign finance regulation.[6] The Government therefore considers that the Green Paper process is the best forum in which to pursue issues relevant to the remainder of the Committee's recommendations.

The Government welcomes further discussion and debate on these issues, and has called for public submissions on the matters raised in Dr Twomey's paper by 5 December 2008. Any submissions received will assist the NSW Government in preparing its response to the Green Paper.

[6] Dr Anne Twomey, 'The reform of political donations, expenditure and funding' (November 2008) page 6.