

**Submission
No 4**

INQUIRY INTO PUBLIC FUNDING OF ELECTION CAMPAIGNS

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Submission

on

Public Funding of Election Campaigns

to the

Joint Standing Committee on Electoral Matters

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1. Introduction

In June 2008 the Select Committee on Electoral and Political Party Funding recommended that all donations to political parties and candidates other than donations of \$1000 or less from individuals be banned. It noted that this would require a significant increase in public funding of election campaigns and recommended that the Premier consult on an appropriate public funding scheme.¹

On 3 December 2009 the Joint Standing Committee on Electoral Matters received a referral from the Premier to inquire into “*a public funding model for political parties and candidates to apply at the state and local government levels*”.²

The committee has called for public submissions to be received by 22 January 2010. The committee is due to report by 12 March 2010.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Public funding for State elections

2.1 Data from the 2007 State election

The election funding reports for the March 2007 State election provide the base data for considering a model for public funding of state election campaigns.^{3,4}

Treating the Liberal and National parties as a single coalition, five parties received election funding of more than \$25,000 from the Central Fund for the 2007 State election.

Taking the amount of public election funding received as a percentage of total income from political donations, annual subscriptions and public funding gives the following results: Liberal/Nationals 11.20%; Labor 14.62%; Shooters 22.65%; Christian Democratic Party (CDP) 24.14%; Greens 55.04%.

Implementing the ban on donations over \$1000 would have a significant effect on reducing the income from private donations to political parties. Data is available on donations over \$1500 given to political parties for the 2007 election campaign. This gives an indication of the size of the reduction in income to be expected: Liberal/Nationals \$23.371 million (60.54%); Labor \$21.592 million (66.67%); Shooters \$0.556 million (51.62%); Greens \$0.679 million (32.44%); CDP \$0.123 million (6.59%);

Overall this data suggests that the proposal to ban all but small donations on individuals and introduce a new model for public funding of election campaigns would have a differential effect on the five major political parties in New South Wales.

The proposal to ban all but small donations will deprive the two largest parties (Liberal/Nationals; Labor) of **about two thirds** of their current income sources; the Shooters of **about half**; the Greens of **about one third** and the CDP of **less than seven percent**.

The Greens are already significantly dependent on public funding for their election campaign, deriving over half their income from this source. The Shooters and the CDP derive only about one quarter of their income from public funding. Labor derives about fifteen percent from public funding and the Liberal/Nationals are least dependent on public funding, deriving only eleven percent from this source.

2.2 Capping expenditure or massive increase in public funding?

The proposal to ban all but small donations and to introduce a new model of public funding will either require drastic reductions in expenditure on election campaigns or a massive increase in public funding.

The ban could result in the loss of about \$50 million in election campaign funding from private sources. If this were to be made up from the public purse it would, allowing for the current level of public funding, require a total expenditure of over \$60 million.

It seems an extraordinary proposition to firstly prevent private donors freely giving to the political party of their choice and then using public funds – deriving ultimately from the members of the public – to make up the shortfall. This amounts to shifting the financing of political parties from those who share their views and freely choose to support them to those who may not share their views but who are forced to support them!

The alternative to this massive increase in public funding would be to reduce expenditure on election campaigns. While this is superficially attractive, as anecdotally many people say they find frequent election advertising irritating, this may not serve the interests of a vital democracy. With compulsory voting for State elections, it is imperative that political parties and candidates be free to use any reasonable means of their choice to set out their case to the voters. To get people's attention in an information-saturated age naturally requires extensive expenditure on communications.

Capping expenditure – either by default by leaving political parties underfunded or by legislation – could result in a less well-informed voting public.

2.3 The case for private funding

There are strong arguments that private funding of political parties should be preferred to public funding as a matter of principle.

Each political party exists to represent a set of ideas or coalition of interests as to how the State is best governed. In a functioning democracy there will be a lively diversity of views, often strongly held, on these matters. Citizens need to be free to make their own judgment about which political parties to support – not just at the ballot box, but also, if they choose, by offering financial or other support to the political party with whose ideas and interests they agree. In deciding to offer financial support to a political party, donors may also make judgements based on personal relationships with candidates or other personnel in a political party. Private funding of political parties can be understood as one way in which people are free to participate in the democratic process.

By contrast public funding of political parties is an impersonal approach in which the allocation of funds is tied to the percentage of votes a party attracts. This is unjust. All political parties are free to solicit donations. Why should those who are less successful in persuading people to give them financial support be compensated from the public revenue?

Recommendation 1:

That the proposal to ban all but small donations from private individuals to political parties and election candidates and to increase public funding of election campaigns be abandoned.

Some specific aspects of a possible public funding model are discussed below. This should not be taken as an endorsement of the overall proposal.

3. Criteria and thresholds [Terms of Reference (TOR) a]

The current public funding scheme has a threshold of 4% for candidates or groups before any funding is received. The data reported in the Select Committee's report demonstrates that lowering the threshold to 2% would have resulted in some minor redistribution of funding from major party candidates to minor party and independent candidates for Legislative Assembly seats.

If private funding is to be heavily restricted it would be fairer to have a lower threshold for public funding to create more opportunity for emerging parties and independent candidates to engage in an election campaign.

Recommendation 2:

A threshold of 2% of the formal votes cast should apply for any candidate to be eligible for public funding.

4. Calculating public funding and caps [TOR b & c]

If the public funding scheme were to be expanded one approach would be to have two components. The first component would be funding tied to the number of votes. The second component would be matching funds, dollar for dollar, to private donations raised by the political party or candidate. This would ensure that public funding is not used entirely as a replacement for efforts to raise funds privately.

This would effectively cap public funding by making it proportionate to votes gained and private funds raised.

Recommendation 3:

In addition to public funding tied to the number of votes received, a second component could include dollar for dollar matching funds to private donations raised by a political party or candidate.

5. No restrictions on expenditure [TOR f & g]

Any shift to greater use of public funding of election campaigns should not be used as an excuse to interfere in the freedom of political parties and candidates to choose their preferred means of political communication with the voters. There is no warrant for such interference in a free democracy.

The existing requirements for establishing that funds have been expended on an election campaign before public funding is received are sufficient.

There is no persuasive case for any general restrictions on election expenditure.

Recommendation 4:

Any shift to public funding of election campaigns should not be accompanied by any new restrictions on how political parties and candidates spend these funds.

6. Regulating third parties [TOR i]

A participatory democracy requires maximum freedom for individuals and groups of all kinds to participate in the electoral process. There is no case for restricting the expenditure of third parties on election advertising or communication.

Recommendation 5:

There should be no restrictions on third party expenditure on election advertising or communication.

7. The Constitutional issue [TOR m]

Proposals to limit expenditure on electoral communications by political parties, candidates or third parties seem likely to breach the right to freedom of political communication which the High Court has found to be implied in the Constitution of Australia.

The Court has held that this right applies to State as well as federal matters.

The discussion by Justice McHugh in *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* is directly pertinent.⁵ [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

26. The constitutional rights identifiable in ss.7 and 24 of the Constitution - freedom of participation, association and communication - exist so that the people of the Commonwealth can make reasoned and informed choices in respect of the candidates who offer themselves for election. Laws which interfere with the flow of political information or a category of political information simply because it is political information are an interference with the constitutional rights conferred by those sections. However, the rights identifiable in ss.7 and 24 are not absolute rights. They are rights conferred for the purpose of enabling the electors to make a true choice in a free and democratic society. They may be regulated by other laws which seek to achieve an honest and fair election process. Thus, the power conferred by ss.10, 29, 31 and 51(xxxvi) and (xxxix) of the Constitution to make laws with respect to the federal electoral process may be used to prevent fraud, intimidation, corruption and misleading information in an election without infringing the rights conferred by ss.7 and 24.

28. In considering the scope of the Commonwealth's regulatory power over elections, a distinction must be drawn between laws which restrict the freedom of electoral communications by prohibiting or regulating their contents and laws which incidentally limit that freedom by regulating the time, place or manner of communication. "(R)easonable time, place, and manner regulations, which do not discriminate among speakers or ideas"((357) Buckley (1976) 424 US, at p 18) are not inconsistent with the conceptions of representative government if those regulations are designed to protect some competing aspect of the public interest and the restraint on freedom of communication is not disproportionate to the end sought to be achieved. But laws which seek to prohibit or regulate the content of electoral communications are in a different category. While the rights which ss.7 and 24 confer are not absolute, they are so fundamental to the achievement of a true choice by the electorate that a law enacted pursuant to the powers conferred by s.51 which seeks to prohibit or regulate the content of electoral communications can only be upheld on grounds of compelling justification.

Recommendation 6:

It would be undesirable for the Parliament to enact laws restricting freedom of political communication that would be likely to be found unconstitutional. For this reason, as well as because they would unduly limit the freedom of political communication, any

proposal to regulate election expenditure by political parties, candidates or third parties should be rejected.

8. Endnotes

1. Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, June 2008;
[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/Final%20report%20080619.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/Final%20report%20080619.pdf)
2. *Letter from Premier referring inquiry*, 3 December 2009;
[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/c499102bd6b76127ca2576880001e6ac/\\$FILE/Letter%20referring%20inquiry.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/c499102bd6b76127ca2576880001e6ac/$FILE/Letter%20referring%20inquiry.pdf)
3. Summary of political contributions received and electoral expenditure incurred by parties;
http://www.efa.nsw.gov.au/_data/assets/pdf_file/0003/63696/Parties_Summary_Published_080409.pdf
4. Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, June 2008, pp 53-55;
[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/Final%20report%20080619.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/Final%20report%20080619.pdf)
5. *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45, (1992) 177 CLR 106 (30 September 1992), McHugh J. at 26, 28; <http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html>