

REPORT OF PROCEEDINGS BEFORE

**JOINT STANDING COMMITTEE ON ELECTORAL
MATTERS**

INQUIRY INTO PUBLIC FUNDING OF ELECTION CAMPAIGNS

At Sydney on Wednesday 9 December 2009

The Committee met at 4.00 p.m.

PRESENT

Mr R. A. Furolo (Chair)

Legislative Council
The Hon. J. A. Gardiner
The Hon. D. T. Harwin
Ms Lee Rhiannon
The Hon. M. Veitch

Legislative Assembly
Ms D. Beamer
Mr R. D. Coombs

CHAIR: I declare the meeting open. This is the Committee's first hearing as part of the inquiry into a public funding model for political parties and candidates to apply at the State and local government elections. The final terms of reference for the inquiry were received from the then Premier, the Hon. Nathan Rees, MP, on 3 December 2009 following a consultation process in which opportunity was given for comment on the draft terms of reference. The final terms of reference are inclusive of wide-ranging issues relating to the reform of electoral and political party funding.

In making the formal referral to the Committee, Mr Rees noted that the current inquiry builds on the earlier report of the Legislative Council Select Committee on Electoral and Political Party Funding which recommended banning all but small donations by individuals and that further consultation be undertaken on increasing public funding of political parties and elections. Mr Rees also noted that the Government support the introduction of a comprehensive public funding model.

The Committee's inquiry process enables multi-party consideration of this important area of reform. The inquiry was advertised in today's newspapers and the Committee has made a call for public submissions. As a prelude to the next stage of the inquiry process, the Committee has invited Mr Colin Barry to give evidence today, thereby commencing the preliminary phase of the inquiry. On behalf of the Committee I welcome Mr Barry and his staff here today.

COLIN ANTHONY BARRY, New South Wales Electoral Commissioner and Chair, Election Funding Authority, Level 25, 201 Kent Street, Sydney, and

SONJA HEWISON, Senior Legal Officer, New South Wales Electoral Commission, Level 25, 201 Kent Street, Sydney, affirmed and examined:

ROBERT HAMLYN ARMITAGE, Legal Officer, New South Wales Electoral Commission, Level 25, 201 Kent Street, Sydney, sworn and examined:

CHAIR: Mr Barry, we are pleased that you could be here. I understand you wish to make an opening address outlining your initial views about the inquiry and that a formal submission from the Electoral Commission and the Electoral Funding Authority will be forthcoming in 2010.

Mr BARRY: Thank you, Chair. I am pleased to be invited to make a preliminary submission to the Committee on this very important inquiry. I should state that this submission I am about to make is from me in my capacity as Chair of the Election Funding Authority and as Electoral Commissioner. The views that I express in this submission are my own views and they do not represent the views of the New South Wales Government or the responsible Minister, in this case the Premier.

This inquiry is an important opportunity for New South Wales to once again take a lead in establishing a comprehensive and integrated scheme of public funding and disclosure that is fair, transparent and enhances the quality of democracy in our State. I note that the terms of reference are wide ranging and provide the Committee with scope to look at all aspects of funding and disclosure, including the possibility of extending the regime into four important areas which have previously not been covered by the existing legislation: public funding of political parties; caps on election expenditure by parties, candidates and third parties; regulating government advertising; and the application of a scheme to local government elections and stakeholders.

The time frame for the report will be demanding as the Committee is required to report by 12 March 2010. I want to use the opportunity today by way of a preliminary submission to deal with some higher-level principles that in my view should underpin the regime of public funding and disclosure, and to provide ideas for a framework for establishing a comprehensive and integrated system. By way of background, as members are aware New South Wales was the first Australian electoral jurisdiction to introduce public funding and disclosure legislation, in 1981. This was avant-gard legislation at the time and preceded the Commonwealth introducing similar legislation in the mid 1980s. The legislation has stood the test of time, with only minor amendments until 2008 when there were major amendments to the Act. The 2008 amendments, amongst other things, sought to strengthen the integrity of the disclosure requirements.

There have been a number of challenges and difficulties in giving effect to the anticipated policy outcomes in connection with the 2008 amendments. This is well documented and I do not propose to revisit this issue today, other than to make the observation that, in my view, some of the difficulties associated with implementation of the 2008 amendments arise from the amendments not fitting well into the existing scheme. I would strongly submit that, considering the wide terms of reference, any recommendations that the Committee makes in connection with the 16 specific matters under consideration, the most significant is that you recommend that a completely new Act is now required to fix the weaknesses in the present Act and to give effect to any recommendations arising out of this inquiry.

I want to talk about some governing principles of a democratic political finance scheme. In considering the nature of any scheme that deals with the issues contained in the terms of reference, I submit that the Committee should first and foremost turn its mind to the underlying principles or governing aims, if you like, that any scheme should embody. In dealing with these issues up-front it should provide a framework for the Committee to test policy options in each of the 16 areas in the terms of reference. In the absence of considering and establishing appropriate principles, the Committee will have no guiding beacon to aim for and, as such, policy options and models that are proposed will only be tested in the public debate over perceived partisan outcomes.

I submit the following four governing principles for a truly democratic political finance scheme. They are the four foundation pillars on which any integrated scheme can confidently rest. First is protecting the integrity of representative government. It is fundamental in our system of representative democracy that elected members of Parliament and local government councillors are accountable to the citizens whom they represent.

They are expected to act in the interests of those citizens. Often this is assumed or taken for granted, but it should be acknowledged as the cornerstone of our democracy. The legislative framework that governs the arrangements for their election to office, their behaviour in office and the regime of funding and disclosure must have as its principal objective to protect the integrity of the system of representative government and, consequently, it must prevent corruption.

When any elected officials compromise their duty to act in the public interest, the integrity of the democratic system is weakened. There have been many attempts to define corruption and I am not going to enter this definitional debate other than to refer the Committee to the analysis of "political corruption" provided by Dr Joo-Cheong Tham where he argues that corruption can manifest itself in at least four ways. First is corruption of the electoral process. This occurs when the electoral laws are disregarded by participants. There have been a few well-publicised examples where creative campaigning strategies have resulted in participants found to be in breach of electoral laws. Fortunately, we have few cases of outright disregard for electoral laws.

The second is that graft is the most obvious and simplest concept to understand. This occurs when the receipt of money or gifts or a promise to advantage the recipient results in an elected official using his or her position to improperly advantage the contributor. The third is undue influence. This is more insidious and occurs when there is an act of delivering preferential treatment to financial donors rather than acting in the public interest. Typically, such behaviour involves giving preference to financial backers rather than acting in the public interest. The insidious nature of this form of corruption is that it is not necessarily linked to a specific transaction but, rather, is a culture of delivering preferential treatment to donors. Undue influence also arises when financial backers have preferential access to an elected official.

The fourth is the misuse of public resources. This is where an elected official uses resources provided from the public funds for personal or political advantage. There have been a number of cases where elected officials have been found to have used resources and funds provided for a specific purpose for some other purpose, which may be for personal or political advantage. In my view the system that the Committee recommends should aim to protect the integrity of our system of representative government by making it clear that corruption of the type outlined above will attract the most severe consequences such that the public can have every confidence in the integrity of our system of government in New South Wales.

The second foundation pillar is promoting fairness in politics. It has been argued that political equality is at the heart of democracy. Indeed, the Australian Constitution has an underlying principle that citizens have "each a share, and equal share, in political power". The principle of political equality insists not only that political freedoms be formally available to all citizens, but also that they have a genuine chance to make a difference. They must have leverage. In our complex democracy such leverage is the ability to act as a group. There are very few cases at the State parliamentary level where a citizen of ordinary means can have political leverage in their own right. It is only through groups or parties in a formal sense that citizens can muster political power.

In order to have leverage citizens need access to the public space and the forums in which public opinion is voiced. Nowadays leverage is achieved by having access to the mass media, which in itself is finite space. We have seen instances where the financial strength of some can drown out the voice of others. The objective of having a genuine chance to make a difference is weakened where the financial might of a few make it impossible for others to be heard. The political finance regime should attempt to address this risk. I am not suggesting that every voice should be given equal space. I am supporting the idea that the Committee should be mindful of the power of access to the public noticeboard and that any regime should recognise this.

The political finance scheme should have as an objective to promote fair rivalry between the main parties. It should act as a stopper to serious imbalance in campaign funding. At the State level citizens will make a choice between a single party and a coalition as to who will form government. For citizens' choices to be meaningful there needs to be something akin to an equality of arms. It is important also to deal with the role of third parties in promoting fairness in politics. The role of third parties has become complex and the system of political finance should recognise the increasing importance of these players. Third parties, for instance, should not get under the radar. They need to be seen as major players. They must not drown out the voice of the real players, the candidates and the political parties. Consequently, they need to be regulated and subject to rules.

The third pillar is the supporting of parties to perform their functions. There is no doubt that political parties are the major players in the Australian representative democracy. They are the main opinion framers and the agenda setters. At Federal and State levels the Parliaments are party Chambers. The lawmakers are party

members and, without doubt, the majority of people who participate in politics in Australia do so through the party system. The parties are central to our system of representative democracy, and in moving forward they will remain as such well into the future. Consequently, the political finance framework that the Committee recommends should acknowledge the key role played by the political parties. The parties need to be appropriately funded in order for them to fulfil their functions as a party. This does not translate into giving parties what they think they need; it is more fundamental than this. It is to provide parties with adequate funding in order for them to do what parties ought to perform. The question I pose for this Committee is: What ought parties do?

I again refer to Dr Tham's discussion of the functions of political parties in our representative democracy. He suggests that parties in a modern representative democracy should, first, play a representative function by representing the diverse opinions in New South Wales—the party platforms should offer genuine choice and cater for different opinions; second, the parties also should perform the function of agenda setting, by raising issues for debate and presenting ideas for consideration; third, play a participatory role by being a vehicle for citizens to become involved in the political process, debate and agenda setting; and, fourth, parties perform a governance role when their members are elected to office. If the party is the government then the members may be part of the executive.

In all of these functions the principle of pluralism is implicit. The parties should provide citizens with a variety of opportunities to participate in the process. At the macro level, for pluralism to exist parties will be based on diverse structures. The diversity of party structures should be respected. If this is accepted as the legitimate functions of political parties, then parties should be financed to do the things that are considered important to the health of our representative democratic system. The funding regime will need to be sufficiently flexible to enable parties to be financed on the basis of their activities in these key areas, not just on what the parties themselves consider is necessary. Simply funding parties only on the basis of votes received at the most recent election may not be appropriate; it may be too restrictive. The Committee may wish to consider including in the mix of funding such things as membership numbers, and special grants for policy development, training of officials and public information, all of which would assist parties to fulfil their functions.

The fourth pillar is respect for political freedoms. In our representative democratic system it should not be the case that the winner takes all. Political competition is the joust of ideas, policies and ideologies. Whoever wins has to govern for all. Deliberation is the basis for citizens to become involved in the process of law making. Deliberation involves justifying, arguing for various positions, and seeking to influence. In our system many citizens will be bound by laws with which they disagree. Deliberation is an important process for justifying laws and policies to the citizens.

Democratic deliberation operates as a constraint on regulation. Free political communication is integral to democratic deliberation. Regulation of political funding should not unduly restrict political communication.

This is not an argument in favour of no regulation, as the absence of regulation will lead to the loudest voice drowning out others. Respect for political freedom does require careful, calibrated regulation based on legitimate outcomes.

A political finance scheme should promote democratic deliberation by promoting informed voting. A key to informed voting is the citizens having access to information about the funding activities of the parties and candidates at the time of the election, and in between elections in the case of parties. Continuous and timely disclosure is important to deliberation, especially for elected officials and parties.

So these are the four pillars upon which a scheme should sit: protecting the integrity of representative government, promoting fairness in politics, supporting parties to perform their functions, and respect for political freedoms.

I now turn to integrated reform. It is essential that any reforms are an integrated package, including comprehensive dealing with all areas of political funding such as private donations, public funding, spending by parties, candidates and third parties, and government advertising. I also want to say a couple of things in this preliminary submission about the Election Funding Authority. I submit that now is the appropriate opportunity for a review of the authority, especially the composition, and whether it is, indeed, necessary to have an authority. As members know, the authority is comprised of the Electoral Commissioner, as the chair, a member on the recommendation of the Premier, and a member on the recommendation of the Leader of the Opposition. The Select Committee on the Inquiry into Electoral and Political Party Funding in 2008 considered the

composition of that authority. No recommendation was made regarding the composition of the authority in its report.

Based on the four principles that I have outlined above regarding the test for a healthy funding and disclosure regime, the current composition of the authority would not meet that standard. I want to state that I have at no time had concerns regarding the way the current two members have performed their duties. They have, at all times, acted with integrity and absolute impartiality. Having said that, the structure as required by law is political in composition. It is important that the authority has the confidence of all key stakeholders and the appearance of impartiality is reflected in that composition. A body that is at arm's length from the political debate should administer the functions of any new political funding and disclosure regime. As well as being competent to undertake the responsibilities, the body should be independent and, more importantly, be seen to be independent of the political parties. I would encourage the Committee to consider this important matter in its recommendations.

I want to say something about local government. I would like to offer some preliminary thoughts on how a publicly funded political finance scheme could be applied to the important area of local government parties and candidates. Considering the very tight time frame in which the Committee is required to consider many complex issues, it might be wise to allow any new scheme recommended for State parties and candidates to be implemented before any final recommendation regarding local government is made. There are a number of additional issues that will need to be considered in implementing public funding at local government level, including how to deal with single-issue local parties, the size and immaturity of local government parties compared with State registered parties, as well as parties that are registered for both State and local government purposes. These interconnecting issues are very important, and any deliberation on recommendations would be advantaged if there was an opportunity to review the implementation of a political finance scheme at the State election.

I turn now to the scope of the inquiry. As I said, the scope of this inquiry is the first comprehensive review of funding and disclosure in New South Wales since the Act was first introduced some 28 years ago. Notwithstanding the 2008 select committee inquiry, which provides an excellent platform for this inquiry, this Committee will deliberate on many more complex matters especially relating to; full public funding of political parties; possibly restricting who can donate to campaigns and parties; possible caps on campaign expenditure; and regulating government advertising. It is important that all these key areas are considered in an holistic manner as they are each connected. To disregard any one, or to set it aside for consideration, will expose the scheme to possible abuse.

In raising these issues, I would like to propose a way forward for the Committee to consider, particularly within the limited time you have. I would suggest that there are three key outcomes. Firstly, for the Committee to determine a framework for principles on which a comprehensive public funding scheme should be based; secondly, to consider policy outcomes which a scheme should achieve under each of the terms of reference; thirdly, to settle on a framework for a comprehensive scheme without getting into the detail of it that will meet my points one and two mentioned above.

The commission and the authority will make a more detailed submission on the terms of reference to the inquiry by the due date in January. Thank you.

CHAIR: I think you have given us quite a few things to think about there. In your opinion, is it possible to have a public funding model in place by the next election and, if not, what do you consider to be the main problems in achieving this?

Mr BARRY: When we talk about a public funding model, I take it you are referring to a public funding model that embodies the complete funding of political parties. I think there are other challenges. This inquiry is very broad. It is wide ranging and, as I said, it has to come up with holistic recommendations. It has to be a composite package of policy outcomes if nothing else. Given the fact that the Committee is required to report by 12 March, which I think in itself is extremely challenging, it would require a fundamental new piece of legislation in order to give effect to a complete public funding model for the next State election.

I think that is going to be very challenging, particularly as I have outlined four principles on which I think such a model should be built. One of the important things is that it has bipartisan support, that it has the support of Parliament and, more importantly, there is an opportunity for the community to digest what is being contemplated. I think that would require some exposure bill, a bill to be drafted and given exposure, so there

will be an opportunity for comment. I have some concerns about meeting a timeline that would give effect to all of that by the State election.

CHAIR: On that issue, do other members have any questions?

The Hon. JENNIFER GARDINER: You have mentioned that maybe local government should be put to one side until we test it, say, if it gets done by the general election. If we did not do that, we would have greater problems, would we not?

Mr BARRY: In my view, yes. I think one of the things to remind Committee members about is that at the moment there is reimbursement to political parties and candidates at State elections. There is no reimbursement for political parties and candidates at local government elections, so there is not even an existing model on which to build.

CHAIR: In some other jurisdictions, such as New Zealand, election expenditure by political parties and candidates is capped. How do you consider such a system could be implemented in New South Wales?

Mr BARRY: I think there are a number of options for capping expenditure of political parties and they are not particularly rocket science. It is a question of simply picking a number and applying a formula. An obvious thing is to say a political party cannot spend any more than the number of voters on the roll. There is 4.6 million, so a political party cannot spend any more than \$4.6 million. That is a very simple approach. But again I strongly submit to the Committee that before getting into the detail of such a scheme, I would encourage the Committee to come back and deal with some high-level principles—that is, should there be funding of political parties? Should there be a cap? I think the Committee needs to hear evidence and come up with a policy outcome.

What I am saying is I would submit to the Committee you have 16, I think it is, terms of reference. If the Committee came up with a policy outcome for each of those 16 terms of reference, the mechanics of how you get to a detailed scheme for others to do later. I think it is well beyond the time that we have available for the Committee to come up with a rolled gold, integrated and comprehensive scheme. But I think it is achievable for the Committee to come up with, a framework having considered the pros and cons in each of those terms of reference areas and policy issues around them, here are the pros and here are the cons, and this is what we as the Committee recommend as the policy outcome.

Ms DIANE BEAMER: I take on board the things you have been saying about setting policies in place and having a philosophical approach to the way you do that before what it is you are about to achieve and what you think is the best way of going about that and leaving certain things to a draft exposure bill to be tested by the citizens of New South Wales. I want your opinion on this—and you can perhaps get back to us, I am not sure—but we have your submission to us here and on page 6 of that submission—

Mr BARRY: Which submission is that?

Ms DIANE BEAMER: What you have just said to us. You talk about the need being akin to equality of arms between the two political parties, and I see that as a fundamental tenet of the things we are talking about. You talk then about third parties and say, "they must not drown out the voice of real players, the candidates and political parties. Consequently, they need to be regulated and subject to rules." You are suggesting to us they are subject to the same rules or different rules?

Mr BARRY: They need to be subject to some rules, and what I meant there is it would be not in the interests of the health of our system for a scheme where there were caps on what political parties could spend at an election, but there were no such caps on third parties. So if you had a cap on political parties but third parties could simply do what they like and spend what they like, you would have by default the third party stepping into that space.

The Hon. DON HARWIN: That is organisations that were not political parties?

Ms DIANE BEAMER: Trade union organisations, et cetera?

The Hon. DON HARWIN: Political action committees, interest groups?

Mr BARRY: Yes.

Ms DIANE BEAMER: You would just say off the top of your head you have how many million voters, how many million dollars they can spend. Would they be subject to a lesser amount of spending in your view?

Mr BARRY: That will be subject to a further submission we will make.

Ms DIANE BEAMER: That is what I said, you may be answering this later. It would be something I would be interested to hear, how you would go about doing that?

Mr BARRY: I would like to stick to other principles, and I think if the principle is yes, we want to have a cap on what stakeholders can spend, then you need to identify the stakeholders. Political parties are obvious, candidates are obvious, third parties is another group and there are models around. New Zealand, I think, is one. Again, it comes back to one of my other principles and that is what we are regulating here is political freedom, and we have to be careful. It has to be finely calibrated that we are not over regulating to stifle political debate and stifling people from having a say. A scheme might provide that an organisation can spend X amount of dollars without having to register itself. It still has to disclose, but it does not have to register. Once it wants to spend large sums of money, then it has to register with a funding authority, whoever that might be, and then they start to get involved. They become more formal players in the whole scheme.

Ms DIANE BEAMER: I think you have answered me by saying that you would get back to us with more detail about that particular thing. Everybody around the table can think of specific examples which skew one way or the other. You could have one group that is registered and has quite a big voice in just one electorate. If we look at a State funding model, we have one group just spending in one or three electorates for a particular interest, and that can skew those three electorates or one.

Mr BARRY: They are the sorts of things that I submit the Committee needs to consider at a policy level. You want to see an outcome whereby, if there is capping of expenditure, third parties are brought into a scheme. The policy outcome is that at a State level they cannot drown out the voice of the main parties and at a local or district level, they cannot drown out the voice of the candidates. What that will translate into as a scheme—this is where I think the Committee will find it very challenging—is that if you then start to get down into the minutiae, you will be here for a long time with lots of whiteboards and rolling up your sleeves. That work needs to be done by others down the track to achieve the policy outcome that the Committee recommends.

Ms LEE RHIANNON: Thanks, Mr Barry. That was really good to get us going. You put a strong case for the framework for the principles. Considering the work of the Select Committee on Electoral and Political Party Funding was considerable and there was across party and broad agreement with a number of major parties as well as the various minor parties on that, do you feel that goes a long way to establishing those objectives or those principles?

Mr BARRY: I think it goes part of the way, but I do not think it deals with all of the four principles that I outlined. What I wanted to achieve today is to put before you what I think are some pretty motherhood-type statements, but I think they need to be very clearly made and well rooted in any deliberation that the Committee will make against the 16 terms of reference. Whether you accept the four principles that I have outlined or whether you wish to reconsider some of the issues that were raised in the upper House select committee report is a matter for the Committee. But what I am advocating is that you select principles and outline them and make them clear because, if you do not do that, I fear that what will happen is that there will be lots of ideas presented, there will be lots of policies presented as outcomes, there will even be schemes and models presented, but you will not have any way of testing all of it: What are these trying to achieve? What are these satisfying?

Ms LEE RHIANNON: Considering that this whole issue has been debated for a few years now and considerable work has been done, I am certainly not disagreeing with what you say. But I suppose the little voice in the back of my mind is referring to the delays that so often come in government. Things often take a long time. Wheels take a long time to turn. How will we proceed? How fast we will proceed? Again, I am not arguing against the need to have the framework in place. Considering there is considerable awareness among the public of a need to change and an expectation—we have now had two Premiers make the promise—democracy is being damaged every time another story comes out. I again emphasise that expectations are raised.

If we only go as far as principles in the framework, there could be disappointment. Would you consider it would be possible to go ahead by taking maybe one aspect of those points that you have set out on page 12 of your document where you list the various complex matters that the Committee needs to deal with: public funding, the restrictions on donations, election expenditure, advertising, et cetera? If we take one aspect of that and try to drill down and do it in more detail—for example, a cap on election expenditure—would you see that you could do one aspect in detail before you went further so that we have something in place before the next election? To be frank about it, if we go forward only with frameworks and we do not do anything before the next election, there will be disappointment.

Mr BARRY: What I would say is a comment that I made in the submission. If you do not treat this as a holistic exercise, in my view you run the risk of one of a number of things: one is bolting something onto a piece of legislation that has already been bolted onto—unsuccessfully, in my view; in fact, with two bolts on. We have just had another bolt onto it last week with the amended legislation for developers. We are yet to see how all of that is going to work. My caution is that while I can see the enthusiasm for wanting to get something up for the State election, and while I share enthusiasm to do that, I come back to what I said at the beginning: this will require a completely new piece of legislation. That needs to be kept in mind.

That is why I think I would be saying to the Committee that I do not know how you could achieve by 12 March coming up with a completely integrated scheme unless you lock yourself in the room with lots of whiteboards and butchers paper and start working on it now. First, there need to be guiding principles and second there need to be at the next level down policy outcome expectations. I do not know what the Committee's view is. Are you all in agreement that there need to be caps on political expenditure, or election campaign expenditure? You have not yet heard what the community is going to say by way of submissions. You have not taken any evidence. At this stage we are waiting to hear what evidence you will get and what is the community's expectation. I have sympathy for what you are saying, but I again come back to what I desperately do not want to see—and I plead this. We do not want a piece of legislation that has been rushed and that is unworkable. It will create a lot more disenchantment among the stakeholders in the community.

Ms DIANE BEAMER: Do you think we should have a constitutional lawyer as well?

Mr ROBERT COOMBS: That was my question. Stop pinching my questions. My question is in line with what I was asking, especially in relation to third parties and probably non-party candidates. It would appear that the elephant in the room may well be the Constitution. In general discussions with people who probably know far more than I do in relation to this matter, they say there are some very important constitutional values that we may find ourselves exceeding and we may leave ourselves open to all sorts of suits and challenges.

Mr BARRY: On the constitutional issues, I attended a conference in Victoria a couple of weeks ago. I think you are going to get some very interesting submissions about some constitutional issues, which may give you considerable comfort.

Mr ROBERT COOMBS: Considerable comfort?

Mr BARRY: Considerable comfort.

Mr ROBERT COOMBS: That is interesting.

The Hon. DON HARWIN: The committee heard evidence that suggested we could do what we were proposing to do at a State level, but that was not the view of Associate Professor Twomey.

Mr BARRY: I think if you get submissions from certain quarters you might get some comfort in that area.

CHAIR: In your submission you talked about the composition of the Election Funding Authority—

Mr BARRY: Yes.

CHAIR: —with you as the chairman and two people on the recommendations of the Premier and the Leader of the Opposition. While you indicated that it has not presented a problem, the system itself may not necessarily be seen as being impartial. Do you have a suggestion on how the Election Funding Authority could be constituted?

Mr BARRY: I want to leave that until our more detailed submission, if I might.

CHAIR: Sure.

Mr BARRY: I will say one thing. In giving evidence to the select committee I was, at the time, of the view that the work of the Election Funding Authority should not come under the jurisdiction of the Electoral Commission. I have since had further opportunity to reflect on all of that, and I will relax the strong stance I took on that. But I cannot pull a rabbit out of the hat and say who should be on this authority, other than to say I think the way it is constituted at the moment does not meet my four pillars test.

CHAIR: Do you consider that the Election Funding Authority is the most appropriate body to oversee a public funding model for election expenditure and what changes might be needed, both to its composition and the way in which it operates?

Mr BARRY: I think there needs to be either an authority or it brought under the jurisdiction of the Electoral Commission, which could be reconstituted. But the actual composition of it, I think, is something for further consideration by me in the submission and by the Committee.

The Hon. DON HARWIN: Do you think that the model of the Australian Electoral Commission has anything in particular to recommend it?

Mr BARRY: The Australian Electoral Commission is comprised of the Electoral Commissioner and the chief executive—I think it is a retired Federal Court judge and the Commonwealth Statistician. There is something to commend that model but again that would require an amendment to the Parliamentary Electorates and Elections Act and bringing all of the new election funding and disclosure Act under that Act. But that is an option.

CHAIR: In terms of resources, how do you think a public funding model would impact on the resource requirements of the Electoral Commission and the EFA?

Mr BARRY: It is too early for us to say. What I would like to see is when we get the Committee's report I think we would not be in a position to comment at any great length on what additional resources, other than there would be a need for some additional resources if for no other reason than we have to educate the stakeholders and the community.

Mr ROBERT COOMBS: It would probably come out in further deliberation that we have, but one of the problems I have—and I do not know whether you have given any thought to this—is that going to a fully public model is the whole thing becoming politicised. One party basically coming out and trying to hit the high moral ground by reducing expenditure and then you end up with a model basically where it makes it impossible for anybody to get their message out at election time. Could there be appropriate measures put in place to prevent that from occurring?

Mr BARRY: I think the nature of the political parties themselves is that it would be unlikely for a party to be terribly successful if it said, "Look, we are pure as the driven snow. We will not do very much at all, and we will just allow our opposite number to spend up to the limit." I think that is unlikely. I think what is more of concern is that we have to come up with a system of fairness and it comes to one of these principles I talked about, the equality of arms. With the main political parties, there needs to be a cap that ensures that one party cannot grab all of the public noticeboard and just leave the other parties with very little.

Mr ROBERT COOMBS: For example, in Opposition and some desperation a party might say—I do not know how much it would be but let us say it is \$50 million—"That's public money. There is some waste involved in that. If we get in we'll make it \$30 million." So you get this race to the bottom. Do you think that in any legislation there could be some preventions put in place to stop that from occurring?

Mr BARRY: I think the only way you would be able to do that would be to entrench it in the Constitution because there could always be that race to the bottom, where one party says, "Good heavens, this scheme is costing \$50 million. If we get elected we will do it for less." One of the other things that is very important in this concept of funding political parties is it sort of spins around this idea of winner takes all. There are always the risks, as we know with Federal and State elections, that there tends to be the tide—the tide comes

in and the tide goes out. You have to ensure that at elections political parties that are on the ebb do not become so depleted of funding that they cannot be an effective political party while they are in that state of having gone out of office. So it is important that there is some equalisation scheme so that parties are not just funded on the basis of a very simple approach of how many votes they got at the last election, because that could mean that a party could be very depleted, and that would not be in the democratic interest. It would not satisfy one of my pillars.

The Hon. MICHAEL VEITCH: Earlier you indicated that you do not want to get down to the minutiae just yet, but with the funding model concept we keep talking about the major political parties. I get the impression that the expenditure you are talking about is for the lower House seats as well.

Mr BARRY: Both.

The Hon. MICHAEL VEITCH: Upper House and lower House?

Mr BARRY: Yes.

The Hon. MICHAEL VEITCH: Looking at your four pillars, if I wanted to start a new political party and run candidates, or if I wanted to run as an Independent in the upper House, for instance, as opposed to an Independent in a lower House seat, I do not think your guiding principles quite accommodate that scenario for a funding model.

Mr BARRY: One of the things this Committee needs to address in how you will deal with emerging parties, not just the existing players. This is one of the challenges. At the moment we can focus our attention on the existing players and how any sorts of schemes might impact upon them, but it is the emerging parties and that is why I have suggested that in terms of fairness, in terms of access to the public notice board, in terms of getting agenda setting and in terms of debate and information, emerging parties have to be considered as part of the scheme and how they will be funded.

The Hon. DON HARWIN: The values that you talk about—or, as they are referred to, the four pillars—one of them is supporting parties to perform their functions. I note that there is a lot of discussion of the possibility of a full public funding model as part of that. In terms of teasing out what that value might mean, one of the things that a Canadian group called Democracy Watch pushes quite strongly is a view that the campaign finance regime should value responsiveness and parties need to talk to voters and respond to their concerns to be legitimate political players, and through responsiveness they win support, including, for example, financial support. I wonder whether you have a comment on the importance, therefore, of whether we should value responsiveness and whether that is consistent with the idea of having the total public funding of political parties' election campaigns?

Mr BARRY: When you say the total public funding of political parties—

The Hon. DON HARWIN: Can I specify what I mean? If you have an expenditure limit and you are able to be completely reimbursed for all of your election expenditure, right up to the actual expenditure limit.

Mr BARRY: That is one of the policy objectives that I think this Committee has to turn its mind to. My view on it is that I think there needs to be private donations to political parties. I think the difficulty will be for the Committee to turn its mind to where you draw the line. If you want to have public funding for political parties and a mix of private funding, where do you draw the line in the sand? There are a couple of things that occur to me as obvious starting points for discussion on that.

As to the responsiveness of political parties, I think that is a very important thing, because that is engaging their support. It is all about communication with their backers, their membership. One of the things I mentioned is that I think the Committee needs to consider some more sophisticated ways of public funding to political parties, such as by way of grants and donations, to enable particularly emerging parties to be able to do those sorts of things. In terms of responsiveness, I am not quite sure how you would fund political parties on that basis.

The Hon. DON HARWIN: I think you did get to what I was mainly referring to, which is: Is it appropriate that you do leave that space for private donations? Of course, building up support, including financial support, reflects responsiveness.

Mr BARRY: Personally, I think there needs to be room in a regime, as the policy outcome, for people to be able to join a political party. In fact, this is one of the interesting debates we have been having in our office. I have taken it on the basis that if you join a political party you become a financial member; you hand over some money. But I might be misguided there: it may well be that you can join a political party and hand over nothing. That, to me, seems a bit odd, but it may well be possible. I think there has to be space for people to join political parties and to be able to donate.

CHAIR: The Political Education Fund that currently exists to some extent covers the issue the Hon. Don Harwin raises. That fund is to be used for parties to engage with the community, develop policy, and communicate that policy, is that right?

Mr BARRY: I think that is the theory. But in practice, I think, it is extremely difficult for us to know how that is actually used.

CHAIR: Does that need to be looked at, in your view?

Mr BARRY: I must admit, I have worked on the basis that the terms of reference for this Committee are so broad that, by and large, I have not really turned my mind to what parts of the current scheme need to be fixed. I have just assumed that the current scheme is over here and we are looking at something that is a completely consolidated, integrated package, of which I see that as a part. Rather than just handing money over to political parties on the basis of the number of votes you got in the Legislative Assembly and that turns into something called the Political Education Fund—I think that is a bit cute.

If we are going to have what the Hon. Don Harwin was referring to, that is, some sort of funding for genuine communication with membership, I would much prefer to see some sort of grants so that the overseeing body can have some satisfaction and evidence that that is how the money was used. To give you another example, if emerging political parties, in particular, were given access to grants for developing policy, one of the things I would expect to see is that the policy that is developed is on a website somewhere—not just handing money into a black hole into a political party, for the political party to use the money for whatever purpose they consider to be appropriate.

CHAIR: That goes to a resourcing issue for the Electoral Commission as well, though, in terms of administering the grants, and then following up and ensuring compliance?

Mr BARRY: It does. Whatever amount of money a full public funding scheme is going to cost, the amount of money that would be required for the overseeing body to administer it is going to be quite small in the whole scheme of things.

Ms DIANE BEAMER: The terms of reference about government advertising and information advertising is not used for partisan political purposes, and you are especially relating it to regulating government advertising. Will you be giving much more thought to how you are going to define what is partisan, what is the health message, and what is the message, "Don't speed this weekend"? A whole range of advertising goes on all the time that is government advertising and what is described as not for partisan political purposes. Having defined that, how is that then looked at?

Mr BARRY: I do not think that in our submission we will be—

Ms DIANE BEAMER: Looking at that?

Mr BARRY: We will make a comment on it. Because I have talked about an integrated package, I do not think it would be appropriate for me to then make a submission that just does not deal with all the matters.

Ms DIANE BEAMER: I was simply saying that I think that would be quite interesting for this Committee to look at, as to how you would define those—

Mr BARRY: And I think there have been attempts at that, particularly at the Commonwealth level regarding government advertising. I think it is a very important area. It is one of these parts of the whole that, if it is not dealt with, it clearly would leave any government of the day the opportunity to basically use public money for political propaganda, badged under information.

The Hon. DON HARWIN: There are four pages on it, including a recommendation, in the select committee report.

CHAIR: I think the Committee will invite the Auditor-General to make a submission as well. I suspect that he might have a view on that issue.

The Hon. DON HARWIN: Yes. He has a 60-page report on it today.

Ms LEE RHIANNON: Mr Barry, your comments could well put the brakes on the timeline for reform. That could obviously be a good thing; we all want to get it right. I have listened to your very well reasoned and very convincing arguments. At the same time, I am also thinking of the 47 recommendations in that select committee report. There is also the Canadian model that has been around for a long time. That model has been finetuned, and it has been tested before the Supreme Court and did not fall over.

I have been sitting here thinking about how much work has been done, and therefore thinking about the points of view you have put forward. You set out in the document that you spoke to the problems that occurred—well, that is my interpretation; I think you were more diplomatic—the changes that occurred in 2008, with the amendments that came through then. You then made reference to the changes that came through just last week. I suppose I am trying to find a diplomatic way in which to say this. Perhaps I should simply cut to the chase. I am reading into it that you have had concerns about those changes. Has that influenced you to some degree, or to a great degree, in terms of what you have put before us today? You are concerned with what this Parliament has done when we have amended the present Act, and therefore you are saying we really have to go slowly to get it right. I am totally hearing that, but I am thinking that a lot of work has been done here and maybe we are now further down the track.

Mr BARRY: I have a couple of comments. Yes, I would be very concerned about any further bolt-on to the current legislation because it will fall over. It just is a nightmare even now.

Ms LEE RHIANNON: A nightmare because of what happened in 2008?

Mr BARRY: Yes.

Ms LEE RHIANNON: Have you an opinion on what happened last week or is it too early?

Mr BARRY: Last week is another bolt-on and it is too early. I did not particularly want to get into the real challenges with the whole legislation, but one of the principal issues is that we now have a raft of definitions of people. If anybody asks who is a candidate, you can pick various parts of the Act and come up with a different definition. The Act has a fundamental principle in section 96I that is a major impediment to any successful prosecutions in that we have to establish that at the time a person committed an offence they knew that what they were doing was illegal. I am not a lawyer; here are two lawyers. The Crown Solicitor will tell us, "Colin, that is a very, very big hurdle to prove." It cannot just be drawing a conclusion because you gave somebody a manual or you gave them training: "You ought to have known it was illegal." That is not the test. You have to prove that they knew it was illegal. We have a very difficult piece of legislation to administer. Not that we are in the business of wanting to get heads on stakes in Martin Place, but an important part of the law is if you cannot enforce it, it makes it very difficult to get people to play the game.

Ms LEE RHIANNON: That has been a problem though since before the 2008 amendments?

Mr BARRY: Yes, it has, but the 2008 amendments have just made it worse. Having said all of that and to come back to your query, am I saying go slowly? I actually am not saying go slowly because I think what you can achieve by March 2010 under each of the 16 areas for consideration is to come up with some principles and the policy outcome you want. For the actual scheme by which you achieve the policy outcome you may even come up with a framework for a couple of schemes. That is what I am saying. I do not think that is beyond the March deadline.

Ms LEE RHIANNON: And then framework for legislation?

Mr BARRY: That would become the framework for the legislation. But there is another process and that is that the Government has to accept it, there have to be drafting instructions prepared for Parliamentary

Counsel, and Parliamentary Counsel has to draft the bill. My humble suggestion is that the bill should have some exposure and there should be proper time to consider it. We are talking about March; I think you are going to be in very challenging territory. Bearing in mind that the current law requires that we start the disclosure period from 1 July 2010 to 31 December 2010, we are already into a current disclosure period. So there has to be a transitional arrangement and we have the election in March 2011. I am not a wet blanket. I am a keen advocate for moving forward and I think it can move forward as long as this Committee does not try to come up with basically a rolled gold integrated scheme but, rather, restricts itself to a framework. To me the key things are the policy outcomes under each of the 16 terms of reference. What is the Committee recommending is the policy outcome? Sorry to labour the point.

Ms LEE RHIANNON: No, thank you. That is very good.

Mr ROBERT COOMBS: Might it be the fact that we are wasting our time insofar as there is Federal activity going on with a green paper and a white paper—I cannot recall just what it is—and they are due to report back sometime next year? May it be the case that they have covered a lot of this ground and are going to come out with a policy basically where all the States agree and so a lot of the work we are doing is either superfluous or academic anyway?

Mr BARRY: I would take a contrary view. One of the great things about our Federation is that the States can occupy their own space. In the past New South Wales was a leader in this area. We are a leader in the area of a smart roll. This is certainly not a waste of space. Yes, the Commonwealth may go down the process of introducing some legislation, but remember that there is no reason why Commonwealth law and State law in this area cannot sit side by side. It is not the case that Commonwealth Parliament passes a law in this space that automatically takes over from the State legislation. First of all, the Commonwealth has to specifically enact a law with a purpose of taking over State responsibilities in this area. I do not think the current Government would do that without considerable consultation with the States and Territories. Again, it is a lengthy process. They are going to have an election sometime later next year. I think we are in pretty safe territory. I certainly would not say this is a waste of time. I think this is a very important inquiry.

The Hon. DON HARWIN: Presuming that something was done on the issue of the control of expenditure, what do you think would be the appropriate regulated period? Leaving aside the fact that we are now getting very close to March 2011, in the normal election cycle what period prior to the election—or, for that matter, even prior to the issue of the writs—is appropriate, given that we have a fixed term?

Mr BARRY: It is interesting. If there were a cap on campaign expenditure on political parties, there are two possibilities. One is that you could regulate the period from 1 July in the financial year in which the election is held.

The Hon. DON HARWIN: The preceding year?

Mr BARRY: The preceding year, sorry. It could be an ongoing calendar year. It could be a financial year, a calendar year or election to election, if there was a cap. Let us pick \$4.6 million. A party cannot spend anymore than \$4.6 million. It could be in between for a whole election period in a four-year period. That is one option. The other option is that it could be in the financial year in which the election is held.

The Hon. DON HARWIN: They would be the two options you would look at?

Mr BARRY: The other thing you need to consider is that once you establish a regulated period, does that mean it is all hands off for the unregulated period? Effectively, if the regulated period was 1 July 2010, does that mean in June 2010 you would see the party starting to spend millions and millions of dollars that is not covered by the cap?

Ms DIANE BEAMER: And then stop this strange blitz.

The Hon. DON HARWIN: It is very relevant also for third-party expenditure.

Mr BARRY: Very relevant. These are the sorts of policy issues the Committee needs to consider.

The Hon. DON HARWIN: For example, in Ontario at the last provincial election the regulated period for third parties commenced only from the issue of the writs. One third party spent almost \$20 million in the three months prior to the issue of the writs.

Mr BARRY: That is the sort of thing I would want to see, and I would encourage you to make sure is not—

Ms DIANE BEAMER: The writs?

Mr BARRY: —able to be achieved. Third parties should not be able to do that. It may well be that the cap on political expenditure actually applies from election to election over a four-year span to stop that, and to stop third parties. But they are things for consideration.

The Hon. DON HARWIN: But that would be very draconian for third parties, would it not? It would be a perpetual ban virtually.

Mr BARRY: No, I would not say that third parties could not spend; they would just need to be regulated. For example, if political parties could not spend any more than \$4.6 million in the four-year period, then third parties would equally have to be regulated but it would not be up to the \$4.6 million—there would be some other threshold.

CHAIR: That has given Committee members plenty of things to think about. On behalf of the Committee I thank you for your considered opinion and presentation today, Mr Barry. I also thank the commission staff for their attendance today.

(The witnesses withdrew)

(The Committee adjourned at 5.22 p.m.)

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