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.