Submission No 6

INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

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Submission to the NSW Legislative Council Select Committee on Electoral and Political Party Funding.

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Thank you for the invitation to make a submission to the Committee's Inquiry into Electoral and Political Party Funding. I am reluctant to make any concrete comments on NSW's current regulatory measures, nor to provide recommendations as to whether (and how) this should be changed. Simply put, I am not familiar enough with the state of affairs in NSW to hazard much in the way of informed and considered insight. My fear then is that advice given in ignorance can be worse than no advice at all. Therefore, I think the only real value I may add to the inquiry is to provide an update on changes to New Zealand's regulatory practices adopted in late 2007. Insofar as New Zealand provides a model or comparator for NSW to consider (as indicated by its inclusion in para. 1.37 of the Discussion Paper), the Committee should be aware of these amendments.

1: The passage into law of the Electoral Finance Act 2007.

New Zealand's *Electoral Finance Act* (EFA) came into force on December 20, 2007. Its immediate origins trace back to the 2005 election campaign, although the issues it addresses have been of concern for a number of years. In particular, the campaign activities of members of the Exclusive Brethren (discussed below) drew attention to the relatively lax restraints on so-called "third party" activities (lax, at least, when compared with the regulations that applied to political parties and individual candidates). More broadly, the concern that wealthy individuals or groups might exert an "undue influence" over the election campaign highlighted the secrecy surrounding the way that political parties and candidates raise funds for their campaign activities. The primary aim of the EFA, as finally enacted, is to address these two issues. It does not otherwise markedly change the basic regulatory measures in place in New Zealand (i.e. spending caps apply to the campaigns of individual candidates and political parties, while spending on election-related broadcasting is banned unless paid for through an allocation of money provided by the State at each election).

The basic purposes of the EFA, as well as its particular means of affecting those aims, have been highly controversial. I address the legislation's substantive provisions below. When doing so, however, I try to avoid judging the motivations of the political actors who supported or opposed the EFA. However, I have several general, process-oriented points criticisms regarding the way the EFA became law. I believe these shortcomings heightened, even if they did not entirely cause, the controversy surrounding this legislation. They provide a lesson that NSW may wish to learn from when considering whether (and how) to reform its own regulatory scheme.

1. The Labour-led Government's failure to consult with either opposition parties or the public before introducing its initial proposals to the House created at least the *appearance* of partisanship. I hasten to note that the mere fact not all parties agree to some change in the law does not in and of itself mean the measure is motivated by partisan considerations. Claims that there is a "convention" that all changes to electoral law require a substantial, cross-party consensus seem overdrawn. For one thing, previous practice does not really support the existence of any such uniformly followed, binding convention when changing election law.[1] Nor is the behaviour of all the parties currently touting such a convention completely consistent with it.[2] Nevertheless, the role electoral law plays in a constitutional framework dominated by a sovereign Parliament makes it vitally important that it not be, nor be widely seen to be, a vehicle for one party's advantage over others. It appears to me that the Government's decision to introduce the EFA into the

[1] See, for example, A Geddis, *Electoral Law in New Zealand: Practice and Policy*, LexisNexis NZ Ltd, 2007, at pp. 254-55.

[2] For example, at the 2005 election, the National and ACT parties campaigned on a promise to abolish unilaterally the reserved Maori seats in Parliament, irrespective of the views of other parties in Parliament (or, indeed, Maori voters).

House, and subsequently progress it through the legislative process, on a purely party-line basis raised exactly this spectre in the public mind.

2. There was inadequate consideration of the initial Bill's effect on the individual rights affirmed in the *New Zealand Bill of Rights Act* 1990 (BORA). The pre-introduction BORA "vet" of these legislative proposals by the Crown Law Office was, with respect, overly deferential to the Government's policy preferences. It also failed to analyse adequately the concrete impact of the proposed measures on individuals and groups wishing to participate in the electoral process. Consequently, the original legislative proposals introduced into the House included what many commentators (myself included) believed to be unreasonable restrictions on the rights to free speech and association, as guaranteed by ss. 14 and 17 of the BORA. The fact that the Government (and the House) was not alerted to this problem from the outset left the original legislation vulnerable to significant and justified criticism, as well as forcing the Justice and Electoral Committee to engage in a significant (and hurried) rewrite of its provisions.

3. Due to resistance from the Government's support partners, a number of important measures were removed from the original Bill without allowing the public a full opportunity to discuss them. In particular, a requirement that all significant donors to political parties publicly disclose their identity (as well as an allied proposal to provide some state-funding of political parties to compensate for lost donation revenue) was dropped before the Bill's introduction into the House. This initial failure to openly address the problem of large, anonymous donations to political parties ignored one of the most pressing problems with our electoral funding rules. The fact the original legislation imposed significant restrictions on fundraising by third parties made this basic failure even worse, as it meant politicians were exempting themselves from norms of transparency they believed necessary for everyone else.

4. The failure to address the issue of parliamentary and governmental advertising in a way that is consistent with the Bill's provisions raised legitimate concerns about incumbent advantage at election time. This problem has been compounded by the passage of the *Appropriation (Continuation of Interim Meaning of Funding for Parliamentary Purposes) Act 2007*, as well as the EFA's exclusion of "anything done in relation to a member of Parliament in his or her capacity as a member of Parliament" from a political party's total election expenses.[3] Consequently, there are now three regulatory regimes operating, with an unclear relationship between them.

    - The private funding of election campaigns, as well as spending on election advertising by candidates, political parties (apart from "anything done in relation to a member of Parliament in his or her capacity as a member of Parliament"), and third parties, is regulated by the EFA.
    - The use of parliamentary funding by individual MPs and parliamentary parties is regulated by a mix of legislation (the *Parliamentary Service Act 2000* and the *Appropriation (Continuation …) Act 2007*) and Speaker's Rulings.
    - The "Guidelines for Government Advertising", appended to the Cabinet Manual, regulates the advertising of government policies and programmes.

    A better approach would have been to address the problem of "political funding" in a holistic fashion, rather than try to carve "election funding" off as a separate issue.

2: The Electoral Finance Act's restrictions on "third party" election activities.

The most contentious aspect of the EFA is the various new restrictions it imposes on so-called "third parties" during the election campaign. Such third parties range from the individual voter with a view on a particular candidate running in his or her electorate, right through to groups with nationwide clout that seek to sway the overall outcome of the electoral contest. Before the EFA's enactment, the *Electoral Act 1993*, ss. 221 & 221A, governed the electoral participation of these various entities.

[3] *Electoral Finance Act 2007*, ss. 93 (definition of "party activity"); 94(1)(a).

- Section 221 prohibited the publication[4] of any advertisement that "is used or appears to be used to promote or procure the election of a constituency candidate",[5] or "encourages or persuades or appears to encourage or persuade voters to vote for a party",[6] unless the publication first was authorised in writing by the candidate or party concerned, and included a statement setting out the true name and the address of the person for whom or at whose direction it was published.[7] Should a candidate or party authorise such publications, any costs associated with it then had to be included in that candidate or party's total (and statutorily limited) election expenses.[8]
- Section 221A covered the publication of any other advertisement "relating to an election." These advertisements also had to include a statement identifying the person for whom or at whose direction it is published,[9] but unlike advertisements advocating support for a particular candidate or party, did not require any formal authorisation from any person. As such, there was no restriction on how much third parties could spend on this form of communication.

In practice, these legislative provisions meant most third party election advertisements took the form of either "negative advocacy" or "issue advocacy". The former attacks a candidate or party without then calling on voters to cast their ballots for any particular candidate or party; the latter promotes issues closely connected with a candidate or party and encourages voters to vote on those issues, but does not specifically call on voters to vote for any named party. Such advertisements avoided the s.221 authorisation requirements (and associated spending limits) by not "appear[ing] to encourage or persuade voters to vote for a party"; although s.221A still required them to include the identity of the person responsible for their publication.

During the 2005 election campaign, the activities of several individual members of the Exclusive Brethren Church drew attention to possible shortcomings in this regulatory regime. By distributing a range of pamphlets nationwide that attacked the Labour and Green Parties, as well as calling on voters to vote for "Lower Taxes" or elect "A New Leader", these individuals legally were able to spend some $500,000-$1.5 million in an attempt to influence the outcome of the election. A number of other groups, notably the racing industry and individual unions, also engaged in significant spending on such election-related advertising, although this did not attract nearly the same level of media coverage. This extensive third party activity (at least, extensive when compared to previous election campaigns in New Zealand) raised two potential issues. First, there are basic questions of democratic equality involved where an individual or group uses superior access to wealth to try to affect a particular electoral outcome. The costs associated with large-scale expressive activities bring to the fore a tension inherent in democracy, between the undeniably important values of participant freedom and participant equality. Second, this advertising occurred in a context where both the Labour and National parties spent close to (or even in excess of, if Labour's "pledge card" spending is included in its total) their permitted election expenses. The activities of third parties then provide a potential avenue for political parties to exceed the mandatory cap on their election expenses, via "front" organisations or friendly individuals who coordinate their electoral messages with the party.

The EFA seeks to address the "problem" of third party election-related spending in the following fashion. It first deems the following types of communications to be an "election advertisement":[10]

any form of words or graphics, or both, that can reasonably be regarded as doing 1 or more of the following:

(i) encouraging or persuading voters to vote, or not to vote, for 1 or more specified parties or for 1 or more candidates or for any combination of such parties and candidates:

(ii) encouraging or persuading voters to vote, or not to vote, for a type of party or for a type of

[4] The medium of the publication was restricted to: "any newspaper, periodical, poster, or handbill", and included any advertising broadcasts made over any radio or television station. Therefore, internet advertising fell outside of this regulatory framework.
[5] *Electoral Act 1993*, s.221(1)(a).
[6] *Ibid.* s.221(1)(b).
[7] *Ibid.* s.221(2)(a)&(b). Failing to do so was an illegal practice, punishable upon conviction by a fine of up to $3000.
[8] *Ibid.* s.213(1)(a)&(b); 214B(1). Individual candidates may incur up to $20,000 on election expenses; registered political parties may incur up to $1 million, plus $20,000 per electoral district contested.
[9] *Ibid.* s.221A(1). Failing to do so was an illegal practice, punishable upon conviction by a fine of up to $3000.
[10] *Electoral Finance Act, 2007*, s.5(1).

candidate that is described or indicated by reference to views, positions, or policies that are or are not held, taken, or pursued (whether or not the name of a party or the name of a candidate is stated).

There are a number of specific exceptions to this broad definition,[11] including any editorialising that appears in a "periodical" or on its website; the content of any radio or TV programme (other than advertising); a book sold for no less than commercial value (provided it was to be published irrespective of any election); any document published directly to the shareholders or members of incorporated or unincorporated bodies; as well as a blog entry (where the publication is on a "non-commercial basis").

The EFA then goes on to prescribe a "regulated period", during which statutory controls will apply to election advertisements. This regulated period is defined as:[12]

(a) ***where a general election is held in the year in which Parliament is due to expire, whichever is the longer of the following periods:***

(i) the period that commences on 1 January of that year and ends with the close of polling day; or

(ii) the period that commences 3 months before polling day and ends with the close of polling day:

(b) … where a general election is held in any other year on the dissolution of Parliament, the period that commences 3 months before polling day and ends with the close of polling day.

Any election advertisement published during this regulated period—with "publish" widely defined to encompass not only disseminating physical advertising material, but also making it available through film or broadcast media, the internet, or any other electronic medium[13]—must include the name and home or business address of its "promoter".[14] The following restrictions apply to who may publish such election advertisements during the regulated period, as well as how much can be spent on them:

- Any person or group may spend up to $12,000 (GST inclusive) nationally, or $1000 (GST inclusive) in respect of any individual candidate in a particular electoral district, on election advertisements during the regulated period without having to comply with any additional regulatory requirements.[15]
- Any person or group wishing to spend in excess of this amount on election advertisements during the regulated period first must register as a "Third Party" with the Electoral Commission.
    - Foreign residents, corporations or organizations are not eligible to register as Third Parties; nor may a range of individuals or groups connected with political parties, individual candidates, or government organisations.[16]
    - Any individual or group wishing to register as a Third Party must provide a range of information to the Electoral Commission.[17]
    - A Third Party also must appoint an individual to act as its "financial agent",[18] who becomes personally responsible for the expenditures of the Third Party and for meeting all donation disclosure requirements (discussed below).
- A Third Party may then incur "election expenses" of up to $120,000 (GST inclusive) nationally, or $4000 (GST inclusive) in respect of any individual candidate in a particular electoral district.[19] The

[11] *Ibid.* s. 5(2).
[12] *Ibid.* s. 4(1).
[13] *Ibid*.
[14] *Ibid*. s.63(2)(a). An election advertisement's "promoter" is the "person on whose initiative [it] is published"; *ibid.* s.4(1).
[15] *Ibid*. s.63(3)(d).
[16] *Ibid*. s.13(1)&(2).
[17] *Ibid*. s.15.
[18] *Ibid*. s.8. In addition, a third party that incurs more than $30,000 in election expenses must appoint an auditor to report on its election return; *ibid*., s.11.
[19] *Ibid*. s.118.

definition of an "election expense" mirrors that which applies to political parties.[20] In essence, it encompasses all costs authorised by the Third Party or its financial agent that are associated with preparing, making and publishing an election advertisement during the regulated period.[21] Specifically exempted from this definition are the costs of travel, the conduct of opinion polls or surveys, labour provided free of charge, and the cost of replacing election advertisements destroyed by vandals or other uncontrollable events.[22]

- A range of offences applies to election advertisements published during the regulated period in breach of these basic rules. These offences take the form of "illegal practices" (attracting a fine of up to $40,000 for financial agents, or $10,000 for any other person),[23] and "corrupt practices" (punishable by up to 2 years imprisonment, a fine of up to $100,000 for financial agents or $40,000 otherwise, as well as entry on the "corrupt practices list").[24]
    - It is an "illegal practice" to publish an election advertisement during the regulated period without including the name and home or business address of its promoter.[25]
    - It is an "illegal practice" to spend more than $12,000 nationally, or $1000 in respect of any individual candidate in a particular electoral district, on election advertisements during the regulated period unless the promoter of the election advertisement is the financial agent of a Third Party;[26]
    - It is an "illegal practice" to enter into any agreement, arrangement or understanding to circumvent these $12,000/$1000 limits, as is it for a body corporate to split itself into two or more bodies for the purpose of circumventing these limits;[27]
    - It is an "illegal practice" to publish an election advertisement at any time that that encourages or persuades, or appears to encourage or persuade, voters to vote for a party or candidate, unless the financial agent of the party or candidate first gives written authorisation;[28]
    - It is a "corrupt practice" for any person to promote an election advertisement during the regulated period and thereby incur election expenses in excess of $120,000/$4000, unless that person is the financial agent of a Third Party acting in that capacity (in which case, the particular offence provisions described below apply);[29]
    - Only the financial agent of a Third Party may incur election expenses in relation to an election advertisement published by that Third Party during the regulated period.[30] Wilfully incurring such expenses is a "corrupt practice", while in any other case it is an "illegal practice";[31]
    - It is an "illegal practice" to enter into an agreement, arrangement or understanding to circumvent the requirement that only the financial agent of a Third Party may incur election expenses in relation to an election advertisement published by that Third Party during the regulated period;[32]
    - Should a Third Party's total election expenses exceed the $120,000/$4000 maximums, its financial agent commits either a "corrupt practice" (if he or she knew the maximums were exceeded) or else an "illegal practice", unless he or she can prove all reasonable steps were

[20] *Ibid*. s.94.
[21] *Ibid*. ss.113 (definition of "third party activity"); 114.
[22] *Ibid*. s. 114(2).
[23] *Ibid*. s.143.
[24] *Ibid*. s.142.
[25] *Ibid*. s. 63(4).
[26] *Ibid*. s. 63(4).
[27] *Ibid*. s. 64.
[28] *Ibid*. s. 65.
[29] *Ibid*. s. 66.
[30] *Ibid*. s. 116.
[31] *Ibid*. s. 117(1).
[32] *Ibid*. s. 117(2).

taken to ensure the election expenses did not exceed the maximum;[33]

- It is a "corrupt practice" to enter into an agreement, arrangement or understanding to circumvent the $120,000/$4000 maximum cap on election expenses.[34]

Immediate responsibility for overseeing this regulatory regime lies with the Chief Electoral Officer and the Electoral Commission. If either body believes a person has committed one of the offences detailed above, it must report the facts underpinning the belief to the Police, unless it "considers the offence is so inconsequential that there is no public interest in reporting those facts."[35] The Police then decide independently whether there is sufficient evidence and public interest to prosecute the matter. Any such prosecution must be brought "within six months of the date on which the prosecutor is satisfied there is sufficient evidence to warrant the commencement of proceedings",[36] and in no case can be commenced later than three years after the alleged offence occurred.[37]

There are a number of questions regarding this regulatory framework:

- The most basic is whether it is legitimate to constrain the participation of individuals at election time, by imposing limits on how much they may spend on election-related communications. Does the desire to maintain a measure of participant equality during the election campaign trump or outweigh the right of individuals to express their opinions as to how voters should cast their ballots?
  - What is the harm/threat that unconstrained third party spending poses (i.e. is there any evidence it has an "undue influence" on the election outcome)?
  - Is the mere perception or fear that undue influence *may* result sufficient to justify restrictions (i.e. is a purely prophylactic justification enough)?
  - Is it true that election advertisements simply provide voters with information to form better choices (i.e. what is *really* lost when spending limits are placed on this sort of communication)?
- Even if it is legitimate in theory to impose some kind of limit on election-related advertising, are the EFA's provisions an appropriate constraint on expressive rights?
  - The maximum election expenses that a Third Party may incur only equates to 5% (1/20th) of the maximum allowed for national political parties, or 20% (1/5th) of the maximum allowed for an individual candidate;
  - The period during which these limits apply may (in practice) extend for up to 11 months.
- Even if these spending restrictions in theory allow for adequate communication with the voting public, what types of communication will qualify as an "election advertisement"?
  - In particular, what types of communication can ***"reasonably be regarded as … encouraging or persuading voters to vote, or not to vote, for a type of party or for a type of candidate that is described or indicated by reference to views, positions, or policies that are or are not held, taken, or pursued (whether or not the name of a party or the name of a candidate is stated)"***?
  - The interpretation of this definition must take into account (i) the NZBORA, s.14 guarantee of freedom of expression; (ii) the legislative history to the EFA (especially the fact that a definition of "election advertisement" encompassing communications that can "reasonably be regarded as … taking a position on a proposition with which one or more parties or one or more candidates is associated" was dropped from the Bill).
  - Consequently, I suggest that to meet the definition of an "election advertisement", a communication must link an issue to the election contest either directly (i.e. through using language such as "vote for the Environment"; "put Education first this election"; "don't throw our progress away at the ballot box"), or through contextual factors that allow for no other

[33] *Ibid*. s. 122(1).
[34] *Ibid*. s. 122(2).
[35] *Ibid*. ss. 70; 132.
[36] *Ibid*. s. 140(2(a).
[37] *Ibid*. s. 140(2(b).

reasonable interpretation of the communication (i.e. issuing an "issues scorecard" shortly before an election, which compares the parties' positions on an issue in a favourable or unfavourable fashion).

- In particular, communications that simply criticise a government policy or legislative proposal (especially while Parliament is still sitting) will, I suggest, virtually always fall outside the definition of an "election advertisement" *unless* they then go on to specifically call for a vote against the government.

- Even if only a relatively narrow range of communications are deemed to be "election advertisements", how will the Chief Electoral Officer and Electoral Commission decide if a breach of the EFA is "so inconsequential that there is no public interest in reporting" it to the Police?
  - Much of the potentially onerous effect of the EFA (i.e. requiring any person carrying a placard that reads "Bring Down The Government!" to include their name and address on it) likely will be mitigated by the judicious application of common sense.
- A final, overriding question then is, will the EFA's restrictions make that much of a difference in practice?
  - The only real change for individuals or groups spending less than $12,000/$1000 is that they now will have to include their names and addresses on internet sites (whereas previously only pamphlets and the like required such information);
  - The small number of individuals and groups wishing to spend more than $12,000/$1000 may simply word their messages in an issue-oriented manner that falls outside the definition of "election advertisement", while having much the same communicative effect;
  - The leadership of groups (such as unions, churches, etc) may still communicate with their membership in any manner without any form of regulation applying;
  - Any group able to meet the criteria of having 500 current financial members always has the option of registering as a political party, thereby gaining a higher maximum "election expenses" of $1 million.

3: The Electoral Finance Act's restrictions on fundraising for electoral purposes.

Before the EFA's enactment, the controls on private funding of individual candidates' and political parties' election activities were relatively *laissez-faire*.[38] Candidates and registered parties technically were required to disclose publicly the identity of any donor giving more than $1000/$10,000. However, a number of loopholes meant that this disclosure requirement was, in effect, voluntary in application.

- Donations could be given "anonymously" if the identity of the donor was not "known" to the recipient. In such cases, only the amount of the donation and the fact it was from an "anonymous" source needed to be disclosed.
- Donations could be given to a conduit entity (such as a trust), which would then pass them on to the candidate/party. In such cases, only the conduit entity need be disclosed, even if the recipient knew the identity of all persons giving to that entity.
- A large donation could be split amongst several "straw donors", so that each individual donation falls beneath the disclosure threshold. In such cases, no disclosure was required at all.

The *Electoral Finance Bill*, as originally introduced to the House, did not address this issue in respect of candidates and political parties (although it did require Third Parties to disclose the identity of all donors giving more than $500, as well as prohibiting them from receiving anonymous donations greater than this amount). Following criticism of this lacuna by a range of submitters, the Government and Green members of the Justice and Electoral Committee agreed to include the following transparency measures in the legislation.

- Every person who receives a donation on behalf of a candidate, party or Third Party must, within

[38] See generally A. Geddis, "Hide behind the targets, in front of all the people we serve: New Zealand election law and the problem of 'faceless' donations", 12(1) *Public Law Review* 51 (2001).

10 working days, transmit that donation to the candidate's, party's or Third Party's financial agent.[39] If the recipient of a donation exceeding $1000 knows the identity of the donor, they must disclose it to the financial agent.[40] Failing to comply with these requirements "with the intention of concealing the identity of the donor" is an offence, punishable by a fine of up to $40,000.[41]

- Where a donation is funded from "contributions" (i.e. money or the equivalent given to a donor directly or indirectly in the knowledge or expectation it will be wholly or partly included in or used to fund a donation), the donor must disclose this fact to the financial agent when making the donation.[42] If any of the contributions exceed $1000, the donor must disclose the total value of this contribution, as well as the name and address of the contributor.[43] Where the financial agent has reasonable grounds to believe the donor has failed to comply with this requirement, he or she must return the entire donation.[44] If a donor fails to comply with any of these requirements with the intention of concealing the identity of the contributors, he or she commits and offence punishable by a fine of up to $40,000.[45]
- Where a donation is being "transmitted" (i.e. is made by a person to whom a donor gives or sends a donation for transmittal to a candidate, party or Third Party), the transmitter must disclose this fact to the financial agent.[46] He or she must also disclose the name and address of the donor, with the donation to be treated as anonymous if this is not known.[47] If a transmitter fails to comply with any of these requirements with the intention of concealing the identity of the donor, he or she commits and offence punishable by a fine of up to $40,000.[48]
- Where any financial agent receives a donation over $1000 in circumstances where the financial agent does not know, or cannot reasonably be expected to know, the identity of the donor, he or she must (within 20 days) pay to the Electoral Commission the amount of that donation (less $1000).[49] It is a "corrupt practice" to enter wilfully into an agreement, arrangement or understanding to circumvent this limit on anonymous donations, or an "illegal practice" in all other cases.[50]
- If a Third Party's financial agent receives a donation in excess of $1000 from an "overseas person"—being a person not resident in New Zealand and not a New Zealand citizen or registered elector, or a company not registered in New Zealand, or an unincorporated body with its head office or principle place of business outside New Zealand—he or she either must return the donation (less $1000) to the donor (if practicable), or else pass that amount over to the Electoral Commission.[51] It is a "corrupt practice" to enter wilfully into an agreement, arrangement or understanding to circumvent this limit on anonymous donations, or an "illegal practice" in all other cases.[52]

However, when designing these disclosure rules, the Select Committee (and Parliament thereafter) also believed it necessary to provide an avenue by which donors may continue to fund political parties or Third Parties without having to disclose their identity. It was feared that, absent such an avenue, public disclosure might (i) dissuade some donors from giving, and thus (ii) make it impossible for parties or Third Parties to raise adequate funds for their election activities. Consequently, the *EFA* requires that the Electoral Commission act as a neutral conduit to pass along anonymous donations to parties and/or Third Parties, as follows:

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[39] *Electoral Finance Act, 2007*, s. 23.
[40] *Ibid*. s. 28.
[41] *Ibid*. s. 29.
[42] *Ibid*. ss. 21(2) (definition of "contribution"); 24(2)(a).
[43] *Ibid*. s. 24(2)(c)&(3).
[44] *Ibid*. s. 24(4).
[45] *Ibid*. s. 25.
[46] *Ibid*. ss. 21(2) (definition of "transmitter"); 26(1)(a).
[47] *Ibid*. ss. 26(b)&(2).
[48] *Ibid*. s. 27.
[49] *Ibid*. s. 21(2) (definition of "anonymous"); 30.
[50] *Ibid*. s. 31(1).
[51] *Ibid*. s. 32.
[52] *Ibid*. s. 33.

- A donor wishing to give more than $1000 to a political party or Third Party without disclosing his or her identity may send the donation by way of a cheque, cash or bank draft to the Electoral Commission; along with the intended recipient of the donation, the donor's name and address, and (where the donation is made up of contributions) the name and address of any contributors giving more than $1000;[53]
- The Electoral Commission must forward such donations to the relevant political party or Third Party on a monthly basis, or a weekly basis during the period between writ day and the return of the writ;[54]
- It is an offence for any person (including both the Electoral Commission and the donor) to disclose to anyone except an "authorised person" the identity of a donor who has made, or intends to make, a donation via the Electoral Commission in such a manner that indicates or suggests such a donation has been, or will be, made;[55]
- A political party may receive up to $240,000 in an election cycle from anonymous donations channelled through the Electoral Commission, with no more than $36,000 coming from any individual donor.[56] A Third Party may receive up to $12,000 in an election cycle from anonymous donations channelled through the Electoral Commission, with no more than $1,800 coming from any individual donor.[57]

The actual public disclosure of a candidate, party or Third Party's funding sources takes place through donation returns filed with the electoral agencies:

- Political parties are required to file an annual return with the Electoral Commission by 30th April, containing the details of disclosable donations received in the previous calendar year;[58]
- Candidates are required to file a post-election return within 70 working days of polling day with the Chief Electoral Officer;[59]
- Third Parties are required to file a post-election return within 70 working days of polling day with the Electoral Commission.[60]

These returns all must include the following details regarding any donations that exceed a threshold amount (being $10,000 for political parties, $1000 for candidates, and $5000 for Third Parties).

- The name and address of all individual donors who have given donations that aggregate to more than the threshold amount, as well as the amount of such donations and the date given;[61]
- Whether a particular donation was funded by multiple contributions; and if so, whether any of the contributors to that donation have donated in the aggregate more than the threshold amount; and if so, the name and address of the contributor, as well as the amount of the contribution and date it was given;[62]
- The amount of any anonymous donation in excess of $1000 and the date it was received, as well as the amount and date of any payment made to the Electoral Commission;[63]
- The amount of any donation from an overseas person in excess of $1000 and the date it was received, as well as the amount and date of any payment made to the Electoral Commission;[64]
- The amount of any donations received via the Electoral Commission, as well as the date

[53] *Ibid*. s. 38.
[54] *Ibid*. s. 42.
[55] *Ibid*. s. 43.
[56] *Ibid*. ss. 39(1)&(3).
[57] *Ibid*. ss. 39(2)&(4).
[58] *Ibid*. s. 51(1).
[59] *Ibid*. s. 45(1).
[60] *Ibid*. s. 58(1).
[61] *Ibid*. ss. 45(1)(a)&(2); 51(1)(a)&(2); 58(1)(a)&(2).
[62] *Ibid*. ss. 45(1)(b)&(3); 51(1)(b)&(3); 58(1)(b)&(3).
[63] *Ibid*. ss. 45(1)(c)&(4); 51(1)(c)&(4); 58(1)(c)&(4).
[64] *Ibid*. ss. 45(1)(d)&(5); 51(1)(d)&(5); 58(1)(d)&(5).

received.[65]

A further disclosure obligation applies to any political party that receives a donation that by itself, or when aggregated with any other donations received in the previous 12 months, exceeds $20,000. The financial agent, within 10 days of receipt, is required to file a return with the Electoral Commission containing the name and address of the donor, the amount of the donation, and the date received.[66]

This more extensive disclosure regime contains a number of potential problems:

- In general, there is a measure of ambiguity as to exactly what will constitute a "donation". Two particular questions arise:
    - Do membership fees or charges count as a donation? For example, if a party should create a special category of member open only to those who pay a $50,000 membership fee, does that payment count as a donation to the party for the purposes of disclosure?
    - Does access to party officials or candidates carry a notional value? For example, if a party should charge $15,000 to attend a gala dinner with the party leadership, and the cost of the meal/venue is only $1000 per head, does the extra $14,000 constitute a "donation"? On the other hand, does it simply represent the "reasonable market value" of an evening's worth of access to those individuals?[67]
- With respect to donations to a third party, these only need be disclosed if they are intended "to fund, or to contribute directly or indirectly towards the funding of, the election expenses of the third party".[68] Consequently, any donation given to a third party without any indication (explicit or reasonably inferred in the circumstances) that it is to be used for the purpose of publishing election advertising does not need to be disclosed.[69] A donor may thus give a third party a large sum of money to be used "for any general purposes of the third party",[70] thereby enabling the third party to take a like amount from its general fund and use it to pay for election advertising, without any disclosure being required.
- The threshold for disclosure remains relatively high, especially with regard to political parties. The party's financial agent must know the identity of donors who give a party $1000-$9,999 in any given year, but he/she is not required to disclose this to the Electoral Commission (and hence the public). Consequently, it is still legal to give $9,999 to a party in all three years of the election cycle, to a total of $29,997, without any form of public disclosure.
- Furthermore, an individual can give up to $36,000 to the Electoral Commission each election cycle to pass on to the party, thereby giving $65,997 to the party without ever having to appear on any public disclosure record. While it would be an offence for the donor to tell the party he or she has done so (always assuming this could be detected), the public would also remain in the dark as to the donor's identity.
- Furthermore, should a donor's husband or wife happen to make the same donation decision, it would permit donations of $131,994 from a single household without any public disclosure being required.

[65] *Ibid*. ss. 51(1)(e)&(6); 58(1)(e)&(6).
[66] *Ibid*. s. 54.
[67] *Ibid*. s. 21(2) (definition of "party donation").
[68] *Ibid*. s. 21(2) (definition of "third party donation").
[69] *Ibid*. s. 21(3).
[70] *Ibid*. s. 21(3)(c)(i).