

The Secretary

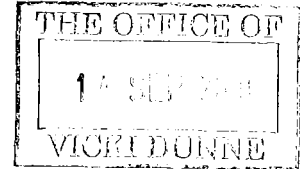
Standing Committee on Justice and Community Safety

Inquiry into the Campaign Finance Reform

Legislative Assembly for the Australian Capital Territory

GPO Box 1020

CANBERRA CITY 2601



Dear Secretary

Inquiry into Campaign Finance Reform

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	10
DATE AUTH'D FOR PUBLICATION	15.9.10

I am pleased to lodge the submission for the Inquiry into the *Inquiry into Campaign Finance Reform* by the Canberra Liberals.

In summary, the Canberra Liberals:

- i. Commend the Assembly for considering this important legislative reform;
- ii. Recognise the importance of informing and engaging the electorate during an election campaign;
- iii. Notes the inherent dangers of 'deep pocket' campaigning, that allows one party to dominate a campaign through sheer volume of expenditure, especially with one party generating massive revenues through poker machines;
- iv. Submits this unbalanced approach is not in the best interests of open debate or accountable democracy;
- v. Submits that legislative regulation is necessary to redress this problem;

- vi. Submits that a legislative approach can and should be reasonable and adapted to offer a broader range of parties a better say in political campaigning;
- vii. Submits that these reforms have broad support across a range of participants and observers and is in the best interests of more equitable and open election campaigns.

Our submission also includes background and information from a variety of sources to support our contentions.

I hope the committee finds our submission to be of benefit in their deliberations.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'W Rosser', written in a cursive style.

Winifred Rosser
President, Canberra Liberals

INTRODUCTION

Our system of democracy is designed to give an equal voice to all members in society.

As campaigning becomes a more professional and organised activity, we have seen the costs of actually engaging in political debate become more complex, more crowded, and most importantly, more costly.

We can see from the electoral returns from the last Territory election that expenses were counted in millions of dollars, all for a Territory of around 250,000 voters. Federally, tens and even hundreds of millions are expended, while the last American election has the distinction of being the first billion dollar election campaign.

With such expenditures now seemingly being the price of entry into political campaigning, it is more than evident that the perception that elections can be 'bought' is an issue that should properly be addressed.

The call for reform is not a partisan call from a single side of the political spectrum. Both Kevin Rudd and Malcolm Turnbull have called for reform at a federal level. Both Nathan Rees and Barry O'Farrell have called for reform. Academics and observers all note the concerns and problems with a completely unregulated market.

Furthermore, it must be recognised, in the context of the ACT, the problem is exacerbated by the conflict of interest that exists right at the heart of the Labor Party campaign machine. In the ACT, the Labor Party is funded by the Labor Clubs, one of the most dominant players in the poker machine industry, and an industry that the Labor Party is charged with being the regulator. Other poker machine clubs, such as the Tradies, are controlled by Trade Unions and also make significant contributions. This raises a serious and evident perception of a conflict of interest between the party in power as regulator and the funding stream that keeps that party in power as beneficiary. The conflict can be no clearer than the call issued by Minister Andrew Barr to reduce poker machine numbers, while simultaneously the Labor Club is lobbying to gain more poker machines for themselves.

This debate is going on around the country and around the world, and has been for some time. While the solution may be complex, it can certainly be achieved. Both Canada and New Zealand have introduced legislation to regulate campaign financing.

The Terms of Reference for the Inquiry into Campaign Finance Reforms address several criteria. They are to examine:

- a) regulation of donation size;
- b) regulation of political party campaign expenditure;
- c) regulation of third party campaign expenditure;
- d) disclosure laws;
- e) public funding;
- f) regulation of personal candidate funding;
- g) regulation of corporate and union donations; and
- h) any other relevant matter.

a) Regulation of Donation Size.

The Canberra Liberals support caps per financial year on donations from individuals and corporations. The caps may be set at different levels. This removes the possibility of a perception of a conflict of interest, as outlined above, as well as restoring the perception that 'democracy is not for sale.' This position is well known and has broad support for reform. For example, the United States has a cap of \$2,300 for each primary and presidential candidacy.

It is important that the cap level should be a reasonable amount. Reasonable in that it is not so low as to overtly limit a person's right or ability to meaningfully participate in the political process, nor so high that the perception of entitlement or influence becomes problematic. As Senator Nick Xenaphon said recently in the media:

“A \$1,000 donation makes you a supporter, a \$100,000 donation makes you an owner.”

The Labor Clubs provided over \$550,000 in the 2008/09 year alone.

In a paper submitted to *Australian Review of Public Affairs* in September 2007, Carmen Lawrence wrote an extensive piece titled "*Election 2007: campaign finance reform*". Ms Lawrence provides a very frank overview of the situation. She says:

What we have not achieved is a more equal distribution of the power to influence government decisions between elections; we cannot claim that all citizens enjoy an equal opportunity to participate in the political processes and decisions which affect their wellbeing and status.

Nor are all candidates and parties equally able to present their credentials and policies to the electorate, and some of this inequality derives from the way we fund political parties and election campaigns.

Ms Lawrence further notes:

... campaign donations do more than reduce electoral competition; they also strip average voters of equality at the ballot box ... Apart from the political inequality inherent in the system, the possibilities for corruption and influence peddling are real.¹

On 17 August 2009, the Liberal Leader of the Opposition, Barry O'Farrell, issued a statement calling for reform, saying it would:

help allay community concerns about a "decisions for donations" culture. Similar reforms have been successfully implemented in countries such as New Zealand, Canada and Britain, which have comparable democratic institutions and histories.²

Labor Premier Nathan Rees was reported on 5 March this year by the ABC as saying: Raising standards is long overdue in NSW. By restoring confidence in decision-making, campaign finance reform would put the public back at the centre of government.³

¹ '*Election 2007: Campaign finance reform*' Carmen Lawrence, *Australian Review of Public Affairs* September 2009

² Campaign-finance reform long overdue, *Barry O'Farrell, August 17, 2009*

³ *Rees wants to be campaign reform 'cheerleader'* ABC Online, March 5, 2009

The Canberra Liberals believe there is broad support for capping donations and also that it sound public policy.

b) Regulating Campaign Expenditure

This is one of the most crucial aspects of reform, and one that is most starkly apparent in the ACT due to the imbalance of poker machine revenues flowing from the Labor Clubs to the Labor Party.

The ability to 'buy' elections is a factor that distorts rather than supports democracy.

It should also be noted by the Committee that limits on expenditure by parties and individuals is by no means a new or novel idea.

The Electoral Reform Green Paper: *Donations, funding and expenditure*, of December 2008 notes that "The *Commonwealth Electoral Act 1902* contained a limit on candidates' electoral expenses of £250 for a Senate candidate and £100 for a House of Representatives candidate, and required candidates to lodge returns detailing their expenses.

Canada, New Zealand, and the United Kingdom limit expenditure on elections with a set cap. Canada caps expenditure by reference to the number of enrolled electors. The United States has a system under which political parties and candidates can agree to limit their expenditure in exchange for receiving public funding for their campaigns. The funding is paid subject to proof of their expenditure.

Once again, a crucial element is the setting of a reasonable limit. The Canberra Liberals believe there is a right and duty for political participants to disseminate information and an equal right and interest for electors to receive it.

As a suggestion, linking the expenditure to the electoral roll may create a reasonable basis on which to set expenditure. This figure should be high enough to enable a range of forms of communications in a variety of mediums yet no so much as to dominate all of them throughout a campaign.

At three dollars per elector, for example, this would result in about \$750,000 – enough to run a reasonable campaign.

Without a limiting of expenditure, the Canberra Liberals submit the other reforms would be purely cosmetic, and the true purpose of reform, to prevent elections becoming a contest of expenditure rather than policy would not be met.

c) Regulating Third Party Expenditure.

This is another area that needs regulation. It is part of the regime in other jurisdictions, for example the Canada Elections Act 2000.

This factor was raised by Barry O'Farrell in his call for campaign finance reform in the NSW context in August 2009.

Under our model, limits will apply to groups other than political parties who seek to influence voters during a campaign. Without this provision, candidates or parties could use special interest groups or other "third parties" to circumvent limits.⁴

That other parties have a legitimate interest is not doubted, what is equally without doubt is that, without concomitant limits on third party expenditure, any limits on party expenditure would easily be nullified and the point of the legislation would be negated.

Currently, there is a striking anomaly regulating 'associated entities' and their campaign contributions, but which specifically excuses clubs, including those owned by unions that make political donations from club business activities, from disclosing details of clients who buy liquor or food; or details of amounts received through the proceeds of gambling. This alteration was passed during the last term of the Labor majority government and has the effect of creating a clearly unequal situation for clubs and unions, who can contribute completely free of the disclosure requirements forced upon all other support groups.

⁴ Campaign-finance reform long overdue, *Barry O'Farrell, August 17, 2009*

This was a blatant misuse of majority power and a prime example of the principle that, whatever laws are introduced, they should be applied equally to all contributing entities, without an obvious and partisan exemption.

d) Disclosure Laws.

As noted in Carmen Lawrence's paper on Electoral Reform, Democratic Audit of Australia researchers Sally Young and Joo Cheong Tham (2006) 'concluded that the effectiveness of the disclosure regime is limited by a general failure to specify the nature of contributions and delays in that disclosure.'⁵

The Canberra Liberals believe that disclosure laws are an integral part of any open and accountable electoral system. The current system of disclosures above a limit, set at a reasonable amount, should require only minor modifications to be included in the reforms proposed. However, which laws are enacted would have to be closely monitored.

Again, a reasonable limit must be kept in mind to allow and encourage smaller donors to participate, while larger donations are open and transparent.

e) Public Funding

It is arguable that, if donations are to be capped, an appropriate amount of public funding be made available to enable reasonable debate to be conducted.

The policy basis for this is well exemplified in Graeme Orr's NSW Law Review article:

It needs to be realised that genuine democracy requires parties to be able, in rough equality, to afford to commit resources to *policy generation*, and not simply campaigning.⁶

Currently, there is a level of public funding for ACT elections, based on the amount of votes gathered. This seems to have been a robust model.

⁵ 'Election 2007: Campaign finance reform' Carmen Lawrence, Australian Review of Public Affairs September 2009

⁶ "The Currency of Democracy: Campaign Finance Law in Australia" Graeme Orr [UNSWLawJl 1; (2003) 26(1) University of New South Wales Law Journal 12

However, the quantum set is smaller for Territory elections than Federal elections, even though the cost of campaigning is identical in both instances. Newspapers, TV stations and Radio stations do not charge a different amount for advertising, and printing and distributing material is a constant expense.

The Canberra Liberals endorse matching the public funding for local elections to the same amount per vote as the Federal election funding.

f) Regulation of personal candidate funding.

The Canberra Liberals supports the introduction to limits of personal candidate funding, for the same reasons outlined for party funding. Limits to party funding would be nugatory if it were not part of the matrix and it would be all too simple for funding bodies such as the Labor Clubs to avoid the purpose of the reforms by simply funding individual candidates rather than officially supporting the party.

g) Donations from corporations and Unions.

Corporations and Unions should be subject to the same laws noted in our submission on the caps to donations and expenditure. Of particular note, Corporations and Unions need to be monitored to ensure they are not used as a mechanism to circumvent or frustrate the reforms currently being considered.

h) Other Matters – Constitutional Issues.

Opponents to Campaign Finance reform will raise the issue of the implied constitutional freedom of political communication.

This issue is addressed in detail in the Federal Government's Green Paper, and makes the following important points:

Furthermore, the Court found that the freedom of political communication is not absolute: the freedom is limited to the extent necessary for the effective operation of the system of representative and responsible government in Australia.

A two-part test for determining whether a law infringes the implied freedom of political communication was outlined by a full bench of the High Court in *Lange v Australian Broadcasting Corporation* and refined by McHugh J, supported by Gummow, Hayne and Kirby JJ, in *Coleman v Power*⁷ as follows. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?⁸

It is submitted that the proposed reforms in fact address an imbalance in the current political landscape, that the right to communicate is currently being infringed by the massive imbalance in funding and expenditure.

Furthermore, the proposed reforms do not, as our party understands it, limit communication, just limits the way one party might use financial dominance to effectively silence other voices. Therefore, such reforms would meet the tests by being reasonably appropriate and adapted to serve a legitimate purpose.

⁷ *Coleman v Power* (2004) 220 CLR 1.

⁸ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at paragraphs 95–96, 195–196, and 211.

The issue is also discussed in depth in the Federal Labor Government's Electoral Reform Green Paper: *Donations, funding and expenditure, of December 2008*, where it notes in Part 7 that:

Other western democracies, including the United States, Canada and the United Kingdom, seek to balance the individual right to freedom of political association and expression against the public interest in minimising the risk of undue influence or corruption in their electoral systems, by limiting the amount individuals and organisations can donate to political parties, independent candidates and others in the political process.⁹

It is not true to say that the implied freedom prevents the introduction of any law, just unreasonable ones.

As noted in the ACT TV Case:

'Parliament may regulate the conduct of persons to prevent intimidation and undue influence, even though that regulation may fetter what otherwise would be free communication.'¹⁰

As we have stated throughout this submission, a reasonable limit is the key to avoiding a potential constitutional issue.

The importance of complete reform.

Of crucial note is the importance that any reform must be a complete package of reforms. Failure to do so will result in failure to meet the intent and purpose of the reforms. As noted, regulating maximum expenditure by a political party is completely ineffective if another party can spend that money 'by proxy.'

Similarly, thought needs to be given to prevent 'in concert' behavior; that is, a range of smaller players all running campaigns which purport to be under the cap, but which

⁹ 7.27 *Federal Government Green Paper: Donations, funding and expenditure, December 2008*

¹⁰ *ACT TV* (1992) 177 CLR 106 at 142, with similar comments by Gaudron J at 217 and McHugh J at 235.

are identical or substantially similar ads run deliberately as part of a coordinated campaign. These issues have been addressed in the United States effectively.

CONCLUSION.

The Canberra Liberals believe it is important and timely that campaign finance reform be considered by the Assembly.

The Canberra Liberals commend these reforms to the Committee.