28 June 2023

Ms Elizabeth Williams
Chair,
Electoral Review Expert Panel, Victoria
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Dear Ms Williams,

I refer to your request for a submission to your review. Due to a heavy load of other commitments, I have not had the time to address your terms of reference in any detail, but I offer these general suggestions, in the hope that they provide some assistance.

Expenditure limits and political communication

While Victoria has imposed caps on political donations, it has not yet imposed caps on campaign expenditure. The two, however, need to operate together to be effective. If donation caps reduce the size of donations, but expenditure is unlimited, it creates an environment that encourages corruption and the avoidance of legal constraints to maintain high levels of expenditure. If, however, overall campaign expenditure is strictly limited and enforced, so parties (taking into account public funding and expenditure caps) know they only have to raise an amount of $X over four years to fund their election campaign, it removes the pressure to act corruptly or to breach the campaign finance laws.

It also has the benefit of freeing up party structures from the high administrative and time burdens of perpetual fund-raising. Parties might even be able to focus more on policy development and nurturing high quality candidates. Indeed, parties might be able to attract high quality candidates if the role of candidate/Member did not involve scrounging for donations and attending unrelenting fund-raising events. The whiff of corruption around political donations and donors is enough to put off many good people from seeking to be candidates for parties in election. That same whiff corrodes public trust in the system of government and damages the reputation of politicians.

The amount expended by political parties during election campaigns is excessive and unnecessary. It is the consequence of ratcheting. Each party has a strong incentive to spend more than its main competitor, ratcheting up the level of spending with no overall benefit to the community. The excessive amount spent on political advertising does not have the effect of creating a better informed voting public. It just results in repetitive advertising which annoys the public and frequently turns them off, causing them to cease to pay any attention to the campaign. More could be done to help inform the electorate with much less being spent.

The constitutional constraints

Any restriction or burden placed by the law on political advertising will amount to a burden on the implied freedom of political communication. The implied freedom does not constitute a right that anyone can exercise. It operates instead as a limit on legislative (and possibly executive) power at both the Commonwealth and the State level.

To be valid, a law that burdens the implied freedom (eg by limiting expenditure on political communications or capping the donations that go to that expenditure) must be for a legitimate purpose that is compatible with the system of representative and responsible government (eg preventing corruption or preventing the voices of some drowning out the voices of others). It must also be reasonably appropriate and adapted to advance that legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. To be so, it must satisfy a proportionality test that justifies the law as 'suitable' (i.e. it has a rational connection to its purported purpose), 'necessary' (i.e. there is no obvious and compelling alternative reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom) and 'adequate in its balance' (i.e. the importance of the purpose served by the law outweighs the extent of the restriction on the freedom) (see the test as set out in the cases of *Lange*, *McCloy* and *Brown*).

This test has been applied to NSW laws that impose both caps on donations and expenditure in cases such as *McCloy v New South Wales* and the three *Unions NSW v New South Wales* cases, so most of the constitutional issues are now relatively clear and good guidance can be given for the constitutionally valid enactment of any such law.

In those cases, the High Court has accepted that 'equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution' (*McCloy*, [45]). That means that some voices can be quietened so that the voices of others can be heard. The 'risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty' (*McCloy,* [45]). This could include levelling the playing field by imposing caps on political expenditure and taking action to enhance the access of voters to information that can aid them to make an informed vote in an election. Laws that have the effect of expanding the number and variety of voices that can be heard in political discourse are more likely to satisfy the above constitutional tests.

Given that the effect of imposing caps on political donations and expenditure is likely to (and, indeed, intended to) reduce the amount of political advertising, it would be wise at the same time to take some measures to enhance the capacity of people to be informed, when they vote, about the candidates running in the election and their policies.

Currently, it is surprisingly difficult to find sufficient information, prior to an election, about every candidate in one's electorate and their policies, in order to allocate an informed preference to each candidate. Political advertisements provide little or no substantive information. There is no single web-site that one can visit to find adequate information on the candidates and policies in each electorate. One has to search individually for each party and Independent, and their websites are often uninformative (usually providing a page with lots of photos, requests for money and an attack on the other side, but little of substance on the party's own policies and often nothing on each particular candidate).

In my view, one could simultaneously enhance the capacity of voters to be informed while significantly reducing advertising expenditure in election campaigns, by mandating an online voter pamphlet (a bit like the Yes/No case in a referendum) for each electorate for the Legislative Assembly and the eight electoral regions in the Legislative Council. This pamphlet could allocate to each candidate in the electorate: one page setting out their personal details, including their education, qualifications, prior work experience, relationship with the electorate, details of current and prior party membership, and party roles; one page setting out

their case for why they should be elected; and up to three pages setting out their policies (not comments on the policies or candidates of their opponents). The pamphlet containing such information from all candidates in the electorate could then be published online by the Electoral Commission, although it would not be responsible for its contents. Each candidate would be responsible for contributing the material about the candidate and their policies, within the stipulated headings and page limits. Hard copies could be kept at libraries or other publicly accessible places so that those without internet access could read them. This would give all voters in the State the opportunity to be well informed in giving their vote, regardless of the amount of political advertising that reaches them.

A cap on expenditure would also permit more voices to be heard in the political debate, as limited advertising resources (eg prominent billboards, television advertising, etc) would not be dominated by those with the greatest amounts to spend.

Third party campaigners

It is also clear from the High Court's jurisprudence in the *Unions NSW* cases that the implied freedom of political communication is not confined to protecting the communications of voters. It also extends to cover the communications of legal entities (such as unions, corporations, charities and associations) that wish to engage in political communication.

In imposing caps on donations and expenditure, it is important also to impose caps on third-party campaigners (or at least, those that expend significant amounts, so as not to pick up small community groups and charities). If not, party political expenditure could shift so that it is made through a proliferation of third-party campaigners.

But care needs to be taken in setting the level of that cap and in the associated administrative burden that is imposed on third-party campaigners, as the law should not be used as a weapon to silence their voices. The High Court rejected in *Unions NSW (No 2)* the argument that the Constitution privileges political parties and candidates, as participants in the electoral system, over third-party campaigners. It accepted, however, that a legitimate purpose of a campaign finance law may be to level the playing field to prevent voices from being drowned out by well-funded campaigns. That would, for example, permit limits being imposed on expenditure by third-party campaigners so that they could not drown out the voices of the political parties. But in this case, there was insufficient evidence to justify a significantly lower expenditure cap for third party campaigners. While differential caps for political parties and third-party campaigners could be justified, with reference to their different functions and the need to prevent some from drowning out the voices of others, there needs to be evidence to support that difference.

Care should be taken in relation to measures that aggregate the spending of political parties and 'associated' third parties. An attempt to do that in New South Wales was struck down by the High Court in *Unions NSW v New South Wales (No 1)* because the Court was not convinced that it was an anti-circumvention measure. This was because the political party and the third party were two distinct entities which derived their expenditure from different sources. There was also difficulty in justifying the law as falling within the anti-corruption purpose of the law. Justice Keane expressed concern at [167] that the effect of the aggregation was that 'certain sources of political communication are treated differently from others' and that this 'differential treatment' distorted the free flow of political communication in a manner that was unconstitutional.

A similar area for caution is the imposition of any 'acting in concert' provisions for third-party campaigners. They have been challenged twice in the *Unions NSW* cases (No 2) and (No 3), but for technical reasons, the validity of such a provision was not resolved by the Court. Nonetheless, it is a sensitive area that may well result in invalidity, so particular care is needed in addressing it, including the need to have strong evidence to support both the legitimate purpose of the law and the proportionate relationship of the law to that purpose.

Disclosure and transparency

Once caps are imposed upon donations and expenditure, mechanisms need to be put in place to ensure transparency so that the caps are not avoided or breached. This is aided by the existence of a separate campaign account for each party/independent (which I gather is already required in Victoria) and monitoring what money goes into that account and is spent from it. In addition, it is important to have accurate details of the source of all donations above the set disclosure amount and then to match donation information so that a party is aware when a donation cap has been exceeded. Collecting those details and administering the reporting requirements is administratively burdensome on political parties, consuming both significant time and money. It is particularly hard on small parties and independents who do not have the infrastructure and economies of scale to manage the system and who constantly need legal advice on their obligations. It also gives rise to legal risks for those involved if it is done incorrectly.

One way of avoiding these problems for political parties and candidates would be to create a central portal, administered by the Electoral Commission or another government agency, for all political donations above the disclosure amount. To donate, donors would need to register, providing appropriate identification information. Once registered, they could easily make donations through the portal to whichever political party or candidate the donor chose, and the money would then be transferred directly to the relevant campaign account through the portal. The portal would automatically identify when a donation limit had been reached by the donor, rejecting additional donations until the relevant donation period had expired. Donation details could be reported, consistently, on a real-time basis.

Such an approach would have the advantages of: (a) efficiency; (b) reduced cost and administrative burdens on political parties – saving the need for additional public funding; (c) greater accuracy and capacity to enforce caps; and (d) greater transparency and the capacity to provide real-time donation information to the public. While I appreciate that Electoral Commissions have an attitude of complete horror at such a proposal, if a proper computer program were established to run the portal, it should improve the capacity of the Electoral Commission to oversee the operation of the campaign finance scheme by providing it with accurate and consistent information, and it should not be particularly administratively burdensome to manage.

I hope these comments and suggestions are of assistance to the Committee.

Yours sincerely,

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