New Zealand Law Society

SUBMISSION ON

ELECTORAL FINANCE REFORM
ISSUES PAPER

CONTENTS

INTRODUCTION

1.1 This submission by the New Zealand Law Society (Society) on the Electoral Finance Reform Issues Paper (Issues Paper) responds to most of the questions asked in the Issues Paper (noted in bold) but also takes up the invitation on page 8 of the Issues Paper to comment on any issues that may have been overlooked.

1.2 The Society does not seek confidentiality for any part of this submission; and may well publish it on its own website.

1.3 The primary submissions of the Society are:

(a) that electoral finance law should not restrict the communication of political views nor engagement in political debate (including the opportunity to persuade others of the merits or otherwise of policy or candidate) unless there is an identified reason to do so; and

(b) related to (a) above, the first step should be to identify the mischief that gives rise to the need to have electoral finance law. The next step is to design laws, including related structures or institutions, that effectively address the identified mischief. Laws that are ineffective or inappropriate (whether because they are too easily avoided or cast too wide) do not enhance the electoral system or the law.

1.4 The Society comments more specifically on:

(a) the lack of a problem definition in the Issues Paper and the importance of identifying at the outset a clear need to regulate;

(b) the possibility of a Royal Commission of Inquiry;

(c) the issues regarding the regulation of political activity that the Electoral Finance Reform project is not considering;

(d) the regulation of parallel campaigning;

(e) the importance of clear drafting in electoral finance legislation;

(f) the regulation of funding of political activity; and

(g) the regulation of campaign spending, including restrictions on access to broadcasting.

2. PROBLEM DEFINITION

2.1 In response to **Q 1.1**, the Society accepts that the six principles for guiding the development of the new legislation are important. However the Society does not agree that these principles are a sufficient basis of themselves for the regulation of political activity. The Society considers that the Issues Paper and the wider debate around electoral finance law suffer from an inadequate definition of the problems or potential problems that the regulation of political activity seeks to remedy. Responses to questions about the content of regulation of political activity should be based on a comprehensive discussion and understanding of what the problems and potential problems of unregulated political activity are. A clear need to regulate should be identified.

2.2 For example, the Society has not seen a sufficient explanation of the problems or potential problems of not regulating political activity that justify significant restrictions on parallel campaigning. The Society considers that an inadequate problem definition may cause the Electoral Finance Reform project to become confused.

2.3 A failure to discuss the need to regulate and to properly define the problems and potential problems that exist will result in inappropriate regulation. Good regulation needs to be well thought through, so the process of regulatory reform should begin with a clear problem definition.

2.4 Having accepted that the principles indentified are important, some comment is appropriate in response to **Q.1.**

Principle 1 is rather loaded. Fairness and equality are not the same. Some candidates will be better public speakers than others; that does not entitle some to presentation lessons, though they can buy them themselves if they wish. Independent candidates, or single issue parties may not get the same opportunities to explain policies and influence voters. Not every leader may be invited to a televised leaders debate?

Principle 2 should recognise freedom of action as well as expression. This might include freedom to make anonymous donations especially at lower levels i.e. balance with transparency.

Principle 3 probably should read “not to be discouraged”. Paragraphs 1.8 and 1.9 are more aligned to that view. Unlike Australia, New Zealand does not have compulsory voting. Individuals, and groups, as part of their freedom of expression have the right (at their peril) to decline to take any interest in the political process if they wish.

Principle 6 The system must not only be legitimate in the sense of being legally valid (which it will be by definition) it must also be accepted by society as appropriate. Perhaps “credible and clear” would be better than “legitimate”?

2.5 **Q.1.2** asks whether any principles more important than others

Probably principles 2 and 6 (freedom of expression and legitimacy (or credible and clear)) stand above the rest.

Principle 4 (transparency) could probably be combined with Principle 6.

Do any of the principles conflict?

Transparency conflicts with unstated concepts such as privacy. “Fairness”, to the extent that it tries to even out resources, conflicts with the general right to use as much of one’s resources as one wishes to express views on any cause, be it “Save the Whales”, “Build a Smelter”, or “prohibit abortions”. If Dick Smith in Australia or Stephen Tyndall in New Zealand have more available funds to spend on causes (political or otherwise) than other people then why not let them do it; so long as the public can see who is doing the spending; or the recipient admits in a timely way that it is receiving large donations from unknown sources?

If so, how do you think a balance can be achieved?

Through clear legislation passed after public, not just political, debate.

Principles in the legislation

2.6 In response to **Q 1.3**, the Society does not favour including principles in electoral finance legislation if they are to be used to aid interpretation of the legislation. The detailed provisions in the legislation should themselves speak clearly.

2.7 Having to consider and weigh general principles that often conflict with each other is a difficult task. People will disagree about how the principles should inform the interpretation of provisions, which may only make the meaning of provisions even more ambiguous and increase the chilling effect on expression.

2.8 Furthermore, the legislation would need to be interpreted with a view to the right to freedom of expression contained in section 14 of the New Zealand Bill of Rights Act 1990 anyway. Requiring any legislation to be interpreted against a further set of principles, some of which conflict with freedom of expression, will increase complication and ambiguity.

Conclusion

2.9 **Q 1.3** asks whether a statement of the principles should be included in the new legislation. Is it reasonable to ask why the principles would be stated. It is to enable judges to patch gaps or balance the principles case by case? We already have BORA with its statements of rights and freedom generally. These principles are not amenable to inclusion in a statute in the same way as principles in the Official Information Act, for example. There should not be both principles and purpose clauses in the same legislation; unless there is clarity about why they are there, and their status as general statements.

3. CONSULTATION PROCESS AND PARTICIPATION

3.1 There is a case that Government ought to have established a Royal Commission of Inquiry into the law regulating political activity with broad terms of reference.

3.2 The consultation process adopted is one typically used in law reform projects led by the government.

3.3 The opportunity presented by the broad political support for the repeal of the 2007 Electoral Finance Act to have the issues addressed on a broader basis than a Government-led process has been missed.

The nature of electoral finance law

3.4 Electoral finance law regulates the conduct of politicians (people seeking election) and those who support (or oppose) them. It should be developed on a bi-partisan basis.

3.5 Electoral finance law, like all electoral law, has a fundamental impact on the political system of the country. The regulation of political activity defines New Zealand's democracy and can be considered part of the constitution. Electoral finance law is too important to get wrong.

3.6 Electoral finance law is complex. It requires the balancing of many competing considerations and the ultimate fairness of the law is a very contentious issue.

3.7 New Zealand's recent history of electoral finance law reform, has eroded public trust and confidence in the ability of politicians and the political process to determine the appropriate regulation of political activity.

3.8 The Electoral Finance Act 2007 crossed a boundary that previously existed in the State's relationship with its citizens, both in terms of its content and the process by which it was enacted. The Electoral Finance Act 2007 placed many restrictions on the communication of political views and engagement in political debate. This Act was passed in the face of significant opposition and the public did not have an opportunity to be consulted on the many amendments made to the Bill at and after the select committee stage. The credibility that politicians might otherwise have had had to lead the reform of the law that regulates politicians and political activity was undoubtedly weakened.

The case for a Royal Commission

3.9 A Royal Commission of Inquiry[1] is an inquiry established under the Commissions of Inquiry Act 1908 that is independent of the government; at least once its members are appointed.

3.10 The Department of Internal Affairs has published advice on the merits and suitability of different forms of inquiry. It lists the advantages of a Royal Commission as including the ability to investigate matters of great complexity or difficulty and the fact that its process and findings are seen to be politically independent and credible. It notes that a disadvantage of a Ministerial inquiry or statutory inquiry is the fact that they have less credibility with the public as they are not politically independent.[2] It also notes that a disadvantage of a select committee inquiry is that it can be undermined by political and ideological differences.[3] As a result, it states that a Royal Commission is appropriate for an issue of major public importance,[4] especially for an issue that cannot be dealt with through the normal machinery of government or is in an area too complex or controversial for mature policy decisions to be made.[5] Reform of the law regulating the financing of political activity is such an issue.

3.11 The Law Commission has outlined the reasons for initiating an inquiry, which include:[6]

(a) rebuilding public confidence;

(b) providing an opportunity for reconciliation and resolution; and

(c) allowing for an apolitical and in depth consideration of wide-reaching matters of policy.

All three factors are relevant here.

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1 There is only a small difference between a Royal Commission of Inquiry and a Commission of Inquiry. The former is established by the Governor-General under the Letters Patent 1983 while the later is established by the Governor-General by Order in Council made under the Commissions of Inquiry Act 1908. Both are governed by the Commissions of Inquiry Act 1908. A Royal Commission has typically been used for inquiries into policy matters, the working of existing legislation and the need for new legislation (Department of Internal Affairs *Setting Up and Running Commissions of Inquiry* (2001), p 16).

2 Department of Internal Affairs *Setting Up and Running Commissions of Inquiry* (2001), pp 13-14.

3 Ibid, p 14.

4 Ibid, p 9.

5 Ibid, p 10.

6 Law Commission *A New Inquiries Act* (R102, 2008), para 2.2.

3.12 The Law Commission also states that an inquiry could be used when it is undesirable for an organisation to be responsible for reviewing its own conduct and procedures.[7] This applies to reform of the law regulating political activity, given that this law directly affects the conduct of politicians when acting as politicians.

3.13 Perhaps most respect should be given to the comments of the 1986 Royal Commission on the Electoral System. It recommended MMP and also made recommendations about the electoral finance law that could accompany this new electoral system. It recommended that a bi-partisan parliamentary select committee deal with a bill that would implement its recommendations. The members of the Commission then said:[8]

> We further consider that once the fundamental elements of political finance legislation have been implemented, it would be inappropriate for Parliament to make significant changes other than on the recommendation of an independent body or inquiry.

3.14 The principles of transparency and legitimacy, which the Issues Paper identifies as guiding electoral finance law, should also apply to the process of reforming that law. A Royal Commission is a transparent way to develop policy and, due to its independence, is the most legitimate way to reform law that directly affects politicians. The current process does not have the necessary level of political independence that a Royal Commission would have.

3.15 Finally, as noted above, it is important that the need to regulate is clearly understood. One of the advantages of a Royal Commission is that it could inquire into the problems and potential problems of unregulated political activity since, as the Department of Internal Affairs has identified, Royal Commissions are effective at getting to the bottom of issues.[9] It would also be well placed to deal with difficult and technical issues, such as the issues that are raised by Q 6.1, by undertaking dedicated research and analysis.

The case against a Royal Commission

3.16 Royal Commissions are only as good as the people on them and the people and resources available to service them.

3.17 Typically (the most recent example being the Royal Commission on Auckland Governance) Commissions produce recommendations that are then debated and may be adopted in whole or in part, or rejected. They usually do not have draft legislation attached; yet that is where the detail is worked through. There are two other important considerations:

3.17.1 Scope: A Commission on Electoral Finance alone is unlikely to be acceptable, nor justifiable. There would surely be calls for it to cover other issues such as politicians' (and former politicians') direct and indirect benefits, the role of Parliamentary Services and the Electoral Commission, the application of the Official Information Act, and possibly even issues such as the number and basis of determining electorate and list seats, and Maori seats.

3.17.2 Timing: It is unlikely that a Royal Commission, appointed now, could produce a report in time for debate, resolution of issues and drafting and passage of legislation by the end of 2010 (even if it were confined to electoral finance issues).

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7 Ibid, para 2.8.

8 Royal Commission on the Electoral System *Towards a Better Democracy* (1986), para 8.171.

9 Department of Internal Affairs *Setting Up and Running Commissions of Inquiry* (2001), p 9.

Conclusion

3.18 The Society believes that there is probably a case for a Royal Commission on Electoral Matters with wide terms of reference, but recognises that is well beyond the current exercise.

4. RELATED ISSUES NOT BEING CONSIDERED

4.1 There are two main issues that the Society is concerned are not being adequately considered:

(a) the structure of electoral agencies; and

(b) broader issues relating to the operation of the Parliamentary Service in its function of administering funding for parliamentary purposes.

Structure of electoral agencies

4.2 The Electoral Finance Reform project is considering the monitoring and enforcement of electoral finance law, but is not considering the structure of electoral agencies, including those which may undertake this monitoring and enforcement. **Q 6.1** asks for views on how electoral finance law should be monitored and enforced. This request will prompt, and should prompt, views on how relevant agencies should be structured and organised. For example, there are strong arguments that the Chief Electoral Officer should be an Office of Parliament (like the Office the Ombudsmen and the Parliamentary Service).

The Parliamentary Service

4.3 The Electoral Finance Reform project appears only to be considering the issue of definitions of Parliamentary Service funding (**Q 2.17**), and not wider issues as to the operation of the Parliamentary Service in its function of administering funding for parliamentary purposes, such as those raised by the Controller and Auditor-General in his October 2006 report.

4.4 Following recent events in the United Kingdom, New Zealanders are beginning to question the transparency and accountability of the Parliamentary Service. The current system gives MPs a lot of control of funding through the discretionary powers of the Speaker. A review of the Service is necessary and, in terms of the principles of transparency, accountability and legitimacy, anything other than an independent inquiry would be inappropriate. The review should therefore inquire into the operation and structure of the Parliamentary Service, as well as the public funding of political activity through the Service. This would be a responsible and mature response to growing public concern in this country and to events in the United Kingdom.

Question 2.1

4.5 Should direct anonymous donations be permitted to constituency candidates and/or to political parties?

The “anonymity” concept needs to be analysed. If a donation is less than $10,000, the name of the donor need not be disclosed, but the donee may know the identity of the donor.

That is not an unknown donation; it is simply that disclosure is not required.

A truly anonymous donation is one where the donor does not know and cannot find out the identity of the donor. These present their own problems because if there are many of them, nobody can identify the donor or total amount of donations from any one source or related sources.

Truly unidentifiable donors need not be sinister; for example they may contribute to collections at a public rally, or be purchasers of raffle tickets.

Nevertheless, there is the potential for abuse here where donations are deliberately structured to avoid identification of the donors. The short-lived 2007 Electoral Financial Act allowed a "sweeping mechanism" that could have been abused. The mechanism should be allowed (indeed probably cannot be outlawed effectively) but there should be more prompt disclosure.

If so, is the current threshold appropriate?

Unidentified donations up to a total of $10,000 p.a. for each group of related persons or entities should be permitted but disclosure of the fact of them should be very soon after receipt.

Question 2.2

4.6 Should there continue to be a disclosure requirement for indirect anonymous donations (for example, through intermediaries such as trusts) to constituency candidates and/or to political parties?

Yes. It should be a continuous disclosure obligation; not done after the election campaign.

If so, is the current threshold ($1000) appropriate?

There may be some merit in setting the figure higher, and applying the same to political parties. However, parties will ordinarily spend much more than candidates.

Question 2.3

4.7 Should the protected disclosure scheme for donations to political parties be retained?

Yes. See answers to Question 2.2. Same case for simplifying disclosure. What is the available evidence about sizes of donations at candidate and party level?

Question 2.4

4.8 Should the name and address of donors who donate above a certain threshold be disclosed (that is, made publicly available)?

Privacy and harassment issues arise, especially if disclosure is continuous or more prompt.

In turn, this could lead to greater use of trusts and other devices to avoid identification. It is probably justified above reasonably high thresholds where the fact of donation can be said to be in the public interest, rather than just of public interest.

Some donors may want their donation to be public, especially a corporate donating to more than one party.

Question 2.5

4.9 Should the disclosure thresholds be left as they are?

Raised or lowered?

See answer to Question 4.8. To the extent that simplicity is a virtue then the level could be the same for candidates and parties. Otherwise a distinction is valid.

If so, to what level?

Higher than at present; but it would be good to see some analysis of whatever is known about current donation trends.

Question 2.6

4.10 Should the same disclosure threshold apply to donations made to constituency candidates, and to donations to political parties (including donations made through intermediaries, such as trusts)?

Only if simplicity is required.

Question 2.7

4.11 Should the disclosure threshold for political parties (currently set at $10,000) be the same as the limit on anonymous donations (currently set at $1,000) to reflect the equivalent regime that exists for candidates?

Probably justified for the sake of simplicity, but little else.

Question 2.8

4.12 Should there be a limit on donations from a single source?

No. But there should be prompt continuous disclosure; not just after the election. Identification of related parties, etc.

If so, what should it be?

N/A

Should it be inflation adjusted?

If adopted, there is no reason to inflation-adjust here unless doing it to all figures. It is likely to become confusing and general inflation indices are quite possibly a poor proxy for electioneering expenses.

Question 2.9

4.13 Should there be a prohibition on donations from certain sources (for example, overseas individuals, or corporate, or unincorporated entities)?

No. There are many anomalies at both corporate and individual level and it would be so easy to use local branches of overseas entities that the appropriate course is to allow the donations and publish if over the threshold.

Overseas people

4.14 The lack of an adequate problem definition means that it is difficult to form any conclusions on any limitations that might apply to overseas persons and corporations donating to political parties and candidates.

4.15 The Issues Paper simply states that supporters of restrictions on the political activity of overseas persons consider that they help reinforce New Zealand's control over its political system (para 2.38). The Paper also states that the rationale for these restrictions is that overseas people "should not be able to financially influence New Zealand's democratic process" (para 5.17). It is very unclear what improper impact overseas people could have on New Zealand by making donations to New Zealand's political parties, if there is full and timely disclosure.

4.16 It is difficult to form a view on the issue of an appropriate definition, should one be needed. However, even the highly restrictive nature of the limitations applied to 'overseas persons' in the 2007 Act that came about as a result of the wholesale importation of the overseas person definition from the Overseas Investment Act 2005 could have been unduly restrictive while at the same time having loopholes.

Question 2.10

4.17 Are the current limits on overseas donations appropriate?

No.

Question 2.11

Should any other sources of donations be banned?

Public entities (i.e SOEs etc)

If so, which ones?

Question 2.12

4.18 Should legal entities (for example, companies, trade unions or special interest groups) be treated differently from individuals?

There is less of a case for protection of individual privacy, so the naming threshold could be lower. However, logically there is no reason to differentiate by structure of donor.

Public funding

Question 2.13

4.19 Should constituency candidates and political parties be solely reliant on private funding or should they receive additional public funding?

The Society expresses no view on this question.

Question 2.14

4.20 If the public funding system in New Zealand is changed or increased, how do we make constituency candidates and political parties accountable for how they spend public money?

If this happened, it would essentially be a funding donation from public money. The donee should be free to apply it as it wished. There is no room for "accountability" because the public purse has no interest in the outcome. If the recipient spends the money ineffectively, it bears the consequences. "Use it or lose it" might be appropriate, but wider accountability is not.

Question 2.15

4.21 If there are to be changes to the public funding of political parties, should public funding be restricted to parties that are represented in Parliament, or alternatively, should it continue to be available more broadly to a wider group of political parties?

The Society recognises the issues, including:

- whether acceptance of public funding should restrict acceptance of other funding;
- how to avoid "rear view mirror" perspectives. Does it give unfair levels of assistance to parties well represented in Parliament ahead of those less so, or not at all?
- possible proliferation of single issue parties seeking funding to publicise their cause but with little Parliamentary prospects.

This response is in the context that the Society does not express a view on whether or not there should be public funding.

Question 2.16

4.22 Do you have any suggestions to make about the appropriate level of funding?

Question 2.17

4.23 Are the rules sufficiently clear that Parliamentary Service funding cannot be used for election expenses?

In view of the disputes every election, evidently not. The same applies to Departmental spending.

If not, what do you think would make the rules clearer?

Explore possibility of a "safe harbour" for pre-approved spending?

4.24 There is a case for an independent review of the Parliamentary Service in its function of administering funding for parliamentary purposes. It may be that MPs and the Speaker have too much control over Parliamentary Service funding. Only an independent inquiry could legitimately consider this and other issues regarding the Parliamentary Service.

4.25 As a further response to **Q 2.17**, in addition to the rule that Parliamentary Service funding cannot be used for electioneering, funding for all communication services could be suspended during a period before an election. This period could begin the day after the day that Parliament sits for the last time before polling day. Arguably, MPs do not need communication services funding during this time because almost all of their communication will be electioneering, paid for from their own campaign funds.

4.26 This suspension of communication services funding would reduce pressure on officials to make judgments about applying the funding rules. It would also reduce the risk of, and the perception of the risk of, the misuse of taxpayers' money.

4.27 Moreover, this suspension of funding would better accord with the principle of equity by not giving incumbent MPs an advantage over other candidates for election. Incumbent MPs have an advantage as they can use public funding to communicate with their constituents. Even communication that is not electioneering helps to raise a candidate's profile. Levelling the playing field for all candidates in the period immediately before polling day is desirable.

Question 2.18

4.28 If there is public funding, do you have any suggestions about the kind of model that might be suitable to adopt?

Broadcast (radio and television) advertising

Question 2.19

4.29 Should there continue to be an allocation of public funding to allow political parties to advertise on radio and television?

Since it is well established and largely uncontroversial, it could continue.

Should it decrease?

Question 2.20

4.30 Should there be a change in criteria if the current allocation process is retained?

Question 2.21

4.31 If the allocation of public funding for radio and television is abolished, should there be a proportionate increase in political parties' spending limits?

Logically, yes.

Question 2.22

4.32 Should the broadcast allocation be restricted to buying radio and television advertising or should political parties be able to use it for other purposes?

Any media promotion e.g. newspapers, website and static advertising. Not general campaign expenses if it is to remain a broadcasting allowance.

Question 2.23

4.33 If political parties are given greater freedom to choose how to spend the broadcast allocation, should criteria for 'approved' spending be developed?

Defining the media should be sufficient.

If so, what spending do you consider should be approved?

Question 2.24

4.34 If campaign broadcasting continues to be regulated in a similar way to how it is currently regulated, then parties who receive an allocation of time and money should be able to spend their own money on campaign broadcasting. The State should not determine a party's ability to campaign using broadcasting through a government decision on how much time and money the party can use for broadcasting.

Question 2.25

4.35 If campaign broadcasting continues to be regulated in a similar way to how it is currently regulated, then parties that do not receive an allocation of time or money should still be able to access broadcasting. The State should not deny smaller parties the ability to campaign using broadcasting through a government decision not to allocate the party time or money for broadcasting.

Questions 2.27 to 2.30

4.36 **Q 2.27**: Parallel campaigners should be able to campaign on radio and television. **Q 2.28**: If there is a limit on the spending of parallel campaigners, then restrictions on radio and television advertising by parallel campaigners should be removed.

4.37 **Q 2.29** and **Q 2.30**: There should be regulation in place which allows all political parties and candidates to have fair access to some mainstream broadcasting, but not necessarily free of charge.

Question 3.1

4.38 Should there be limits on campaign spending for constituency candidates and political parties?

The starting point should be an assessment of what would be likely if there were no restrictions but full disclosure; only impose restrictions if there is a likely mischief.

4.39 The 1986 Royal Commission on the Electoral System agreed that, without a spending limit, campaigning could become a spending race with escalating costs.[10] It would be undesirable for this to occur and for it to become difficult to communicate the full range of political views to the public.

Question 3.2

4.40 If there are campaign spending limits, should the current limit for constituency candidates ($20,000) and political parties (a maximum of $2.4 million, if all electorates are contested) be retained or adjusted?

If they have dropped in real terms since 1995, then yes. But modern technology for printing etc might have reduced costs.

Question 3.3

4.41 Should campaign spending limits be adjusted regularly in line with inflation?

Inflation (CPI) is probably not a very close proxy for election campaign expenses.

If not should spending limits be regularly reviewed?

Yes.

Who should have responsibility for the review (for example, a parliamentary committee or an independent body)?

An independent body. Parties should have to demonstrate rising costs. Similar to Higher Salaries Commission process? Possibly the Electoral Commission.

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[10] Royal Commission on the Electoral System *Towards a Better Democracy* (1986), para 8.36.

4.42 A parliamentary committee should not have responsibility for reviewing aspects of electoral finance law, such as spending limits. Only independent bodies should have responsibility for reviewing aspects of electoral finance law. As already expressed, independent bodies have the credibility and legitimacy to review the law regulating political activity that political bodies do not. This argument is not based on a fundamental mistrust of politicians, but on the proper separation of functions in a system of government. People gain confidence in a system when there is little perceived risk of misconduct and where any opportunities for misconduct are eliminated.

Regulated campaign period – commencement and length

Question 3.4

4.43 When should the regulated campaign spending period start?

Probably 3 months, but with some sophistication e.g. hoardings printed or commercials made before, but used during, the period should be deemed to be printed or made within the period.

Spending outside the regulated campaign period

Question 3.5

4.44 How long should the regulated campaign spending period be?

See answer to **Q 3.4**.

Question 3.6

4.45 If the length of the regulated campaign spending period is decreased or increased, should there be a corresponding decrease or increase in overall spending limits?

Yes.

Advertising

4.46 In response to **Q 4.1** and **Q 4.2**, the definitions in electoral finance legislation should be drafted so that they can be easily understood. The definitions of campaigning in electoral finance legislation (such as "advertisement" or "election activity") are central to the legislation. It is therefore especially important that these definitions are drafted so that they can be easily understood by those wishing to spend money to express their political views.

4.47 The Society agrees that a simple definition with clear exceptions would be easy to understand (Issues Paper, para 4.19). Additionally, in response to **Q 4.3**, rules on political expression should be media-neutral. (The use of the word "publication" in Q 4.3 itself implies a certain type of media and this language should be avoided in any media-neutral legislation.)

4.48 There could be a broad, media-neutral definition and any specific forms of communication could then be expressly excluded from it. The Society submits that sensible exclusions would include:

(a) speeches and interviews (Issues Paper, para 4.12);

(b) political parties' websites, but not advertisements placed for a fee on other websites (Issues Paper, para 4.16);

(c) blogs (Electoral Finance Act 2007, s 5(2)(g));

(d) books sold at commercial value (Electoral Finance Act 2007, s 5(2)(e)); and

(e) use of party colours without more; e.g. balloons, streamers on cars etc.

This does not purport to be an exhaustive list.

5. PARALLEL CAMPAIGNING

General position

5.1 Political parties and candidates for election do not own the political process or the political debate. If anyone owns politics, it is the people. Excessive regulation of the political expression of citizens diminishes their ability to undertake political activity and contributes to the political debate about who they should elect to govern them. This allows ownership of the political process to lie with political parties and candidates, and those groups who have not only the motivation but also the funding to get the advice that enables them to comply with the law, or find the loopholes to own the political process.

5.2 This was the case with the Electoral Finance Act 2007 which, by setting a limit on third party expenditure well below the limits applying to political parties and candidates, restricted the ability of voters to meaningfully communicate their political views. The nomenclature of "third parties" used in the Act also reflected a view that political parties and candidates own the political process. The description of voters who wish to spend money while participating in the political debate about who they should elect to govern them as "third parties" suggests that these people are appendages to this political debate, and that this debate belongs to "the professionals" (ie, political parties and candidates for election). In a democracy, citizens are the most important actors in the political system. They are not third parties.

5.3 The focus of electoral finance law should be on regulating the conduct of politicians (which is a reason why reform should be initiated by an inquiry that is independent of the political process), not the conduct of voters. In terms of the six principles contained in the Issues Paper, the Society considers that only the principle of legitimacy might support regulation of voters' expression. The principles of equity, freedom of expression and participation all suggest that voters' expression should be largely unregulated.

Spending by parallel campaigners

5.4 **Q 5.1**: There should be limited regulation of the political activity of people other than political parties and candidates for election. This regulation should be limited to a requirement that campaigning that directly promotes a party/candidate be authorised by that party/candidate and that its cost be included in that party's/candidate's spending (as explained in para 5.6 of the Issues Paper). This requirement significantly reduces the ability of political parties and candidates to "get around the spending limits by running a parallel campaign through a separate group or individual" (Issues Paper, para 5.12). In response to **Q 5.5**, this requirement is a restriction that should apply to people closely associated with a political party or candidate.

5.5 The requirement also goes some way to regulating the problem of political parties' receiving unwanted political support. For example, a party that recommends a tightening of immigration policy may receive an endorsement from a far-right, neo-Nazi organisation. This organisation may publicly campaign for the election of the party, and the party may lose voter support because of a perceived association with the organisation. The Society considers that it may be appropriate that an organisation

should gain approval from a political party before directly promoting the party; although that concept raises further issues, such as the penalty (if any) for continuing the unwanted endorsement. Unwanted political support that is less than direct promotion is more problematic, and is discussed further below.

5.6 Furthermore, the Society considers that the term parallel campaigning, which is used in the Issues Paper, is only accurate to describe campaigning that is undertaken and paid for by people other than political parties or candidates, but is undertaken in coordination with the political party or candidate that it promotes. This is campaigning that occurs in parallel to a political party's or candidate's campaign, and is the only type of campaigning that is undertaken and paid for by people other than political parties or candidates that should be regulated by a sending limit.

5.7 It follows that the Society considers that other situations that the Issues Paper discusses under the rubric of parallel campaigning should be treated differently.

5.8 **Q 5.2**: There should not be regulation of negative or attack advertising, other than the requirement that advertising material disclose the identity of the person disseminating it and the law that regulates all forms of expression, such as the law of defamation. The law of defamation will often be able to deal with the spreading of false information. However, there is still the potential for false information about candidates for election to be disseminated. False information in political debate can be damaging as it may adversely affect voters' choice. Knowing the identity of the person disseminating material containing false information will allow candidates for election to deal with situations where false information is spread about them (Issues Paper, para 4.26). It can also be argued that the best test of truth is to allow different claims to be circulated in the free market place of ideas. Transparency is a necessary and sufficient requirement on negative or attack advertising.

5.9 It follows that, in response to **Q 5.6**, yes, disclosure is sufficient and, in response to **Q 5.9**, there should not be a spending limit on what is termed parallel campaigning (other than what is described in para 5.4 above).

5.10 There is an issue with political parties receiving unwanted public support which is less than direct promotion and therefore does not need to be authorised by the party. This can be a problem even when those offering support are not spreading misinformation. For example, a group might publicise its dissatisfaction with the current government's policies and endorse a change of government. The political parties likely to be included in a new government might not want to be associated with the organisation, as the group might have other views that the parties do not share. Extreme right or left wing groups might express support that parties seeking the “centre vote” might prefer not to receive.

5.11 Regulating in this area may create further complications, especially where political parties make strategic statements of support for other parties.

5.12 The Society suggests that the best way to resolve these issues is therefore with light regulation that focuses solely on transparency, through the requirement that those disseminating advertising material disclose their identities on it. With disclosure the public will have information with which to decide how to judge political parties and candidates, and management of unwanted associations can be achieved by these parties and candidates themselves (not through heavy regulation).

5.13 In summary, only direct promotion of a party or candidate, which is the activity that can be aptly described as "parallel campaigning", should be subject to spending limits. All other political activity by those other than parties and candidates should be subject to an identification requirement.

Spending by public entities

5.14 **Q 5.3**: There should not be people or groups that are not allowed to engage in political activity, with the single exception of public entities. Public entities (such as SOEs) should be apolitical and it is not appropriate that they form political views or spend public money expressing political views or participating in political debate. For that reason, the Society agrees with the sentiment of the now repealed section 67 of the Electoral Finance Act 2007. The Society also agrees with section 13(2)(e) of the Act in the context of that Act's "third party" expenditure regime (but not with the regime itself).

5.15 **Q 5.4**: Government department rules should be clearer, not necessarily tighter.

Compliance and Enforcement

5.16 Compliance and enforcement are important, as is publication of non-compliance. Enforcement could be by the Electoral Commission, and a “safe harbour” concept might be appropriate.

6. DRAFTING OF NEW LEGISLATION

General submission

6.1 It is important that legislation that restricts expression is drafted well so that it can be easily understood and complied with. Poorly drafted electoral finance legislation, such as the Electoral Finance Act 2007, can have an inappropriate limiting effect on expression, an outcome which is undesirable during an election period.

6.2 Legislation should not restrict expression because people fear prosecution due to the uncertainty of that legislation. In other words, legislation that restricts expression has a limiting effect on expression where it leads people to take an excessively cautious approach to legal restrictions.

6.3 When legislation is poorly drafted and difficult to understand, this limiting effect is increased. When people cannot determine whether their intended expression would be lawful or not, because of ambiguous legislation, they are likely to exercise further caution and refrain from expressing themselves. For this reason it is especially important that electoral finance legislation is clearly drafted.

6.4 Many provisions in the Electoral Finance Act 2007 were ambiguous and the Act as a whole was poorly organised and unnecessarily verbose. For example, the meaning of "wilfully" in section 63(4) was ambiguous, as the Society submitted to the Justice and Electoral Committee in submissions on the Electoral Finance Bill.[11]

6.5 In short, the Society agrees that "electoral finance legislation that is clear and easily understood means that the law has credibility" (Issues Paper, para 1.14). The legislation must be based on an analysis of the mischief to be addressed, and adequate and timely enforcement resources are essential.

John Marshall QC
President
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