

Summary note on electoral finance review roundtable: Friday 29 May 2009

The Institute of Policy Studies hosted a half-day roundtable on Friday 29 May to discuss electoral finance. Dialogue took place in the context of the now repealed Electoral Finance Act 2007 and the need for new legislation to be in place by late 2010 for the next general election. This roundtable brought together around 20 interested parties from academia, watchdog organisations, the legal profession, the public service and the media to discuss the contents of the *Electoral Finance Reform: Issues Paper* (hereafter “the Issues Paper”) produced by the Ministry of Justice.

This note summarises the key themes identified by the participants. Discussion was generally dictated by the order of the chapters in the Issues Paper. The chapters on “advertising” and “monitoring and compliance” were not discussed due to time constraints, however many of the issues overlap and were addressed elsewhere. There were a wide range of views on many, but not all of the issues. It was agreed that further dialogue was needed.

Comments are not directly attributed to anyone as the roundtable was held under Chatham House rule. Unless otherwise stated, views recorded in the note are those of one person.

The Issues Paper and further information about the consultation process can be found at <http://www.justice.govt.nz/electoral-finance-reform/home.asp>

I Guiding principles

- Refer to chapter 1 of the Issues Paper

There are six principles identified in the Issues Paper to guide the regulation of electoral campaigning and political party funding. Participants agreed that these were of wider application, not just to electoral finance, but to the electoral process generally. Issues were raised on meaning, interpretation and weighting.

Specific comments on the individual principles are as follows:

- *Equity* - or “level playing field” means the same *opportunity* to resources, as opposed to equality of resources. Participants interpreted this as meaning there will be no *unfair* advantages, but there will still be advantages. For example, some parties have more money. This perhaps necessitates the insertion of “manifestly” to make the wording “manifestly unfair”. It was noted that third parties were missing from this principle.
- *Participation* - well covered in the Issues Paper, although one participant noted that the complexity of this review will impact on peoples’ ability to participate.
- *Transparency* - was seen as a vital principle, in fact participants felt that this principle should be at the top of the list and would be the one the general public would be the most concerned with. Transparency is also required by the relatively new UN Convention Against Corruption which New Zealand has signed but not ratified. One participant voiced the view that the previous system gave false transparency which was worse than having no rules at all. Whether total transparency should apply is discussed below under Part II (b).
- *Accountability* - electoral finance rules must be enforceable otherwise, even with clear rules, the rules’ effectiveness will be diminished. In addition, reasonable compliance costs should be

involved for candidates, parties, and enforcement agencies. Enforcement needs to be fair and be seen to be fair, with no partisan influence in any matters directly or indirectly relating to electoral finance.

- *Legitimacy* - the Issues Paper covers one side of legitimacy. The other side of this principle is effectiveness; “must be effective to be legitimate”, not just legitimate to be effective. Rules needed to be enforced and effective, harking back to the perception that the without this the public had false confidence. Rules need to be comprehensible and as easily applied as possible.

In addition, *simplicity* was seen as important, particularly in relation to the participation and legitimacy principles. For people to be involved in democracy, this should not entail them having to solicit the services of lawyers. A simplicity principle may have negated the broad definition of “advertising” in the Electoral Finance Act 2007.

II Funding of constituency candidates and political party

- Refer to chapter 2 of the Issues Paper

a) Public funding

Further public funding of parties was thought to be an impossible argument to mount in the current economic and political climate. In the view of some participants, giving political parties money which they did not have to “work for” would insulate them from the need to participate in the democratic process and mean less public participation. A range of other options were briefly mentioned including matching small donations (which would give parties an incentive to interact with the grass roots level in an age where party membership was in decline) and tax rebates on individual donations.

Attention turned to the existing state “funding”: the broadcasting allocation under the Broadcasting Act 1989. Introduced before electoral finance spending limits, some felt that it should now in fact be included. In addition a limit on the proportion parties could spend to this end would be needed in order to stop one party dominating the airwaves.

If free air time continued, some thought it should be weighted in favour of parties not already in parliament to assist with the principle of equity. Parties within parliament had the benefit of existing exposure and headlines, and parliamentary expenses. Attention was drawn to the issue of minor and “less serious” parties being eligible for this funding, and a suggestion was made to make party registration more difficult. Targeting new parties with this funding would mean that the major parties spending limits would need increasing.

The rules surrounding allocation needed further attention it was felt. Advances in communication made the restriction to TV and radio illogical when parties increasingly used the print media, the internet and even text messages to get their messages across.

One participant strongly believed that debate on public funding should be wider: on the funding of democracy generally. Public money should be used to disseminate information, fund informative websites, and pay for the renting of halls for meetings and debates, etc. Another suggested that since smaller parties struggle with compliance costs, funding could go towards auditing party accounts for example. This is the idea of funding transparency.

b) Donations

Participants saw the need for more emphasis on donations in the Issues Paper and it was noted that the previous legislation did not in fact define “donation”.

Divergent views were expressed on the disclosure level. Some felt that the current level was a workable compromise and that lowering the level would only catch “innocent fish”. People also had the right to anonymity and would fear reprisals. On the other hand, others considered that total transparency across the board was required; it was not about how much someone gave but that they did indeed give – “sunlight is the best disinfectant” (Justice Brandeis). Still others were torn and saw this as a balancing exercise; the public having a right to know who was backing respective parties, particularly because donors sought access or advantage, versus the anonymity donors who sought neither should enjoy when they did not seek to be labelled either way.

It was widely acknowledged that multiple donations at the current disclosure limit were being made to ensure the donors remained anonymous. However lowering disclosure limits would encourage the use of other means of contributing, including paying for legal fees and establishing proxies. An appropriate limit remained undecided, but after exploring the problems of the hypothetical example of a party holding a sausage sizzle - namely whether paying more for a sausage than it was worth made it a donation, and if so whether the donor’s name should be recorded - a de minimis level found favour. To this end, the sausage sizzle and the amount raised would be reported but not details of the individual sausage buyers.

An analogy with charity law was recognised and also that donations should count over the entire electoral cycle, not annually.

III Spending limits

- Refer to chapter 3 of the Issues Paper

It is difficult to decide whether the current limitations on spending by constituency candidates and political parties during election campaigns are working. It is not correct to say that approximately 73% of expenditure on election campaigns comes from private money as many other resources are not taken into account including taxis and air travel, accommodation, cell phones etc (see Issues Paper footnote 1). The difference between the major parties’ declared expenses and donations draws the assumption that gaps are being exploited.

The period that spending limits apply to is also problematic. The old 90-day rule was extended in the Electoral Finance Act 2007 to 1 January in the year an election was due. Backdating leaves room for scamming and mistakes and therefore a fixed date is preferable, perhaps counting back from the day Parliament is due to expire. One person suggested that the entire electoral period should be disclosed which emphasised the distinction between funding of parties and funding of elections.

Discussion on spending limits referred back to broadcasting funding. Limits on money allowed for advertising, particularly on the ever popular medium of television, should be enforced because one party capturing all the prime-time advertising slots was not seen to be desirable.

Consensus was reached that spending limits should be population and inflation adjusted. With regards to individual MPs, the limit of \$20,000 was considered too low. Electorates, after all, differ in geographic size eg. Wellington Central in comparison to Te Tai Tonga. Spending limits which were underestimated were seen in the wider democratic process with The Citizens' Initiated Referenda Act 1993 allowing only \$50,000 to be spent on promoting the petition.

The interface with parliamentary service spending was also identified. While the parliamentary service regime is big and too complicated to restructure in its entirety, it was felt that there was an urgent need to restructure the interface with electoral finance spending. One person commented that you could "drive a truck through MPs' allowances" particularly since parliamentary service is not subject to the OIA. Accountability is paramount when the public purse is involved.

IV Parallel campaigning

- Refer to chapter 5 of the Issues Paper

Parallel campaigning and spending by individuals or groups who are not standing for election is a tough issue to regulate. Some thought that private parties should be able to spend whatever they like but that once this spending was actually directly assisting a political party, it should count towards that respective parties' spending limit. Another queried whether this was in fact the "bug bear" it was made out to be? A voluntary transparency regime for third parties was suggested, leaving those that did not opt in to attract the attention of the media and other commentators. The compliance costs here, however, were an issue. There was general concern expressed over the establishment of corporate entities to disguise activities. The 2005 general election case of the Exclusive Brethren uncovered people's distinct discomfit with these sorts of well financed activities, particularly the overall negative tone of the circulated pamphlets and the use of false addresses.

V Purpose of legislation

One participant raised the issue that the precise "mischief" the legislation is trying to stop is not clearly spelt out in the Issues Paper. While the general principles will obviously help to guide what the rules will achieve, their generality makes it difficult to determine the purpose of the legislation.

In the view of one participant there was no evidence that big money had any effect on the outcome of elections and they were not persuaded that electoral funding needed regulating. It would be more appropriate for the emphasis to shift to politicians, who should be bound by a code of conduct. Others disagreed and felt that there was strong evidence that (1) money may not win elections, but a lack of money will lose one; and (2) contestants think money matters, so will seek to raise and spend as much as they can. Obviously how they spend the money is a factor, but big money did is still a problem. Donations were after all often given to gain access to politicians and there were plenty of examples of this in New Zealand's history. Favouritism was the key issue.

Discussions on the purpose uncovered the broad view that regulation and limits in particular were appropriate in order to avoid an "arms race" based on what one party believes another is spending in order to win the election. The concern is that if parties are focused primarily on raising funds, corruption and cutting of corners will occur. Put another way, the purpose of such legislation is to create fairness and to protect "political culture" from, as was put bluntly, "ending up like the

American system”. New Zealand’s political culture was not one focused on revenue generation, instead on participation and interaction.

The regulated period close to an election was redundant in the view of some, because voters had already made up their minds on the parties/candidates they would support. However it was noted that decisions were confirmed during the crucial election period. In addition, other variables could not be guessed at so far in advance, such as the signalling of coalition partners and formulas for vote splitting, which have often been advertised (Rodney Hide in Epsom for example).

While perceptions might arguably be more important than reality, it was pointed out that the public cannot be confident that there is less scope to “rort” the system in New Zealand, than in the United Kingdom for example, where an expenses scandal as recently been uncovered. While MPs benefits and entitlements were increasingly understood, transparency around the reporting of parliamentary expenses was lacking.

VI Process of review

A significant part of the proceedings focussed on the process for the review. In part this related to the view that the review climate has been damaged by the events surrounding the Electoral Finance Act and some of its provisions. As such, this exercise was now occurring in an environment of significant distrust of the institutions of government. Unease was also noted over the short timeframe, the possibility of contradictory responses to the Issues Paper, the lack of independent review and the fear that government would be selective with public submissions.

The timeframe for this review of electoral finance is restrictive. The National party’s pre-election promise to repeal the 2007 legislation, coupled with the three-year election cycle, means that legislation has to be enacted next year in time for familiarisation before the 2011 general election. Ideas in the Issues Paper are not “fixed” by any means and it was noted that officials have a difficult task ahead; particularly as there were wider issues of constitutional significance that were not going to be addressed as part of this process (see Part II below).

Tension was also identified in the task of trying to regulate what was inherently competition and in such an environment, enforcing the transparency principle.

The review process as it is currently structured was seen as a standard consultation or management exercise. There is concern that the Issues Paper, designed to generate public discussion and ideas about how to address issues around electoral finance reform, will produce contradictory answers because of the interconnected nature of the questions set out in Appendix A. The outcome of this broad and conflicting information could, in the view of some, allow government to cherry pick the parts it wanted. Other miscellaneous comments on the Issues Paper identified the lack of precision highlighted in chapter 2 - for example, where it refers to “fund their election campaigns and other activities”. It was important to recognise the distinction between funding elections and funding parties, and funding the democratic process and funding parties.

When the process moves on to the *proposal stage* (the stage after views are received on the Issues Paper), there was enthusiasm for more public seminars to be held. *Options* for electoral finance should also be canvassed in the Government’s proposals so that feedback could be solicited on these before the process moved on to the third and final stage - the parliamentary process. Various

participants felt that better quality information may arise from the presentation of options, as opposed to the Issues Paper's questions.

One person expressed total confidence in the current review process. Although it seemed that timing would inhibit alternative suggestions, there was some agreement that an independent transparent body was needed to conduct this review - "poachers should not be allowed to be game keepers". A Royal Commission was suggested, but then rejected by others, mostly due to time constraints but also over the perception that some of the key recommendations of the recent Royal Commission on Auckland Governance had been ignored by the government.

Deliberative decision making in the form of a Citizens' Assembly or Citizen's Jury was instead mooted. A Citizen's Assembly found favour as it would allow more people to participate and arguably result in information of a higher standard, in a truly independent and transparent process. A suggestion was made that Parliament could rubber stamp the outcome of such a process, although another participant noted that this would be highly unusual. Participants felt that this kind of review process was "possible" in the timeframe outlined, that it could be done within a year. However, there was still the issue of turning the outcome into a Bill which would draw the process out, and having Crown counsel work alongside the assembly was thought to be too cumbersome.

VII Wider constitutional issues

Discussions over the review process uncovered the problem with attempting to review electoral finance when it was merely one aspect of issues of wider constitutional significance. The three-year electoral cycle created incentives for government to cut corners on core constitutional issues. Participants wondered what was happening with the Constitutional Issues Review Group and the signalled referendum on MMP. Constitutional reform is a separate topic in the government's election manifesto was the response. Concern over the level of knowledge and engagement of the general population on how New Zealand should be governed and on constitution was expressed. Others wondered about Bill of Rights checks and the need for MPs to be subject to Official Information Act (with some obvious exceptions). However the electoral system itself seemed to be part of the problem with the low threshold to register political parties and for parties to enter parliament (winning a seat and bringing in the remainder of the party vote, as opposed to the 4% threshold recommended by the Royal Commission), and the lack of a fixed election term, all highlighted. The point was also made that if political parties take public money, then it is appropriate that their accounts and meetings are open.

VIII Electoral Finance Act 2007

Views on this now defunct electoral finance legislation were forcefully made by some participants. These included: the perception that the previous government had breached the implied social contract; that it was a poor piece of legislative drafting; that partisanship had been alleged; that even the New Zealand Law Society (during submissions on the Bill) had described it as "irredeemable"; and that it trespassed on freedom of expression

Participants felt that there was a palpable chilling, if not 'freezing', effect on democratic debate. Advice had been given to businesses and individuals not to make donations or publish advertisements relating to the election because of the high risk of being caught up in the unclear board-brush provisions of the legislation. Reports of the significant curtailment of the election

activities of key representative groups were also discussed. Interestingly, it was reported that these same groups were unwilling to complain publicly, which one participant put down to the vindictive nature of New Zealand politics.

Among the various specific problems identified were the broad definition of “publish” in relation to advertising and the fact that the Act licensed stone throwers by requiring in section 63 for every election advertisement to contain the first name and surname of the promoter along with their detailed home address.

Jessie Williams
Institute of Policy Studies