Joint Standing Committee on Electoral Matters

Inquiry into the funding of political parties and election campaigns

Further material from the Accountability Round Table

The Accountability Round Table, in preparing for the public hearing has continued to give consideration to the issues under review by the Committee. They include the following.

Uniformity

It has considered the desirability of a uniform approach both at a federal and state level. One approach would be to follow at a federal level what appears to be, at present, best practice in Australia, the New South Wales approach, on the basis that it may offer the best opportunity of achieving a uniform approach. But there would still remain many states and territories to be persuaded. Their practices vary considerably and the New South Wales approach falls short of what is required. Ultimately what is most likely to achieve a uniform approach throughout Australia is for the Federal Parliament to take the lead and introduce best practice at the federal level.

The practice of raising funds by offering access to members of Parliament.

The ART has also given consideration to the legality of the current practice of raising funds by offering access to members of Parliament. The submission assumed that it was not illegal, partly because the parliamentarians, political parties and the authorities appear to regard it as legal. Further consideration by the ART has raised serious concerns as to whether that assumption is justified. Included in attachments A and B is further materials relevant to that issue.

Hon T.H. Smith QC

Chair Accountability Round Table

Attachment A

The practice of raising funds by offering access to members of Parliament

Discussion of the practice

May we draw to the attention of the Committee a paper presented in 2009 to the Australian Public Service Anti-Corruption Conference by the former Queensland Integrity Commissioner, Mr. Gary Crooke QC entitled "When public and private interests clashed"[1]. In that paper he discussed the practice of holding "fundraisers" by political parties. He comments[2]

> "Those elected to, or appointed, to high public office are no more and no less trustees of the capital which they hold for use and benefit of the Community. In no way, is it within their remit as a trustee to do things other than for the public good and, in particular, they should never make use of capital for their own interest"

After referring to the rejection of the argument by those involved in fund raising as beneficiaries that any such process "could affect proper and ethical decision-making in public administration" he went on,[3]

> "But, what of informed public perception of this process? Is there a perception that those in business, whether privately, or whether corporately and responsible to shareholders, are going to pay a significant amount to attend a particular function for no expected return? "Nothing is for nothing" as Gordon Nutall famously said in the witness box.
>
> What, for example, of the developer who pays $3000 for a seated next to a Minister responsible for making a decision about a contentious project in which the guest is involved? What of those objectors or other members of the Community who are interested in the outcome of the decision? Are they being perceived to be fairly treated?
>
> At the bottom of all this is the misuse of capital
>
> The esteem in which the holder of a high political office is held and the power to make decisions that goes with it, are part of the capital which is the property of the Community. It is not for sale for sectional interest. A political party is a sectional interest"

Later Mr Crooke stated [4]

> " It is the unspoken creation of an expectation of preferential treatment attending this, which will result in the inevitable conclusion by informed public opinion that the activity is untoward."

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[1] www.apsac.com.au/2011conference/2009/2009papers.html , p5

[2] P5

[3] P 6

[4] P 7

In the ART original submission, it referred to this common practice and argued that it should be made illegal because it

- gives unequal access to our elected representatives based on the ability to pay for it,
- provides every opportunity for corruption,
- damages the reputation of all politicians and confidence in our democratic system.

The legality of the practice?

In submitting that the practice should be made illegal, the ART proceeded on the assumption that the practice was legal, that appearing to be the assumption on which all have been proceeding, including the authorities.

Looking into the matter further, we have considered whether the practice may involve breach of any provisions of the Criminal Code Act 1995 (Cth). The relevant provisions[5] appear to be in sections **141.1 Bribery of a Commonwealth public official**, (Giving a bribe and Receiving a bribe), **142.1 Corrupting benefits given to or received by a Commonwealth public official,** and **142.2 Abuse of public office** ; see attached.

It is suggested that there is a serious question to be resolved as to whether the practice does involve breach of those provisions notwithstanding its apparent wide acceptance.

It should be noted that the sections apply to Ministers, Parliamentary Secretaries and members of Parliament. In addition, the sections are directed to a "benefit", which is broadly defined to mean "any advantage and is not limited to property".

As to the details of the sections, it is sufficient, for present purposes, to consider S141 (3) (Ministers receiving bribes) in more detail. It concerns the performance by Ministers of their duties and obligations. Before considering the application of s 141.1(3) some consideration needs to be given to the nature and extent of those duties and obligations.

The Duties and obligations of Ministers

As our elected representatives in a representative democracy, entrusted with power to be exercised on our behalf, it may be said that Ministers are expected to provide access to any person wishing to make representations to them on the bases of criteria other than whether or not money was paid for that access. In particular fairness is required. It may also be said that, with the reputation of our parliamentary democracy entrusted to them, they are under an obligation to avoid creating the impression that their decision-making can be, and/or has been, influenced by financial inducement. The provisions of the Prime Minister' Ministerial Code support those propositions...

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[5] Chapter 7 – Proper Administration of Government (part 7.6 Bribery and related offences)

A statement of the standards of ethics expected of Ministers is contained in Chapter 5 of that Code. In the introduction section the Code states that

> "The Australian people are entitled to expect the highest standards of behaviour from their elected representatives in general and Ministers in particular (which includes Parliamentary Secretaries).
>
> These standards give a clear indication of my expectations of Ministers. "

In Section 1 the Principles are stated as follows:

> "1.1 The ethical standards required of Ministers in Australia's system of government reflect the fact that, as holders of public office, ministers are entrusted with considerable privilege and wide discretionary power.
>
> 1.2 In recognition that public office is a public trust, therefore, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility and the public interest as required by these Standards.
>
> 1.3 In particular, in carrying out their duties:
>
> (i) Ministers must ensure that they act with integrity – that is, through the lawful and disinterested exercise of the statutory and other powers available to their office, appropriate use of the resources available to their office for public purposes, in a manner which is appropriate to the responsibilities of the Minister.
>
> (ii) Ministers must observe fairness in making official decisions – that is, to act honestly and reasonably, with consultation as appropriate to the matter at issue taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved and the interests of Australia.....
>
> 1.4 When taking decisions in or in connection with their official capacity, Ministers must do so in terms of advancing a public interest – that is based on their best judgement of what will advance the common good of the people of Australia. ...."

The Code then goes on to spell out specific requirements including the following:

> **2. Integrity**
>
> 2.1..... Although their public lives encroach upon their private lives, it is critical that ministers do not use public office for private purposes.
>
> ....
>
> 2.17 Ministers must not seek or accept any kind of benefit or other valuable consideration either for themselves or for others in connection with performing or not performing any element of their official duties as a minister. Ministers shall ensure that they do not come under any financial or other obligation to individuals or organisations to the extent that they may appear to be influenced improperly in the performance of their official duties as Minister.

Application of S 141.1(3) Commonwealth Criminal Code

Applying the specific terms of s 141.1(3) to the common practice of holding functions where access to a member of parliament, in particular a Minister is bought, the prosecution could mount an argument that Ministers

- agree to attend such the functions in part to receive or obtain benefits for themselves and their political parties (funds for the running of their parties and election campaigns) and
- do so accepting that, and therefore with the intention that, the performance of their obligation to give fair access to members of the community will be influenced by such benefit.

It could also be argued that the Ministers induced, fostered or sustained a belief that the exercise of their duties to make decisions in government would be influenced by the benefit received. As to that argument, it needs to be borne in mind that the present justification for not providing details of the individual payments made is that they are not "gifts" because they are made for adequate consideration to attend, a consideration that usually greatly exceeds the market value of the food, drink and other hospitality provided. What then is it that makes the consideration "adequate"? Is it not the fact that it includes the opportunity to influence Ministers that renders the consideration for the payment "adequate"? Why then are Ministers who participate not to be regarded as inducing, fostering or sustaining a belief that the exercise of their duties to make decisions in government will be influenced by the benefit received?

What is the answer to these arguments?

There remains the requirement in s 141.1(3) that the conduct of the public official be "dishonest". The legislation does not attempt a definition of "dishonest" but sets out the elements to be proved by stating that dishonest means:

" (a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people".[6]

Thus it is not the standards of ministers or members of Parliament that are relevant It is the standards of ordinary people. This introduces an objective approach.[7]

We commonly use the word "dishonest" to describe the conduct of someone who lies about something. But "dishonest" is also used to describe other conduct. Examination of dictionaries reveals a wide application of the term including to conduct "not straightforward or honourable, underhand, fraudulent, unprincipled, underhand, unfair, dishonourable".

The meaning that is relevant will be determined by the context. In particular, to confine the concept of "dishonesty" to circumstances where a public official lies to conceal what has

[6] Section 130.3 of the Code

[7] Cf, Gary Crooke QC, op. cit. 4

happened would deprive the sections of any real effect; secrecy and lack of transparency by the corrupt public official, which removes any need to lie, is the main form of concealment in any practice of the kind which the sections seek to address.

Applying the full scope of the definition, it may be argued in relation to the "dishonesty" requirement that,

1. According to the standards of ordinary people, a fundamental obligation of a Minister as a public official is to grant access and to do so fairly according to criteria which do NOT include whether or not money or some other benefit was given for that access

2. For a Minister to grant access because money, or some other private benefit was given, is in breach of that obligation and dishonourable and unfair and therefore dishonest.

For similar reasons, the granting of preferential access to Ministers may be also argued to be a breach of the trust vested in them as public officials in our representative democracy and fraudulent, dishonourable and dishonest, because it involves a misuse for their own indirect benefit of the fundamental powers and functions entrusted to them by the community.

Considering the term "dishonest" in the sense of lying, it may be argued that Ministers, by participating in the practice, represent that it is a legitimate and proper use of their office when it is not.

In establishing the requisite knowledge on the part of Ministers, it should be noted that what must be established is that they knew, according to the standards of ordinary people, that the conduct was dishonest.

Conclusion

If the foregoing analysis is correct, then raising funds on the basis of providing access to members of Parliament will be contrary to law and principle and should cease immediately. Alternatively, if it is not correct, there is a significant gap in the Criminal Code provisions intended to directly address serious threats to the proper administration of government and amendments to the Criminal Code to deal with the issue are needed.

But neither course of action will of itself be enough to stop the practice (or variations on it) so long as the present political funding approach continues. So long as political parties and candidates are engaged in the so-called "arms race" and, to compete, have to use every advantage and opportunity they may have to raise the funds needed to do so, people will look for ways and means around the legislation. The only permanent solution is to remove both the pressures and the incentives.

Attachment B

The *Criminal Code Act 1995* (Cth)

The relevant provisions appear in chapter 7 – Proper administration of Government. In particular reference should be made to the following offences

141.1 Bribery of a Commonwealth public official

Giving a bribe

(1) A person is guilty of an offence if:

(a) the person dishonestly:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and

(c) the public official is a Commonwealth public official; and

(d) the duties are duties as a Commonwealth public official.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:

(a) that the official was a Commonwealth public official; or

(b) that the duties were duties as a Commonwealth public official.

Receiving a bribe

(3) A Commonwealth public official is guilty of an offence if:

(a) the official dishonestly:

(i) asks for a benefit for himself, herself or another person; or

(ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person; and

(b) the official does so with the intention:

(i) that the exercise of the official's duties as a Commonwealth public official will be influenced; or

(ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a Commonwealth public official will be influenced

142.1 Corrupting benefits given to, or received by, a Commonwealth public official

Giving a corrupting benefit

(1) A person is guilty of an offence if:

(a) the person dishonestly:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a public official (who may be the other person) in the exercise of the official's duties as a public official; and

(c) the public official is a Commonwealth public official; and

(d) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

Receiving a corrupting benefit

(3) A Commonwealth public official is guilty of an offence if:

(a) the official dishonestly:

(i) asks for a benefit for himself, herself or another person; or

(ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official's duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

142.2 Abuse of public office

(1) A Commonwealth public official is guilty of an offence if:

(a) the official:

(i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or

(ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or

(iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and

(b) the official does so with the intention of:

(i) dishonestly obtaining a benefit for himself or herself or for another person; or

(ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

Reference should also be made to the definitions of "dishonesty" in section 130.3 and "Commonwealth Public Official" in the Dictionary at the end of the provisions

130.3 Dishonesty For the purposes of this Chapter, ***dishonest*** means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

From the "Dictionary"

"Commonwealth public official" means:

(a).. (b)

(c) a Minister; or

(d) a Parliamentary Secretary; or

(e) a member of either House of the Parliament; or

(f)…(t)

And the

(3) A Commonwealth public official is guilty of an offence if:

(a) the official dishonestly:

(i) asks for a benefit for himself, herself or another person; or

(ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person; and

(b) the official does so with the intention:

(i) that the exercise of the official's duties as a Commonwealth public official will be influenced; or

(ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a Commonwealth public official will be influenced.