Joint Standing Committee on Electoral Matters
Committee Inquiry into the Conduct of the 2007 Federal Election

Submission by Senator Andrew Murray: Electoral Matters spokesperson for the Australian Democrats

April 2008

The Australian Democrats thank the Joint Standing Committee on Electoral Matters (JSCEM) for the opportunity to make a submission. Both the Australian Democrats Party and Party Room have authorised me to make this submission on their behalf. It builds on long-standing Democrats policies and concerns.

The submission covers six main areas:

- The Australian Constitution
- The Franchise
- Political Governance
- Funding and disclosure
- Direct Democracy and Rights
- Advertising

There are many mechanical or technical issues concerning the election campaign and the election day itself that JSCEM will consider. No election is perfect, and we expect the JSCEM will make useful recommendations for improvement, but overall the Australian Democrats feel that Australia can continue to be proud of its fair effective and efficient election machinery.

From the Party's point of view, as far as the running of the election went, we found the Australian Electoral Commission (AEC) senior staff to be highly professional, their staff in general to be always helpful and supportive, and independent. They gave out good information in a timely fashion and none of their processes hindered the campaign.

One issue remains a thorn-in-the-election flesh, and needs JSCEM attention – how-to-vote cards. The Australian Democrats have previously raised this issue in our minority reports to the reports on previous elections. The Democrats continue to recommend that the JCSEM or the Government initiate a cooperative inter-state consultation process to find ways to make how-to-vote laws and regulations as consistent as possible across all Australian parliamentary jurisdictions, and to take an early opportunity to trial, at a by-election, systems of displaying how-to-vote material inside polling booths, enabling them to be otherwise banned.

1 The Australian Constitution

The Australian Constitution provides the basis on which the federal parliament is established, authorises the powers the parliament wields, and provides parliament with the authority under which electoral law is developed.

The Australian Democrats believe that changes to the Australian constitution would improve the functioning of our democracy. We do not intend to make a comprehensive case for all the necessary constitutional reform here. Below are some selected areas on which we wish to specifically comment.

1.1 Modernising the constitution

Although the Senate or the House of Representatives can in theory put matters before the people in their own right, in practice initiating change to the Constitution via referendum has been the sole prerogative of the Prime Minister. Section 128 of the Constitution provides that where a constitutional amendment is supported by only one House of Parliament, the Governor-General 'may' submit it to a referendum once the procedures set out in the section are satisfied. Of course, the Governor-General acts on the Government's advice in exercising this power, giving control of the process to the Prime Minister.

Even where there is parliamentary unanimity on a case for reform over a long period (such as with section 44), for political, practical and financial reasons there is generally little enthusiasm for the referendum process. One answer to that barrier to action is to present a package of reforms in unison. Nevertheless, without political unanimity, precedent shows that it is just as hard to get a package of reforms approved at referendum, as it is to get a single issue approved.

The Australian Democrats have campaigned for constitutional reform for three decades. There are a number of Democrats' Private Senator's Bills on the notice paper that continue this long campaign.

There is no Commonwealth body that is responsible for reviewing the Constitution, but the JSCEM has performed that function to a degree. The terms of reference for this JSCEM inquiry are broad, and constitutional issues have featured in JSCEM reports on previous elections. Even so, modernising the Australian constitution may seem a much broader issue than this inquiry might wish to accommodate. However there is a momentum at present that if progressed will affect our constitution and will in turn inevitably affect our parliamentary system and its elections.

As a case in point the 2020 Summit included the following 'Top Ideas'[1]:

- Introduce an Australian Republic;
- Institute an overhaul of federalism, including a constitutional convention and a National Cooperation Commission; and
- Introduce innovative mechanisms to increase civic participation and strengthen civic engagement.

[1] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* p33.

Our political compact, our social contract, is under real strain. Some of this strain comes from a creaking constitution and institutions with roots in the 19th century that do not fully nourish the 21st century, and there is a consequent need to refresh and modernise our governance.

Are Australians concerned? It seems that the nation is not engaged as much with causes yet, although they are somewhat engaged with effects.

Some suggested solutions have appeared managerialist. For instance in June 2006 the Business Council of Australia put out a discussion paper on *Modernising the Australian Federation*. This BCA paper has a focus on efficiency. It says there need be no radical changes to the relative powers of the States and Commonwealth and no major change to the Australian Constitution.

They are wise to be cautious concerning constitutional change, but that does not justify a lack of courage in review. In any case, history has shown that the people of Australia should be trusted in these matters. Constitutional recommendations put to the people will be carefully assessed.

The value of double majorities has been illustrated many times. The requirement for constitutional changes to be supported by a popular majority as well as a geographic majority is the great example of structural checks and balances. Paradoxically, it also ensures that Australians remain very conservative about advocating constitutional change because it is so hard to achieve.

The foundation of any nation is characterised by the political compact, the social contract. Australian federalism is a political system of checks and balances. No reform of the Australian system will be successful unless it accommodates revised checks and balances to ensure that the social contract is strengthened and refreshed.

A holistic approach is needed. You cannot fix the economic or the social effectively without also fixing political governance. And that means reassessing the constitution, the separation of powers, a republic, whether the federation should stay and if it should in what form, and the powers states and the commonwealth should each have. It means reassessing how power is acquired and restrained, who has power over what, how money is raised and spent, and by whom.

The USA did not begin with its constitution but is defined by it. Canada advances with electoral reform and a charter of rights. Britain has modernised its political compact and adopted rights and agendas as part of the European pact. It may be unkind, but what is the advance in our social contract offered by the BCA? Harmonised rail tracks? A Ministry of Efficiency? All pocket and no soul?

To which the BCA might reply - start with something small, give it a push to get it going and its own momentum will gather size and speed. It might argue that the alternative, the all encompassing vision, just leaves too many people behind, intellectually and emotionally. They could argue that there is no appetite in the community for wide ranging, philosophically driven reform. They could argue that by first giving Australians digestible pieces of reform that mean something to them,

they can be lead to the bigger picture. They could argue that Australians collectively seem to have little patience with grand social schemes or philosophically driven discussions (unlike the Europeans) or debates about civic rights (unlike the North Americans).

In fact, step two in the BCA paper does propose the renegotiation of the federal compact between the partners of the Federation. This needs a deal of thought, not only in relation to the substance but also the process of achieving it.

To achieve lasting reform, anticipate a ten year struggle, as for the original Constitution, to allow time for dialogue with the people.

To ensure momentum what is needed is a standing elected constitutional convention, serviced by a permanent secretariat, and with a budget to allow for full engagement and dialogue. This could be supplemented by a university based institute for constitutional change, producing discussion papers and fostering public awareness and debate. This is serious business and needs a serious approach.

If we were to go back to basics on the Constitution, a useful early exercise would be to identify those aspects which facilitate a more balanced relationship between the centre and the states.

We need to identify those aspects of the Constitution which have fostered imbalances between the three tiers of government. Then there is the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

Power can only be controlled by countervailing power. Since the beginnings of government, citizens have learnt to fear their rulers, and democracies have tried to institute checks and balances. Executives continually find ways round those restraints.

A revised Australian social contract, a new political compact, is indeed necessary to address the real strains in our system. That means a refreshed and modernised Constitution and the political and other institutions that flow from it.

Recommendation 1

> **That a standing elected constitutional convention be initiated to review the Australian constitution, be in place for a number of years, be serviced by a permanent secretariat, and have sufficient resources to allow for full engagement and dialogue with the Australian people.**

1.2 Four-year fixed terms for the House of Representatives

A long-standing constitutional policy of the Australian Democrats is to have four-year terms implemented for the House of Representatives. Our *Constitution Alteration*

(Electors' Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000 reflects this and provides a legislative vehicle to progress this reform.[2]

The Democrats have consistently argued that fixed terms are more important than longer terms, but they have equally consistently supported four-year terms for the House of Representatives.

Snap and early elections are called for personal and party advantage, arbitrarily, sometimes capriciously, and always on a partisan basis. In contrast, elections held on a pre-determined date ensure stability and responsibility by both Government and Opposition. If introduced for the Federal parliament it would allow for sound party and independent preparation and for fairer political competition.

Fixed four-year terms would align Australia with 25 other progressive democratic countries. They would also end the power of the Prime Minister to call elections according to the dictates of political expediency, would increase stability and continuity in the electoral cycle and prevent the unnecessary waste of taxpayers' dollars being spent on having too many elections.

Comparison with other systems

Comparisons reveal disparities between the Australian federal jurisdiction with the states and with other bicameral systems throughout the world. The three-year term consistency with the States and Territories has now been lost with all (apart from Queensland's unicameral parliament) having now moved to four-year terms. The Australian political norm is for longer terms – seven of our nine lower houses have four-year terms.

Fixed terms are an accepted feature of a number of states and territories in Australia.

A significant majority of democratic jurisdictions overseas employ either four or five-year parliamentary terms for their lower houses. The UK Parliament – the principal model for our federal electoral system – has a maximum term of five years: Australia is actually in the backward minority of four countries that have terms of three years.

Support for four-year terms

Since 1900, there have been many forums calling for an increase in the House of Representatives term, including the issue being put to referendum in 1988. However, as it was put together with more contentious proposals and as voters were unable to vote 'Yes' for only one part of the package, defeat was essentially ensured.

In more recent times, the JSCEM has given its unanimous support to four-year terms for the House through its investigations into the 1996, 1998, 2001 and 2004 elections.

Changing the House of Representatives term also entails making changes to the terms of the Senate. How the states have addressed this situation is relevant, and two states have 8-year terms for the upper house. The JSCEM 2004 report canvassed an interesting variant of a three year minimum House of Representatives term with an

[2] This is a reworking of the *Constitution Alteration (Fixed Term Parliaments) Bill* that was introduced by Senator Macklin in 1987.

election to be called in the fourth year, so making the Senate term a minimum of six years, and a maximum of eight.

Advantages of four-year parliamentary terms:

- Improved policy making – the ability to reconcile careful and deliberate policy-making will be enhanced.
- Increased business confidence – the private sector will welcome more focus on long-term business planning and confidence that will benefit the economy.
- Reduced costs of elections – based on full-term expectations, Australia should not have held more than 32 elections last century, instead, they held 38, amounting to significant additional costs of between $800m and $1 billion in today's money.[3]
- Improved debate – can facilitate more in-depth and genuine cross-party discussion on policy issues without the influence of a looming election and continuous campaigning in the third year of a term.
- Voter dislike of frequent elections – will appease voter dislike at the frequency of elections.

Should fixed terms be simultaneous for the House and Senate?

At present the House of Representatives term is not fixed and the Senate's is, and the term length of the former is half the latter's. If the House of Representatives term were to be fixed, even if the length of terms of the House and the Senate were to remain different, the question of simultaneous dates of commencement and termination arises.

Currently a general election comes about with dissolution of the House of Representatives but not the Senate, because the latter has a fixed term. A double dissolution under section 57 of the Constitution involves the dissolution of both Houses, and while those members and senators elected at the subsequent election share a common commencement date, they revert to different termination dates.

However in a general election the introduction of simultaneous House of Representatives/Senate commencement dates would involve dissolving the Senate.

At present the Senate continues functioning during a half-Senate general election. If the Senate were to be dissolved every election, it could mean that, for long periods, (or at least the length of an election), there would be no Parliament. If legislation were required to deal with some serious emergency, such as terrorist attacks or a disease pandemic, legislation could not be passed and governments would either have inadequate powers or would have to resort to arbitrary powers.

Is the caretaker convention adequate for this eventuality? Would it be jettisoned? Similarly, unlike at present when the Senate continues its Committee work (except by convention for the period of the election) during those periods there would be no Parliament to scrutinise and hold government accountable.

[3] For further detail, refer S. Bennett, 'Four-Year Terms for the House of Representatives', Research Paper No. 2, 2003-04, Department of the Parliamentary Library, September 2003.

It would seem that if the Constitution were to be amended to have both houses dissolved, it should be amended so that the terms of members of *both* Houses end on the day before the day on which the terms of their successors begin, as is currently the case with senators, including the territory senators who go out whenever the House of Representatives is dissolved.

This arrangement could apply regardless of whether the parliamentary term is fixed and regardless of the length of the term. At any time during an election the 'outgoing' Parliament could meet to deal with an emergency, and, provided that the handover date were suitably arranged, there would always be a Parliament to call upon. Moreover, the Houses should meet when they decide to meet, and should not be able to be dismissed, either by prime ministerial decree through the Speaker, or by the power of prorogation. In circumstances of constitutional change we need to consider whether prorogation should be abolished.[4]

This option of simultaneous House of Representatives/Senate terms is a proposal which has been put to referendum and rejected before. The lack of support for this option with the Australian public should be noted.

The main reason for opposing the simultaneous House of Representatives/Senate terms proposal was that it would increase prime ministerial power, and the scope for electoral manipulation, by allowing the Prime Minister to dissolve half of the Senate whenever he decided to dissolve the House of Representatives.

The same objection would likely arise even if the first three years of a four-year term is 'fixed': the Prime Minister would still be able to manipulate the Senate term by dissolving half of the Senate. The Senate would no longer be a fixed-term, continuing body.

If this option is put again the same objection will certainly be raised again. Any lengthening of the House of Representatives term will only be successful if this objection is dealt with. The public have consistently fought measures which provide greater powers to the Prime Minister.

Recommendation 2

That the dates of elections be fixed and preset by legislation.

Recommendation 3

That a four-year term for the House of Representatives be put to the people as a referendum question.

1.3 Simultaneous federal/state elections

The Democrats are of the opinion that simultaneous federal/state elections should not be banned outright – they should at least be at the discretion of the governments

[4] *Beware the monarchical gargoyle in our constitution* Harry Evans Canberra Times 25 February 2005.

concerned. Why shouldn't a federal by-election be able to be held simultaneously - with state or local elections; or a state by-election during a federal election; or a federal referendum during local government or state elections - at the discretion of a government or as agreed between governments?

Australians are in frequent election mode, with nine governments holding Federal, State and Territory elections, and local government elections, as well as referenda and plebiscites at all three levels of government. The issue is simply one of cost and convenience. For instance, greater efficiency is achieved in the United States of America where simultaneous elections are a long-standing, regular and unexceptional feature of their election system.

In 1922 the CEA was amended to prevent simultaneous Federal and State elections. The 1988 Constitutional commission recommended that this provision be repealed, and the Democrats urge Government to acknowledge this finding by amending the law.

If fixed dates for elections were to also become a reality, it would open up the possibility for simultaneous elections as well, although these could eventuate anyway, if they were not prohibited by the CEA.

Recommendation 4

> **That subsection 394(1) of the *Commonwealth Electoral Act 1918* be repealed.**

1.4 Section 44 problems

Subsection 44(i) of the Constitution has provoked litigation in the past, the leading case being Sykes v Cleary (No.2) of 1992. The Democrats dealt with the issue of section 44 in our 1996, 1998, 2001 and 2004 Minority Reports to the JSCEM election, as has the JSCEM itself. There is unanimous support for change.

Subsection 44(i) says *'that a person could not seek election to the parliament if that person was a citizen of another country or owed an allegiance of some kind to another nation'*. We argue that this should be replaced with the simple requirement that all candidates for political office be Australian citizens.

This section was drawn up at a time when there was no concept of Australian citizenship, when Australian residents were either British subjects or aliens. It was designed to ensure the Parliament was free of aliens as so defined at that time. The Senate Standing Committee on Constitutional and Legal Affairs in its 1981 Report: *The Constitutional Qualifications of Members of Parliament*, recommended that Australian Citizenship be the constitutional qualification for parliamentary membership, with questions of the various grades of foreign allegiance being relegated to the legislative sphere.

The Constitutional Commission, in its Final Report of 1988, recommended that subsection 44(i) be deleted and that Australian citizenship instead be the requirement

for candidacy, with the Parliament being empowered to make laws as to residency requirements.

The House of Representatives Standing Committee on Legal and Constitutional Affairs Report of July 1997 recommended that subsection 44(i) be replaced by a provision requiring that all candidates be Australian citizens, and it went further to suggest the new provision empower the Parliament to enact legislation determining the grounds for disqualification of members in relation to foreign allegiance. This Report also recommended that subsection 44(iv) be deleted and replaced by provisions preventing judicial officers from nominating without resigning their posts and other provisions empowering the parliament to specify other offices which would be declared vacant should the office holder be elected to parliament.

Whilst some offices, such as those of a judicial nature, must be resigned prior to candidacy, no provision is made for other offices to be declared vacant upon a candidate being successfully elected. It would be absurd, of course, if public servants could retain their positions after having been elected to parliament. It is essential that a mechanism be put in place declaring vacant certain specified offices upon their holders being elected.

Subsection 44(iv) has its origins in the *Succession to the Crown Act 1707 (UK).* Its purpose there was essentially to do with the separation of powers, the idea being to prevent undue control of the House of Commons by members also being employed by the Crown.

Obviously times have changed, even though the ancient struggle between executive and parliament continues to this day. Whilst this provision may have been appropriate centuries ago, the growth of the machinery of government has meant that its contemporary effect is to prevent many thousands of citizens employed in the public sector from standing for election without any real justification. Those that do stand often do so at substantial personal and family cost, because they resign their jobs

The Australian Democrats have a long history of trying to rectify this part of the Constitution. In February 1980 former Democrats Senator Colin Mason, moved a motion which resulted in the inquiry by the Standing Committee on Constitutional and Legal Affairs into the government's order that public servants resign before nomination for election. Again, this section featured in the Sykes v. Cleary (No.2) litigation.

The Australian Democrats *The Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) 2000* is our fourth legislative attempt since 1985 to address this issue. The bill proposes to delete subsection 44(iv) and substitute a requirement that only judicial officers must resign their positions prior to election, as well as empowering the parliament to legislate for other specified offices to be vacated.

The last paragraph of section 44 should also be deleted in its entirety. Indeed, the Standing Committee on Legal and Constitutional Affairs Report of July 1997 noted

that if its recommendations concerning subsections 44(i) and 44(iv) were accepted, the last paragraph of subsection 44 should be deleted. We concur with that view.

Recommendation 5

That the following questions be put to the people as Referendum questions:

- **That subsection 44(i) of the Constitution be replaced by a requirement that all candidates be Australian citizens and meet any further requirements set by the Parliament.**
- **That subsection 44(iv) of the Constitution be replaced by provisions preventing judicial officers from nominating without resigning their posts, and giving Parliament power to specify other offices to be declared vacant should an office-holder be elected.**
- **That the last paragraph of section 44 of the Constitution be deleted.**

2 The Franchise

JSCEM will no doubt be looking in detail at aspects of the franchise. The Australian Democrats have a few areas we wish to highlight.

Universal enrolment

I have seen estimates that as many as one million more Australians could be enrolled, and are not.

The 2020 summit recommended universal automatic enrolment and re-enrolment of eligible voters as a 'top idea'.[5] The Australian Democrats have no suggestion as to how this might be done, but urge JSCEM to examine this idea and seek means by which it could be achieved.

Early closure of the rolls

Hopefully by the time JSCEM reports on this inquiry, the assault on Australia's electoral integrity and representative democracy made by the misnamed *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* will have ended, and retrogressive elements of this act will have been repealed.

The early closure of electoral rolls as a result of that Act ended decades of practice, whereby Australians had sufficient time to either register to vote or to change their details after an election is called. The early closure of the rolls disenfranchised tens of thousands of Australians who were therefore denied one of their most fundamental human rights, the right to vote.

British voters can decide key seats

There are enough non-Australian citizens voting in Australian elections to account for two House of Representatives constituencies. A government response to a question on notice[6] revealed that under sub section 93(1) (b) (ii)[7] of the *Commonwealth Electoral Act 1918* (the CEA) there are still some 163 887 voters on the electoral roll who are not Australian citizens.

This figure may be overstated as it may include British subjects who have become Australian citizens but have not notified the Australian Electoral Commission (AEC) of their Australian citizenship status.

It may also be understated, as this figure does not include British subjects who are on the roll but not coded as such if they have not changed their enrolment address since 25 January 1984.

[5] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* p33 point 4.
[6] Senator Andrew Murray Question No 3027 23 February 2007.
[7] This section permits British subjects coded as being eligible to vote on 25 January 1984 to remain as non-citizens on the Australian voters roll.

British subjects who were on the roll in January 1984 were allowed to stay on it indefinitely, unlike the situation in Canada where Canadian citizenship was required from 1975.

It is odd that foreigners retain this voting right. British citizens who are not Australian citizens are undoubtedly foreigners. The Australian High Court determined in 1999 that the UK was a 'foreign power', making British citizens ineligible to sit in the Australian parliament because of their foreign allegiance. Despite this, British citizens on our electoral roll are there in sufficient numbers to decide elections in federal seats such as Brand and Canning in Western Australia and Kingston and Wakefield in South Australia.

Voting over the age of 16

Because there is some community support for lowering the voting age, periodically there is public debate over the merits of lowering the voting age from 18 to 16. There are members of the Australian Democrats party that support such a policy. Others in the party believe that voting should be set at the age of adulthood, as determined by general legal principles, but at least at 18 years of age.

Lowering the voting age for voluntary enrolment has the positive benefit of allowing politically concerned and possibly politically active young Australians to participate fully in political life.

There would be concern if the response of political parties to lowering the voting age was to start targeting schools in their political campaigns – for instance where the school leaving age is 17 (as in WA), this could be a danger.

Lowering the voting age is an area of interest to sections of the community and the JSCEM should consult and take a view on this matter.

Voting rights of prisoners

Australia's system of government is founded on the sovereignty of its citizenry, whereby the people possess the ultimate power over the system of government. Any move that disenfranchises any group of citizens inevitably undermines that sovereignty. It is important to understand that, whilst prisoners are deprived of their liberty while in detention, they are not deprived of their citizenship. Prisoners should be accorded the right to vote because it is a fundamental right of citizenship.

Until 1983, persons sentenced or subject to be sentenced for an offence punishable by imprisonment for one year or longer could not vote. From 1983 to 1995 the period was five years. From 1995 to 2004 the period of disqualification was to apply to those actually serving five years or longer. From 2004 to 2006 the threshold was reduced to three years. Persons on remand could vote.

However, under the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* all persons serving a term of imprisonment were disenfranchised. This measure has the dubious distinction of moving closer to similar

policy in the United States, the world leader in any democracy in both imprisonment and disenfranchisement.

These 2006 changes to prisoner voting rights were then overturned by the High Court in August 2007 in a 4-2 decision. The Court held that voting in elections lies at the heart of the system of representative government, and disenfranchisement of a group of adult citizens without a substantial reason would not be consistent with it. The High Court found that the net of disqualification was cast too wide and went beyond the rationale for justifying a suspension of a fundamental right of citizenship.

To deny those imprisoned one of the most basic rights of citizenship is to impose an extra-judicial penalty on top of that judged appropriate by the court. It does not fit with Australia's tradition of leading the way in advancing the universal franchise. Nor does it fit with recent international court decisions that have declared prisoner voting bans invalid in Canada, the United Kingdom and South Africa.

There is no logical connection between the commission of an offence and the right to vote. Consider a case where a journalist is imprisoned for refusing to name a source on principled grounds. Should he or she be denied the vote? To complicate this further, there is no uniformity amongst the states, or between the states and the Commonwealth, as to what constitutes an offence punishable by imprisonment.

Denying prisoners the vote does not in any way act as a deterrent to committing crime.

Although Australia's Constitution does not explicitly guarantee citizens the right to vote, there is an implied right under the requirement of representative government or one that is "directly chosen by the people". Australia is a signatory to the *International Covenant on Civil and Political Rights*, which compels the conclusion that every adult citizen shall have the right to vote without distinction and regardless of their circumstances.

An exception to the above arguments is when a person has been convicted of a crime against citizenship, namely treason or treachery, as described in the criminal Code. Being of unsound mind should also be sufficient grounds for removing the right to vote. In these cases, the right to vote should be removed. Otherwise, removing a citizen's rights should be a matter for the Courts, not for the CEA. A convicted person's right to vote should only be removed by the determination of a judge.

Recommendation 6

That JSCEM report on

- **automatic universal enrolment and re-enrolment of Australian citizens;**
- **when closure of the rolls should occur;**
- **only Australian citizens being able to be on the voters roll;**
- **whether the voting age should be lowered to 16; and**
- **franchising all prisoners, unless of unsound mind, or convicted of treason.**

3 Political Governance

Better political governance needed

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability. The Australian Democrats have no doubt that improvements to the quality and acceptance of political governance should be focused on as a reform priority.

The Australian Democrats believe that it is in the conduct of political parties that public interest resides and where corrupted processes, such as branch stacking or preselection rorts, can result in real dangers. The regulation of political parties is largely perfunctory,[8] and constant consequent media exposure of poor governance has led to a significant level of public distrust and apathy in the political process and in politicians, a situation that undermines Australian democracy.

This affects the pool of potential candidates available to political parties. Many Australians are put off politics because of low standards.

The fact that political parties wield considerable influence over all Australians by the nature of political power, and the fact that political parties receive public funding, both demonstrate and justify the need for stronger regulatory control.

All registered political parties should be obliged to meet minimum standards of accountability and internal democracy. Given the public funding of the elections, the immense power of political parties (at least of some parties), and their vital role in our government and our democracy, it is proper to insist that such standards be met.

The increased regulation of political parties is not inconsistent with protecting the essential freedom of expression and the essential freedom from unjustified state interference, influence or control. Greater regulation would offer political parties better protection from internal malpractice and corruption, and the public better protection from its consequences, and it would reduce the opportunity for public funds being used for improper purposes. It would also go some way towards addressing the public's often poor perception of politicians and politics.

The JSCEM has previously agreed with many of these points.[9]

Improving the regulation of political parties

The inclination of political parties is towards self-regulation. That inclination means that there has been minimal political backing for statutory regulation. Since political parties control the legislature, the regulation of political parties is relatively

[8] For instance, we have 2,262 pages of laws to regulate the conduct of companies, 1,440 pages to regulate unions, but no rules to govern how our most important political institutions, political parties, are run.

[9] See Chapter 4 JSCEM report into the 2004 federal election: September 2005.

perfunctory, a failure that is in marked contrast to the much better and stronger regulation for corporations or unions.

At present there are two governance areas that are better regulated by statute – the registration of political parties, and funding and disclosure. The statutory registration of political parties is well managed by the AEC, as a necessary part of election mechanics, but the regulation of funding and disclosure is weak.

Political parties by their role, function, importance and access to public funding are not private bodies but are of great public concern. The courts are catching up to that understanding.[10] Nevertheless, the common law has been of little assistance in providing the necessary safeguards.

To date the Courts have been largely reluctant to apply common law principles (such as on membership or pre-selections) to political party constitutions, although they have determined that disputes within political parties are justiciable.

Political parties are fundamental to Australian society and its economy. They wield enormous influence over the lives of all Australians. Political parties need the very proper and necessary safeguards and regulations that are there for corporations or unions – for the same reason - it is in the public interest.

The integrity of an organisation rests on solid and honest constitutional foundations. Corporations and Workplace Relations laws provide models for organisational regulation.

The successful functioning of a company or a union is based on its constitution, which must conform to the legal code. Political parties do not operate on the same foundational constructs. What is surely indisputable is that the public interest has to be served. Political parties have to be more accountable because of the public funding and resources they enjoy, and because of their powerful public role.

The Democrats have argued for a set of reforms that would bring political parties under the type of regulatory regime that befits their role in our system of democracy and accountability. The present CEA does not address the internal rules and procedures of political parties.

The AEC dealt with a number of these issues in Recommendations 13-16 in the AEC Funding and Disclosure Report Election 98. Recommendation 16 asks that the CEA provide the AEC with the power to set standard, minimum rules which would apply to registered political parties where the parties own constitution is silent or unclear. This was a significant accountability recommendation.

The JSCEM's 1998 Report recommended (No.52) that political parties be required to lodge a constitution with the Australian Electoral Commission (AEC) that must

[10] *Baldwin v Everingham* (1993) 1 QLDR 10; *Thornley & Heffernan* CLS 1995 NSWSC EQ 150 and CLS 1995 NSWSC EQ 206; *Sullivan v Della Bosca* [1999] NSWSC 136; *Clarke v Australian Labor Party* (1999) 74 SASR 109 & *Clarke v Australian Labor Party (SA Branch), Hurley & Ors and Brown* [1999] SASC 365 and 415; *Tucker v Herron and others* (2001), Supreme Court QLD 6735 of 2001.

contain certain minimal elements. This recommendation was a significant one, but the Democrats believed it did not go far enough. In their report into the 2004 election, in Recommendation 19, to its credit the JSCEM again recommended that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements.

Political parties exercise public power, and the terms on which they do so must be open to public scrutiny. The fact that most party constitutions are secret prevents proper public scrutiny of political parties. Party constitutions should be publicly available documents updated at least once every electoral cycle. (The JSCEM were once told by the AEC that a particular party constitution had not been updated in their records for 16 years.)

To bring political parties under the type of accountability regime that befits their role in our system of government, the following reforms are needed:

- The *Commonwealth Electoral Act* should be amended to require standard items be set out in a political party's constitution to gain registration, similar to the requirements under Corporations Law for the constitution of companies.
- Party constitutions should specify the conditions and rules of party membership; how office bearers are preselected and selected; how preselection of candidates is conducted; the processes for the resolution of disputes and conflicts of interest; the processes for changing the constitution; and processes for administration and management.
- Party constitutions should also provide for the rights of members in specified classes of membership to: take part in the conduct of party affairs, either directly or through freely chosen representatives; to freely express choices about party matters, including the choice of candidates for elections; and to exercise a vote of equal value with the vote of any other members in the same class of membership.
- Party constitutions should be open to public scrutiny and updated on the public register at least once every electoral cycle.
- The AEC should be empowered to oversee all important ballots within political parties. At the very least, the law should permit them to do so at the request of a registered political party.
- The AEC should also be empowered to investigate any allegations of a serious breach of a party constitution, and be able to apply an administrative penalty.

Schedule 1 of Senator Murray's *The Electoral (Greater Fairness of Electoral Processes) Bill 2007* encompasses all of these reform measures to ensure that all parties, irrespective of their ideologies, meet minimum standards of accountability, good governance and internal democracy. It is perfectly proper to insist that these standards be met. The public deserve no less.

One vote one value

'One vote one value' is a fundamental democratic principle recognised by Article 25 of the *International Covenant on Civil and Political Rights*.[11] Not only should this

[11] For instance see Senator Murray's *State Elections (One Vote, One Value) Bill 2001.*

principle be embedded in our legislatures, but to achieve registration, political parties should be compelled to comply with this principle in their internal organisations.

The JSCEM took this principle up as Recommendation 18 in its *User friendly, not abuser friendly* report.

It has been widely reported that the Australian Labor Party is one political party with internal voting systems that result in gerrymandered elections for conventions, preselections and various other ballots. This is largely a result of exaggerated factional voting and the bloc power of union officials who are able to use large union memberships, most members of which are not Labor party members, to achieve and exercise power within the Labor party.

If more powerful votes are also directly linked to consequent political donations and power over party policies, then the dangers of corrupting influences are obvious.

Since the 1960s the Labor Party has been particularly strong about the principle of 'one vote one value', first introducing legislation in the Federal Parliament in 1972/3. In recent years the ALP has taken the matter to the High Court with respect to the Western Australian electoral system. They should therefore be expected to support 'one vote one value' as a principle within political parties.

The democratic principle of 'one vote one value' is well established, and widely but not universally supported. As far back as February 1964 the US Supreme Court gave specific support to the principle. During the 1970s, 1980s, and 1990s the principle of 'one vote one value', with a practical and limited permissible variation, was introduced to all federal, State and Territory electoral law in Australia, except Western Australia. That state finally ended the lower house gerrymander in 2005.

If 'one vote one value' were translated into political party rules, no member's vote would count more than another's. It would also do away with undemocratic and manipulated preselections, delegate selections, or balloted matters.

It should be a precondition for the receipt of public funding that a registered political party comply with the 'one-vote one-value' principle in its internal rules.

Among other things the proposition has been put that political parties, in addition to their overriding duty to the Australian public, must be responsible to their financial members and not to outside bodies (hence, 'one vote one value').

There are two legislative avenues that could be pursued in this regard - the CEA and the *Workplace Relations Act* (WRA). The JSCEM took the first step with its recommendation to introduce one vote one value in political parties in its aforementioned report. The WRA could be amended to insert provisions regulating the affiliation of registered employee and employer organisations to political parties. These provisions would be contained in the chapter of the WRA which relates to the democratic control of organisations by their members. Such an approach might:

- Prohibit the affiliation, or maintenance of affiliation, of a federally or state registered employee or employer organisation with a political party unless a

secret ballot of members authorising the affiliation has been held in the previous three (or four) years; and/or
- Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met.

This proposition is popular with some ALP reformers who aim to make the process of trade union affiliation to political parties more transparent and democratic. The ALP is the only registered political party that allow unions to affiliate to it and to exercise a right to vote in internal party ballots, such as in the pre-selection of ALP candidates.

Unions affiliate on the basis of how many of their union members (the great majority of whom are not party members), their committee of management chooses to affiliate for. The more members a union affiliates for, the greater the number of delegates that union is entitled to send to an ALP state or federal conference. Individual members of that union have no say as to whether they wish to be included in their union's affiliation numbers or not. Affiliation fees paid to the ALP by the union are derived from the union's consolidated revenue.

Some proposed amendments that could deal with the inherently undemocratic nature of this system might be as follows:

- Any delegate sent to a governing body of a political party by an affiliated union has to be elected directly by those members of the union who have expressly requested their union to count them for the purpose of affiliation. As an added protection, the AEC could be asked to conduct such an election and the count would be by the proportional representation method;
- Definitions would need to comprehensively cover any way a union may seek to affiliate to a political party e.g. by affiliating on the basis of the numbers of union members or how much money they may donate to a political party;
- Any union delegates that attend any of the governing bodies of a political party that the union is affiliated to, must be elected in accordance with the CEA; and
- Individual members of the union would need to give their permission in writing before the union can include them in their affiliation numbers to a political party. No person should be permitted to be both a voting party member in his or her own right, and also be part of the affiliation numbers of a union. Such people effectively exercise two votes, in contravention of the 'one vote one value' principle.

Recommendation 7

Amend the CEA to ensure that political parties are suitably regulated in order to mandate sound political governance.

4 Funding and Disclosure

4.1 Establishing Principles

We have been going backwards

The recommendations put forward in this submission by the Australian Democrats are formulated to protect politicians and political parties from the undue influence and patronage of donors. For as long as the powerful mix of business, unions, money and politics remains loosely regulated, Australian democracy will continue to be undermined.

Back in 1989, the then Commonwealth Electoral Commissioner, Dr Colin Hughes remarked on his retirement that the integrity of the electoral system was "…teetering on a knife edge in a climate of political corruption". Sadly, this statement still has relevance almost two decades later.

The Democrats trust that the institutional self-interest of political parties can be overcome to advance the reforms required to implement a much improved system of accountability and transparency in political funding and disclosure. The health of Australian democracy at all levels must not be compromised by any suspicion that hidden money influences our political system.

As may be expected from the Australian Democrats' long campaign for policy reform to achieve greater accountability and transparency in the area of political donations,[12] the party welcomes this opportunity to contribute to the Joint Standing Committee on Electoral Matters (JSCEM) consideration of donations disclosure and public funding.

The Democrats were active participants in the major watershed reforms in 1983 to electoral law, and in particular to funding and disclosure law. Since then further progress has been very limited. The Democrats have repeatedly raised funding and disclosure issues at length, such as in our Minority Reports to the JSCEM reports into the 1996, 1998, 2001 and 2004 federal elections. Regrettably to date meaningful change has been thwarted by one or both major political parties.

Until recently however, at least Australia had not gone backward in funding and disclosure law. That is until the former Coalition government used its Senate numbers to pass unamended the dubiously titled *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, which made it much, much easier to give a lot of money in secret to political parties, as it raised the disclosure threshold from $1,500 to $10,000.

In the financial year following these changes, more than $127 million was given to political parties through a combination of donations, investments, taxpayer funding and contributions from affiliated organisations. However, only 264 donations, totalling less than $30 million were specifically disclosed under these new laws.

[12] For a useful article on our views see Senator Andrew Murray and Marilyn Rock, 'The dangerous art of giving', *Australian Quarterly*, June-July 2000, pp.29-33.

The Democrats attempted to address the lack of a comprehensive disclosure regime through their *Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007* (the Greater Fairness Bill). Together with proposing stronger standards for political parties, this bill provides legislative measures for the establishment of a fully regulated and transparent regime of political donations and disclosure.

Currently a legislative move is under way to move forward again. The Democrats welcome the 28 March 2008 announcement by the Special Minister of State, Senator the Hon John Faulkner, of the Government's intention to progress electoral reforms by introducing legislation to fix the loopholes in donations disclosure and public funding. Minister Faulkner should be congratulated at being able to overcome the political institutional hurdles that often impede significant reform of electoral donations.

The Rudd Government intends to reverse the changes pushed through by the Howard Government, including slashing the donation disclosure threshold from $10,300 to less than $1 000. They will also attempt to ban donations from overseas and to end multiple donations being hidden by being paid across State and Territory branches of the same party. The Democrats particularly welcome these funding reforms as they have been a vital part of our long campaign to reform the disclosure system.

JSCEM should consider radical reform

There is wide support in the community, and even serious political consideration (as in the current NSW parliamentary review into funding and disclosure), for the complete banning of donations to political parties and candidates. Some argue for the banning of donations by entities and individuals, others just for the banning of donations by entities.

Banning donations would likely mean political parties would have to be funded from public funding, membership fees and member donations, and investment income.

There is often strong opposition to public funding, but if the quid-pro-quo for universal public funding in all Australian elections is the banning of private donations, and the end of corrupting influences, then the case may be better argued.

Such a policy to ban private donations would at one hit rid political parties and candidates of any perception, prospect or potential for improper, corrupt, or oppressive influence by donors. There would also be less money available for elections, making them cheaper and more affordable.

The Australian Democrats would support such a policy, but it needs thorough investigation, and we would urge the JSCEM to report on such an approach.

Democrats' funding and disclosure principles for reforming the present system

The Democrats' reform agenda for the disclosure of political donations is based on two perspectives: by improving present principles and by establishing new ones.

Those recommendations that build on those disclosure principles already in place are:

- that the existing loophole allowing donations made to separate federal, state and territory division of the same political party, at values just below the disclosure level, be closed;
- that professional fundraising be subject to the same disclosure rules applying to political donations;
- that political parties receiving donations from trusts clubs or foundations be subject to additional disclosure requirements; and
- that political parties receiving donations from trusts clubs or foundations be obliged to return these funds unless full disclosure of the true donor's identities is made.

Those Democrat recommendations that introduce new principles of disclosure into electoral law are:

- that the media or any media entity be prohibited from donating in cash or kind to the electoral or campaign funding of a political party;
- that all electoral and campaign funding be subject to a financial cap, indexed to inflation and controlled by the AEC;
- that cash or in kind donations to a political party or its candidates be capped at $100,000 per annum;
- that large donations (say of over $10,000) be disclosed regularly (say quarterly) and made public immediately;
- that donations from overseas individuals or entities be banned;
- that donations with 'strings attached' be prohibited;
- that shareholders of companies and members of registered organisation such as trade unions be required to approve donation policies; and
- that the funding and disclosure provisions apply to other elections administered by the AEC.

This submission will draw on these Democrat recommendations.

Recommendation 8

That JSCEM should draw up a set of principles that should guide the rules for funding and disclosure and test the CEA against them.

Recommendation 9

That JSCEM should report on the desirability and feasibility of a complete ban on donations to political parties and candidates.

4.2 Hiding donations

Multiple donations

The problem of donation splitting has long concerned the Democrats. The AEC elaborated on this practice back in 1998 in its *Funding and Disclosure Report*:

> The AEC continue to witness instances of apparent cases of donation splitting to avoid disclosure … The donations can be split between family members and a family business and also across the various State and Territory branches of a party, each of which is treated as a separate party for disclosure purposes.
>
> The Act already demands that related companies be treated as a single entity for disclosure purposes. The AEC does not believe that any such deeming provision is possible to overcome the scenarios outline above. The only practical deterrent to donation splitting is to maintain a low disclosure threshold.[13]

The Democrats agree and are pleased that the Labor Government intends to not only lower the disclosure threshold from over $10,000 to $1,000, but also to remove the loophole that facilitates donation splitting. We have consistently recommended that the donations loophole be closed, that allows nine separate cheques to be written at a value just below the disclosure level, made out to the separate federal, state and territory divisions of the same political party.

Recommendation 10

> **The donations loophole be closed, that allows nine separate cheques to be written at a value just below the disclosure level, made out to the separate federal, state and territory divisions of the same political party**.

Recommendation 11

That JSCEM support the lowering of the donations disclosure level to $1 000.

Hidden Funds

It is essential that Australia has a comprehensive regulatory regime that legally requires the publication of explicit details of the true sources of donations to political parties. This is required to prevent, or at least discourage, corrupt, illegal or improper conduct in electing representatives, in the formulation or execution of public policy, and helping protect politicians from the undue influence of donors. As Kim Beazley has stated:

> There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is free of corruption and undue influence.[14]

One of the key screening devices for hiding the true source of political donations is the use of trusts, foundations and clubs for professional fundraising. These are often merely screening devices that allow money to be given in secret. Although there has been a broadening of the definition of associated entity to include trade unions

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[13] AEC, *Funding and Disclosure Report Following the Federal Election held on 3 October 1998.*
[14] Commonwealth, *Parliamentary Debates,* House of Representatives, 9 May 1991, p.3477 (Kim Beazley, Minister for Transport and Communications, Second Reading Speech to the *Political Broadcasts and Political Disclosures Bill 1991*).

affiliated with the Labor Party, to maintain a health democracy there should be no secrecy whatsoever about who donates and the amount donated.

The claim by some political parties that privacy considerations for some donors are warranted must be subordinate to the wider public interest of an open and accountable system of government. If donors have no intention of influencing policy directions (strings-attached donations), they should not be dissuaded by such a transparent scheme.

Full disclosure will address the increasing and worrying perception that politics and money are inevitably linked. The Democrats have long past recommended strong disclosure provisions to address the perception that politics and money are inevitably linked.

Recommendation 12

> **Additional disclosure requirements must apply to political parties and candidates that receive donations from trusts or foundations. They should be obliged to return the money unless the following is fully disclosed:**
>
> - **a declaration of beneficial interests in and ultimate control of the trust estate or foundation, including the trustees;**
> - **a declaration of the identities of the beneficiaries of the trust estate or foundation, including in the case of individuals, their countries of residence and, in the case of beneficiaries who are not individuals, their countries of incorporation or registration, as the case may be**;
> - **details of any relationships with other entities;**
> - **the percentage distribution of income within the trust or foundation; and**
> - **any changes during the donations year in relation to the information provided above**.

Recommendation 13

> **Political parties and candidates that receive donations from clubs (greater than those standard low amounts generally permitted as not needing disclosure) should be obliged to return these funds unless full disclosure of the true donor's identities are made**.

Professional fundraising events held by political parties also need to be subject to disclosure requirements.

> …where a person attends an event, at a ticket-price above [the disclosure threshold], and gains access to senior government ministers, that person may feel this access benefits their business, and is therefore a purchase of services rather than a donation, and therefore no return needs to be lodged.[15]

[15] Mr P. Andren, MP (Submission No. 9 to Funding and Disclosure Inquiry, 40th Parliament).

The AEC has previously recommended "…that all payments at fundraising events be deemed by the Electoral Act to be donations or be required to be disclosed anyway," [16] a recommendation later prioritised following questions from JSCEM in May 2004. However, it was noted by M Joo-Cheong Tham and Dr Graeme Orr that a drawback of this scheme is that it would leave the onus of disclosure on the 'contributor ' (that is, the donor) rather than the fund raiser (that is, the party).[17]

Recommendation 14

> **Political parties that receive donations from fundraisers (greater than those standard low amounts generally permitted as not needing disclosure) should be obliged to return these funds unless full disclosure of the true donor's identities are made**.

4.3 Conflicts of Interest

The Role of the Media

The value of funding disclosure rests on the premise of the availability of, easy readability of, and easy accessibility to documentation for public scrutiny. The nature of disclosure law and practice hamper federal, state and territory electoral commissions from satisfying these requirements.

This funding disclosure then feeds the role of the media as government scrutineer. Comprehensive public scrutiny can only be achieved if issues such as political donations are covered by the mass media, and if the media campaign for greater integrity.

To this end, it is worth noting the following statement by Joo-Cheong Tham and Graeme Orr who submitted that:

> …funding disclosure schemes still serve to put the public, assuming a virile media, on notice of the risk of corruption and undue influence. If armed with such information, independent journalists (and indeed in a truly competitive electoral system, rival parties) will vigorously 'shine a bright light and poke around with a long stick', then there will be a useful antidote against corruption and undue influence. In the context of lazy journalism and lax political morality, however, the information disclosed by the disclosure scheme will by and large be meaningless.[18]

However, this interrelationship between media disclosure to the public is potentially undermined according to a 2004 report by the Democratic Audit of Australia.[19] It notes that the symbiotic relationship the media maintains with government may lead

[16] AEC (Submission Nos 7 and 15 to the Funding and Disclosure Inquiry, 39th Parliament).
[17] See Submission No. 5, Funding and Disclosure Inquiry, 40th Parliament, p.13.
[18] See Submission No.5 to the Funding and Disclosure Inquiry, 40th Parliament, p.22.
[19] R. Tennant-Wood, 'The role of the media in the public disclosure of electoral funding', Democratic Audit of Australia, December 2004.

in some cases to reluctance to fully cover political donations for fear of a backlash in government access. They say the result could be reduced public pressure on the government due to lack of scrutiny by the media regarding funding sources and consequentially, reduced transparency.

There have also been suggestions that members of the media should be required to declare all conflicts of interest that may reflect on their reporting of political matters.

These fears become more important if media concentration accelerates as a result of changed government policies.

While it is not possible to try to prevent a media owner, an editor or journalist from supporting political parties or candidates in the media, it is vital that any potential perception of political influence over the media that is other than opinion, or vice versa, is avoided. For this reason, the Democrats recommend that:

Recommendation 15

> **No media company or related entity or individual acting in the interests of a media company may donate in cash or kind to the electoral or campaign funding of a political party**.

4.4 Escalating campaign costs

The Democrats believe that democracy is best served by keeping the cost of political party management and campaigns at reasonable and affordable levels. Although in any democracy some political parties and candidates will always have more money than others, money and the exercise of influence should not be inexorably connected.

One step forward in setting a limit on expenditure is to set a limit on donations – to apply a cap, or ceiling. Indeed, such limitations do apply in other democratic systems around the world. The cost of campaigning in Australia, however, is growing exponentially and constitutes a barrier to entry.

Numerous submissions to JSCEM's previous inquiries into federal elections and funding and disclosure have called for the imposition of restraints. There is cross-party support for such reform with supportive commentators including Liberal members Mr Malcolm Turnbull and Mr Christopher Pyne, the Greens Senator Bob Brown and academics Dr Sally Young, Professor Williams and Mr Mercurio, Mr Tham and Dr Orr.[20]

In Tham and Orr's submission to the JSCEM inquiry into the 2004 federal election, they stressed the importance of combining improved disclosure laws with donation

[20] See Mr J-C Tham and Dr Orr (Submission No.5 to Funding and Disclosure Inquiry, 40th Parliament); Mr P Andren, MP (Submission No.9 to Funding and Disclosure Inquiry, 40th Parliament; Mr M. Turnbull, MP (Submission No.196 to 2004 Federal Election Inquiry); Mr C. Pyne, Submission No. 195 to 2004 Federal Election Inquiry; Senator B Brown (Submission No.39 to 2004 Federal Election Inquiry); Dr S. Young (Submission No. 145 to 2004 Federal Election Inquiry); Professor G. Williams and Mr B. Mercurio (Submission No.48 to 2004 Federal Election Inquiry); and Mr J-C Tham and Dr Orr (Submission Nos 160 and 199 to 2004 Federal Election Inquiry.

caps and expenditure limits, since "…disclosure on its own is a weak regulatory mechanism, and probably merely "normalises' corporate donations."[21] They suggest improving disclosure laws include:

- expanding the definition of associated entity in the Commonwealth Electoral Act to more accurately capture the financial relationships that exist within political parties;
- payments from fundraisers, party conferences and similar events to be classified as gifts and that all parties be required to submit reports which include the status of all donors; and
- removing delays in the timing of disclosure, by potentially requiring quarterly disclosure statements and even weekly statements during an election period.

For these improvements to be effective, donation caps that limit actual or perceived undue influence by individuals or corporations would also need to be implemented.

Limiting the level of funding for election campaigns is also an issue raised by Professor Williams and Mr Mercurio in their 2004 JSCEM submission, to the extent that increased costs of campaigning heavily favours major parties.[22] They state that unrestricted campaign expenditure which is heavily concentrated on advertising has the effect of crowding out minor party voices and is further evidence of a lack of equity in the current system.

The Democrats note that Prime Minister Rudd has stated that he will examine the prospects of capping campaign expenditure.

We recommend that a cap or ceiling of not more than $100,000 be imposed on any donation made to political parties, independents or candidates. While this is higher than the caps recommended by others, the Democrats take the view that the new principle of a cap, to even be considered, would need to be at a high level.

Recommendation 16

> **That Section 294 of the *Commonwealth Electoral Act 1918* be amended so that all electoral and campaign funding is subject to a financial cap, indexed to inflation and controlled by the AEC.**

Recommendation 17

> **No entity or individual may donate more than $100,000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.**

Ultimately, minimising or limiting the public perception of corruptibility associated with political donations requires a good donations policy that should forbid a political party from receiving inordinately large donations.

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[21] Mr J-C Tham and Dr G Orr, Submission No.160 and Submission 199 (supplementary).
[22] See Submission No. 48.

4.5 Foreign Donations

The Democrats applaud the Labor Government's proposal (by press release on March 28 2008) to ban foreign political donations from overseas. It is long overdue.

The AEC on-line disclosure returns show that between 1998/99 to 2006/07, Australian political parties received $2 319 220 from overseas sources. Of this amount, $1 664 279 went to the Liberal Party, $475 067 to Labor, $170,564 to the Greens, $7,110 to the Citizens Electoral Council and $2,200 to the Democrats.

Within those figures was a startling $1,000,000 for the Liberal Party from British citizen, Lord Michael Ashcroft for the 2004 federal election. Interestingly, this donation would have been illegal in Britain because of that country's ban on foreign donations. Under British law, a donation of more than £200 sterling or $A470 is allowed only if it comes from a person eligible to enrol to vote in Britain or from registered corporations operating in Britain.

Similarly, in the United States it is unlawful for foreign nationals to make donations, but US citizens living abroad can donate. Additionally, to stop foreign influence in domestic political affairs, a number of other democracies, including the USA, New Zealand and Canada also ban foreign donations to their domestic political parties.

Australians are entitled to ask what foreign political donations actually buy – friendship and gratitude, or access and influence? And are they capable of being examined and reported on?

The fundamental principle of Australian electoral funding law is that the AEC must be able to verify the nature and source of significant political donations. Offshore based foundations trusts or clubs or individuals funded from tax havens making political donations to Australian political parties are a real danger, because those who are behind those entities are often hidden and beyond the reach of Australian law.

The AEC comprehensively canvassed the issue of foreign donations in its 1996 Funding and Disclosure Report. Since then, it has consistently repeated its recommendation:

> …that donations received from outside Australia be either prohibited or forfeited to the Commonwealth where the true original source of that donation is not disclosed through the lodgement of disclosure returns by those foreign persons and/or organisations.

While the AEC asserted that an outright ban '…would have negligible impact upon the donations receipts of political parties or candidates", it submitted that the option of making overseas donations conditional upon full disclosure, including by the overseas entity or entities, "…would place an obligation upon overseas donors to comply with Australian disclosure laws … without resolving the problem of trying to track and prosecute donors who are overseas."[23]

[23] AEC (Submission No. 11 to Funding and Disclosure Inquiry, 40th Parliament), p.27.

Although foreign entities with shareholders or members are more transparent, none of these entities are capable of being audited by the AEC. By banning donations from overseas entities and closing the loophole, this problem is significantly mitigated.

Recommendation 18

> **Donations from overseas entities must be banned outright. Donations from Australians living offshore should be permitted**

4.6 Donations with strings attached

In many cases, donors appear to make donations to political parties for broadly altruistic purposes, in that the donor supports the party and it policies, and is willing to donate to ensure the party's candidates and policies are represented in Parliament. Nonetheless, there is a perception that is probably a reality, that some donors specifically tie large donations to the pursuit of specific policies or outcomes they want achieved in their self-interest. This is corruption.

The Democrats have therefore consistently argued against donations with 'strings attached'. In considering this proposal, the AEC Submitted that while certain enforcement difficulties could arise:

> …there may still be value in having a broad anti-avoidance clause if it deters donations with 'strings attached'. Obviously, the definition of that concept – eg access, favours – should be clear in any legislation.[24]

Recommendation 19

> **The *Commonwealth Electoral Act 1918* should specifically prohibit donations that have 'strings attached'.**

4.7 Unauthorised donations

The practice of companies making political donations without shareholder approval and without disclosing donations in annual reports must end.[25] So must the practice of unions making political donations without member approval. It is neither democratic nor is it ethical. Shareholders of companies and members of registered organisations (or any other organisation body such as mutuals) should be given the right either to approve a political donations policy, to be carried out by the board or management body, or the right to approve political donations proposals at annual general meetings. This will require amendments to the relevant acts rather than the CEA.

Recommendation 20

> **The Corporations and Workplace laws be amended so that:**

[24] AEC (Submission No.199 to the 2004 Federal Election), p.8.
[25] See Mr M. Doyle (Submission No.6 to Funding and Disclosure Inquiry, 40th Parliament), p.2.

(a) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve a political donations policy at least once every three years; or in the alternative

(b) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve political donations proposals at the annual general meeting.

Under the Registered Organisations schedule of the *Workplace Relations Act*, elections are conducted under the auspices of the AEC. It would seem self evident, in the public interest and for the same reasons, that the same provisions governing disclosure of donations for political organisations should apply to industrial or other organisations for which the AEC conducts elections.

Controversy sometimes attends union elections. Trade unions are an important institution in Australian society and union elections have become fare more expensive to campaign in today that ever before. Many people and organisations contribute to union election campaigns. As for political elections, the public and members of those unions in particular should have the right to know the source of any campaign donations above a minimal amount.

Recommendation 21

Where the AEC conducts elections for registered and other organisations, the same provisions governing disclosure of donations for political organisations should apply.

4.8 Public funding of elections

Even though public funding was introduced to address problems of corruption and unfair competition, large private donations continue to grease the wheels. Indeed, the quest to attract more and more money for political campaigning just keeps growing in spite of political parties receiving monies from the public purse.

The Democrats understand the Government's intention is to prevent parties or candidates from making a profit from elections by proposing that public funding (currently at $2.10 per vote) can only be provided against verified campaign receipts.[26] Although a constructive measure to regulate public money, and to thwart profiteering, the real impact will be on the ability for minor parties and independent candidates to compete in elections on equal terms.

[26] See Minister Faulkner's 28 March 2008 press release. This move stems from public concern at potential profit-making. In particular, candidate Pauline Hanson is reported as receiving $400,000 in public funding for her 2004 and 2007 campaigns without much election spending having occurred.

It is a reality that as the major parties have access to significant private donations, they are better placed to absorb this change in policy. This change therefore will probably have little impact on them.

However, the smaller parties and independents are not in the same situation as they are rarely the recipients of sizeable private backing. They will have to conduct conventional campaign budgets and may be unable to readily develop a campaign fund for future elections. In this regard, the Democrats are interested in the suggestion made by the Democratic Audit of Australia.

> A fairer and more democratic approach would be to allow the difference between public funding entitlements and campaign receipts to be available to offset against future campaign and administration costs. In this way, the money only becomes available if the party/candidate continues to be involved in election campaigns.[27]

This would allow all candidates to compete on a more equal footing, while ensuring that public money is only spent on genuine campaign and administration costs.

Recommendation 22

> **That JSCEM report on the government's proposal to tie election funding to reported and verified electoral expenditure.**

[27] Norm Kelly, 'Steps in the right direction, despite political footwork', Democratic Audit of Australia, Australian National University, 7 April. 2008, p.1.

5 Direct Democracy and Rights

The federal election is the expression of the will of the people with respect to who represents them, and who governs them. Between elections there is a question as to whether there are adequate opportunities for popular expression of views by the people. This inquiry provides an opportunity for the JSCEM to follow up on recent events such as the 2020 summit, and report on such matters.

The Democrats have always championed the concept of direct democracy, from Senator Mason's first bill in 1980 to the present Democrats' Private Senator's Bill – the *Constitution Alteration (Electors Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000.*

Many Australians have long been disenchanted with our political system because they feel governments do not listen on many issues. The 2020 summit reflected that, and had much to say on greater civic participation.[28] Greater civic participation has long been a matter of great interest to Australians. This was also illustrated by the positive public reaction to the *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007* (the Bill), which came into force in 2007.

That Bill was remarkable in two respects – it promoted direct democracy, and it made explicit inalienable civil and political rights in Australian law. The people of Australia regularly express their democratic will through elections, and on rarer occasions through constitutional referenda, but in the passage of that bill, for the first time in the federation's history the government and parliament was supporting direct democracy initiated by the people.

The Bill allowed for plebiscites – the direct vote of qualified electors to some important public question[29] - to occur under the aegis of the AEC, and no state or territory law can gainsay it. While the purpose of the Bill was to allow the AEC "to undertake any plebiscite on the amalgamation of any local government in any part of Australia"[30], the Bill appeared to be open-ended in that it is for "the purposes of conducting an activity (such as a plebiscite) under an arrangement".[31]

Who knows what that could imply for future questions considered important by groups of citizens. After all, direct democracy means 'initiated by the people', and their initiatives could surprise many.

The second area of welcome democratic innovation in the Bill is with respect to the International Covenant on Civil and Political Rights (ICCPR).[32] The ICCPR was ratified by Australia and came into force for Australia in 1980.[33]

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[28] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* pp33-34.
[29] The Macquarie Concise Dictionary 2nd Edition.

[30] Explanatory Memorandum, *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007*.

[31] Schedule 1, Item 1, *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007*.

[32] International Covenant on Civil and Political Rights (New York, 16 December 1966): Entry into force generally (except Article 41): 23 March 1976. Article 41 came into force generally on 28 March 1979.

It was gratifying that the Bill itself referred to the inalienable rights enshrined in the ICCPR in respect of Article 19[34] and Article 25(a).[35] Article 19 provides "that people should have the right to hold opinions without interference and the right to freedom of expression"; and paragraph (a) of Article 25 states "that every citizen shall have the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives."

Although there has been many a campaign for a Bill of Rights in Australia, there is strong support for a legislated Charter of Political Rights and Freedoms. The Australian Capital Territory and Victoria are the only Australian legislatures to act on this front so far, although extensive public consultations into the need for a charter of rights has also been conducted in Tasmania and Western Australia.

Participants in the Governance stream of the 2020 Summit expressed strong support for a [constitutional] Bill of Rights, or a [legislated] Charter of Rights. If such a development were to occur it would be better if there were one national Australian standard in this vital area.

The Australian Democrats have attempted to establish a comprehensive human rights standard for Australia and introduced the *Parliamentary Charter of Rights and Freedoms Bill 2001*. The Democrats' proposed Charter of Rights was an implementation of the ICCPR. It sets out certain fundamental rights and freedoms including the right to equal protection under the law, the right to a fair trial, freedom of expression and freedom of religion.

The Australian Constitution can only be altered by binding referenda under section 128. As outlined above, this was supplemented in 2007 when the electoral law was changed to support direct democracy initiated by the people.

Plebiscites – the direct vote of qualified electors to important public questions – are now permitted under federal electoral law. They are to occur under the aegis of the AEC, and no state or territory law can gainsay it. However, they only allow for the expression of popular opinion and are not binding on parliaments or governments.

Canada, Italy, New Zealand, Switzerland, 27 states in the USA, Venezuela and Poland have versions of direct democracy to address similar feelings of citizen

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[33] Entry into force for Australia (except Article 41): 13 November 1980. Article 41 came into force for Australia on 28 January 1993.

[34] Article 19 – 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[35] Article 25 – Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

disconnection in those countries. Hence, there is sufficient experience from them to construct an effective form of direct democracy or citizen initiated referenda (CIR) for Australia, perhaps with these features:

- If 0.5% of the population petition on an issue, a parliamentary committee must report as to whether a national referendum or plebiscite should be held; but if over 2% of registered voters' petition, a popular vote must be conducted.
- Only if there is over 60% voter turnout and a clear majority of votes in favour would a proposition that passed have to be considered by parliament; below those percentages, the result would have advisory status only.
- A resolution that passed acts as a guide to parliament; it could not automatically pass into law until approved by the Federal Parliament. This provides a check on any CIR backed by sectional interests, ensuring full legislative scrutiny and that the final decision lies with elected representatives.
- A strict limit to apply to the amount of funding of campaigns for or against a proposition to prevent powerful financial interests dominating.
- Accountability and transparency in relation to the funding of campaigns so that sectional interests are identified to the public.

Should direct democracy become a reality in Australia, it would certainly enhance our democracy. It promotes popular engagement with the political process on questions of public importance, particularly in matters that affect people immediately and specifically.

As the UK Conservative leader, David Cameron, stated:

> I want us to end the age of top-down, 'we know best' politics. Politics should be bottom-up and open – driven by the passions and priorities of the public.

Recommendation 23

> **Introduce legislation enabling citizen initiated plebiscites to be held on specific issues.**

6 Advertising

6.1 Political advertising

Truth in political advertising

The Australian Democrats have actively campaigned to introduce 'truth in political advertising' legislation in Australia since the 1980s. We are of the view that improved controls are essential because elections are one of the key accountability mechanisms in our system of government.

Legislation should be enacted to impose penalties for failure to accurately represent the truth in political advertisements. The enforcement of such legislation would advance political standards, promote fairness, improve accountability and restore trust in politicians and the political system.

As elections are one of the key accountability mechanisms in our system of government, it is essential that advertisements purporting to state 'facts' are legally required to accurately represent the truth. In this way, politicians can be held accountable for election promises designed to win over the electorate.

The private sector is already required by law not to engage in misleading or deceptive conduct by Section 52 of the *Trade Practices Act*. Why should politicians or political parties be any different?

As honesty is regarded as one of the fundamental bases of our society, the perception of politicians being dishonest is one of the most serious threats to the legitimacy and integrity of our democracy.

Suitable controls would go some way to addressing the already widespread cynicism towards politicians.

Controls that are or have been in place

In 1985 the South Australian Parliament enacted the *Electoral Act 1985 (SA*), of which Section 113 makes it an offence to authorise or publish an advertisement purporting to be a statement of fact, when the statement is inaccurate and misleading to a material extent.

Well over 20 years later, this law still operates effectively, putting the lie to those who insist truth in political advertising legislation cannot work.

This legislation has been tested in the Supreme Court of South Australia, where it was held to be constitutionally valid. Further, it was found not to infringe the implied guarantee of free political communication found by the High Court to exist in the Commonwealth Constitution.

The Commonwealth had similar laws to the above for a short period in 1983-84. The Australian Democrats were the only party that fought for their retention, but the major parties ensured they were promptly repealed.

Controls that should be in place

Experience teaches that when the competitive interests of political parties are at play, only the strong arm of the law can ensure honesty. It is long overdue for Australian politicians to support such a Bill.

In March 2003, the Democrats tabled the *Electoral Amendment (Political Honesty) Bill 2003.* In March 2007 this was replaced by the *Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007*. Schedule 2 of this bill represents a substantial commitment by the Democrats to ensure that reasonable standards on truthfulness are made a matter of law.

To establish an effective system of trust in political advertising, the Democrats propose:

- amending the *Commonwealth Electoral Act* to prohibit statements of fact that are inaccurate or misleading to a material extent;
- imposing fines for breaching the truth in political advertising for individuals and corporate bodies, including candidates and political parties; and
- providing for the 'reasonable person' defence and allowing for corrections and retractions.

Nothing in the Democrats' proposals applies to infringe any doctrine of implied freedom of communication.

Additionally, from the Democrats' perspective, ignoring the period leading up to polling day does not go far enough. All inaccurate or misleading statements of fact in political advertising, regardless of proximity to an election day, should be addressed. In recent times, the trend in electoral advertising is towards a 'continuous campaign'[36] that is carried out over the length of an election cycle to support party political goals.

Recommendation 24

The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.

6.2 Government advertising

Not a level playing field

Since the 1980s, the Australian Democrats have campaigned hard to rein in government advertising designed to skew the playing field of electoral competition. While we support information and advertising designed to inform Australians of taxpayer-funded government programs and services, we oppose the abuse of budgetary discretion by governments to put out party political propaganda under the guise of legitimate government advertising.

[36] See Dr S Young, Submission No. 145 to 2004 Federal Election Inquiry.

All governments take advantage of incumbency. However, concern over the use of taxpayer funds to promote party political ideology has escalated to such an extent that it now represents a major issue for our democracy. Concern lies not just with the size of the campaigns, but with their timing, tenor and selectivity.

Between 1990 and 1996 government advertising ran at an annual rate of up to $52 million. This rate has more than doubled in the years since then. One advertising campaign alone in 2005 saw the Government outlaying $55 million to promote the new workplace relations changes under WorkChoices, an amount that dwarfs public funding payments for elections. This advertising campaign was widely condemned both in scope and intention as it involved selling a policy in advance of being considered by parliament.

Government advertising campaigns also tend to spike in election years. For instance, in the election years 2000-01 and 2003-04, government advertising under the Howard Government reached $156 million and $143 million respectively. In the interests of our democracy, public monies should not be used as political armoury.

Overall, it has been estimated that over the March 1996 to November 2007 life of the Howard Government up to $2 billion of public funds was spent on government advertising.

In October 2003, a Senate Order jointly moved by the Democrats with Labor, which was based on committee and the Australian National Audit Office recommendations, aimed to enforce much higher standards and tougher controls on government advertising. The Senate order states that all details of each advertising or public information project must be tabled in the Senate, including its purpose and nature, its cost, who authorised it, and if it is to be carried out under tender or by contract. It was consistently ignored by the Howard Coalition Government.

The Democrats *Charter of Political Honesty Bill 2000* was revised and incorporated into the *Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007*, which proposes that only advertising campaigns with bi-partisan approval be allowed in the last six months of a parliament.

Senate inquiry into government advertising

In November 2004, the Senate established an inquiry to focus specifically on the scope of and existing controls on Commonwealth government advertising. A report of this inquiry was tabled in December 2005 and included recommendations to establish more robust guidelines, including:

- that before an advertising campaign is initiated, legislation must be passed through the parliament to authorise its implementation; and the policy, program or service being advertised;
- that campaigns valued at $250,000 or more be submitted to the Auditor General and that the Auditor General should have an overall supervisory role; and

- that Australia follow the Canadian system of publishing a whole-of-government annual report on government advertising to improve public and parliamentary scrutiny of spending.

The Coalition Government, using its parliamentary dominance, would not implement these recommendations, on the spurious grounds that a case for increased scrutiny of advertising had not been sufficiently made to warrant the establishment of an independent oversight body. In the interests of probity and political equality, it is high time that these recommendations were implemented.

This is especially the case as there are few laws or regulations governing government advertising. The CEA provides limited annual reporting requirements, and the use of authorisation tags for printing and publishing.

Recommendation 25

> **That mandatory standards be adopted in relation to government advertising, policed by an appropriate independent oversight body.**

Senator Andrew Murray
Australian Democrats Electoral Matters spokesperson