Electoral Review Expert Panel (Victoria) – Supplementary Report

Submission from Professor Graeme Orr (University of Queensland)

"The Panel is … required to produce a supplementary report examining appropriate legislative amendments to ensure that major political parties fulfil minimum requirements of party administration to qualify for public funding. The Panel must advise on a minimum threshold to determine the major political parties to which the requirements would apply."

Context

Thank you for the opportunity to make this submission. 'Minimum requirements of party administration' is a little opaque. I take it to mean party processes and rules, within the party proper (ie not the parliamentary wing).

When referring to party internal affairs which might be directly regulated, we usually mean: (a) internal 'democracy', eg rights of participation, and (b) financial affairs. There is a third issue, sometimes neglected. Namely the ability of the common law courts to oversee a 'rule of law' within parties, that I will also discuss. Not least as this element of the puzzle was recently upended by the Victorian and NSW Courts of Appeal.

This submission canvasses all three of these concrete issues.

Issue 1: Internal Party 'Democracy'

Over a decade ago, I counselled against imposing 'democratic' standards on parties as a trade-off for public funding.[1] Doing so has obvious risks for the freedom of association. That is, for the ability of associations like parties to order their relationships and rules as they see fit.

Both the number of parties registered and contesting elections, and the diversity of parties in parliaments, have risen in recent decades. Along the way, we have seen a greater variety of party structures: from parties where ordinary members now have a say in the election of the party leader, through to 'eponymous' parties (founded by and around an individual, where the party's overall direction is tied to that individual). True, this evolution has not always been for the better (eg, there has been some continuation of oligarchical practices as parties focus on being 'electoral brands', and some parties have $0 memberships to help meet higher numbers required to register). But the choice of parties to join and support, and general electoral competition, have not suffered.

Funding per se does not justify impositions on the freedom of association. Put another way, as long as parties are well scrutinised by the media and political rivals, and provided we have a plethora of parties within a reasonably competitive electoral system, it is not clear why parties should be treated differently to other civil society groups that are encouraged or supported by eg public grants, tax

[1] G Orr, 'Justifications for Regulating Party Affairs: Competition not Public Funding' in K Ewing, J-C Tham and J. Rowbottom (eds), *The Funding of Political Parties: Where Now?* (2011).

breaks etc. Compare the problems that have arisen when governments or parliaments have meddled with academic freedom or with the expressive activity of NGOs, as a condition of funding. Perhaps freedom of expression is a more basic socio-political value than freedom of association – but the two are of a piece.

To give examples of risks – and regulatory options - involving political parties:

1. It is often naively claimed that parties must, in core aspects, be run on a 'one-member, one-vote' basis. That would erect barriers to mixed membership parties (like Labor or the old Country Party) by assuming that all politics is at root about individuals, rather than also involving collectives as intermediaries.[2] It also assumes a kind of 'internal primary' system that is not practised by parties for, say, Senate candidatures. Whilst attractive to members it also may not always lead to the selection of the most electable candidates.

2. Queensland's *Electoral Act* requires all registered parties to have a 'Complying Constitution'.[3] It includes guidelines so that constitutions must include rules on party structure, internal dispute resolution and selection of candidates and officers. But without mandating any particular rules on those basic issues.
   However, the Queensland Act goes further and also requires that a party's constitution is such 'that a pre-selection ballot must satisfy the general principles of free and democratic elections.' These principles are specified: ballots be secret, member's votes be equally weighted, no outsider votes, and ballots be accurately tallied. Such 'pre-selection ballots' are subject to audit by the Electoral Commission of Queensland.[4]
   The same provision also includes prohibitions on a person joining or remaining a member within 10 years of conviction of certain 'disqualifying electoral offences'.
   In truth, the Queensland provision is more show than go. It was a classic Beattie government 'mea culpa' or public relations reaction to findings of the Shepherdson Inquiry into internal rorting of some ALP pre-selections/branch-stacking. (So the trigger was not unlike recent concerns in Victoria.)
   In particular, the 'free and democratic' pre-selection rules only apply IF a party holds a pre-selection ballot. Nothing requires that parties ever, let alone always, hold such ballots (so an oligarchical party constitution can let the executive or leader pick all candidates). Nor does it prevent executive override or disendorsement of candidates chosen by a pre-selection ballot,[5] or a mixed-model (eg, union bloc voting).
   All that said, the Queensland pre-selection ballot rules offer a modicum of reassurance to party members that ballots, where held involving them, meet basic 'free and fair' electoral requirements. Particularly if the Commission is properly resourced to undertake audits.

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[2] Already the law – in requiring a minimum number of enrolled electors to register a party – is sending signals to especially new parties that other types of members (under 18s, permanent residents) matter less.
[3] *Electoral Act 1992* (Qld) s 76.
[4] Ibid, Part 9. These apply to candidates for State and local election, not Commonwealth.
[5] Ibid, Schedule 1 (definition of 'pre-selection ballot').

Issue 2: Transparency

Turning from party 'democracy', however, parties seeking to receive public funding should be transparent, especially financially. I suggest two requirements:

- As a condition of continuing registration, a current copy of a party's constitution – including any statewide sub-rules – should have to be lodged with the Electoral Commission,[6] and published on its website as part of the 'register of parties'.
  It also follows that section 59 of the *Electoral Act 2002* (Vic) should be updated so that the register of parties has to be published online and not merely available for inspection 'at the office of the Commission'.
- The annual accounts of all registered parties should be independently audited, lodged with the Victorian Electoral Commission, and published as part of the register of parties.
  In the UK, a condition of registration is that the treasurers of not just all parties, but most constituency branches, file an 'annual statement of accounts' with the UK Election Commission.[7] Where the revenue involved exceeds about $0.5m Australian, these must be audited.[8] Annual statements of account, and audits, are then made public.[9]

Victoria currently pays extra public funding, labelled 'Administrative Expenditure Funding', to parties with MPs.[10] It makes sense that any 'extra administrative requirements' on 'major' parties be at least imposed on all such parties. But if the extra requirements are not onerous, it is not clear why they should not apply to all registered parties.

3. Party Rules and the Rule of Law: 'Justiciability'

Finally, there is the question of whether party rules are binding. That is whether a court can be asked to interpret and enforce them. The technical term is 'justiciability'.

In essence, this boils down to whether members can approach a court for a declaration (a definitive interpretation of an ambiguous rule) and/or an injunction (a direction to a relevant member, usually of the party executive, to do something or not do something to ensure compliance with the rules).

Absent this ability, a party's rules at best are a matter of honour. Or at worst are not worth the paper they are written on. From 1992 to 2002, Supreme Courts around Australia accepted that parties are of such public significance – given their role in politics/governance and their public funding – that their rules should be treated like a contract between their members. This was known as the rule in *Baldwin v Everingham*.

For 30 years, parties largely accepted the potential for court involvement. Courts could not rewrite rules, just interpret them. Courts could only enforce rules that were material and procedural: eg,

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[6] Compare ibid s 80 (requiring at least quarterly update of any amendment to a party's constitution.)
[7] *Political Parties, Elections and Referendums Act 2000* (UK) s 41. In return, the UK Commission offers considerable material to guide party treasurer's on the preparation of financial statements.
[8] Ibid, s 43.
[9] Ibid, s 46.
[10] *Electoral Act 2002* (Vic) s 207GA. Independent MPs are also entitled to receive this funding.

following ordinary contract law, rules that were aspirational or ideological were not justiciable. Courts were as much an independent outlet for resolving disputes than a forum for the washing of dirty linen in public. And courts were sensitive to exigencies, especially in candidate selection. Following the principles of equity, courts would deny a remedy to plaintiffs (even if the plaintiffs' interpretation of the rule was the better one) where the plaintiffs had not acted expeditiously, had not tried to use internal party dispute processes where they were available and timely, or lacked 'clean hands'.

But both Labor and Liberal parties successfully overturned this 'justiciability' approach in litigation involving Setka, Asmar and Albanese (in Victoria) and Camenzuli and Morrison and Hawke (in NSW). This has left three problems:[11]

1. Party rules are not subject to the ordinary rule of law, that would apply to any serious agreement. By comparison, the constitutions or rules of unions, of corporations, even of any 'Inc' club or society (ie one incorporated under the associations incorporation statute), are all able to be interpreted and ruled on by the ordinary courts.
2. Party executives, if made defendants, can actually choose to not plead that the case is not justiciable. It is weird that the law would let one party unilaterally decide to accept (or reject) court jurisdiction, given the important public role parties occupy.
3. The Courts of Appeal have *not completely* ruled out a court being involved. But have left a narrowed and unpredictable criteria to consider a case. If the party rule in question is sufficiently directly connected to a legislative provision, then the courts say they can get involved. The obvious example is a dispute over who is the party treasurer or secretary to be the registered agent of the party with the Electoral Commission. But what about a dispute over pre-selection of candidates? Now NSW, Queensland or WA say 'no', but Victoria said 'probably yes'. Given that 'administrative funding' in Victoria is paid quarterly based on the number of 'elected members' a party has, it is also arguable that an MP could litigate to challenge their expulsion from the party (but probably not from the parliamentary caucus).[12] Without doubt, no-one in parliament had turned their minds to consequences for justiciability for party rules when such provisions were enacted. But this panel – and future reformers – can't avoid that!

As a condition of being eligible for public funding – ie registration – the *Electoral Act* should be amended to embrace the principle of justiciability in Victoria.

Summary of Recommendations

1. Public funding does not justify imposing any particular form of 'democracy' on parties' internal affairs.

[11] The cases and problems are explained in G Orr, 'It's My Party: the Enforceability of Political Party Rules' (2022) 44 *Alternative Law Journal* 248.

[12] As the expulsion intersects directly with the calculation of the quarterly payment by the Electoral Commission: *Electoral Act 2002* (Vic) s 207GA, 206. If this is considered unlovely, s 206 could be amended so that 'elected member' meant 'per member declared elected at the return of an election writ'. But that would unravel the conceit that administrative funding is based on needs correlated with having a certain number of current MPs, and that 'independent' MPs also receive it.

2. Public funding does justify requiring greater transparency of parties. Especially in financial affairs. All registered party constitutions should be published via the Electoral Commission website.
3. All registered parties should be required to report audited financial statements annually to the Electoral Commission, with these also published on the Commission's website. If the costs of auditing were considered unfair on minor parties, that requirement could be nuanced: eg to cover only 'major' parties (whether defined as those with MPs – ie receiving 'administrative' funding – or as those with revenue over a certain amount) or to still apply to all registered parties but with the costs of an independent auditor being covered by public funds.
4. As a corollary of transparency, the rules of all registered parties should be justiciable, at the suit of members. That is, the rule in *Baldwin v Everingham* should be reinstated in Victoria.
5. Where parties provide for membership ballots (either to select officials of the party, or as part of pre-selection processes) these should be subject to similar 'fair election' process requirements and auditing as in Queensland.

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