

Towards a System of Taxpayer Funding for New Zealand Elections?

Andrew Geddis*

1. The Problem of "Faceless" Donations, and the Possible Consequences of Disclosure

The issue of election campaign funding in New Zealand has made recent media headlines, following revelations that some political parties have exploited regulatory loopholes so as to receive large-scale donations from wealthy contributors without having publicly to disclose the identity of those donors.¹ While this behaviour on the part of the parties and their contributors would appear (as a matter of technical interpretation) to lie within the bounds of the law,² it represents something of a breach of the spirit behind the regulatory schema. The reason for rules that require anyone giving a substantial donation to a political party to make their identity known to the voting public is obvious. Political parties, especially those in government, are involved in making important public policy decisions. Where those parties rely on private donors to fund their election campaigns there will always be at least the suspicion that they may be tempted to trade favourable policy outcomes for large monetary contributions. Public disclosure of the identity of those who make such donations is thought to help both to deter attempts at exercising such improper influence over public policy, and to combat public perceptions that any such influence is actually exerted. In the oft quoted words of U.S. Supreme Court Justice Louis Brandeis, "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."³

However, as I have discussed elsewhere,⁴ recent events make it abundantly clear that there are a number of legal stratagems available for use by the political parties and their donors in order to avoid having to disclose a donor's identity. The use of these ruses allow donors to remain publicly "faceless", even though the party receiving the contribution may in fact be all too aware of the donor's

* Lecturer in Law, University of Otago. Once again, my thanks to Geoff Barnett for his invaluable suggestions, as well as to James Allan for his comments. All remaining errors are, of course, entirely my responsibility.

¹ Geraldine Johns, "Act's hidden millions", *Sunday Star-Times*, 22 April, 2001, A1; Guyon Espiner, "Paying the pipers", *Sunday Star-Times*, 22 April, 2001, C1; Jonathan Milne, "Prebble plays down claims about big-business donors", *The Dominion*, 23 April, 2001, 2. See also Andrew Geddis, "Political donation disclosure law not so hard to avoid", *Otago Daily Times*, 2 May, 2001, 7; Andrew Geddis, "'Faceless' party donations impede democracy", *National Business Review*, 4 May, 2001, 20.

² See Electoral Act 1993, ss 210, 214I.

³ Louis Brandeis, *Other People's Money* (Washington : National Home Library Foundation, 1933), 62 (cited in *Buckley v. Valeo* 424 US 1, 67 (1976)). See also *Buckley v. American Constitutional Law Foundation* 525 US 182 (1999).

⁴ See generally Andrew Geddis, "Hide Behind The Targets, In Front of All the People We Serve: New Zealand Election Law and the Problem of 'Faceless' Donations", (2001) 12 *Public Law Review* 51.

identity. So even with the Electoral Act's disclosure regime in place the political parties are still able to receive faceless donations of quite substantial amounts – more than \$200,000 in at least one case. Given the manifest failings of the present regulatory regime, there have been a number of calls made for a law change to prevent this practice of the parties receiving faceless donations.⁵ The Prime Minister, Helen Clark, has expressed her support for such a reform,⁶ and Parliament's Justice and Electoral Reform Select Committee is currently studying this issue.

In light of these steps towards instituting a ban on faceless donations, I will assume for present purposes that such a law change will be introduced in the foreseeable future. Then, with this hypothesis in place, I wish to spend the remainder of this article examining the suggestion that any law change banning the making of faceless donations will also necessitate the introduction of some form of state (or taxpayer) funding for the parties' election campaigns.⁷ The concern has been expressed that should donors be forced to disclose their identities they will respond by no longer making substantial political contributions, thus harming the democratic process by depriving the political parties of the funds they need to run their election campaigns.⁸ In Part 2 of this article I begin by questioning how valid this concern is, before going on to ask if there are other arguments that support the introduction of taxpayer funding for the political parties' election campaigns. To evaluate the strength of such arguments I propose a set of criteria against which different methods of election funding can be judged. I proceed in Parts 3-5 to use these criteria to compare the present system of privately funded election campaigns with two different forms of taxpayer funding. In Part 6 I conclude with a summary of the strengths and weaknesses of each funding scheme.

2. How Should We Judge Taxpayer Funded Elections?

As has just been noted, the principal reason presently being advanced for introducing taxpayer funding for the election campaigns of New Zealand's political parties is that implementing stronger rules on the disclosure of the identity of political donors may lead to the parties being unable, legally, to garner sufficient financial resources to run an adequate election campaign. For instance, when stating her support for the introduction of stronger mandatory donor disclosure laws, Helen Clark also expressed an opinion that the more transparent

⁵ "Support mounts for donor law change", *The Dominion*, 10 May, 2000, 10; Espiner, *supra* note 1; Geddis, *ibid.* at 64-68; Geddis, *supra* note 1.

⁶ Geraldine Johns, "PM wants end to secret funds", *Sunday Star-Times*, 29 April, 2001, A2; Electoral Commission, *Electoral Brief*, No. 19, June 2001, 2.

⁷ See *ibid.*; Ruth Laugeson, "Call for ban on mystery donors", *Sunday Star-Times*, 7 May, 2000, A2; John Armstrong, "Election Probe to Look Into Secret Donations", *NZ Herald*, 8 May, 2000, A03; Guyon Espiner, "Taxpayer dollars set to contribute to political party funding", *Sunday Star-Times*, 3 June, 2001, A2. See also Margaret Wilson, "Political Parties and Participation", in Alan Simpson (ed), *The Constitutional Implications of MMP* (Occasional Publication No. 9, School of Political Science and International Relations, Victoria University Wellington, 1998) 174.

⁸ Report of the Royal Commission on the Electoral System, *Towards A Better Democracy* (December, 1986) 217 (hereinafter "*Towards A Better Democracy*").

the donation system is made, the less corporates and individuals would give.⁹ Whilst recognising the Prime Minister's undoubted intuition about matters political, I am not completely convinced of the strength of the argument that she and others are advancing. After all, it is one that is belied by the experience of other countries – such as Australia, Canada, and the United States – that have legal regimes in place requiring the public disclosure of the identity of donors to political parties.¹⁰ Yet the parties in each of these countries have found that donors are still prepared to give them significant sums,¹¹ as “money contributes to and flows to power and the monied have learned to live with disclosure.”¹² In other words, just because at the present time many of the large-scale donors to New Zealand's political parties prefer to remain faceless does not mean that they would cease pursuing whatever advantage they may see in contributing to a party if they are forced to do so in the open.

Therefore it is an open question as to whether or not the introduction of greater disclosure rules will result in a significant fall in political giving, and I would suggest that it requires an uncomfortably large amount of crystal ball gazing to make a firm prediction about the matter in the here and now. As we cannot forecast with any certainty if donors will still keep giving to the political parties when forced to do so in the full glare of publicity, we therefore cannot know if the political parties will struggle in a post-disclosure environment to continue to raise adequate sums of money with which to fund their election campaigns. Because of this uncertainty I would suggest that the introduction of taxpayer funded election campaigns should proceed only if there are grounds to conclude that such a move is in itself good policy, irrespective of the ultimately unpredictable effects of any new donation disclosure laws. We could of course just wait to see if the introduction of new disclosure rules really does have the

⁹ See sources at *supra* note 6. For the present I will take the Prime Minister at her word and discount two other possible explanations for her support for taxpayer funded elections, namely;

- She sees taxpayer funding as a way by which the Labour Party can overcome its traditional fundraising disadvantage *vis a vis* the National Party; and,
- She actually opposes changing the law to require the compulsory disclosure of the identity of large-scale donors, and is using the suggestion of resultant taxpayer funding of elections as a kind of “poison pill” to kill the measure.

¹⁰ The United Kingdom has recently also introduced new legislation mandating the disclosure of the identity of all donors giving more than £5000 to a political party. See *Political Parties, Elections and Referendums Act 2000*, s 62; sched. 6. This legislation was in turn based on a report by the Committee on Standards in Public Life, in which the Committee specifically rejected the argument that introducing such a disclosure regime would also necessitate the introduction of some public funding scheme as “[w]e do not consider that they are likely to reduce the level of donations significantly ...” Fifth Report of the Committee on Standards in Public Life, *The Funding of Political Parties In Britain* (October, 1998) 92, para 7.24 (hereinafter *The Neill Report*).

¹¹ According to figures for 1999 from the relevant Electoral Commissions in each country, the largest contribution made in that year in Australia was A\$430,860.72; in Canada it was Can\$221,906; while in the USA it was US\$1,405,000.

¹² Khayyam Zev Paltiel, “Canadian Election Expense Legislation 1963-1985”, in Herbert E. Alexander (ed), *Comparative Political Finance In The 1980s* (New York: Cambridge University Press, 1989) at 67.

chilling effect on political donations that is feared. But if it did then transpire that the new set of disclosure rules had produced such an outcome we would still have to choose between introducing some system of taxpayer funding to compensate for this loss of private revenue, and abandoning the disclosure laws altogether. In other words, we would at that point need to go through the exercise of investigating the policy grounds for introducing taxpayer funding, even if only to compare these with the policy grounds for requiring the public disclosure of the identity of political donors.

That being so, there is a number of immediate arguments to support a move towards taxpayer funded election campaigns. The Royal Commission on the Electoral System – whose comprehensive 1986 report provided the basis for the Electoral Act 1993 – recommended that taxpayer funding be given to political parties.¹³ During the recent parliamentary review of the MMP system, political parties representing the majority of MPs in Parliament supported the introduction of additional State funding.¹⁴ There is already precedent for such funding within our existing election laws, with the State already providing money to political parties to pay for the broadcasting of their election advertisements.¹⁵ So the provision of taxpayer funding for election campaigns would involve the expansion of an existing feature of our election law rather than the importation of a completely exogenous concept. In addition, most of the Western democracies with which New Zealand compares itself provide some form of taxpayer assistance to their political parties' election campaigns.¹⁶ So perhaps the state funding of election campaigns forms some kind of international democratic "best practice" to which New Zealand also should conform.

But arguments such as these can hardly dispose of the issue. At best they only show that the idea of taxpayer funding in the New Zealand context is one that should be taken seriously, and not be dismissed out of hand. In order to evaluate whether or not the taxpayer funding of political parties' election campaigns is a good policy move a more detailed exploration of the issue is required, with a closer consideration of the likely consequences for our electoral processes of adopting any such a scheme. Such a closer consideration will benefit from a two-tier analysis. To begin with we need to define more concretely what the taxpayer funding of the political parties' election campaigns actually involves. Then, once we have our definitions in place, we need to establish some sort of

¹³ *Towards A Better Democracy*, *supra* note 8, at 226-229. The Commission's recommendation was not taken up when the Electoral Act 1993 was introduced. For an account of why this was so see Keith Jackson and Alan McRobie, *New Zealand Adopts Proportional Representation* (Aldershot, UK: Ashgate Publishing, 1998) 138-156.

¹⁴ The Alliance, Green, and Labour parties all "favoured additional State assistance to achieve a more transparent funding process", whilst the ACT, National and United parties opposed any such move. See Report of the MMP Review Committee, *Inquiry into the Review of MMP* (August, 2001) 62.

¹⁵ See Broadcasting Act 1989, s. 74; Stephanie Corban, "Funding Political Party Broadcasting", (1997) *Auckland University Law Review* 265. Since 1990 this grant has consisted of \$2 million split between the various parties according to a complex formula involving past electoral support, current membership numbers, present opinion poll support, and the like.

¹⁶ See *Inquiry into the Review of MMP*, *supra* note 14, at 59, 91-93.

criteria by which to decide whether taxpayer funding is a better alternative than the present system of privately financed elections.

As a first step, we must specify what actually is meant when we are talking about the “taxpayer funding” of election campaigns. The problem here is that there is a wide variety of ways through which the State may provide assistance to the electoral participants.¹⁷ For instance, the 1986 Royal Commission considered eight separate types of assistance schemes.¹⁸ Rather than traverse this terrain again, and in order to make the following discussion manageable, I intend to focus below on two particular forms that taxpayer funding may take. First of all I will examine the type of scheme recommended by the Royal Commission in its 1986 report,¹⁹ whereby taxpayer funding is provided directly to the political parties in the form of a bulk grant in proportion to the votes gained by each party in the previous election campaign. Then I will examine schemes that provide an indirect taxpayer subsidisation of individual donations to the political parties – either by giving tax rebates to donors, or by giving a grant to a party to match each small-scale donation it receives, or by providing funding vouchers to individual voters who may then donate these to the political parties that they support.

The direct and indirect forms of state funding are quite different, and adopting one or the other would have different consequences for the electoral system as a whole. The question we therefore have to address is not whether the taxpayer funding of election campaigns is desirable in the abstract. Rather we need to examine whether one of these particular methods of taxpayer funding will improve our electoral process in some particular way.²⁰ That is to say, any decision to move to a system of taxpayer funded election campaigns should only follow on from a conclusion that one of these particular schemes of taxpayer funding of election campaigns contains some distinct advantage over the present system of privately financed elections (with the addition, I shall assume, of a tighter set of rules requiring the disclosure of the identity of large scale donors to political campaigns).

This second, comparative step requires the development of some set of criteria by which we can judge the issue of the “improvement” of our electoral processes. Unfortunately, constructing such criteria is not easy, and any proposed standard is likely to be controversial.²¹ To begin with, any comparison of systems of election

¹⁷ In the words of a leading U.S. commentator on election funding issues; “[t]o say that one favors government financing of campaigns is a bit like saying that one enjoys sports. Are we talking football? Kayaking? Downhill skiing? Ballroom dancing? Chess?” Bradley A. Smith, “Some Problems With Taxpayer-Funded Political Campaigns”, (1999) 148 *University of Pennsylvania Law Review* 591, 592.

¹⁸ *Towards A Better Democracy*, *supra* note 8, at 219-225.

¹⁹ *Ibid.*, at 226-229.

²⁰ Smith, *supra* note 17, at 594-609; Andrew Geddis, “The More Speech – More Competition Solution: Campaign Finance Reform After McCain-Feingold” (2001) 19 *Journal of Law and Politics* 571.

²¹ Compare, for instance, Smith, *supra* note 17, at 593, with Richard Briffault, “Public Funding and Democratic Elections” (1999) 148 *University of Pennsylvania Law Review* 563, 563. See also Andre Blais, “Criteria for Assessing Electoral Systems”, Paper presented to the Canadian Advisory Committee of Registered Political Parties (April 23, 1999), available at <http://www.elections.ca/loi/sys/blais_e.pdf>

funding requires that we have regard to at least five different considerations. We must carefully think about how any proposed set of rules to govern the funding of our elections will:

- (1) Reduce the risk of corruption of elected officials, or the appearance of such;
- (2) Guarantee the liberty interests of those wishing to participate in the process;
- (3) Promote equal citizen participation in the democratic process;
- (4) Foster competitiveness between participants in the electoral process;
- (5) Be easily administered, and responsive to changing political realities.²²

Clearly some of these five considerations will always operate to pull us in different directions (e.g., the timeless clash between “liberty” and “equality” represented by considerations (2) and (3) above),²³ whilst others will have the potential to do so (e.g., measures taken to reduce the dangers of corruption may in turn lead to a more complex, and therefore difficult to administer, system of regulation). Any given system of political funding will better satisfy some of these five considerations than it will others, and as such no funding system will fully satisfy them all. Therefore, the decision about the rules we should adopt to regulate the funding of our public election process will inevitably require a series of choices and tradeoffs in ranking which of these considerations each participant holds to be of higher value than the others.

Which leads us in turn to confront a further problem. For when it falls to be decided how this ranking should be ordered, we are likely to find that precious little agreement exists on how the tradeoff between each of the five considerations ought to be made. Instead, the preferred ranking order held by each individual participant will heavily depend upon his or her overall “vision” of what the democratic process should *mean*.²⁴ In other words, underlying the importance that a participant gives to each of the considerations listed above will be some normative view of what elections are for – what their purpose and meaning is – and the rules that are required in order to achieve and safeguard these aspirations. As these visions are the subject of reasonable disagreement amongst the participants in a nation’s democratic processes,²⁵ it should not greatly surprise

²² In addition to this set of considerations, probably the most important is the political question of public acceptance: will the voting public accede to the rules governing the funding of their election process? In the discussion that follows I mostly set this issue to one side, not because I do not view it as important in the present context – taxpayer funding will only occur if it is politically feasible for the Government to introduce it – but because I simply do not claim to have any special insight into what particular system the public will or will not support.

²³ See K.D. Ewing, *Money, Politics, and Law* (Oxford : Clarendon Press, 1992) 26-31; K.D. Ewing, “The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study”, (1992) 22 *University of Western Australia Law Review* 239, 241.

²⁴ See Andrew C. Geddis, “Democratic Visions and Independent Third Party Expenditures: A Comparative View” (2001) 9 *Tulane Journal of International and Comparative Law* 5.

²⁵ For the ways in which “the burdens of reason” may cause disagreements to arise even between reasonable persons seeking to reach an accord with each other see

us that we find conflict over how we ought to weigh these considerations when deciding how to structure the funding of our election processes.

The above may be no more than an extended warning that in the following discussion I do not pretend to provide *the* definitive answer to the question of whether the taxpayer funding of election campaigns is a good policy move or not. Given the fundamental disagreements that characterise this topic as a whole it is impossible to construct an answer that is of such a final, unarguable character. Instead I propose to evaluate the two different taxpayer funding schemes outlined above alongside the present, privately funded system. I shall do so by examining each in turn against the five criteria outlined above, seeing how well they satisfy these criteria and what drawbacks there may be in adopting one funding system over the other. In so doing I will offer some of my own comments on what I see to be the strengths and weaknesses of each funding scheme without trying to formulate any final conclusion as to which one is most appropriate for the New Zealand context.

3. Evaluating The Current, Privately-Funded System of Election Campaigns

The election campaigns of New Zealand's political parties are at present funded from voluntary donations given by each party's supporters.²⁶ There are both principled and historical reasons behind this decision to leave the funding of political parties in the private sphere. As a matter of principle, contributing to the funding of a party's election campaign – either through a one-off donation, or through paying ongoing dues to a political party – has been seen as an important part of an individual's right to participate in the electoral process.²⁷ Political parties also historically have enjoyed a kind of quasi-existence due to the fact that "for legal purposes, political parties are private bodies. They have no statutory or public duties."²⁸ As a consequence there have been few legal controls over the parties' internal operations and, until recently, no requirement for them to register or to file public accounts. This has meant that the fundraising activities of the parties have been largely shielded from any public scrutiny for most of New Zealand's electoral history.

That being said, when MMP was introduced there was a conscious decision made to give the political parties a much more formal role in the electoral process

John Rawls, "The Domain of the Political and Overlapping Consensus", 64 *New York University Law Review* 233, 235-8 (1989).

²⁶ That being said, the New Zealand State does give quite considerable support, both direct and indirect, to political parties and individual candidates for office. First of all, it carries out substantial advertising around the election process, thereby saving the contestants the need to run "get out the vote" efforts. The State also pays for all of the mechanics of the actual voting process: enrolling voters, organizing and holding the ballot, and tallying the vote. In addition, the State gives funds to qualifying political parties to pay for the costs of broadcasting election advertisements; see *supra* note 15. Candidates for election may also use rooms in public schools to hold public meetings for election purposes; Electoral Act 1993, s.154(1).

²⁷ *Towards A Better Democracy*, *supra* note 8, at 185-186.

²⁸ *Peters v Collinge* [1993] 2NZLR 554, 575. See also Wilson, *supra* note 7, at 169.

as a whole.²⁹ As a result, those political parties which wish to contest the party vote under MMP are now required to register with the Electoral Commission,³⁰ to make a public disclosure of the total amount that they spend on their election campaigns,³¹ as well as to detail what that expenditure went towards.³² The (admittedly incomplete) disclosure rules for donations in excess of \$10,000 also indicate a newly recognised public interest in the funding practices of the political parties. In this new electoral environment it seems insufficient to argue that the funding of political parties should be left entirely in the private realm because “that’s how it has always been.” Instead, before deciding whether to retain or replace the present system of private funding we need to see what merits or shortcomings it has by measuring it against the five criteria outlined in Part 2 above.

(i) *Reduce the risk of corruption of elected officials, or the appearance of such:*

Underlying this article is the assumption that legislation will be introduced to require the public disclosure of the identity of any donor giving a substantial amount to a political party. Such laws are intended to help mitigate the potential problem of corruption as public scrutiny will dissuade parties and donors from attempting to trade contributions for political outcomes, or at least from being perceived as doing so, lest such behaviour result in the voters punishing the party concerned at the polling booth.³³ But that being said, as long as some of the political parties continue to receive a major proportion of their campaign funding in large sums from a few private sources there will always be a risk that the system will be seen to be “corrupt” in some fashion.³⁴ Ironically enough, improving the disclosure of the identity of political donors could even worsen this perception problem by making it more obvious to the public how dependent some of the political parties are on big donations, which in turn may lead the public to become increasingly cynical towards the political process as a whole.³⁵

²⁹ *Towards A Better Democracy*, *supra* note 8, at 61-62.

³⁰ Electoral Act 1993, s 63.

³¹ *Ibid.*, s 214C(1).

³² *Electoral Commission v Tate* [1999] 3NZLR 174.

³³ See *supra* note 3 and accompanying text. Of course, this response is only possible where not all of the parties are involved in the kind of behaviour that is being punished. See Thomas E. Mann, “Deregulating Campaign Finance: Solution or Chimera?”, (1998) 16 *Brookings Review* 20, 21; John Ferejohn, “It’s Not Just Talk”, (1999) 85 *Virginia Law Review* 1725, 1731.

³⁴ The 1990 documentary by the *Frontline* program, “For the Public Good?”, provides the classic example in the New Zealand context.

³⁵ Such as appears to have happened in the United States. So, for instance, a 1999 opinion survey by The Pew Research Center for the People and the Press found that 74 percent of U.S. voters felt that large political donors had “too much” influence over which candidates become presidential nominees, while 62 percent felt the average voter had “too little” influence; Pew Research Center, “Bush Bests Gore and Buchanan: Too Much Money, Too Much Media Say Voters”, at <<http://www.people-press.org/sept99que.htm>>.

(ii) *Guarantee the liberty interests of those wishing to participate in the process:*

The present system of private funding is predicated on the idea that in a democracy those who wish to participate in the electoral process should be at liberty to support whomever they choose, in whatever manner they choose.³⁶ After all, democratic governance requires that a free, two-way flow of communication occurs between those running for election and those whose support the electoral contestants seek.³⁷ In this context the contribution of a sum of money to a political party can be seen to be a form of communicative action, one which expresses the donor's agreement with the public policy stances that the party espouses.³⁸ The total amount of funding that donors choose to give to a party will therefore reflect not only the breadth of approval enjoyed by that party, but also the intensity with which those donors support the party's policies and principles.³⁹ So a party which can attract highly committed supporters will be successful in raising more funds than one which is unable to so motivate its supporters. As such, the amount of funding each party is able to raise under the current system of private funding can be argued to be an undiluted reflection of the strength – both quantitative and qualitative – of the public support enjoyed by each political party.

(iii) *Promote equal citizen participation in the democratic process:*

Of course, the previous argument from liberty rather ignores the fact that the supporters of a political party will not be equally able to express their approval in a material form. In simple terms, under the present system of private funding a millionaire who supports a particular party can endorse that party to a much greater degree than can a beneficiary or low-wage earner.⁴⁰ Those without wealth

³⁶ That being said, the Electoral Act 1993 contains a variety of restrictions on how participants in New Zealand's election process may use their resources in order to affect the outcome of the ballot. For a review of these provisions see Geddis, *supra* note 4, at 58.

³⁷ "At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions." *Reynolds v Times Newspapers* [1999] 4 All ER 609, 621 per Lord Nicholls. See also Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass.: Harvard University Press, 1995) 277.

³⁸ Bradley A. Smith, "Money Talks: Speech, Corruption, Equality, and Campaign Finance" (1997) 86 *Georgetown Law Journal* 45, 48-52.

³⁹ See generally Kevin A. Kordana, "Political Parties As Donative Intermediaries", (1999) 85 *Virginia Law Review* 1683.

⁴⁰ But see the comments of a Reform Party M.P. during a parliamentary debate on campaign spending limits in Canada: "The right to spend one's own money on election advertising is a right which is just as valid for the poor as it is for the wealthy." Mr. Ted White, *Hansard*, Number 57, Feb. 25, 2000, @10:40, available at <http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/057_2000-02-25/han057-e.htm#LINKT8>. Compare this statement with Anatole France's famous observation that "[t]he law, in all its majestic equality, forbids the rich as well as the poor to sleep under bridges." Quoted in Jonathon Green (ed), *The Cynic's Lexicon* (London: Routledge & Kegan Paul, 1984) 76.

may, of course, still take part in the democratic process in other ways. They may volunteer to stuff envelopes, or to door-knock for a local candidate, or the like. What is more, *absolute* equality between the participants in the political process can never be achieved. Some participants in the electoral process will always enjoy some sort of advantage *vis-à-vis* others. They will be better speakers, or they will have more free time available to devote to political matters, or they will enjoy some sort of public recognition that makes their opinions of greater interest to the voters.

But even taking those points into account, the present system of private funding would appear to create an unhealthy dependence on the part of at least some of the political parties on large donations made by a few wealthy contributors – mostly institutional entities such as corporates or unions. The reliance of these parties upon a handful of contributors for much of their funding, which is given in the form of donations that amount to several times the average annual wage, means that the involvement in the political process of such contributors will be much more strongly sought after than will the participation of those who cannot give such amounts.⁴¹ For no matter how many envelopes a volunteer stuffs for his or her local candidate, this form of participation will not be considered as important or useful as is that of a large-scale donor whose monetary contribution can then be used to hire a dozen such envelope stuffers.

This state of affairs potentially has three negative consequences for our democratic process. One is that the interests of those who have money to give will be accorded a higher priority by the political parties than are the interests of those without such money, thereby giving those with wealth some kind of “unfair” advantage in the contest for political influence.⁴² The second is that “a participatory system in which money plays a more prominent role is one unlikely to leave either activists or the citizenry at large feeling better about politics.”⁴³ Ordinary participants who are unable to give such large donations may become disenchanted with the political process, and will disengage from it as they feel their non-monetary contributions are devalued in comparison with those who give donations.⁴⁴ Finally, the unequal ability of donors to fund the political party that they support may have consequences for the capacity of different parties to compete in the election battle. It is this third point I turn to consider next.

⁴¹ Barry Gustafson, “Regeneration, rejection or realignment: New Zealand Political Parties in the 1990s”, in Hawke (ed), *Changing Politics* (Wellington : Institute of Policy Studies, Victoria University of Wellington, 1993) 79; Richard Mulgan, *Politics in New Zealand* (Auckland: Auckland University Press, 2nd ed., 1997) 253-354.

⁴² *Ibid.* The point at which this sort of “unfair advantage” actually amounts to a form of corruption of the democratic process is a contested claim; see Burt Neuborne, “One Dollar, One Vote?: A Preface to Debating Campaign Finance Reform”, (1997) 37 *Washburn Law Journal* 1, 8.

⁴³ Sidney Verba, Kay Schlozman, Henry Brady, *Voice and Equality* (Cambridge, Mass.: Harvard University Press, 1995) 531.

⁴⁴ As the U.K. Committee on Standards in Public Life expressed the concern in their report on the British funding system, the growing importance of fundraising may “offend ... voters and thereby alienate them from the political process.” *The Neill Report*, *supra* note 10, at 27, para. 2.22. See also Briffault, *supra* note 21, at 581-82.

(iv) Foster competitiveness between participants in the electoral process:

Figures from the political parties' election reports filed with the Electoral Commission reveal that they spent a widely varying amount on their most recent election campaigns. So during the 1999 election campaign the National Party reported expenditure of \$2.139 million – the largest amount of any of the political parties – while the NZ First Party spent just \$108,316. On its face, this inequality need not necessarily pose much of a problem from the point of view of the competitiveness of New Zealand's electoral process. First of all, as has been noted above, the differing levels of funding enjoyed by each party might simply be seen as a reflection of the different levels of support enjoyed by each of the political parties involved. More people think that the National Party should govern the country than think that New Zealand First should, so it is hardly surprising that the National Party has more money to spend. And in addition there is little evidence – at least in New Zealand⁴⁵ – that unequal spending by the political parties is in itself determinative of the outcome of the election. For instance, during the 1999 election battle National was able to out spend Labour by a factor of almost 2:1, and yet Labour gained significantly more votes than did National.

However, it might still be argued that the discrepancy between the amount that each of the parties has available to spend on its election campaign results in some sort of “unfairness” arising between the political parties.⁴⁶ I am unsure about the strength of this argument as it is expressed. It is true that it would be undesirable if the current unequal levels of party fundraising and spending were to prevent some political groupings from getting their message across to the public. Equally, it would be undesirable for a particular political party to be able to win an election solely on the basis that it has more money than its competitors. But these seem to be deficient states of affairs because of the effect on the electoral process as a whole rather than because they are somehow “unfair” to the parties concerned. Dawn Oliver sums up this point as follows:

[T]he [electoral] rules ought to be geared to enable voters to cast their votes on the basis of full information about the parties and their candidates. Set against this vital role of elections, arguments about ‘fairness to parties’ seem quite inappropriate... . It may be that provisions that enable voters to make informed choices produce some sort of ‘fairness’ between parties, but to the extent that this is desirable so it seems to me that it can only be regarded as a ‘spin-off’, desirable from the point of view of the parties, of measures that are quite justified for other reasons.⁴⁷

⁴⁵ Although such evidence does exist elsewhere. See R.J. Johnson, *Money and Votes: Constituency Campaign Spending and Election Results* (New York : Croom Helm, 1987), 179, 207; Robert K. Goidel, Donald A. Gross, & Todd G. Shields, *Money Matters: Consequences of Campaign Finance Reform in U.S. House Elections* (Lanham: Rowman & Littlefield Publishers, 1999).

⁴⁶ Alan McRobie, “Elections and the Electoral System”, in Miller (ed), *New Zealand Government and Politics* (Auckland: Auckland University Press, 1998) 189.

⁴⁷ Dawn Oliver, “Fairness and Political Finance: The Case of Election Campaigns”, in Robert Blackburn (ed), *Constitutional Studies*, (London: Mansell, 1992) 132.

Therefore, in considering the effects that the private funding of New Zealand's political parties have on the overall competitiveness of our electoral processes, we should be primarily concerned with the end-goal of achieving an open democratic process in which voters are able to make informed choices at the ballot box rather than with pursuing some abstract "fairness" between the political parties.

Even if we accept this approach, there are two possible ways in which the present system of privately funded elections may be claimed to have a negative impact on the competitiveness of our electoral system. The first is that political parties whose policies appeal to voters from lower socio-economic classes may systematically find it harder to raise money to spend on their election campaigns than do parties which appeal to voters with higher incomes, thereby hampering the former type of parties in their general efforts to communicate with the electorate. But the extent to which this concern is at present borne out in New Zealand is open to debate. After all, in the 1999 election campaign the Labour Party was still able to raise and spend over \$1 million on its campaign,⁴⁸ which the final vote tally proves was sufficient for it to promote a winning message to the voters. Also, the Alliance Party, generally considered the most "left-wing" party in Parliament, was actually able to raise and spend some \$87,000 more on campaigning at a national level than did the ACT Party, the exemplars of the right.⁴⁹

Secondly, it may be that newly emerging political parties will find it difficult to raise money from large-scale institutional givers such as companies or unions, who in general appear to be more interested in seeking advantage by donating to the established parties than in supporting new political groupings. So an emerging political party may only be able to compete on an equal financial footing against the more established parties if they can call upon some wealthy individual supporters – as was the case with Sir Robert Jones and the New Zealand Party in the 1984 election campaign. It may be argued that this pro-status quo effect of the present funding system deters the development of new political movements.⁵⁰ But again the New Zealand experience would seem to somewhat belie this concern. For instance, since the introduction of the MMP system in 1996 the Green Party has been able to gain representation in Parliament without the help of a clutch of wealthy benefactors. And other parties, such as Christian Heritage, have also been able to spend six figure amounts on their (ultimately unsuccessful) election campaigns,⁵¹ again funded in the main by grass-roots supporters.

⁴⁸ According to its return filed with the Electoral Commission, the Labour Party spent \$1,038,506 at a national level in 1999.

⁴⁹ The Alliance Party spent \$744,711.29 on its campaign in 1999, as compared with ACT's \$657,889.14. These figures exclude the amounts provided to each party under the broadcasting allocation.

⁵⁰ A matter of particular concern to the 1986 Royal Commission: "We consider that as the costs associated with contesting elections increase, the chances of parties other than National and Labour being able to adequately develop sound policies and convey them to the electorate become more remote." *Towards A Better Democracy*, supra note 8, at 217.

⁵¹ The Christian Heritage Party spent some \$114,178.18 on its 1999 campaign.

In addition, it is really not clear what can be done about the problem of emerging political parties. Even under some taxpayer funding scheme, as shall be seen below, an emerging party would first have to prove its "seriousness" as a political entity before it could get money from the State to help fund its campaigns. Therefore it does not necessarily follow that a system of taxpayer funding would make it any easier for newly emerging political parties to compete with their more established rivals than under the present private funding system.

As such, it is not evident that the present system of private funding really acts to deter competition in the New Zealand election process. On the evidence it would appear that the political parties are able to raise enough money to run campaigns that adequately communicate their messages to the voters, even if the amount spent by the parties on doing so is widely divergent. Of course, no political party wants to be in a position whereby its rivals can spend more on their campaigns than it can. Electoral spending rather resembles an "arms race problem" in which the contestants will scramble to avoid being out-spent by their opponents for fear that electoral expenditures *might* buy some sort of advantage. But even so, the evidence indicates that in New Zealand's electoral context spending by the political parties is not the most important element in the success of their campaigns. Other factors, especially the amount of attention given to the parties by the media,⁵² would seem to be of greater significance. Here the restrictions on party spending contained in New Zealand's election laws,⁵³ and in particular the restrictions in place on spending on broadcast advertising, seem to have had a salutary effect.

(v) *Be easily administered, and responsive to changing political realities:*

The present system of private funding can be easily administered by the Electoral Commission as the role of that body in overseeing the present system is minimal.⁵⁴ However, it should be noted that this role is likely to expand somewhat if the Commission is called on to oversee any new rules relating to the mandatory disclosure of the identity of donors. A system of private funding of political parties' election campaigns can also quickly change to take account of the electorate's shifting political preferences. For if a donor decides that she no longer likes the positions or policies of a particular party, or she comes to like the positions or policies of another party, then she can immediately adjust her contributions accordingly.

⁵² "During the campaign proper, all parties had as their major communications objective exposure on the 6 pm television news for their leaders, luminaries, and policies, supported by exposure on the major radio networks and in the metropolitan and provincial newspapers." Mike Williams, "Labour Party Strategy in 1999" in Boston *et al* (eds), *Left Turn – The New Zealand General Election of 1999* (Wellington: Victoria University Press, 2000) 24. See also the various contributions in *ibid*, chs 10-14.

⁵³ Currently candidates for election may spend \$20,000 on campaigning, while registered political parties may spend up to \$1 million, plus \$20,000 for every constituency in which they are standing a candidate. See Electoral Act 1993, ss 213, 214B(2).

⁵⁴ Indeed, the Commission's role is limited to receiving the reports filed by the Political Parties, and ensuring that they meet all the formal, statutory requirements. If the Commission suspects that any breach of the Electoral Act 1993 has been

4. Direct Bulk Taxpayer funding.

The 1986 Report of the Royal Commission on the Electoral System recommended that the political parties should be given taxpayer funding in the form of a bulk sum based on the number of votes gained by a party at the previous election.⁵⁵ The scheme proposed by the Royal Commission has similarities to that which exists in Australia, where parties which poll above 4 percent of the vote receive a fixed amount of funding per vote gained. In addition, many European countries also give bulk grants to their political parties based on their prior electoral performance.⁵⁶ In some cases this funding is provided to help pay for the parties' day-to-day operating expenses, as well as for their election expenditures.

However, such a "dollars per vote" mechanism is not the only way to bulk fund the election campaigns of the political parties.⁵⁷ For instance, at present the New Zealand State gives out money prior to an election to pay for broadcasting the parties' election ads according to a complex set of criteria, of which the number of votes gained in the previous election is but one element.⁵⁸ Qualifying political parties in Canada receive a partial reimbursement of the actual amount that they spend on their election campaigns. The United States makes a fixed sum of money available to all qualifying candidates who are running for President. In addition, various states in the U.S. have also adopted schemes that give a set amount of pre-election funding to candidates for state office – most notably through the "Clean Money" systems adopted in Maine, Vermont, and Arizona.⁵⁹ The American system also differs in that funding is given to the campaigns of individual candidates rather than to the political parties, and those candidates who agree to take taxpayer funding must also agree to forgo any additional, privately-funded spending on their election campaigns.

Therefore the initial questions to be asked in the New Zealand context are as follows: For what sorts of expenses should the taxpayer funding be provided for? To what degree should taxpayer funding substitute for private donations? And how should the amount of funding given to each party be calculated? In the following discussion I will follow the scheme recommended by the 1986 Royal Commission and assume that the State will give money with the intention of paying for election campaigns, rather than trying to cover the overall costs of party administration and policy development. Also, I will assume that the parties will be free to continue to raise donations from private sources to supplement

committed, it must then notify the police, who then decide whether to conduct an investigation.

⁵⁵ *Towards A Better Democracy*, *supra* note 8, at 226-229.

⁵⁶ A review of the funding rules of a variety of European countries is to be found in *The Neill Report*, *supra* note 10, at appendix 1, 195-207.

⁵⁷ The 1986 Royal Commission did survey these other sorts of funding schemes; see *Towards A Better Democracy*, *supra* note 8, at 219-225.

⁵⁸ Broadcasting Act 1989, s 75(2). See Corban, *supra* note 15 for a description of the system of distribution.

⁵⁹ See David Donnelly, Janice Fine, and Ellen S. Miller, "Going Public", in Donnelly, Fine, and Miller (eds.), *Money and Politics: Financing Our Elections Democratically* (Boston: Beacon Press, 1999); Geddis, *supra* note 20.

the money provided by the taxpayers. Finally, the payments given to each party will be based on the number of votes gained in the previous election rather than a flat grant, or a reimbursement of a proportion of the party's actual election expenditures. How does such a scheme perform against the five criteria from Part 2?

(i) *Reduce the risk of corruption of elected officials, or the appearance of such:*

One of the more common arguments raised in support of providing taxpayer funding is that it will help to reduce the dependency of the political parties upon donations from private interests, and thus remove any public perception that political parties are somehow in thrall to their donors.⁶⁰ If the parties already have much of their election campaign paid for then there will be less of an incentive for them to risk public disapproval through taking money from a supporter whose donation might raise some hint of impropriety. That being said, taxpayer funding would only *reduce* the incentives involved, and not completely remove them. As long as private donations can still be received and spent a political party will always face the temptation to continue to swell its coffers in potentially illegitimate ways. The example of the secret "slush funds" operated by Germany's ex-Chancellor Helmut Kohl on behalf of his Christian Democrat party shows that, even with bulk taxpayer funding and mandatory disclosure rules in place, the electoral contestants can, and sometimes do, still engage in dubious conduct.⁶¹

(ii) *Guarantee the liberty interests of those wishing to participate in the process:*

A general objection may be raised against the taxpayer funding of political parties' election activities to the effect that any such scheme involves the State meddling in what should be a realm of entirely private, individual decision-making. As it is the individual choices of the voters – expressed through a vote at election time – that accord legitimacy to the existence of any particular government the state should, as a matter of principle, be excluded from having any involvement in shaping the process through which the voters decide whom they wish to form the government.⁶² However, this argument is unconvincing as phrased. As Samuel Issacharoff puts it:

I find this invocation of a world of politics without government as curious as it is unimaginable. Political competition as we know it does not exist except in the

⁶⁰ See, e.g., *The Neill Report*, *supra* note 10, at 90-91, para. 7.16.

⁶¹ Kohl admitted secretly accepting millions of Deutsche Marks from wealthy supporters over a period of years, which he then paid into undisclosed bank accounts to be used to fund the operations of his Christian Democrat party. See "Germany's desperate right: Kohl's blushing Christian Democrats", *Economist*, 22 January, 2000, 13. The New Zealand situation may be somewhat different from the German one, however, as the German system of campaign spending regulation places no limits on the total that a party may expend on its election campaign – meaning there is a situation of unrestricted demand for campaign money.

⁶² See, e.g., John O. McGinnis, "For Freedom and Against the Scribes: Campaign Finance Reform Revisited", (2000) 24 *Harvard Journal of Law and Public Policy* 25.

context of state-created rules and regulations, and any discussion that presumes the contrary is simply misguided. Just as baseball must presuppose a consensus on how many outs each side has and what constitutes first base, democratic politics cannot exist without fairly rigidly prescribed rules of conduct imposed from outside the political process itself. Without clear ground rules that secure, among other things, that the losers of today can have a fair opportunity to displace the winners in the future, the orderly transfer of governmental authority among competing political factions would be impossible.⁶³

Thus decisions about matters such as when to hold the ballot, the process by which the voters will elect their representatives, as well as how money can be used to influence the electoral outcome, all involve state intervention through the legal regulation of the election process. The overall point may be summarised quite simply: “there are no pre-political politics, and unless we are going to go back to the Hobbesian sovereign, we have to understand that there is going to be a regulated environment and that government regulation is a precondition for any kind of effective representative politics.”⁶⁴

So the argument that the State should not be involved in funding election campaigns because, as a general matter of principle, it has no business in intervening in the election process seems to be too broadly drawn. That being so, it may still be objected that taxpayer funding is an undesirable form of state intervention because it interferes with the electoral participants’ freedom of association by forcing them to contribute to the campaigns of political parties whose positions and policies they would not otherwise choose to support. Indeed, such schemes may involve taxpayers having to participate in the funding of parties whose policies or pronouncements they find morally repugnant. Compelling taxpayers to provide monetary support in these circumstances would appear to infringe upon both an individual’s right to choose for herself whom to support in the political process and upon her right not to be associated with political positions or policies with which she does not personally agree.⁶⁵

Against this position we have to recognise that virtually any spending of government revenue will involve some individual taxpayer having to fund something she would not otherwise choose to support, and which she may even find reprehensible. So the tax revenues contributed by pacifists will go towards equipping the armed forces; those contributed by environmentalists will fund new road building; those contributed by Catholics will pay for abortions; and so on. Put simply, when we pay taxes we do not get to designate what our contribution to the public purse can or cannot be used for. This fact may generally be claimed to be an invasion of an individual taxpayer’s liberty – one of the

⁶³ Samuel Issacharoff, “Oversight of Regulated Political Markets”, (2000) 24 *Harvard Journal of Law and Public Policy* 91, 91-92.

⁶⁴ *Ibid.*, at 93.

⁶⁵ See New Zealand Bill of Rights Act 1990 s 13 (“Everyone has the right to freedom of thought, conscience...”); *ibid.* s 17 (“Everyone has the right to freedom of association...”). But see *Re Mackay and the Government of Manitoba* (1990) 61 D.L.R.(4th) 385 (Canadian Supreme Court rejecting a challenge to the public funding of elections which alleged that forcing taxpayers to contribute to political parties they do not support was a breach of the guarantee of freedom of association under the Canadian *Charter of Rights and Freedoms*.)

reasons that libertarians such as Robert Nozick liken taxation to slavery⁶⁶ – but the imposition seems to be no greater when taxpayer funded elections are at issue than in any other area of government spending. So if our representatives were to decide that providing monies from the public purse to the political parties would somehow improve the democratic process, then it is hard to see why this kind of collective end-good is different to any other policy goal that taxpayer funds can be used to accomplish.

Of course, some participants may still object that there are no good policy reasons to justify a system of taxpayer funded elections, or even that the whole idea of governmental tax-and-spend policies are wrong in themselves. In such a case those participants remain free to support political parties which reject taxpayer funding, and which then use this principled stand as a point of policy differentiation when it comes to campaigning in the next election contest. Individual participants will also still be free to contribute money to any political party which takes such a stand. They may also choose to spend their money independently on helping to fund some sort of campaign against taxpayer-funded elections. In other words, taxpayer funding does not act to restrict the opportunities for individuals to continue to fund the political party that they support, or to spend money on issues that they feel to be of political importance, including the issue of removing taxpayer funding. Accordingly, the actual infringement upon the liberty interests of individual participants involved in introducing a system of taxpayer funded election campaigns would appear to be minimal.

(iii) *Promote equal citizen participation in the democratic process:*

The grant of a bulk sum of taxpayer funds might help to equalise the resources available to the different political parties (depending on how the scheme is funded, and how the rules determining the parties' eligibility to draw on it are drawn up – matters I consider in Part 4(iv) below). However, it would not do much to encourage the parties to shift their fundraising attention from large-scale donors towards their grassroots support base. Looking at the evidence from our nearest neighbours across the Tasman we find that "anecdotal reports would suggest that public funding has not diminished political participants' enthusiasm for seeking donations from large or specialised interest groups."⁶⁷

In addition, bulk taxpayer funding actually creates a risk that the political parties will become *further* isolated from their membership. Britain's Committee on Standards in Public Life articulated the concern well:

If the political parties were to become reliant on state funding, they might be tempted – depending on the system adopted – to abandon the strenuous efforts that some of them now make to raise money at the grassroots (by means of raffles,

⁶⁶ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) 167-74.

⁶⁷ Deborah Z. Cass & Sonia Burrows, "Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits", (2000) 22 *Sydney Law Review* 477, 493. Again, however, it should be noted that the Australian system differs in that there is no spending cap imposed on election activity by the political parties.

whist drives, garden fêtes and so on). Fund-raising is one of the most common activities in which local party members engage; if they did not have to engage in it, they might become less active in the party overall. State funding also runs the risk that, since the state's money would almost inevitably be channelled through party headquarters, at whatever level, the power of party headquarters *vis-à-vis* the grassroots might be considerably increased.⁶⁸

So the bulk funding of parties with taxpayer money may act to reduce the opportunities for the supporters or members of a political party to become involved in the operations of that party. Rather than having to deal with ideologically motivated supporters or party members, who can be troublesome and demanding, the party hierarchy may prefer to use the taxpayer funds provided to hire others to accomplish the tasks that volunteer participants would usually perform. A political party may not need to bother much to encourage the active participation of its supporters and members when it is able to use money provided by the State to replace the services they would otherwise provide.⁶⁹

Were the parties to become dependent on state funding in this manner then this state of affairs would have negative consequences for the structure of the democratic system as a whole. Political parties form an important component of civil society, in that they are organisations through which the voices and interests of individual members of society can be transmitted into the decision-making processes of the state.⁷⁰ At the risk of lapsing into jargon, the political parties provide an avenue by which the mechanisms of public opinion formation can act to discipline and restrain the organs of public will formation.⁷¹ However, should the parties become reliant on taxpayer funding then they run the risk of becoming "captured" by the state. Thus, instead of channeling the concerns and the requirements of the citizens into the institutions of state power, the parties would be tempted to take on the role of an arm of the state *vis-à-vis* the citizens. Evidence from Europe would seem to indicate that this is an emerging concern there, as substantial levels of public funding have resulted in the emergence of "cartel parties" whose representatives are perceived to be institutionalised and remote from the voters.⁷²

⁶⁸ *The Neill Report*, *supra* note 10, at 92, para 7.21.

⁶⁹ A danger admittedly recognised by the 1986 Royal Commission, see *Towards A Better Democracy*, *supra* note 8, at 211, para. 8.96.

⁷⁰ Samuel Issacharoff and Daniel R. Ortiz, "Governing Through Intermediaries", (1999) 85 *Virginia Law Review* 1627; Nancy L. Rosenblum, "Primus Inter Pares: Political Parties and Civil Society", (2000) 75 *Chicago-Kent Law Review* 493.

⁷¹ See Jurgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996).

⁷² In 1992 this concern actually led the German *Bundesverfassungsgericht* (Federal Constitutional Court) to place strict and precise limits on the amount of State funding given to the German political parties in an effort to ensure that it would not undermine efforts to receive financial support from party members and sympathetic citizens. See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C.: Duke University Press, 2d ed., 1997) 188-89.

Of course, it is important not to overstate the problem. Even if the bulk taxpayer funding of the political parties were introduced there would always still be some need for the parties to retain the participation of some members and volunteer supporters, if for no other reason than to continue to be eligible to be registered under the Electoral Act.⁷³ What is more, the election process itself will always act as a check on the parties getting too out of synch with the public mood. A party that is perceived as being detached from the real concerns of the voting public will struggle to attract support at the ballot box. In turn, this will mean it will fail to get much in the way of taxpayer funding for the next election cycle. But the possibly alienating effects of bulk funding the political parties with taxpayer money may still pose a particular risk in New Zealand, where the levels of membership in the political parties are already reported to be in steep decline.⁷⁴ Also, public concerns have been expressed that the MMP system of electing our representatives already puts too much control over the political parties in the hands of the parties' leadership.⁷⁵ In this context I would suggest that we ought to be cautious about instituting a form of taxpayer funding that does not encourage the direct, voluntary participation of party members and supporters lest such a move exacerbate the already existing perception that the political parties are becoming increasingly insulated from their grassroots supporters.⁷⁶

(iv) *Foster competitiveness between participants in the electoral process:*

Giving a bulk amount of taxpayer money to the political parties might help to offset any fundraising advantage that "rich" parties presently enjoy over "poor" parties.⁷⁷ It may also ensure that the parties have access to adequate resources with which to communicate their policy positions to the electorate. But that being said, the effect that bulk taxpayer funding will have on the overall competitiveness of the political parties will depend upon how any such scheme is designed and implemented. Two inter-related problems in particular will have to be resolved. First of all, some threshold level of support will need to be stipulated before a party becomes eligible to receive taxpayer funding. Once this has been decided, some formula will need to be adopted to calculate how much funding each eligible party is entitled to receive.

With regard to the first problem, there will be a need to establish some criteria of "seriousness" which a political party must first meet before it can claim any

⁷³ In order to continue to be registered, a political party must have at least 500 current financial members who are eligible to enrol as electors; see Electoral Act 1993 ss 63(2)(v); 70(2).

⁷⁴ Mulgan, *supra* note 41 at 248-249; see also Ruth Laugeson, "The Politics of Mistrust", *Sunday Star-Times*, 1 August, 1999, C3; Anthony Hubbard, "Balancing Act", *Sunday Star-Times*, 4 March, 2001, C1; Nick Venter, "Slater's cunning attempt at spin can't hide National's plight", *The Dominion*, 14 May, 2001, 2.

⁷⁵ See, for instance, the minority report on the Electoral (Integrity) Amendment Bill issued by members of the Justice and Electoral Reform Select Committee, available at <<http://www.clerk.parliament.govt.nz/publications/electoralintegrity.html>>

⁷⁶ Compare with *Towards A Better Democracy*, *supra* note 8, at 216-217, para. 8.121.

⁷⁷ However, the extent to which such inequality in fundraising exists, or really translates into that much of an electoral advantage is questionable. See *supra* part 3(iv).

taxpayer funding. A bar which is set too high will effectively lock small and emerging parties out of the taxpayer funding system. However, setting the qualifying mark too low will risk a blow-out in costs if too many parties are able to take advantage of the State financing option. It may also undercut the public acceptability of the system if fringe parties are seen to be receiving large sums of public money in order to spread their messages. For instance, a system of public financing that regularly funds the campaigns of candidates representing such marginal organizations as the McGillicuddy Serious Party, or the Natural Law Party, may very quickly come into disrepute with the voters. For these reasons, bulk funding by the State should in principle be available to only those parties that have demonstrated a significant level of public support at the previous election contest.

Of course, what constitutes a “significant level of support” remains an open question. The 1986 Royal Commission recommended the support threshold be set at “4 per cent of the total valid vote averaged over the electorates in which [the party] compete[s].”⁷⁸ However, this formula was designed for the First Past the Post voting system in place when the Commission made its report. It would not appear to be workable in a post-MMP environment, where the crucial element is the total nationwide party vote gained by a party rather than the vote in each electorate.⁷⁹ As such, I would suggest some threshold percentage of the vote at a *national* level should have to be met before a party becomes eligible to receive taxpayer funding. A glance beyond our chimney pots reveals there is little international consensus on what this threshold percentage should be. Australia puts its required level of support at 4 per cent of the entire primary vote nationwide.⁸⁰ Other democracies which give taxpayer support require a threshold level of support ranging from just 0.5 per cent of the total vote in the general election,⁸¹ up to 25 per cent.⁸² The courts in Canada have upheld a requirement that a candidate get 15 per cent of the vote before she is eligible to receive any state funds against a challenge under the *Charter*.⁸³ The courts instead found that:

⁷⁸ *Towards A Better Democracy*, *supra* note 8, at 227, para. 8.163. It should be noted that the Royal Commission also recommended that the 4 per cent level be used as the threshold at which a party be eligible to receive any list seats; see *ibid.*, at 66, para. 2.190.

⁷⁹ For instance, there is no consideration given under the Royal Commission’s proposal to a party which does not contest any electorate seats, but only stands list candidates. Also, under the Royal Commission’s formula a party which stood candidates in only a very few seats and polled above 4 per cent in these would be eligible for public funding, whereas a party that stood candidates nationwide but polled under 4 per cent would not – even though the latter party could gain substantially more total votes than the former. Whether this state of affairs is desirable is highly questionable.

⁸⁰ There has been criticism of this figure as too high to encourage the development of new political parties. See Beth Gaze & Melinda Jones, *Law, Liberty, and Australian Democracy* (Sydney: Law Book Co., 1990) 105.

⁸¹ The level required in the Federal Republic of Germany.

⁸² The level required to get funding as a “major” party under the U.S. Presidential funding system.

⁸³ *Barrette v Canada (A.G.)* (1994) 113 D.L.R. (4th) 623 (Que. C.A.). However, a political party is eligible to have a proportion of its election expenses reimbursed if it receives

[There is] no principle which states that the legislature cannot provide a solution to a public problem or concern unless it gives everyone involved equal access to the resources provided. Nor do I agree that unequal access restricts or limits free speech of a person who gets less of a resource which would not be there but for the legislation.⁸⁴

In view of the wide divergence of international practice in this area, it would appear that there is no real democratic consensus on the level of support that should be required to be shown before taxpayer monies are made available to some political party. As such, deciding what level of support ought to be required also involves us in asking what purpose the taxpayer funding system is to serve. If it is simply to ensure that established parties will have access to enough resources to get their message across to voters then the reimbursement threshold could be set at a relatively high level.⁸⁵ However, if the purpose of State funding is to encourage the development of small, new political movements then a lower threshold will be required.⁸⁶ Of course, the support threshold could simply be set at 5 per cent of the vote nationwide, the same level as is required for a party to gain representation in Parliament from its Party List. This figure would have the benefit of neatness and consistency. However, placing the threshold here would result in those parties which exceed this level of support getting a “double dose” of funding – each of their representatives in Parliament would receive an allowance to help him with his parliamentary business, plus the party would become eligible to get taxpayer funds for its election expenses. By contrast, parties that gained 4.9 per cent of the vote would receive nothing at all. Also, an additional problem to be considered in setting any support threshold is the existence of the Maori seats, and the fact that some political party may seek to contest these alone. Should funding be made available to such a party if it polls well in these few seats, but negligibly at a nationwide level?

I pose these questions without pretending to have any particular solution to the problems involved. Instead I wish to highlight the sorts of choices that will have to be made in structuring any bulk taxpayer funded scheme. That being said, whatever approach is adopted will have ramifications for the second problem that needs to be addressed: how the amount of funding to be made available to each party ought to be calculated. For if it is decided that public

more than 2 per cent of the valid votes cast nationwide; *Canada Elections Act 2000*, s. 435 (1)(c)(i).

⁸⁴ *Reform Party of Canada v Canada (A.G.)* (1995) 123 D.L.R.(4th) 366, 389, per McFadyen J.A.

⁸⁵ So, for instance, the 15 per cent threshold for reimbursement of candidate expenses in Canada means that “...the subsidy system as it now operates benefits the two largest parties the most, because they rarely fall below the 15 percent threshold.” Jane Jenson, “Innovation and Equity: The Impact of Public Funding”, in F. Leslie Seidle (ed.), *Comparative Issues In Party And Election Finance* (Dundern Press: Toronto, 1991), 128. This claim is echoed by Paltiel, who argues that reimbursements have not helped many “outside the magic circle of the two major parties.”, Khayyam Zev Paltiel, “Canadian Election Expense Legislation 1963-1985”, in Herbert E. Alexander (ed.), *Comparative Political Finance in the 1980s* (Cambridge: Cambridge University Press, 1989) at 69.

⁸⁶ The Royal Commission favoured this role for a system of taxpayer funding, as “[i]t would be undesirable if new parties without access to donors of substantial

funding ought to be designed to enable established parties to have access to enough resources to promote their policies to the voters, then the obvious way to distribute the funding is in direct proportion to the vote gained by each party. This is the approach which is taken in Australia. So after the 1998 election campaign those Australian parties that qualified to receive funding were given A\$1.62 for every first preference vote cast in their favour. Allocating funding in this manner has the additional benefit that the amounts given to each party by the State are a direct reflection of the support that each party enjoys amongst the voting public.

However, such a system of allocation will in practice result in the bulk of the taxpayer funding provided going to larger, established political parties,⁸⁷ who may already enjoy an advantage when it comes to fundraising for their election campaigns. In the Australian context this meant that after the 1998 election the Australian Labor Party received A\$14,010,512.42 in taxpayer funds – nearly half of the total of A\$33,920,787.43 paid out by the State.⁸⁸ On top of this funding the Labour Party reported raising an additional A\$48,368,678 in privately donated funds for the 1998-1999 period. By comparison, the Australian Democrats were given A\$2,256,772.57 in taxpayer funds, but could then only raise an additional \$2,490,974.03 from private contributions. Thus allocating taxpayer funds in strict proportion to the vote gained by a party may doubly reward the large, established parties who can more readily call upon institutional donors to help them with their election campaigns.

As such, if we want public funding to encourage the development of small, new political movements then we will need somehow to weight the allocation of taxpayer funding towards parties that will only get a relatively small proportion of the vote. On this view, the suggestion put forwards by the Royal Commission that funding be determined according to a “sliding scale” would seem to be a good one. While the Commission recognised that “the room for variation in this area is considerable”,⁸⁹ it recommended that, “[eligible parties] should receive funding of \$1 for each vote received up to 20% of the vote ..., and 50 cents per vote thereafter. No funds should be allocated for votes gained in excess of 30% of the total valid vote...”.⁹⁰ Whether this scale should be lowered even further – given the fact that under MMP even the largest parties fail to gain much in excess of 30 per cent of the vote⁹¹ – is an open question. But whatever the final figures adopted, the strength of such a system of allocation would lie in its directing a greater proportion of the State funds to small or emerging parties.

wealth and generosity were effectively excluded from the political process.”
Towards A Better Democracy, supra note 8, at 217, para. 8.123.

⁸⁷ See Cass and Burrows, supra note 67, at 495.

⁸⁸ The following figures are from the Australian Electoral Commission website, see <http://www.aec.gov.au/results/1998/tally_room/payments.htm>

⁸⁹ *Towards A Better Democracy*, supra note 8, at 226, para. 8.162.

⁹⁰ *Ibid.*, at 227, para. 8.164.

⁹¹ For instance, in the 1999 election the Labour Party was the only party to receive a vote total significantly above the 30 per cent mark, with 38.74 per cent. The National Party, the second place getter, only got 30.50 per cent.

(v) *Be easily administered, and responsive to changing political realities:*

The bulk funding scheme proposed above has the positive value of being based on a fairly clear and easily determined criteria. Implementing it would therefore not appear to pose many difficulties for any administrative agency. The agency need only identify those parties that qualify for funding, tally the total vote that each such party has received, and then apply whatever allocation formula is decided upon to determine the total amount of funding each should receive. What is more, the scheme will make this money available to the parties in response to the public's support for each party as indicated through the election process. In this respect the amount given will retrospectively mirror the views of the entire voting public as expressed at the previous election.

However, the retrospective nature of the scheme may also be a drawback as it makes the scheme blind to any change in public sentiment towards the parties in the time period between elections. Because the amount of taxpayer funding available to a party will be determined by how well it did in the last election, and this money is intended to fund the party in its next election campaign, the allocation system in practice will be running on information that is three years out of date. There are two situations where this is likely to cause problems. The first is where a new and relatively popular party forms in the middle of an election cycle, as did the Greens in 1997. Such a party will have to finance its first election campaign purely from private donations before becoming eligible for any state funding. Secondly, an established party whose fortunes sharply rise or fall from one election campaign to the next, as was the case with the NZ First Party between 1996 and 1999, will still have funds made available to it based upon what its level of popularity was before these swings occurred.

Of course, attempts could be made to build in extra criteria to any allocation formula to try and take care of this problem. So the time at which funding is made available to the parties could be moved closer to the start of an election campaign, and variables such as a party's current support in opinion polls, its number of members, and the like could be considered when deciding how much each party should receive. But such a scheme would then be open to the same complaints of complexity and unfairness that are levelled at the current method of allocating money for broadcasting.⁹² Already the political parties are calling for a change in the way broadcasting money is given out to the parties precisely to avoid these problems.⁹³ Given this experience with the allocation of broadcasting monies, it would seem questionable as to whether we should introduce yet another level of complexity to the funding process.

5: Indirect Taxpayer Subsidisation of Private Donations

The second method of providing taxpayer funding to the political parties that I wish to consider takes the form of giving a subsidy to augment the donation decisions of individual supporters. Thus the funding given by the State would

⁹² See Corban, *supra* note 15. For similar problems in allocating broadcasting time in the Canadian context see "Appendix: The Broadcasting Arbitrator's Report", in Report of the Chief Electoral Officer of Canada on the 37th General Election (Ottawa: Elections Canada, 2001) 107-111.

⁹³ Helen Bain, "Parties' Electoral Wish Lists", *The Dominion*, 15 September 2000, 9.

“piggy-back” upon individual, private donative acts rather than being given directly to the political parties, as was the case with the bulk funding scheme discussed above. There are three ways that such indirect subsidies to individual donations might be provided. First of all, the State may make a tax rebate available to donors for some proportion of the amount of their donation, as it currently does with respect to gifts to charities.⁹⁴ Secondly, the State could provide a grant to a political party to match any contribution given by an individual donor, up to some capped amount.⁹⁵ Thirdly, the State might give all voters a funding voucher representing some set amount of money, which the individual voter is free to donate to the party that she supports for that party to then cash in with the State.⁹⁶

There are some differences between these three methods of indirect taxpayer funding. For instance, a system of tax rebates or matching grants would still require a participant to use some of his or her resources, whereas a voucher system would involve the State providing the resources from which the contribution would be made. That being said, in the discussion below I will concentrate less on these sorts of differences between the three indirect subsidy approaches (unless these are relevant to the point at hand) and more on what they all have in common. Each seeks to use taxpayer money to supplement the individual donative preferences of participants, and to thereby encourage the making of small donations by individuals to political parties.⁹⁷ What effect might implementing such a scheme have on our electoral processes?

(i) *Reduce the risk of corruption of elected officials, or the appearance of such:*

A system of indirect taxpayer subsidisation of individual donations would still leave much of the funding of political parties in private hands. In particular,

⁹⁴ Donors may claim a rebate for 33 per cent of the value of all cash gifts made to a charity in excess of \$5, up to a maximum of \$1500. See generally Gino Dal Pont, *Charity Law in Australia and New Zealand* (OUP: Melbourne, 2000) 104. Such a scheme exists in Canada with regards to political donations. Individual contributors there can claim a tax credit for 75% of the amount of donations less than Can\$200, plus 50% of the amount of donations that exceed Can\$200 but not more than Can\$550, plus 33.3% of the amount in excess of C\$550. However, the total deductions for an individual cannot exceed Can\$500 per year. See Canada Elections Act 2000, s.560(1).

⁹⁵ As occurs in the US Presidential public funding system. Also, matching grants are made available in some local election systems in the US. For instance, New York City funds candidates running for election to public office with four dollars in public funds for each dollar a New York City resident gives, for a maximum of \$1000 in public funds per contributor.

⁹⁶ See Richard L. Hasen, “Clipping Coupons For Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers”, (1996) 84 *California Law Review* 1; David A. Strauss, “Corruption, Equality, and Campaign Finance Reform”, 94 *Columbia Law Review* 1369 (1994); Edward B. Foley, “Equal-Dollars-Per Voter: A Constitutional Principle of Campaign Finance”, 94 *Columbia Law Review* 1204 (1994); Bruce Ackerman, “Crediting the Voters: A New Beginning for Campaign Finance”, 13 *American Prospect* 71 (1993).

⁹⁷ I shall assume that only donations by individual voters will attract some indirect subsidy, not contributions made by institutions or groups.

individual donors would still be able to give large amounts to the political parties that they support, even though not all of the amount of such donations would necessarily attract taxpayer support. That being said, indirect taxpayer subsidisation would not create any worse risk of corruption, or perceived corruption, than does the present, completely privately funded system. Indeed, as the subsidisation of small donations would make more funding available to the parties from these sorts of sources there would arguably be less need for the parties to seek out large gifts from institutional or wealthy contributors.⁹⁸ In turn, parties that continue to accept large donations in such a climate may pay a price at the ballot box for appearing to be unable or unwilling to fund their activities from smaller donations.

(ii) *Guarantee the liberty interests of those wishing to participate in the process:*

The indirect taxpayer subsidisation of small donations would not prevent any individual from giving money to any party that he supports. A system of tax rebates or funding vouchers might instead enable some donors to contribute money who may not otherwise be able to do so. Providing some type of indirect taxpayer subsidisation for donations would also retain the link between party funding and the intensity of donor support, in that the amount of state funding that a party receives will depend upon how strongly its individual supporters are prepared to invest in it. However, as with the bulk funding of political parties, indirect state aid would still involve some taxpayers in helping to fund a political party or parties that they would not choose to support. In this way an indirect taxpayer subsidisation scheme would still have some marginal effect on the liberty interests of participants.

(iii) *Promote equal citizen participation in the democratic process:*

The purpose of providing some indirect taxpayer subsidisation scheme would be to encourage the making of small scale donations to the political parties. In turn, this can be seen to help stimulate more individual participation in the political process in two ways. The subsidy would provide a direct encouragement to individual donors to contribute financially to the political parties that they support. Also, providing a subsidy would give the political parties an incentive to seek more actively the participation of small donors as they would represent a larger potential source of funds for the party.⁹⁹ Indirect taxpayer subsidisation would also mean that the political parties would still be required to rely on the support of their supporters and members for their election funding, thus avoiding the problem encountered by bulk taxpayer funding of insulating the party from the influence of these types of participants. So while the state would be involved

⁹⁸ However, the Canadian experience would indicate that this result will not necessarily occur; see Jeffrey Simpson, "It's time to clean up political fundraising", *The Globe and Mail*, July 14, 2001, A17.

⁹⁹ So, for instance, evidence was presented to the U.K.'s Committee on Standards in Public Life that "in Germany, where a system of tax relief was introduced in 1974, the pattern of giving to political parties has changed in favour of many small donations and against large donations." See The Neill Report, *supra* note 10, at 95-96, para. 8.6.

in funding the political parties in their election campaigns, it would be doing so in a way that does not threaten to replace the participation of individuals in the political process.¹⁰⁰

But that being said, subsidising donations through the means of tax rebates or matching grants will still require that a donor have enough disposable income to give to a party in the first place. Even if the cap at which any donation subsidy ended were set at quite a low level – say, for discussion’s sake, at \$1,800¹⁰¹ – the ability to give this amount will vary across different participants. For some people it will represent less than their weekly income, for others a couple of months pay. So giving some type of State subsidy to those who are already able to give this amount may simply act to entrench their advantage over those who are less well off. It was this concern that would seem to have underlain the 1986 Royal Commission’s decision not to recommend the adoption of these forms of State assistance.¹⁰²

There may be two responses to this critique. One is to accept that some degree of financial inequality is unavoidable in a market society, and that this fact will inevitably be reflected in the ability of different participants to fund their preferred political parties. But while providing indirect taxpayer subsidies through tax rebates or matching grants will not *completely* equalise the position of all participants, it will at least have the potential to make them *more* equal than they would otherwise be. Even though a system of tax rebates may be more widely used by those with the *ex ante* wealth to fund donations, it may also act to enable (or encourage) some donors (who would not otherwise have been able (or have chosen) to make a contribution) to do so. Likewise, giving matching grants for small donations will help to amplify the value of support from such quarters, thus encouraging the political parties to cultivate the active participation of smaller donors. In either case the effect of such state subsidies would be to redistribute political capital away from large institutional or wealthy contributors and towards those individuals who make smaller scale donations, even though participants would admittedly still retain a disparate ability to contribute.

Alternatively, the State could try to counter the existing financial inequalities amongst participants by giving each voter an equal amount of base resources from which to fund the party that he supports. This is the idea behind providing each voter with a funding voucher, which can then be passed on to the political party that she favours.¹⁰³ Giving each participant access to some base amount of financial resources from which to fund his preferred party will provide an incentive for the electoral contestants to address the interests and concerns of

¹⁰⁰ Compare with Dal Pont, *supra* note 94, at 450 (“The main advantage of *indirect* funding of charities through tax deductibility or rebates is that it promotes pluralism, as individuals are given the *motivation* to direct assistance to specific organisations of *their own choice*.” (Emphasis in the original)).

¹⁰¹ This is the cap which the Government is currently considering placing on tax rebates for charitable donations. See Inland Revenue Department, *Tax and charities; a government discussion document on taxation issues relating to charities and non-profit bodies* (June, 2001), 49.

¹⁰² *Towards A Better Democracy*, *supra* note 8, at 220, para. 8.137; 221, para. 8.141.

¹⁰³ See sources *supra* note 96.

participants they may otherwise overlook. In the words of one proponent of such a funding voucher scheme: “[t]he politician always has the incentive to look to everyone in the market for direct votes; the voucher system will provide the incentive to explore the entire market for campaign contributions as well.”¹⁰⁴ However, the equality aimed at by funding vouchers would be somewhat undercut if participants are then free to make whatever extra contribution that they like on top of the value of any voucher that they are given. For this reason the proponents of such schemes suggest that funding vouchers should completely replace private donations, with a ban placed on any additional donations being given to electoral contestants from an individual’s private wealth holdings. Given the restrictions this would place on the liberty interests of individuals it may be questioned whether such a measure would be feasible – or desirable – in New Zealand.

(iv) *Foster competitiveness between participants in the electoral process:*

At first blush it would appear that providing some form of indirect taxpayer subsidy to small donors would have positive benefits for electoral competition in New Zealand. It could well result in more money being available to the political parties by providing an incentive to new contributors to make donations. This extra party income would in turn better enable the parties to transmit their policy messages to the voting public. These extra resources would result from the donative decisions of smaller, individual participants rather than large contributions from institutional sources. As such, the parties’ access to the extra resources would be proportionate to the level and strength of support that they can attract from amongst the entire voting public. Also, depending on where the support threshold to prove a party’s “seriousness” were set, the subsidy might act to encourage the development of small and emerging parties.¹⁰⁵

Nevertheless, an indirect taxpayer subsidy scheme may still pose some potential problems with regards to electoral competition. One general problem lies in the inevitable uncertainty that surrounds the way in which donors will act in response to the provision of some state subsidy. It may be that the general public has become so “turned off” politics that, regardless of the incentives provided by the State, people still will not want to give money to the political parties. Individual donors may not participate in numbers that are sufficient to provide the political parties with much in the way of extra revenue to fund their election campaigns. If this were to prove to be the case, however, it would also prove to be a problem for the other two methods of party funding. After all, if donors will not make contributions with some state subsidy in place to encourage them, then they will be even less likely to make contributions under a system of purely private funding. Bulk taxpayer funding for the political parties would deal with the problem of donor apathy, as it is not predicated upon any prior individual donative decision. However, why should the political parties receive taxpayer funding if they are unable to convince individual donors to support them financially? At least a scheme of indirect taxpayer funding has the benefit of forcing the parties to seek to make themselves more attractive to small donors,

¹⁰⁴ Hasen, *supra* note 96, at 30.

¹⁰⁵ See below at note 112 and accompanying text.

rather than allowing the parties to continue to operate financially in the absence of such public support.

A second potential problem with indirect taxpayer funding lies in the parties' unequal ability to take advantage of it. In its 1986 report the Royal Commission expressed the fear that tax rebates and matching grants would "merely heighten the advantage already held by parties representing wealthy interests".¹⁰⁶ Given that the supporters of these parties will already have financial resources from which to make donations, the Royal Commission was concerned that a system of tax rebates or matching grants would disproportionately help those political parties whose supporters already could afford to give without affording much assistance to political parties whose supporters could not afford to give. But it may be questioned if this outcome would eventuate if the upper limit of indirect taxpayer subsidies were set at a low enough level.¹⁰⁷ The (admittedly incomplete) returns filed by the political parties indicate that the smaller, "poorer" parties receive proportionally more funding in smaller amounts (below \$10,000) than do the larger, "richer" parties.

What is more, the evidence of the already existing tax rebate given for charitable donations shows that "[e]ven though the proportion of income earners who claim a rebate increases as income increases (from around 20 percent at \$10,000 to nearly 50 percent at \$100,000), those with annual taxable incomes under \$40,000 claim ... 70 percent of the total rebates".¹⁰⁸ In fact, nearly half of the total value of the rebates given by the IRD went to taxpayers whose income fell below \$20,000 per annum. We may extrapolate from this evidence and conclude that while it may be true that proportionately more high income earners would take advantage of any tax rebate scheme set up for political donations, overall such an arrangement would still seem to deliver most of its benefits to donations made by low income earners.

(v) *Be easily administered and responsive to changing political realities:*

The major shortcomings of any scheme involving indirect taxpayer funding would be administrative in nature. Each of the forms of indirect taxpayer funding already considered could be predicted to throw up a different set of problems.

A tax rebate scheme would be the simplest and least administratively demanding form of indirect taxpayer funding. Donors would simply get a certificate or receipt from the political party concerned for any donation they may make, and then submit this to the Inland Revenue Department (IRD) in order to be eligible for a tax rebate. Whilst there would be some administrative costs involved in setting up such a process, these should not be too great given that the existing system of tax rebates for charitable donations would provide a template from which to work. However, when the 1986 Royal Commission studied the issue of providing tax rebates to political donors it was informed by the IRD that these would be incompatible with the Department's policy of

¹⁰⁶ *Towards A Better Democracy*, *supra* note 8, at 220, para. 8.137; 221, para. 8.141.

¹⁰⁷ The U.K. Committee on Standards in Public Life did not think so; see *The Neill Report*, *supra* note 10, at 98, para. 8.17.

¹⁰⁸ See IRD, *Tax and charities*, *supra* note 101, at 49.

restoring “neutrality and equity in the tax system.”¹⁰⁹ It was not then explained in the Commission’s report why the IRD’s preference for a simple tax scheme necessarily outweighed the policy arguments for introducing this form of indirect taxpayer funding of the political parties. After all, if such a scheme operates well in respect of charities, as the IRD would seem to admit that it does,¹¹⁰ then why not extend its use to encourage small donations to be made to the political parties?

That being so, in order to prevent a fraud on the revenue there would be a need to define tightly which “political parties” are eligible to give receipts for tax rebate purposes. One option would be to allow all registered political parties to issue such tax receipts. However, at present the only express statutory requirement for registration with the Electoral Commission as a “political party” is that the party have 500 financial members.¹¹¹ There have already been complaints made that some parties are abusing this process by gaining and retaining registration without having adequate membership numbers. The problem could become even worse if donations to any grouping that registers as a political party then became tax deductible, as there would thereafter be an incentive for an organisation to register as a party so as to gain the resultant tax benefit. Therefore, a tax rebate scheme would necessitate either that the current requirements for party registration be strengthened, or that some threshold level of public support be demonstrated before a registered party may give tax receipts to their donors.¹¹² Here the problems involved in setting such a support threshold, as seen above in part 4(iv), will again come into play.

A system that provides matching taxpayer funds to the parties would also require a large amount of policing to prevent fraudulent practices. One risk is that, as with the tax rebate scheme, groups may seek to establish themselves as “political parties” solely so as to profit from the taxpayer funding. There is a danger that large donors might attempt to split a contribution into several smaller amounts before passing each of these on to a political party through “straw donors”, so as to inflate the total amount of matching funds that the party is eligible to receive. In order to prevent such practices from occurring the political parties would have to be required to keep extensive donor records, and disclose the identity of these donors to some policing agency. In turn, the policing agency would have to carry out regular spot-checks so as to deter donors from such behaviour. This would involve substantial compliance costs for the political parties, administrative costs for the State, and costs to individual donors in terms of their privacy rights.

Finally, the most demanding form of indirect taxpayer funding from an administrative point of view would be a funding voucher scheme. Not only would putting this in place involve quite extensive “start up” costs for the State,

¹⁰⁹ *Towards A Better Democracy*, *supra* note 8, at 221, para. 8.142.

¹¹⁰ See IRD, *Tax and charities*, *supra* note 101, at 48-50.

¹¹¹ See *supra* note 73.

¹¹² So, for instance, in the U.K. it was suggested that “Political parties should be eligible to claim under the tax relief scheme if at the last general election two members of the party were elected to the House of Commons or one member was elected and the party won at least 150,000 votes.” *The Neill Report*, *supra* note 10, at 99, recommendation 39.

it would also require measures to stop people setting up “political parties” designed to profit from the scheme. As well, there would be the problem of a market in the funding vouchers developing. If the State were to distribute funding vouchers to every voter representing (for the sake of argument) \$20 in funding to the party to which it is donated, then it would clearly be in a political party’s interest to buy that voucher from a voter at a proportion of its value. Motivated supporters may not require this monetary incentive, but for politically disinterested voters an offer of (say) \$10 in cash for an otherwise useless piece of paper would be hard to resist. Commodifying the funding vouchers in this manner would seem to run counter to the equality principle that justifies having them in the first place. Of course, such transactions could be made illegal. But this would then create yet more policing costs for the State in order to stop a black market from springing up. Also, there would be line-drawing problems in deciding what sort of transactions constitute “voucher buying”. Even if it were illegal for a party to pay cash directly to obtain a funding voucher from a voter, would it be permissible for the party to provide some sort of good or service to the voter in exchange for the voucher?

As for the responsiveness of an indirect taxpayer subsidisation scheme, by tying the State funding of the parties to private donative decisions it will continue to track the current political preferences of the donative public. Like the present system of completely private funding, this means that the levels of funding available to each party can quickly change in accordance with the electorate’s shifting political preferences. If a donor decides that she no longer likes the positions or policies of a particular party, or she comes to like the positions or policies of another party, then she can immediately adjust her donative behaviour accordingly. In turn, the monies provided by the State will follow this shift in preferences, making the funding system sensitive to fluctuations in the market for political support.

6: Conclusion

In concluding this paper I do not pretend to resolve the issue of whether the introduction of some system of public funding would be a positive or negative move. Instead, I simply summarise the strengths and weaknesses (as I see them) of the funding schemes that have been considered above. The final conclusion on which (if any) of these funding systems is the “best” for the New Zealand context clearly depends upon which criteria each participant thinks are most important for the democratic process as a whole.

The strength of the present private funding system lies in the liberty it affords to individual electoral participants to finance the political party that they support to the level that they wish. As such, it is a scheme that is relatively easy to administer and responsive to the changing political fortunes of the parties. An examination of the current situation of the political parties reveals that the present funding system does not seem to have greatly diminished competition amongst them. However, the “arms race” nature of the parties’ desire to raise campaign funds gives large scale, institutional donors an undue weight in the political process as a whole. In turn this may create the perception that the fundraising

process is in some way “corrupt” as the parties are seen to be overly reliant on these sources of revenue.

A bulk taxpayer funding system would also have the benefit of being relatively easy to administer, and would financially reward parties based upon their demonstrated appeal to the entire range of voters rather than simply to those who are able to afford to make a donation. Depending on how rules are drawn up to determine which parties may qualify to receive funds, and how these funds are to be distributed, bulk taxpayer funding may help small or emerging parties to fund their campaigns. But the scheme would involve some taxpayers having to contribute to parties that they do not support. Bulk taxpayer funding would also make the parties less dependent upon their supporters for financial support and more reliant upon the State, thus threatening to further separate the party hierarchy from its grassroots membership. Finally, a system that financially rewarded parties based on their past election performance would fail to reflect accurately the present levels of support enjoyed by each political party.

The use of an indirect taxpayer funding scheme would link the provision of state monies to the direct donative decisions of individual supporters, thereby encouraging the parties to seek more actively small donations. This would empower small donors *vis-à-vis* larger givers. Depending upon how the qualification rules were drawn up, distributing taxpayer funding in this manner would seem to be of greatest benefit to the smaller, poorer parties. It would, however, also involve some taxpayers contributing to a party that they do not support. In addition, there would be real administrative problems with implementing and policing any such scheme. It would be open to potential abuse by pseudo-parties, or by electoral contestants who are seeking to maximise the funding that the state gives them.