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Ethics and Integrity in Parliament: Emerging Perspectives
‘How Effective is the Existing System of Self-Regulation?’

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Current and former parliamentarians, distinguished guests and delegates, my thanks to Professor Uhr for inviting me to make a contribution today.²

This conference has the challenging topic of *Ethics and Integrity in Parliament: Emerging Perspectives*. My sub-topic is *How Effective is the Existing System of Self-Regulation?*

For Australians these matters relate to all Australian parliaments, whether federal, state or territory.

Simply put, the argument I make is that the existing system for self-regulation of political parties is in many respects ineffective, inefficient, unproductive, antiquated and unaccountable, and that some of the answer lies in better political governance.

Australians are demanding much more of their Governments. The push for higher standards and better performance is strong. Plans have been devised that embrace nearly every sector in Australia, yet the political sector has been left largely untouched, as if only the political class at the apex do not need to be more able, a higher calibre, more productive, more competitive, professionally more suited for the future.

The personal calibre quality and character of political and public service leaders matter greatly in delivering better performance.

Can better political governance give Australia an improved political class?

¹ Andrew Murray was a Senator for Western Australia from July 1996 to June 2008. He is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children.

² This argument is included in the submission by Andrew Murray November 2009 in response to the Australian Government’s September 2009 Electoral Reform Green Paper STRENGTHENING AUSTRALIA’S DEMOCRACY; and *Agenda: A Journal of Policy Analysis and Reform* vol 16, no 3 2009, which in turn drew on a section of the 17 February 2009 public lecture given by me in Brisbane for the Australia & New Zealand School of Government: *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda*; and has also been reproduced in *Critical Reflections on Australian Public Policy selected essays* edited by John Wanna ANU E Press Canberra 2009.

This question has even more relevance in the context of markedly smaller membership of political parties than was once the case. That shrunken membership will inevitably have diminished the numbers, quality, and variety of potential candidates for public office.

Poor governance has significant negative effects. Governance through law, regulation and process makes power subject to performance and accountability and leads to better outcomes and conduct; which is why so much effort was put into better governance in the bureaucratic³ union and corporate sectors, with great improvements resulting.

In contrast not much effort has been put into reforming governance in the political sector, although it must be said that at least the reporting of parliamentarians' interests and entitlements has significantly improved in recent years.

Political governance matters because political parties are fundamental to the Australian democracy, society and economy. They wield enormous influence over the lives of all Australians. They decide the policies that determine our future, the programmes our taxes fund, the Ministers that government agencies respond to and the representatives in parliaments they are accountable to.

Conflicts of interest and the self-interest of politicians have meant minimal statutory regulation of political parties. It is limited and relatively perfunctory, in marked contrast to the much better and stronger regulation for corporations or unions.

The successful functioning and integrity of any organisation rests on solid and honest constitutional foundations. The laws for corporations and unions provide models for organisational regulation. But political parties do not operate on the same foundational constructs.

We have law and governance in the public interest for corporations and unions because it makes a real difference to their integrity and functioning. The laws for the regulation of companies and industrial relations, the *Corporations Act* and the *Fair Work Act* currently number 2,400 and 650 pages respectively. In contrast to lengthy and detailed rules for the governance of corporations and unions in those Acts, there are almost no rules regulating the governance of political parties in the 440 page *Commonwealth Electoral Act 1918*.⁴

³ For instance see the definition in page 13 of ANAO and PM&C 2006 *Implementation of Programme and Policy Initiatives: Making Implementation Matter*, Better Practice Guide Commonwealth of Australia, Canberra.

⁴ As entities political parties sit within the Third Sector – see - Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008; ONE REGULATOR ONE SYSTEM ONE LAW, The Case for Introducing a New Regulatory System for the Not for Profit Sector, Senator Andrew Murray, Canberra, July 2006, available from the Parliamentary Library Canberra; and the public submission by Andrew Murray February 2009 in response to the Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE.

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

Although they are private organisations in terms of their legal form, political parties by their role, function, importance and access to public funding are of great public concern. The courts are catching up to that understanding.⁵ Nevertheless, the common law has been of little assistance in providing necessary safeguards.

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

The entity status of political parties needs to be confronted as a policy issue.⁶ The first Green Paper on Electoral Reform picks up on this issue.⁷

From accountability and reporting perspective a decision needs to be made on the desirable legal form for political parties. Political party entity status is not a harmonisation issue, as the Commonwealth does not need the Council of Australian Governments'⁸ approval to proceed and a Commonwealth decision would flow into state participants, but it would be sensible to get agreement.

Political parties lie within the not-for-profit or Third Sector.⁹ Nonprofits use a number of legal forms available for their formal entity status under both state and federal law – including unincorporated associations, incorporated associations, corporations, companies limited by guarantee, trusts, joint venture companies, and partnerships.

⁵ For instance, *Baldwin v Everingham* (1993) 1 QLDR 10; *Thornley & Heffernan* CLS 1995 NSWSC EQ 150 and CLS 1995 NSWSC EQ 206; *Sullivan v Della Bosca* [1999] NSWSC 136; *Clarke v Australian Labor Party* (1999) 74 SASR 109 & *Clarke v Australian Labor Party (SA Branch)*, *Hurley & Ors and Brown* [1999] SASC 365 and 415; *Tucker v Herron and others* (2001), Supreme Court QLD 6735 of 2001.

⁶ This argument on legal forms is included in the submission by Andrew Murray November 2009 in response to the Australian Government's September 2009 Electoral Reform Green Paper STRENGTHENING AUSTRALIA'S DEMOCRACY.

⁷ The Australian Government's September 2009 Electoral Reform Green Paper STRENGTHENING AUSTRALIA'S DEMOCRACY 8.26-8.28 page 118.

⁸ The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

⁹ There are four sectors in this terminology - the other three sectors being business government and households.

The legal form chosen may be determined by law;¹⁰ by the members themselves; by historical circumstances; by the type of activity being undertaken; by needing to hold a license or permit; by the need to access tax concessions; or, by a perceived need to remain in or out of state or federal jurisdictions.

In the case of political parties, the need for parties to be registered constitutes a form of political licence. It would be a simple matter to require any political party seeking or holding registration as a political party to be incorporated under the *Corporations Act 2001* and so subject to the financial non-financial and accountability requirements of corporations law.

Most political parties are either unincorporated associations or incorporated associations under state law.

The Senate Not-for-Profits Disclosure report says of incorporated associations that they are *considered to be poorly regulated* and [due] *to different legislation in each state and territory, the reporting requirements of incorporated associations are not aligned*.¹¹

They had this to say on unincorporated associations, a very common form of legal structure for many in the Not-for-Profit (Third Sector), including political parties:

7.5 *Unincorporated not-for-profit associations are generally not required to be registered. They are not legal entities and therefore impose few legal obligations on members;*

7.6 *....The committee heard that, while it is the preferred legal structure of many organisations, 'an unincorporated association is a very dangerous creature. There are lots of cases that I could take you to that would fully illustrate that' [AD Lang, Law Council of Australia Proof Committee Hansard 29 October 2008 page 43].*

7.7 *There are no reporting requirements for unincorporated associations....*¹²

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability.

Increased regulation of political parties is not inconsistent with protecting the essential freedoms of expression and from unjustified state interference, influence or control.

¹⁰ There are for example non-government, community, voluntary, club, society, association, co-operative, friendly society, church, union, foundation, charity, party and other entities, some set up under specific sectoral legislation.

¹¹ Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008 page 70 and 66.

¹² Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008 page 62.

Greater regulation offers political parties protection from internal malpractice and corruption, and the public better protection from its consequences. It will reduce the opportunity for public and private funds being used for improper purposes.

The Joint Standing Committee on Electoral Matters has previously agreed with many of these points, but nothing has been done.¹³

The *Commonwealth Electoral Act 1918* does not address the internal rules and procedures of political parties.¹⁴

In their report into the 2004 election, in Recommendation 19¹⁵ to its credit the JSCEM again recommended that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements.

Improved political governance will over time lift the overall calibre of the political class by requiring greater professionalism, better pre-selection recruitment and training, a sustainable career path for professional parliamentarians as well as those that aspire to executive ministerial careers, and by reducing the opportunity for patronage, sinecures and dynastic factionalism.

Australia is fortunate in having many very able politicians, but the overall quality and ability of politicians and ministers – local, state, territory, and federal – needs to be lifted.

A trained professional experienced political class that is subject to the rigours of regulation, due process, and organisational integrity will always perform better than one that is not.

Most work environments or the trades are focussed on productivity and performance. In contrast formal training is curiously neglected in politics, and training is best characterised as ‘on the job’. The training our elected representatives get before resuming full duties is perfunctory haphazard and limited.

It is true that some politicians are already trained in politics policy and government as former advisers or former public servants, but most are not. Many have no experience in managing an office a budget and staff.

¹³ See Chapter 4 Joint standing Committee of Electoral Matters report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, September 2005, Canberra.

¹⁴ The AEC dealt with a number of these issues in Recommendations 13-16 in the *AEC Funding and Disclosure Report Election 98*. Recommendation 16 asks that the CEA provide the AEC with the power to set standard, minimum rules which would apply to registered political parties where the parties own constitution is silent or unclear. This was a significant accountability recommendation.

¹⁵ Joint standing Committee of Electoral Matters report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, September 2005, Canberra; pages 94-95.

Like all workforces, elected representatives would benefit from better training on entering their new profession.¹⁶

To bring political parties under the type of accountability regime that befits their role in our system of government, at the very least, the following reforms are needed.¹⁷ It is perfectly proper to insist that these standards be met. The public deserve no less.

The question of what legal form political parties should hold is dealt with above. The choice of legal form affects reporting requirements, but the question of party constitutions needs also to be addressed.

The CEA should be amended to require standard items be set out in a political party's constitution to gain registration, similar to the requirements under Corporations Law for the constitution of companies.

Party constitutions should be required to specify the conditions and rules of party membership; how office bearers are preselected and selected; how pre-selection of candidates is conducted; the processes for the resolution of disputes and conflicts of interest; the processes for changing the constitution; and processes for administration and management.

Party constitutions should also provide for the rights of members in specified classes of membership to take part in the conduct of party affairs, either directly or through freely chosen representatives; to freely express choices about party matters, including the choice of candidates for elections; and to exercise a vote of equal value with the vote of any other members in the same class of membership.

Party constitutions should be open to public scrutiny and updated on the public register at least once every electoral cycle.

The AEC should be empowered to oversee all important ballots within political parties. At the very least, the law should permit them to do so at the request of a registered political party.

¹⁶ Intensive residential courses could be devised. As an example formal courses might include essential legal principles and legislation design; Australian political parliamentary electoral and constitutional law and systems; government and the bureaucracy in all its complexity; foreign affairs, treaties and diplomacy; accountability laws systems and practices; procurement and tendering; budgets finance and revenue, including cost-benefit analysis; managing a parliamentary office and staff; and so on.

¹⁷ Schedule 1 of Senator Murray's *The Electoral (Greater Fairness of Electoral Processes) Bill 2007* encompasses all of these reform measures to ensure that all parties, irrespective of their ideologies, meet minimum standards of accountability, good governance and internal democracy.

The decline in membership of political parties has led reformers to consider means of making pre-selections more competitive, along the lines of American primaries. The AEC should be empowered to conduct these at the request of a registered political party.

The AEC should also be empowered to investigate any allegations of a serious breach of a party constitution, and be able to apply an administrative penalty.

Changes to political governance such as these do not need COAG coordination although their support would be welcome. Such reforms to Commonwealth law would inevitably flow onto the conduct of state political participants, since nearly all registered state participants are also registered federal parties.

Political parties are at least as significant to society as are corporations and trade unions, if not more so. Governance changes such as those outlined above have been tried tested and found effective in the governance of corporations, unions and other entities. They would undoubtedly improve the performance and governance of politics in Australia.

These are necessary reforms, but whether they would be sufficient on their own to produce a markedly more able and higher calibre political class overall is uncertain. Other reforms, including constitutional changes, will need to be kept in mind.

‘One vote one value’ has been a central theme in strengthening Australia’s democracy. The long campaign has often been geographic concerning very large voter number differences favouring rural over urban constituencies in both lower and upper houses, but there have been political party concerns over internal voting power imbalances as well.

‘One vote one value’ is an effective tool against ‘gerrymanders’.¹⁸ ‘One vote one value’ in its guise of ‘equal suffrage’ is a fundamental democratic principle recognised by Article 25 of the *International Covenant on Civil and Political Rights*.¹⁹

The democratic principle of ‘one vote one value’ is well established, and widely but not universally supported. As far back as February 1964 the US Supreme Court gave specific support to the principle.

In Australia ‘one vote one value’ legislation was first introduced in the Federal Parliament in 1972/3. During the 1970s, 1980s, and 1990s the principle of ‘one vote one value’, with a practical and limited permissible variation, was introduced to all federal, state and territory electoral law in Australia, except Western Australia. That state finally ended the lower house gerrymander in 2005.

¹⁸ To ‘manipulate the boundaries (of an electorate etc.) so as to give undue influence to some party or class’; The Australian Concise Oxford Dictionary Oxford University Press.

¹⁹ For instance see Senator Murray’s *State Elections (One Vote, One Value) Bill 2001*.

The decline in membership of political parties has increased concern at strong external influences on political party processes. Reformers have sought to reduce the influence of non-members of a political party on its members and processes; or to reduce the power of one set of party voters over another.

Not only should this ‘one vote one value’ principle be embedded in our legislatures, but to achieve registration, political parties should be compelled to comply with this principle in their internal organisations.

The JSCEM took this principle up as Recommendation 18 in its 2001 *User friendly, not abuser friendly* report.²⁰

If non-members or a class of affiliated members can affect internal political party voting systems for conventions pre-selections and various other ballots through exaggerated factional voting and bloc power votes, this can lead to legitimate concerns as to undue influence.

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

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

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

Political parties, in addition to their overriding duty to the Australian public, must be responsible to their financial members and not to outside bodies, so that under ‘one vote one value’ the members are responsible for the party.

There are two legislative avenues that were previously but unsuccessfully advocated as better governance in this regard - the CEA and the (now repealed) *Workplace Relations Act*. The JSCEM took the first step with its recommendation to introduce one vote one value in political parties in its aforementioned 2001 report.

Workplace law could

²⁰ Joint Standing Committee on Electoral Matters: Report of the Inquiry into the Integrity of the Electoral Roll *User friendly, not abuser friendly* Canberra, May 2001.

- Prohibit the affiliation, or maintenance of affiliation, of a federally or state registered employee or employer organisation with a political party unless a secret ballot of members authorising the affiliation has been held in the previous three (or four) years (or electoral cycle); and/or
- Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met.

This proposition is popular with some reformers who aim to make the process of trade union affiliation to political parties more transparent and democratic. The same principle should apply to corporations that affiliate to political parties.

Unions affiliate to political parties on the basis of how many of their union members (the great majority of whom are not party members) their committee of management chooses to affiliate for.

The more members a union affiliates for, the greater the number of delegates that union is entitled to send to a political party's state or federal conference. Individual members of that union have no say as to whether they wish to be included in their union's affiliation numbers or not. Affiliation fees paid by the union are derived from the union's consolidated revenue.

Reformers have considered various amendments that could make the system fairer, more transparent and more democratic.

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

The first Green Paper²¹ considered the issue of political donations resulting in undue influence and conflicts of interest and detrimentally affecting the integrity of Australia's political system. The same attention needs to be paid to undue influence and conflicts of interest arising from large voting blocs in political parties.

²¹ The Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE.