Chair & Members
WA Legislative Council Standing Committee on Legislation
Parliament House
West Perth 6005

3 October 2020

Dear Chair & Members,
I appreciate the opportunity to make this submission, as the rules surrounding political donations lay at the heart of political systems, which not only claim to be democratic but that ensure the structure and processes they establish reflect that claim.

It is heartening, therefore, to see that the Legislative Council Standing Committee on Legislation is considering long-overdue reforms to the State's political donations regime; reforms that target disclosure laws, expenditure caps for election campaigns and the banning of all foreign donations.

I congratulate the McGowan Government for introducing the Electoral Amendment Bill 2020 (hereafter the Bill), which gives effect to these reforms and to the Legislative Assembly for passing the Bill. Hopefully, those congratulations can be extended to the majority of Legislative Council Members whose affirmative vote is required to pass the Bill into law.

These reforms, and I would argue a tightening of some elements of them, should be passed by the Legislative Council as soon as possible. Doing so will, among other things, demonstrate the Council's respect for the wishes of the WA electorate, the majority of whom supported the promise made by the then Opposition, now Government, in the lead up to the last State election; promises that included reforming the political donations regime.

Before I focus on specific reforms outlined in the Bill, I will briefly elaborate on an issue that goes to the heart of why I said the Bill should be passed. It relates to the vitally important public interest and public office-public trust nexus. While the public interest is referred to often in political and public policy debates, and is therefore familiar to most people, the public-office-public trust concept is not often discussed and hence is less well known.

I raised the public interest and public office-public trust nexus in a research paper I wrote in 2016, *Come Clean: Stopping the Arms Race in Political Donations*. The paper analysed the (still) sorry state of Australia's federal political donations regime but the arguments raised, particularly on pages 15-17, apply to any truly democratic political system.

The opinions I referred to and cited on those pages are from learned experts, who have clearly articulated the nature and importance of fiduciary relationships; relationships which are fundamental to understanding the strong association between the public interest and the concept that public office is a public trust. The following draws heavily on what I wrote in the *Come Clean* report.

A fiduciary relationship is a legal term that refers to obligations on a person that arise as a result of a relationship with another person or persons.

When explaining how honouring one's fiduciary duty goes to the heart of relationships between members of parliament and those who elect them to office, I drew on a paper delivered by the Hon. Roger Macknay QC (2012) to the 18th Annual Public Sector Fraud and Corruption Conference and to a presentation by the Hon. Tim Smith QC to the University of Melbourne's School of Government (2015).

Macknay's paper refers to the Royal Commission into Commercial Activities of Government and Other Matters (Government of Western Australia 1992). It laid down what should be the minimum standard of conduct for elected and appointed public officers. In doing so it referred to and 'set considerable store' on a decision of the Supreme Court of New Jersey (1952) which explained that:

> [Public officers] stand in a fiduciary relationship (that is a relationship of trust) to the people who they have been elected … to serve. As fiduciaries and trustees of the public weal they are under an obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to … exercise their discretion not arbitrarily but reasonably and above all to display good faith, honesty and integrity.… They must be impervious to corrupting influences and they must transact their business frankly and openly and in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves … their actions are inimical to and inconsistent with the public interest.
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> These obligations are not mere theoretical concepts or idealistic abstractions of no practical force or effect … the enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people (pp.3-4).

The Hon Tim Smith's paper refers to an attempt by the Hon. Tony Fitzgerald QC AC to have Queensland members of parliament promise to abide by a series of commitments in the lead up to an election. Fitzgerald asked, among other things, that parliamentarians:

> Make all decision and take all actions … in the public interest without regard to personal, party political and other immaterial considerations; and
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> Treat all people equally without permitting any person or corporation special access or influence.

Smith also refers to a presentation by former Chief Justice of the High Court, Sir Gerard Brennan in which Sir Gerard explained that:

> The motivation for political action is often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the parliament by the public for exercise in the

> interests of the public and not primarily for the interests of members or the parties to which they belong. The cry "whatever it takes" is not consistent with the performance of fiduciary duty (p2).

In summary, the learned and distinguished experts cited above make clear that parliamentarians have a duty to always place the public interest before party or personal interests. This duty is found in the "sacred trust" bestowed on every parliamentarian elected to public office. Failure to honour that trust by, for example, placing party and/or personal interests at the front of the queue when determining the rules governing political donations has a corrosive effect on that trust, and over time erodes confidence in the institutional pillars that underpin a democratic political system.

Failure to deliver a more open, transparent, accountable political donations regime to the people of WA undermines the principles underpinning fiduciary relationships between the electors and elected and dishonours the sacred trust that accompanies a vote.

Disclosure laws

Caps on donations to be disclosed

It is important for democracy that the cap placed on political donations (in all their various forms including cash and in-kind) be set at a level that does not advantage the rich and powerful while disadvantaging the vast majority of people who elect members of parliament to office and hence place them in a privileged position in relation to the passing of laws.

The WA amendment to reduce the cap on accumulative, yearly disclosable donations to $1000 is highly commendable. It certainly levels the playing field between the rich and powerful and interested and concerned citizens.

Cap needs to be extended

As welcome as the $1000 cap is, it does not appear to extend to the costs associated with gaining entry to fundraising events held by political parties. I am not referring here to modest "sausage sizzles" where hard working party members pay $50 to attend a fundraising barbecue. I am referring to the cost of entry to events, which for a considerable sum of money, provide an opportunity to have lunch or dinner with a minister(s) and/or premier and to spend time conversing with these powerful legislators. Opposition parties charge similar entry fees to dine with the leader of the opposition and shadow ministers. Entrance fees to these functions can be in the thousands of dollars, a sum which is well beyond the reach of the "ordinary" voter. Public interest inspired amendments are clearly required here. Attendance at such functions should not be allowed to exceed the $1000 cap associated with disclosable donations and entrance fees must be publicly disclosed within 24-48 hours of the event taking place (of which more below). The disclosure needs to go beyond the name of the person attending. It must also include the organisation the

person(s) is associated with and their position or relationship to that organisation, be it as an employee, consultant, lobbyist etc.

Timely disclosure

I welcome the initiative to reform disclosure laws, however the Bill to amend the *Electoral Act 1907* (hereafter the Act) does not go far enough in terms of timely disclosure. In the technological age in which we live and have lived for many years, there is no reason why a political donation cannot be disclosed to the public in "real-time ", within 24 to 48 hours of receipt of a donation. The 12-weeks outlined in the Bill is not in the public interest nor is the disclosure period strictly 12 weeks. Ten days is allowed after the 12-week period to forward required information to the WA Electoral Commission (EC). There is then an ill-defined "soon as practicable" period allotted to the EC to publish returns. This means that the WA electorate is still being expected to cast an uninformed vote. By that I mean they will not know who donated how much to whom before they cast their ballot. For example, a donation made on the second Saturday in February during an election year would not have to be disclosed to the EC until 12 weeks and 10 days later – mid to end of May. Since 2011 WA's State elections are held every four years on the second Saturday in March.

Even Victoria's distorted definition of "real-time" disclosure, which for some inexplicable reason they claim is three weeks, is better than 12 plus weeks allowed for in the WA Bill.

The technology exists for more genuine real-time disclosure. A 48-hour time limit has been used in New York for many years and they sometimes disclose political donations within 24 hours. Real-time transfer of funds in the banking industry are used around the world, including in Australia and some Australian states impose real time information sharing in relation to "chemist shopping".

There is no credible reason why a 24 to 48-hour disclosure period could not be applied in WA in the foreseeable future. While it is probably not possible to do so before the next State election in March 2021, what is possible in the lead up to that election is for all political parties and independent candidates to pledge to introduce real time disclosure a year before the 2025 election.

Expenditure caps on election campaigns

Election campaigns in WA, in other Australian states and at the federal level have become an 'arms race', a term used by then Secretary of State, Senator John Faulkner in a 2008 Green Paper: *Donations, Funding and Expenditure*, and clearly acknowledged in the reforms put forward in the MacGowan Government's Electoral Amendments Bill.

While it is possible to debate the amounts outlined in the Bill, the mere fact that the WA Government is moving toward placing a cap on electoral funding is most welcome and clearly in the public interest.

The provision to allow political parties to spend over the capped amount in a certain district or region providing there is a balancing reduction in other districts/regions does seem to favour parties that hold a majority of safe seats while disadvantaging those with less safe seats. This is an issue which I hope the Committee will address in its report.

I am unsure how the $2 million-dollar expenditure cap for individuals and organisations wishing to campaign in State election was arrived at and wonder if it was simply an arbitrary figure or if there is some research underpinning it. It would be enlightening if the Committee could address this matter in its report.

Foreign donations

The decision to ban all foreign donations in WA is certainly a move in the right direction, as leaving WA's election outcomes vulnerable to foreign influence is unacceptable. The criteria around who is still permitted to make a donation, however, does raise concerns that should be addressed.

There appears to be potential loopholes in this amendment to the Act that could be exploited by foreign entities wishing to influence the outcome of a WA election.

The acceptance of a political donation will be banned unless the donor is an Australian citizen or resident or has a relevant Australian Business. Many foreign-owned companies, however, could fall under the permitted relevant Australian business category, and many residents have strong and close ties to foreign companies that could wish to influence the outcome of a WA election.

The Committee may wish to consider what structures and processes could be introduced to minimise, as much as is humanly possible, the gaming of foreign donations laws. Valuable lessons could be learnt from the New South Wales (NSW) "Aldi shopping bag" affair and from the many thousands of dollars supposedly donated by staff working for a particular business when, as NSW ICAC has revealed, those staff members lacked the financial capacity to make the donations they formally claimed to have made. Checks and balances to avoid such happenings in WA are required and the WA community needs to be told what they will be.

Electoral Commission

Australians are very well served by their fiercely independent electoral commissions and WA is no exception. Its EC has and continues to serve the people of WA and its democratic political system very well. In order for the EC to continue to do so, it is imperative that it is adequately funded. There is little point in giving the Commission the powers it needs to ensure a fair and transparent electoral system if it is not provided with the resources required to operationalise those powers. I say this as "powers without resources equates to no powers".

Conclusion

I conclude by repeating what I said at the beginning of this submission. I do so because of its importance to WA's political donations regime and therefore to its democratic political system.

As the Bill has already passed the Legislative Assembly, the decision about whether it becomes law rests with the people's representatives sitting in the Legislative Council. If they decide to pass the Bill (hopefully with some strengthening amendments) they will be demonstrating their commitment to improving the openness, transparency, accountability and hence the integrity of WA's political donations system. They will also be demonstrating their appreciation for the need to honour the fiduciary relationship they hold with the people of Western Australia, which requires that they place the public interest above all other interests. While far from perfect, the Bill is a step in the public interest direction and therefore deserves to be passed.

I hope the Committee finds this submission useful and I am happy to appear before it should that be the wish of committee members.

Sincerely

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