Submission to Crime and Corruption Commission on Issues Relating to Local Government Elections

Thanks for the opportunity to comment on this important review. I must state at the outset that I am primarily a constitutional and human rights lawyer. My interest in electoral matters primarily occurs in the context of the Australian *Constitution*, hence my interest and publications in one-vote, one-value and compulsory voting. However, I have written on electoral finance matters in the context of the implied freedom of political communication found in the Australian Constitution. The best example of my work here appeared in Anthony Gray 'Donation and Spending Limits in Political Finance Law and their Compatibility with the Australian *Constitution*' (2014) 60(4) *Australian Journal of Politics and History* 592-605. I have enclosed a copy of that (double blind refereed) journal article with this submission.

Implied Freedom of Political Communication

Now clearly the Australian *Constitution* does not refer to local government. However, the High Court has already found that the implied freedom of political communication, though in the Australian Constitution, applies to State elections (*Unions NSW v New South Wales* [2013] HCA 58). I am not aware of authority (to date) which has established that the implied freedom of political communication applies to local government level, but if pressed, the High Court might find that it does, given that it has applied it to State level.

Why is this important? It will be necessary to briefly explain the implied freedom of political communication. In a series of cases, the High Court found that Australia's liberal democracy required that electors have full access to information relating to political decisions that they make, including full information about those running for office and their policies. Voters had a right to receive information from a range of sources to inform their vote. One of the leading cases involved a ban on political advertising, and this was found to be contrary to the implied freedom (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106). A ban on donations from anyone other than an individual was held to be constitutionally invalid in *Unions NSW v New South Wales [2013] HCA 58*. In contrast, a ban on donations from property developers was held valid in *McCloy v New South Wales* [2015] HCA 34.

Cases subsequently have found that where a law impinges upon the implied freedom, questions of proportionality will be considered. Questions regarding the law as being *suitable, necessary and adequate in its balance* will be asked. A law will be *suitable* if it has a rational connection to its purpose, it will be *necessary* if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom, and *adequate in its balance* depending on the importance of the objective served by the measure, and the extent of the restriction it imposes.

Caps on Donations and Expenditures

Now, due to the implied freedom of political communication, and because of my personal commitment to ideals of liberalism and my view of Australian government as being a liberal democracy, I have difficulty with proposals to cap donations and expenditures. I believe that, in a liberal democracy, individuals, as well as corporations and trusts, should have the right to donate money to whatever cause they wish. I believe this is an exercise of free will which the law should respect and protect. Similarly, I believe that political parties should be free to spend money as they wish, without limits on how much they can spend, or what they can spend it on.

Now, in the very first group of cases in which the High Court considered the implied freedom of political communication, it found to be unconstitutional a federal government law which banned political advertising. This was unconstitutional because it impeded the free flow of information to voters about particular candidates and particular parties. I believe that a restriction on political expenditure by parties or individuals would have the same effect. By parity of reasoning, there is serious constitutional doubt about such regulation.

On the issue of possible restrictions on donations and expenditure, as indicated they are likely to be found to burden the implied freedom of political communication. This does not automatically make them constitutionally invalid. It is necessary to undergo proportionality testing, to determine their suitability, adequacy and necessity. Now, as indicated in my article in the *Australian Journal of Politics and History* (and conceding that at the time of its writing, the High Court's formulation of the tests to be applied in this area are slightly different to what they are after 2014's McCloy), I think it is difficult to justify these kinds of restrictions.

Firstly, it is very difficult to frame them in a way such that they cannot be circumvented. I have previously commented that past Queensland attempts to impose donation and spending limits were full of loopholes, and could be easily circumvented. These laws were repealed by the Newman government in 2014, and have not been re-introduced by the current Queensland government. So their utility in achieving what they set out to achieve is, at the very least, questionable.

Another justification for them is that they are needed to avoid corruption. Now, without wishing to sound complacent, Australia was ranked 7 out of 176 nations in terms of countries with the least corruption: Ian McAllister 'Corruption and Confidence in Australian Political Institutions' (2014) 49(2) *Australian Journal of Political Science* 175-177. Corruption is not the serious problem in Australia that it is elsewhere. So whilst we must be vigilant, claims that caps on donations or spending are needed to prevent corruption must be fairly scrutinized, given their significant impact on freedoms of individuals (and others, for that matter).

Another justification for them is that they are needed to 'level up the playing field'. As I indicated in my 2014 article, this justification is also dubious. There

is actually significant evidence of equality in relation to private funding of political parties, in terms of the donations they garner. Further, the fact that a candidate attracts large levels of funding may be an expression of the democratic will. For instance, former President Obama garnered record political donations from individuals. But this was because he was electorally popular. In this way, the ability to attract donations can be seen to be an expression of the democratic will. I am highly suspicious of attempts to thwart this will by capping donations or expenditure.

However, I accept the possibility that donations could lead to corruption, and we need to remain vigilant. On the basis that 'sunlight is the best disinfectant', I believe in a full and timely disclosure regime.

Disclosure of Donations

In my view, it is an appropriate safeguard to have full and timely disclosure of all donations received by a particular candidate or party. This should be prominent on a publicly available website. It should be updated very regularly (weekly, monthly). It should be something to which voters are referred on a regular basis. Publish it on websites, in newspapers, TV news etc, so that all can say where the money is coming from. There must be complete transparency in this regard, and disclosure must be timely.

In this light, I have some reservation with definitions of the 'disclosure period'. My reading of the *Local Government Electoral Act 2011* (Qld) s115 suggests it commences from the day the person announces their nomination (mirroring *Electoral Act 1992* (Qld) s198). I suggest this is too narrow – a person may garner significant donations prior to the announcement of their candidature, yet not have to disclose any of it due to its timing. In my view, there must be a longer period during which donations etc must be disclosed. It is too late to start it at candidature announcement. (By the way, this example reinforces for me the great difficulty in casting legislation in this area that cannot be circumvented by a wily operator).

Comments that follow subsequently are also made in the light of the need for complete transparency during elections.

Definition of 'Group of Candidates'

This definition appears to be too narrow. Its definition describes the reason why a group was formed ie 'formed to promote the election of candidates or share in the benefits of fundraising'. A group should not be thought of merely in terms of the reason it was formed. It should also be thought of in terms of what it does. By some analogy, I am teaching constitutional law at present. In relation to the Cth's corporations power, I tell my students that in the past, we considered whether an organisation was a 'trading corporation' by virtue of the purposes for which it was formed. Nowadays, we consider whether an organisation is a trading corporation by virtue of its actual activities, in recognition of a

substantive, rather than formalistic, approach. By way of analogy, the definition of 'group of candidates' should be informed by what the group does, not the purpose/s for which it was formed. Further, it may be difficult to obtain evidence of why a group was formed, with different people having different views, and in some cases they may not be forthcoming with relevant information.

False and Misleading Provisions

I think there is merit in the creation of a more generalised 'false and misleading conduct' in relation to standing for election. I acknowledge existing provisions s169 and s182, but these are very narrowly framed. They relate to misleading conduct in relation to 'ways of voting' or on the returns. But there are many other ways in which electors might be misled during election campaigns. These apparently are not covered by the existing legislation. And further, penalties must be appropriate. A penalty of 40 penalty units for a breach of s182 seems completely inadequate.

Specifically, for example, I don't think it should be possible for a person to claim they are an 'Independent' yet be receiving donations/funding/assistance from established political parties. A person who is an 'Independent' should not be using how to vote cards that, by design including colour or names, suggest an affiliation with an established major party. In my view, these practices can occur because of the lack of a specific, broad offence provision relation to false and misleading activity in relation to a local government election. The word 'Independent' should be defined in the Act. It should be made clear that a person who uses this word to describe themselves will be liable to prosecution if it is shown they are not truly 'Independent' in the way that ordinary, reasonable voters would understand that word. And there must be serious, appropriate penalties for misleading or attempting to mislead voters. This is a corruption of democratic process. It must be given appropriate weight in the penalty provision.

Conflicts of Interest

These must be taken very seriously. Any possible perception of a conflict of interest must be dealt with by an independent person or body – Integrity Commissioner, Crime and Corruption Commission etc. It most certainly is not acceptable for a person to personally decide whether they have a conflict of interest or not. A person must not participate, directly or indirectly, in any decision in which the actuality or reasonable perception of a conflict of interest could arise. We cannot have mayors, councillors etc making decisions on developments where they have obtained a financial benefit, directly or indirectly, from that developer. A strong independent body must be proactive in this area.

Conclusion

Citizens have grown weary, cynical and disengaged about politicians and the political process. This review provides a chance to restore some faith in the political process and, dare I say it, trust in politicians and the political system. Transparency and openness is the key, with strong and proactive independent umpires. However, our liberal democratic mode of governance must also be preserved, and unnecessary, cumbersome regulation that is full of loopholes and of highly questionable utility must also be avoided.

Availability for Consultancy

I have developed this submission relatively quickly, given my other commitments, and I have not looked closely at the *Local Government Electoral Act* (1992) in detail until now. I am sure my University would be interested in a paid consultancy arrangement where I research these issues in a lot more depth in a report for the CCC.

Regards Anthony

Professor Anthony Gray

University of Southern Queensland

Anthony.gray@usq.edu.au

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