

GCCC Chief Executive Officer Response to CMC Discussion Paper on Local Government Electoral Process

Preamble

It is important to properly balance the various public interest imperatives when we consider democracy at the local level in Queensland and Australia.

The Queensland local government system, including its attendant election processes, is a much improved model through the various measures which are now in place to ensure public confidence and trust in the democratic process and local government decision-making, than was the case prior to 1994. The current disclosure regime as applied to Councillors and officers is a key component of this improved model.

A central issue which has arisen out of the recent GCCC experience is the proposition that 'prior disclosure' of electoral gifts, or even the abolition of electoral gifts, will improve public confidence and trust.

My view is that this perspective does not properly take account of the compelling need to ensure all eligible citizens can, in a practical and equitable sense, exercise their democratic right to stand for public office at a local level.

We should not entertain a model which may well ensure independently wealthy people have, to some extent, an unfair advantage in terms of their candidature than other members of the community.

It is appropriate and necessary that the widest and most representative field of candidates can realistically run for office, and this will be best assured through a system which facilitates (and does not discourage) electoral donations, coupled with timely and comprehensive disclosure, other measures to mitigate against misconduct, and enshrine accountability for individual and collective conduct and performance of persons elected.

The reality is that our system of local government has evolved properly and appropriately in this direction over the past decade, and can be further refined and improved without 'tipping the scales' unnecessarily.

As a final opening observation, community trust and confidence in contemporary Queensland local government is very much intertwined with the conduct or behaviour of individual elected members, the reasonableness and professionalism of the local media, and the exercise of civic or political leadership in what is a profoundly open, transparent and highly scrutinised model of local government.

Issues for consideration

Unique disclosure provisions for local government

- *Should the laws relating to the disclosure of election gifts for candidates at local government elections differ from those applying to candidates at state government elections?*

Response

There should not be any difference between the disclosure provisions for local government candidates and those applying to candidates at state government elections.

Should there be any change to the disclosure provisions at local government elections any such change should be mirrored in the state electoral provisions.

There should also be consistency with respect to the administration of electoral gift returns. The Local Government Act provides that the Chief Executive Officer of a local government is responsible for local government electoral gift returns whereas the Electoral Act provides that the Electoral Commissioner is responsible for gift returns for state elections. The Electoral Commission of Queensland should ideally be responsible for all electoral gift returns. This would provide consistency in approach, information, advice and administration with respect to such returns.

I understand that the specific provisions relating disclosure by broadcasters and publishers, sections 310 and 311 of the Electoral Act 1992, do not apply to local government elections. Those provisions should perhaps be applicable to local government elections so that there is consistency between state and local elections and that the role of the media is acknowledged in the local government election process.

False or misleading statements of candidates

- *Is the existing law prohibiting false statements of fact about the personal character or conduct of a candidate adequate to safeguard the integrity of local government elections?*

Response

No.

Section 394 deals with misleading voters. Subsection (2) deals with false statements about candidates. Subsections (1) and (3) are quite clear in their application.

Apart from the obvious mechanics of receiving a complaint, proof of the identity of the person making the alleged false statement, investigation and proceeding with a prosecution by some person, there is the size of the penalty prescribed by the Act.

The penalty for a breach of subsection (2) is 40 penalty units or \$3,000.00. As this is a maximum penalty reserved for the worst case scenario, it would be unlikely that a penalty in excess of \$400 would be imposed for a first offender and the Magistrate would probably take the view that they had better things to do if the Parliament thought so lowly of this type of offence.

Moreover, as any current action can, practically, only take place after the election, it is unlikely the legislation would have any effect on the behaviour of a candidate who was so inclined to publish false statements about another candidate during an election period.

- *If the current law is inadequate, what changes should be made?*

Response

Section 365 of the Criminal Code creates a misdemeanour and provides for a penalty of 3 years imprisonment for criminal defamation, which is a similar offence. Whilst that may seem to be on the high side, a similar offence and penalty would not be out of place in attempting to preserve the integrity of local government elections.

A person convicted of this offence could also be disqualified from being elected or hold a position as an elected representative in local government or from being a candidate in a local government election for a substantial period of time, say 10 years, to add to the deterrent effect of the offence provision.

Further, consideration should be given to some form of quasi summary procedure whereby such conduct can be restrained, for example, via a "show cause" process where a suspected offender appears before a magistrate within 24 hours, with power to direct the publication of a retraction/apology/explanation.

Electoral bribery

- *Is the existing law relating to electoral bribery in local government elections appropriate?*

Response

Electoral bribery is specifically covered in section 385(2) the Local Government Act. The financial penalty is 85 penalty units (\$6,375.00) and 2 years imprisonment. While the imprisonment sanction appears to lift this offence into a higher category, the financial penalty likely on prosecution is minimal and may influence any decision vis-à-vis whether or not to impose a term of imprisonment.

It is understood that electoral bribery in a State context and in Brisbane City Council elections under section 98B of the Criminal Code attracts a seven-year penalty and is a crime. The Criminal Code provisions for other elections including local government elections have not been reviewed in recent times as the offence has been replicated in the LGA.

The seriousness of the offence needs to be highlighted with an increase in the monetary penalty and a consideration of elevating it to an indictable offence with a longer prison term.

The person convicted of this offence could also be disqualified from being elected or hold a position as an elected representative in local government or from being a candidate in a local government election for a substantial period of time, say 10 years.

Periods in which election gifts have to be disclosed

- *Should the period in which candidates must disclose election gifts be changed?*

Response

The disclosure period for new candidates, ie those to which section 420 of the LGA applies, should commence say two years before an election. The current disclosure period for a new candidate commences when the person announces that the person is to be a candidate in the election or upon nomination, whichever is the earlier. Ideally, the date of commencement of the disclosed period should be clarified so as to establish a firm date which is clear and unequivocal for all candidates whether incumbent or not.

- *Should candidates have to disclose election gifts received at any time before an election?*

Response

Yes. However any person who is to be a candidate for an election should be prohibited from receiving an election gift any earlier than two years before the election.

- *Should the period after an election in which candidates have to disclose gifts be increased?*

Response

No. However any person who is to be a candidate for an election should be prohibited from receiving an election gift any earlier than two years before the election.

Any increase in the period after an election in which candidates have to disclose gifts will result in a commensurate increase in the time required for an unsuccessful candidate to submit a gift return. It is suggested that the current period for final returns is probably the maximum time for effective disclosure after an election for transparency and accountability.

Fundraising

- *Should the LGA be amended to clarify the disclosure requirements for monies received through fundraising activities?*

Response

An amount received from any person which is the prescribed amount or more should be declared in the same manner as a gift is declared.

Alternatively gross takings of fundraising activities may be disclosed. However, in so suggesting I must point out that I am not suggesting that any profit on a fundraising event should be separately disclosed. So called profit is not a gift and in any event it would be almost impossible to arrive at a figure for "value for money" to the "purchaser" to determine if there was any amount of a gift in any "purchase price" paid in relation to the fundraising activity.

Lodgment date for returns

- *Before an election, should candidates have to disclose elections gifts they have received?*

It would superficially seem that, in an ideal world, disclosure of election gifts prior to polling day, or preferably the commencement of any form of voting (pre-poll, postal, etc.) is desirable, given that this would, theoretically, result in voters being better informed.

One 'topical' consideration that suggests Queensland local government should move to pre-polling disclosure of election gifts, and pledged gifts, is the proximity of developer sourced election gifts and the responsibility of local governments to decide development applications. A closer examination, of State government or ministerial powers, and their historical application, would suggest any distinction to be drawn between local and State governments in this regard is not marked.

Importantly, there exists a wide range of checks and balances, including the current election gifts disclosure regime, which mitigate against concerns of inappropriate favourable treatment of developers or indeed other interest groups linked to election gifts. These include:

- All local government decisions made openly (compare with State cabinet or ministerial decisions)
- Delegation powers limited (see later comments)
- Sophistication of contemporary development approval process, often involving many professional opinions/inputs
- Considerable proportion of delegation of decision-making to officers, particularly in the larger Councils.
- The “reach” of FOI legislation as applied to local government decision-making compared to State cabinet deliberations.

My personal view is that, on balance, a move to pre-polling disclosure is not desirable, for the reasons to be outlined hereafter, however it is conceivable that the *Local Government Act* (s.472) could be amended such that no individual Councillor (Mayor or Chair of a Standing Committee) could exercise a delegation of power in relation to any party who has made an election gift to that individual. In practical terms, the delegation powers relating to the Mayor or Chair of a Standing Committee are probably rarely invoked, so any such reform would be somewhat academic.

The dominant reasons for not recommending ‘prior’ disclosure include:

- It is a basic tenet of our democratic system that persons can practically and equitably exercise their right to stand for public office.
 - In practical terms, electoral gifts may be a necessity to enable candidates to run effective campaigns.
 - Publication of the names of donors prior to an election could lead to inappropriate (exaggerated, biased etc) publicity. This may lead to donors not contributing to campaigns thereby diminishing the potential pool of candidates.
 - The timing of the declaration of electoral gifts will be complicated by the impact of pre-poll and postal voting. As the Commission will be aware, a reasonably significant proportion of votes at an election can be cast up to two weeks prior to election day.
- *Should candidates be prohibited from accepting election gifts for a period after the disclosure deadline. If so, for how long?*

Response

Candidates should not be permitted to accept gifts for a prior election after the disclosure date unless they have disclosed the gift as a pledged gift in their disclosure statement. The ban on gifts for an election that has passed should be a total ban, however a candidate should be able to accept donations for the next election 2 years prior to the proposed election.

- *If candidates are prohibited from accepting election gifts for a period after the disclosure deadline, what other provisions should be introduced to prevent abuse of this prohibition?*

Response

No comment.

Groups of candidates

- *Should any person who is not a member of candidate's campaign committee be allowed to solicit funds on behalf of the candidate?*

Response

Yes, this should be left as a matter between the persons involved.

- *Should candidates who share election funding be required to be part of an identifiable group of candidates?*

Response

Merely pooling funds to achieve, for example, greater purchasing power should not, in itself, constitute a cause for bringing such a collection of candidates within the meaning of sections 426 or 427A of the Local Government Act. The proper test for "group" of candidates should be that the "group" effectively campaign as a group in such a way that identifies the individual candidates as being part of a group and clearly associates those candidates as standing, collectively, for a common platform or in support of common policies. The object of identifying a group should be to differentiate the commonality of the candidates similar to the effective branding of political parties and the policies they stand for.

- *Should there be a registration requirement for groups of candidates?*

Response

No comment.

- *Does the definition of a 'group of candidates' require amendment?*

Response

The definition of a group of candidates should ideally be such that a group is recognised as being a collection of candidates who are publicly standing for election on a common basis of an agreed and publicised platform or stated policies.

Donations via solicitors'/accountants' trust accounts

- *Should there be specific reference to solicitors' /accountants' trust accounts in the LGA? If so, in what form?*

Response

The LGA should be amended so that donations from or other funds received on behalf of another person by any trust are identified and declared as gifts by the trustee. The relevant details should include the value of the gift and the original donor or person entitled to or providing the funds.

However, it would be wise to include a reference to trust accounts of any type, not simply solicitors and accountants as it is possible to have other trust accounts such as under the Property Agents and Motor Dealers Act 2000 which provides for trust accounts. While it would be expected these accounts would relate solely to property transactions, there is nothing in that Act that prevents the use of the trust account as a vehicle for distributing money on instruction from a donor.

Origin of candidates' donations

- *Is there any good reason for allowing candidates to accept donations from unincorporated associations, trust funds or foundations that have sourced donations from individuals or companies?*

Response

Candidates should be able to obtain funds from any source so long as the source is disclosed. The fact the donation comes from an unincorporated association, trust fund or foundation only places a full disclosure problem in the path of the candidate. A mechanism is needed to record the nature of the association, trust fund or foundation, i.e., not for profit, specific issue pressure group, profit group that is not incorporated and not trading (otherwise it would be a partnership or joint venture).

- *Should candidates be allowed only to accept election gifts directly from the person making the gift?*

Response

No. So long as full disclosure is made, the funds can be paid through a third party. Relevant details for disclosure should include the amount of the gift, the original donor and the identity of any person acting on behalf of the original donor in making or paying or providing the gift.

Anonymous donations

- *Is the current penalty for accepting anonymous donations adequate?*

Response

Section 428 of the LGA merely makes the amount received a debt due to the Local Government. To provide any penalty could be misused by some person against a candidate/councillor who would have no control over the giving of the donation.

- *Should the acceptance of anonymous donations above the prescribed amount be an offence?*

Response

No comment.

Third parties and parallel campaigns

- *Should a third party have to disclose its expenditure as well as donations received?*

Response

No. It must be recognised that an election campaign is not confined to candidates alone. It would be inappropriate for, say, the Australian Surf Life Saving Association, or indeed any other person or organisation to be compelled to declare any expenditure incurred by it for a political purpose during an election campaign simply because it chose to conduct a publicity campaign during an election period aimed at targeting candidates so as to achieve increased funding for patrolling Gold Coast beaches.

- *Should the \$1000 threshold above which donations have to be declared be lowered?*

Response

It is relevant to note that the Federal government is apparently moving to increase the threshold from \$1,500 to \$10,000. The limit of \$1,000.00 is reasonable in the context of the Gold Coast City Council elections as most candidates will spend more significant amounts.

- *Should third parties have to lodge returns before an election?*

Response

A third party should be treated no differently to a candidate.

- *Should election advertising instigated by a third party that is not an individual have to identify the third party as well as the individual who authorised the advertisements?*

Response

Yes. It is considered appropriate to inform the electorate of who is actually behind an advertising campaign.

Limits on election expenses

- *Should there be limits on election expenditure in Queensland local government elections?*

Response

There is no compelling reason to limit the amount spent by a candidate in a local government election. Indeed, there are various public policy options which should be explored to better enable or encourage people to stand for local government office.

- *If so, should first-time candidates be allowed to spend more than incumbent councillors, to take account of the incumbent's natural advantage in relation to voter recognition?*

Response

The reality is that there will always be differences in the community profiles and public awareness of individual candidates. To place an arbitrary limit on the amount an individual may spend on an election campaign will be to add a potential bias into the electoral system which favours candidates with high public profiles and which will restrict the ability of lesser known candidates to compete effectively.

- *If there were to be limits on election expenditure, how would a candidate's expenditure be audited to ensure compliance?*

Response

No comment.

Loans to candidates

- *Should the LGA be amended to require candidates to disclose details of loans received?*

Response

No philosophical objection.

Enforcement

- *Is the existing system of enforcing the disclosure provisions of the LGA operating effectively, and can it be improved?*

Response

The practical reality is that the CEO's workload during an election period increases considerably, whether or not the CEO is the Returning Officer.

The Electoral Commissioner of Queensland should ideally be the office responsible for administering electoral gifts returns.

Penalties

- *Are the current penalties for offences in relation to election returns appropriate?*

Response

Generally the small fines applicable do not make the conviction for an electoral offence a deterrent to candidates who wish to ignore the implications of the law.

The level of sanctions should be reviewed generally with a view to increasing the respect that should be demanded of candidates and others who may wish to participate in the local government election process.

Conflicts of interest

- *Are the current provisions of the LGA in relation to conflicts of interest on the part of councillors sufficient? If not, what improvements should be made?*

Response

The matter of Conflicts of interest should be dealt with via each Council's Code Of Conduct For Councillors.

- *Should councillors be prohibited from participating in council matters that involve a person who gave an election gift to the councillor?*

Response

See earlier comments regarding the LGA delegation powers as potentially applied to individual Councillors.

- *Should failure by a councillor to appropriately resolve a conflict of interest be an offence under the LGA?*

Response

No comment.

Donations through political parties

- *Should local government candidates endorsed by registered political parties have to disclose election gifts received by the candidate's campaign committee, and donations received by the party's central office where the candidate is aware that the donation was made for the candidate's benefit?*

Response

No comment.

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