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VICTORIAN LOCAL GOVERNMENT ELECTORAL REVIEW

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* This paper is based on a talk given to the ERRN on the 27th February 2014 at the University of Melbourne. These notes were prepared for reference only and may not match the actual speech given.

Abstract

In this paper (based on a talk given to the ERRN) Petro Georgiou outlines his experiences as Chair of the Local Government Electoral Review Panel (Victoria) and reports on some preliminary findings from the Panel.

Acknowledgements

Thank you, Ken.

And thank you to everyone who has taken the time to be a part of the discussion this afternoon on the Local Government Electoral Review.

Let me first recognise the significant work that the Electoral Regulation Research Network is undertaking to broaden and deepen our understanding of electoral systems. There is much to learn from your input into the experiences informing debate across Australia and around the world.

The Network's efforts to have regular forums like this and its leadership in collaborative research are important to advancing the thinking and innovation that are necessary to improvement in public policy over time.

I would also like to acknowledge the Network's submission to the Local Government Electoral Review as part of our public consultation process. The views put forward were useful to the Panel's understanding of the issues and informed our deliberations.

Let me begin by giving you some background to the Local Government Electoral Review.

Introduction

In August last year, the Minister for Local Government, the Hon Jeanette Powell MP, appointed me and fellow Panel members, Anne Murphy (OAM) and Sally Davis, to review the conduct of council elections in Victoria.

The review was prompted by a significant fall in voter participation and a doubling of complaints about candidate behaviour at the 2012 general elections – amongst other things.

Accordingly, our terms of reference directed us to look at participation by voters and candidates, integrity of elections and better electoral process.

I have recently provided Minister Powell with our Stage 1 report, which addressed these terms.

The Government is currently considering the recommendations and will table the report and Government response in due course.

The report is based on extensive consultation in which the Panel:

-released a discussion paper;

- held 13 public hearings across Victoria, taking evidence from over 100 speakers;
- received 164 submissions (including a good one from this network);
- surveyed CEOs on their practice and understanding of their electoral responsibilities;
- polled voters on their attitudes and understanding of their voting rights and the electoral process.

The people we talked with identified a great number of issues on all aspects of local government elections:

- Who should be entitled to vote?
- How accurate and complete are the voters' rolls?
- How rigorous is the candidate nomination process?
- How much information does the voting public want about candidates standing for election?
- Should we minimise the influence of dummy candidates?
- What are the means of ensuring donations do not compromise elected councillors?
- What polling method should be adopted?
- Who should conduct elections?
- How well is the complaints handling process operating?

We received a diversity of answers to these and many other questions. In attempting to reconcile the answers, we had regard at all times to two overarching challenges:

- how to raise meaningful civic participation in local government democracy, and;
- how to strengthen the integrity with which elections are conducted.

In the time I have on today's program, I'd like to focus on just three of the fundamental issues raised.

The first is the franchise – people's entitlement to vote at local government elections.

The second issue is candidates – their qualifications and disqualifications, the availability of information about candidates, and whether there should be any limits on the campaign donations they receive.

The third is candidate behaviour and its regulation – are people behaving illegally more often or are we simply complaining more? And what can we do to make the playing field fairer for candidates?

Voter Entitlement

The issue of voter entitlement is a key part of the Panel's terms of reference.

The voting franchise is fundamental to the health of democracy. It is the foundation of the electoral system at all levels of government.

Over the history of Victoria's local government, there have been extensions and contractions in the franchise. As an illustration of this, prior to 2004 resident occupiers were able to vote even if they were not ratepayers.

This right was removed in a substantial contraction of the franchise for policy reasons which are not well articulated in any publicly available material.

Clearly, there are no universally accepted principles that define an ideal voter franchise. Franchises can adapt and change over time to reflect contemporary community standards, expectations and attitudes.

In assessing the appropriateness of the franchise in the second decade of the twenty-first century, our Panel settled on three broad principles as a starting point:

Transparency – by which I mean that voting entitlements are clear and known to the public;

Equity – where the entitlements do not raise questions about why one person is entitled to vote and another is not;

Inclusiveness – where the people defined as constituting the local community do have the entitlement to vote.

The evidence is that the current patchwork of accumulated voting entitlements for local government does not stack up well against these criteria.

In fact, voting entitlements are highly complex and opaque.

On the issue of transparency, people need to be able to comprehend whether they have an entitlement to vote and whether it is compulsory to do so.

The Panel's survey of the community revealed that people do not understand the basis of the franchise right in local government:

- 71 per cent of respondents thought that citizenship was a prerequisite for being entitled to vote. This is not the case;
- Only 17 per cent of respondents thought that ratepayers had an entitlement to vote. In fact, all people who pay rates to the council have an entitlement;
- Only 1 per cent of respondents recognised that being a lessee of a commercial property could confer an entitlement under the current franchise.¹ It is not surprising then that less than 1 per cent take up this right;

¹ In fact, up to two occupiers who are ratepayers for a property are entitled to vote.

- Nine per cent of respondents thought that residents of a municipality were entitled to vote. In fact, being a resident does not in itself confer a voting entitlement.

The franchise as it stands is so complex and conditional that I'm not surprised so few people seem to understand the voting entitlements.

On the issue of equity, the anomalies outrun the logic:

The rights to vote can be assigned from one party to another. The landlord can choose whether or not to transfer their vote to a tenant. This to me seems to be a relic from another era (if a commercial tenant wants to apply to vote as a ratepayer, they need the landlord's consent and the vote transfers to the tenant – section 15 of the Act)

Non-resident ratepayers who live outside the municipality are automatically enrolled to vote. However, resident ratepayers in their municipality have to apply to be enrolled to vote!

Meanwhile, residents who are not on the state roll in the municipality cannot vote at all because they are not listed as ratepayers, despite paying rent and contributing indirectly to the payment of rates.

This is as much a discussion of disenfranchisement as enfranchisement.

Let me come to inclusiveness.

Councils, under the Local Government Act are responsible for their local community defined as residents, ratepayers and those who conduct activities in the municipality. (Section 1A (4) of the Act defines local community as 'people who live in the municipal district, people and bodies who are ratepayers and people and bodies who conduct activities in the district').

Councils are charged with representing this community and yet not all members of the local community as defined by the Act have a right to vote.

Roll integrity

But the issue of franchise is not just about who should vote.

Entitlements are embodied in the electoral roll. It is enrolment that confers a vote.

This means it is critical that the roll's integrity is unimpeachable in terms of its:

Accuracy – that is, the information on the roll is correct and current;

Completeness – all voters with a right are included, and;

Validity – voters who do not have an entitlement are excluded.

I am now convinced that the VEC and 79 individual councils compiling different parts of a roll with an exceedingly complex franchise results in significant risks to roll integrity.

The risks to integrity include:

- voters with an entitlement not understanding their entitlement and so not enrolling;
- voters who are enrolled not knowing that they are enrolled and failing to vote by default – particularly at attendance elections;
- voters receiving multiple votes, and;
- legitimate voters being removed from the roll.

Council CEOs surveyed by the Panel revealed they have little communication with potential voters outside of ratepayers despite the franchise being much broader than a ratepayer franchise. This results in very low levels of enrolment among businesses who occupy commercial premises, such as shop tenants and operators in other commercial or industrial premises.

To give you an idea of the scale of their under-enrolment, data provided by the Valuer-General estimates that there are over 181,000 business premises across Victoria (excluding the City of Melbourne).

Many of these premises are tenanted and as such, commercial tenants in this category would be able to vote if they enrolled.

However, only 178 individuals and corporations were enrolled in that category as business tenants for the 2012 elections. Only 43 voted. This is a very low participation rate.

Even if you take into account that some voters in this category may have voted in that municipality or in another municipality as residents or in another category, their disengagement is puzzling.

Given the importance and breadth of council decision making especially in relation to strategic and urban planning, my Panel expected a higher turnout from this group.

While it is difficult to pinpoint the specific reasons, part of the answer lies in councils' perceptions of their responsibilities.

One council went so far as to say that engaging and enrolling this part of the electorate was too costly for something which they considered to be outside their 'core business'.

We should have confidence in the voters' roll – and restoring it will require some significant reform in how the roll is prepared, starting with consolidating responsibility for its preparation with the VEC.

Candidacy

Turning now to my second major issue – candidacy. Many stakeholders advocated more stringent tests or prerequisites for entry into local government.

These tests or prerequisites, people claim, should be aimed at excluding those who do not have qualities necessary for functioning as a councillor.

Some of these have included: the financial acumen and the level of literacy or the knowledge of governance necessary for sound decision making in local government.

The fact is, however, that councillors are elected representatives, not employees or board appointees.

Moreover, this notion that political participation may be restricted to an accomplished elite is at odds with the application of the Charter of Human Rights, which enshrines the right to stand for public office without unreasonable interference.

Some have advocated heightened and more onerous tests specifically to reduce dummy candidates, a phenomenon that has been variously defined.

Whilst not illegal, the running of dummy candidates is not desirable and many have commented that it compromises the integrity of the electoral process.

There are various ways of reducing the incentives for dummy candidates.

Some of the options we believe deserve to be considered include requirements that candidates:

1. be enrolled for the municipality (removing the provision that allows non-enrolled persons to nominate by claiming an entitlement to be enrolled that they have failed to act on);
2. make in-person declarations as part of the nomination process;
3. make definite declarations of eligibility (unambiguously confirming that none of the disqualification conditions apply to them);
4. provide proof of identity, a recent photograph and contact details for public distribution when nominating;
5. supply names and signatures of six voters in the municipality who endorse their candidacy in order to nominate;
6. submit template-based information for distribution to voters (which prescribes information about qualifications and experience for the role of councillor);
7. if elected, agree for the council to obtain a national criminal record check and a check of the ASIC register of prohibited persons.

Collectively, these measures may blunt the influence of candidates who participate with the sole objective of garnering preferences for a serious candidate.

The Panel heard that many voters believe that the information they receive is insufficient to allow them to make an informed judgment about the candidates contesting council elections.

This message came through persistently from all stakeholders in all aspects of the consultation.

...And the electorate is quite clear on what it wants from local government...

...It is important that we respond to this challenge – with balanced, objective and comparable information about the candidates they are assessing.

The regulatory system may not be able to provide answers to all the real-world challenges facing candidates and the electorate, but it does express the standards expected of those who run for public office and the enforcement of those standards.

A persistent area where regulation is challenged is in the intersection between campaign donations and conflicts of interest for sitting councillors.

Campaign donations are unique in the sense that they are not interests acquired in the course of

private life, which need to be managed once a person is elected councillor. Instead, campaign donations are sources of conflicts of interest generated by the very act of seeking public office.

You may consider it anomalous that candidates are permitted to receive campaign donations without limit, when the act of accepting them may circumvent the discharging of their responsibilities as councillors – locking them out of council issues involving donors of more than \$500.

The issue, however, goes beyond the consequences for individual councillors. This is most conspicuous when sufficient numbers of councillors have received campaign donations to prevent a council forming a quorum. This has happened in recent months with Melbourne City Council.

When this occurs, not only are conflicted councillors prevented from participating in a decision, but councillors who are not in conflict are disenfranchised.

Without remedial action, such occurrences will increase in the future.

One option is to harmonise the conflict of interest provisions relating to campaign donations by capping permissible donations at the level at which a conflict is triggered.

The levels of individual donation amounts for council elections are low enough to make this a feasible option.

The Panel believes it should be seriously considered.

Complaints – Was 2012 a dirty election?

Turning now to the behaviour of candidates.

Some commentators suggested that the 2012 elections were the dirtiest in memory.

If you looked at the complaints data, you might be persuaded. They doubled from 223 in 2008 to 456 in 2012.

However, almost 300 of the 383 matters serious enough to be investigated by the Local Government Investigations and Compliance Inspectorate did not constitute a breach of the Local Government Act 1989.

You may conclude from this that at least some of the escalation in complaints in 2012 was driven by a lack of understanding by complainants of what is allowable, or a desire to discredit an opponent.

But the data on alleged breaches of the Local Government Act 1989 provides cold comfort – these also jumped from 28 in 2008 to 84 in 2012.

However, the significance of these numbers should not be exaggerated.

Of the 84 possible breaches:

- 13 were unable to proceed due to insufficient evidence;

- two warranted no further action;
- one warranted a request for formal compliance;
- 49 warranted a formal warning, and;
- 19 warranted criminal investigation for failure to lodge a donation return.

A significant number of breaches of the Act, if sufficiently serious, can result in the disqualification of an elected councillor or an election being voided.

Of those breaches that were proven in 2012, none were so serious as to result in the disqualification of an elected councillor or an election being voided.

The rise in complaints and breaches witnessed at the 2012 elections raises important questions about the increasing challenges in regulating candidate behaviour during an election.

At the heart of this lies judgments about which behaviours are best regulated by election-specific laws and which are better left to legislative protections that apply across society, which are usually more encompassing.

Wider community arguments about where lines should be drawn between rights to freedom of expression and rights to be free from misrepresentation become sharper during the election period.

Candidates urgently seek redress from statements or behaviour that may damage their candidacy.

Time is of the essence. Yet observation of the laws of natural justice, which take time to run their course, is more, not less, important during an election contest.

The charged nature of the environment sometimes means that complaints that may not be ordinarily made, are made in the heat of the contest and, once issued, are not withdrawn.

Nor can the incentive to make frivolous complaints – which may damage an opponent or take up their time in defending their conduct – be dismissed as a motivation.

The nature of many electoral offences (allegations of misleading or deceptive material, lack of authorisation, and false or defamatory statements) create significant evidentiary challenges, which set a high bar for successful prosecution.

If regulation of elections in general is challenging, the challenges can be even greater for local government elections.

Many participants are not career politicians and lack the party vetting of materials and behaviour, which can constrain illegal behaviour at federal and state elections, thus removing a layer of self-regulation.

Low levels of understanding of the rules of engagement are common, and this uneven understanding generates more unfounded complaints and more breaches made in ignorance of acceptable behaviour.

In this often emotionally charged environment, the pressure on candidates to communicate their message, in a compressed period of time in an intense competition with high stakes, inevitably means that some will behave in ways that are unacceptable to their competitors.

While for the 2012 elections, this experience was more common than at previous elections, it is important to recognise that the lion's share of offensive behaviour was at the lower end of the offence scale.

Conclusion

This overview provides a small taste of the issues my Panel grappled with in the first stage of our review.

It was even more complex and challenging than I had anticipated – so I have a renewed respect for the skill required from a network such as yours in informing electoral regulation.

Sound electoral regulation is critical in achieving a fair contest and it is a sobering privilege to be in a position to advise Government on the nature and extent of that regulation.

It is equally important to understand the limits of regulation.

A strong electoral system alone cannot guarantee a healthy democracy.

A healthy democracy relies on a partnership between the regulatory system and the engagement, goodwill and integrity of civic society.

This calls in the responsibilities of an interested and responsive electorate, committed and talented candidates and peak organisations, stakeholders and academics with the best interests of the wider community at heart.

That is why networks such as this one and discussions such as today's are so important.

Thanks again for your participation.