ELECTORAL BRIBERY

Colin A Hughes[*]

Introduction

The purpose of this article is to argue that the current law of electoral bribery is defective, as has been demonstrated in several recent, widely publicised episodes which will be examined below. It can be considered defective because authoritative statements concerning its application in contemporary political life conflict, they usually appear arbitrary to professional politicians who are the people most concerned, and they provide limited guidance for anyone wishing to pursue their own or their party's interest without breaking the law.

Much of the problem arises from the fact that the relevant law is largely obsolete, having been developed in the United Kingdom to discourage the bribing of individual electors in a time when electorates were numerically small, voting was open and free of party loyalties, and MPs were unpaid and for the most part independently wealthy. Once adult suffrage had produced 'large and anonymous electorates' and MPs became careerists, that sort of bribery virtually disappeared.[1] However, the multiplication of benefits which government might confer and the intensity of competition among a few disciplined parties created new opportunities for what might still be thought to be bribery; the need for legal prohibitions of some sort remains.

As the existing law has attracted little scholarly attention, some definition may be helpful. Electoral bribery is that sub-species of political bribery which occurs in the electoral process. In the *Commonwealth Electoral Act* 1918 (Cth) (*CEA*), s 326(1), for example, where it is called simply 'bribery', it is defined in relation to the components of that process:

> A person shall not ask for, receive or obtain, or offer or agree to ask for, or receive or obtain, any property or benefit of any kind, whether for the same or any other person on an undertaking that ...[X] will, in any manner, be influenced or affected.

X equals five matters. The first three Xs are the person's own vote, their candidacy and their support for or opposition to a candidate, group of candidates or political party; these are components inherent in all free electoral systems. The last two are allocation of preferences by an elector and the ordering of candidates on a party ticket for a Senate election (effectively by the group or party lodging the ticket with the Returning Officer) which are consequences of, respectively, Australian use of the alternative vote and

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* Emeritus Professor of Political Science, University of Queensland; federal Electoral Commissioner 1984–89.

1 PD Finn, 'Electoral Corruption and Malpractice' (1977) 8 *FLR* 194, p 197.

single transferable vote. Section 326(2) repeats the provisions, now directed to those who give or offer bribes to influence or affect a voter. The first three components appeared in slightly different language in the original *Commonwealth Electoral Act* 1902 (Cth), s 175; the last two were added when new voting methods were introduced.

There is also an exception, contained in the present sub-section 3, again dating back to 1902 (then s 179): 'This section does not apply in relation to a declaration of public policy or a promise of public action'. The exception recognises the reality of electoral competition in Australia by the end of the 19th century; candidates and parties give or promise to give government-created benefits to electors.

History of Electoral Bribery

In Britain, the development of electoral bribery law really began when seats in the Commons started to attract the ambition of wealthy men, though 'vague and platonic' efforts to discourage it stretch from the last quarter of the 13th century to the end of the 17th, followed by several ineffectual statutes starting with the *Bribery Act* 1726 (Imp).[2] More effective was the *Treating Act* 1696 (Imp), which in 1902 entered federal electoral law as *CEA*, s 176, bringing within the definition of bribery:

> the supply of meat, drink, or entertainment after the nominations have been officially declared, or horse or carriage hire for any voter when going to or returning from the poll, with a view to influence the vote of an elector.

Treating has disappeared from the *CEA* but in Britain and some Australian States it survives as a minor nuisance, eg in the *Representation of the People Act* 1983 (UK), s 114.[3]

It might be noted as an historical curiosity that the relationship between public policy and bribery controls appeared at an early stage but was then seen in a different light. In one of the North American colonies, Virginia, anti-treating legislation adopted in 1705 also forbade making promises to electors because they 'were held to intrude on the freedom of the elector to make up his own mind'; in 1758, a successful candidate who combined treating (involving more than 30 gallons of rum) with a promise to get the county divided for the greater convenience of electors was unseated by the House of Burgesses.[4] However, by the end of the 18th century, the growth of political parties and national issues in the now United States had 'encroached

2 C Seymour (1970) *Electoral Reform in England and Wales*, orig 1915, Archon Books, pp 165–6. It was said of one constituency that the Act's requirement of an oath 'was worse than useless, since it merely added perjury to the political immorality of the inhabitants' (p 176).

3 HF Rawlings (1988) *Law and the Electoral Process*, Sweet and Maxwell, pp 147–8.

4 JR Pole (1966), *Political Representation in England and the Origins of the American Republic*, University of California Press, p 157.

on the personal character of the relationship between representative and electors by introducing considerations of general and impersonal policy'.[5]

In Britain, the extravagant bribery of electors, previously concentrated in the relatively few large boroughs or directed to non-resident electors, became more widespread after 1832. Despite the emergence of grassroots constituency organisations and political clubs, election and inter-election expenditure came primarily from the pockets of wealthy candidates or patrons; disbursements from central party funds were relatively modest.[6] Concern about the rising level of expenditure led eventually to the *Corrupt and Illegal Practices (Prevention) Act* 1883 (Imp), which combined prohibition of certain types of expenditure, refreshments and payments for transport with control over amounts which might be spent, by whom and on what, and introduced a disclosure regime, the whole enforced by severe penalties. But the new controls were focused on expenditure at the constituency level where it still predominantly occurred, whilst national level activity was ignored. This was the model adopted by the Australian colonies but it reflected a political era which was drawing to a close as the model was adopted. Although the Commonwealth and some States introduced expenditure controls more appropriate to contemporary practices in the 1980s, electoral bribery was left alone.

Before setting out the specifics of some recent wrestling with the question of what acts may constitute electoral bribery, two preliminary points are advisable. First, political bribery in general is usually thought to require involvement of a public official and the doing (or not doing) of an official act.[7] Electoral statutes like the *CEA* designate electoral officers (s 4) and create special offences for them (ss 323, 324, 325) and for people like hospital or nursing home proprietors and employees (s 325A) well placed to influence or affect electoral decisions, and limit the 'relevant period' in which some offences may occur (s 322). But it may defeat the purpose of legislation to ensure 'free and fair' elections to confine its proscriptions and penalties to those who occupy an official, ie statutory, role and to acts within a statute-limited period. As we will see, for example, there may be little difference between a Minister of the Crown, who is an official, saying what they would do if their party wins the election and a shadow minister, who is not, saying what they would do if their party wins.

Secondly, Australian electoral law does not yet concern itself with the internal processes by which political parties select their own candidates,[8]

5 Ibid, p 161.

6 M Pinto-Duschinsky (1981) *British Political Finance 1830–1980*, American Enterprise Institute, p 24.

7 D Lowenstein, 'Political Bribery and the Intermediate Theory of Politics' (1985) 32 *UCLA LR* 796.

8 Though it should be noted that an 1870 British case held that 'a test ballot' in a safe seat for which voters were paid to vote, though not for voting for a particular candidate, was illegal at common law and came within the statutory words 'in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament': *Halsbury's Laws of England* (1956) 3rd edn, vol 14, p 215.

unlike some American state statutes which regulate party primaries and have given rise to a considerable case law on bribery in that context. As at least two-thirds of outcomes in Australian single-member electoral districts and a comparable proportion in multi-member districts are determined by a political party's choice of who to nominate or the order in which several nominees appear on the party's ticket, the deficiency is serious. Even if dissatisfied party members might have remedies under law relating to private associations, these are unlikely to fit appropriately into the politically charged electoral environment; neither do they illuminate the issues being pursued here. There is an argument for expanding statutory regulation of parliamentary elections to cover pre-selection processes and the possibility has started to attract some attention.[9]

We can turn now to three recent episodes in Australian political history which show the poor match of existing law to the realities of contemporary politics. The first concerns payments made to organisations in one electoral district during a New South Wales (NSW) state election campaign (the Port Stephens Case), the second an inducement to a sitting Member of the NSW legislature to resign his seat and cause a by-election (the Metherell Affair), which resembles candidacy-tampering sufficiently for discussion here, the third an agreement made during a Queensland state election between leaders of a political party then in Opposition with the executive of a public sector trade union (the MOU Affair).

The Port Stephens Case

The question of when a payment to an organisation may constitute a bribe came before a NSW court in *Scott v Martin.*[10] At the 1988 State general election, the respondent, standing for the Australian Labor Party (ALP) which was in office at the time, won the new electoral district of Port Stephens by 90 votes. In the last two weeks of the campaign, he had, in the words of the petition, presented cheques drawn on various State government departments to local:

> groups and organisations comprising electors and/or persons who could reasonably be expected to be influenced by that payment to support the Respondent and/or influence others to support those persons within the Electoral District.[11]

There had been three cheques totalling $6500 for pre-schools, three totalling $8000 for life savers' clubs, two totalling $7500 for youth organisations, one of $3000 for the coast guard and one of $2000 for a theatre. In most instances, the cheque was handed by the candidate to a representative of the recipient organisation; others were posted by the government department to the retiring ALP member who had represented part of the new district, who passed them on to the organisation. In one instance, a facsimile of the cheque

9 D Solomon (1998) 'Open house for better parties', *Courier-Mail*, 24 June.

10 *Scott v Martin* (1988) 14 NSWLR 663.

11 Ibid at 664–665.

was presented at a committee meeting of the organisation and the original subsequently handed to its treasurer. Five presentations took place on the day before polling day. There was also a promise of $15,000 made to a koala preservation society; that cheque did not arrive until after polling day.

The relevant provision of the *Parliamentary Electorates and Elections Act* 1912 (NSW), s 147(a) reads:

> Every person shall be guilty of bribery who:
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> (a) directly or indirectly, by himself or by any other person on his behalf, gives or lends, or agrees to give or lend, or offers, promises, or procures, or promises or endeavours to procure, any money or valuable consideration to or for any elector or any other person on behalf of any elector, in order to induce any elector to vote or refrain from voting, or knowingly does any such act as aforesaid on account of any such elector having voted or refrained from voting at any election...

Needham J, sitting as the Court of Disputed Returns, rejected an English view 'that gifts to hospitals, churches, chapels, libraries and clubs of all kinds have never been considered bribery',[12] holding that whether s 147(a) had been breached was a question of mixed fact and law. As there was no doubt that the actions of the respondent were intended to influence persons to vote for him, there had been a breach and the election was void.

> The respondent's actions were not, in my opinion, corrupt in the ordinarily accepted meaning of that word; unfortunately, in modern times, there seems to be an accepted view that public moneys are in the unrestricted gift of those in power. In some cases, the temptation is to use such resources for purposes of party political advantage. That, in my opinion, is what has been done in the present case, and the respondent was but one of those involved.[13]

Incidentally, costs were awarded against the Crown because Ministers of the Crown were involved in the breach of s 147(a) as 'without their apparently willing co-operation, that breach could not have occurred'.[14] The ALP retained the seat at the subsequent poll.

The NSW statute lacked a declaration of public policy or promise of public action exception equivalent to *CEA*, s 326(3), which, if one had been in place, would presumably have saved the donations from illegality and avoided overturning the election. Jurisdictions which had such a clause saw no need to amend their law as a consequence of the Port Stephens decision. It may still be asked whether temptation to use public resources for party advantage in so blatant a fashion ought to be resisted. For example, the

12 *The East Division of the Borough of Nottingham Case* (1911) 6 O'M&H 297 at 306.

13 *Scott v Martin* (1988) 14 NSWLR 663 at 673.

14 Ibid at 674.

convention of 'a caretaker government' commencing at the start of the election campaign which requires avoiding decisions and appointments that can be postponed has recently been expanded by prohibitions on government advertising in that period that might influence voters.

Should such a prohibition extend to grants to organisations, which are the modern, taxpayer-funded versions of the private charity that was once required of a local MP and candidate? Government subventions paid to government-supportive organisations have been criticised.[15] It would be possible to prohibit promising or making gifts or donations to any club or association in the election period,[16] but given that it is the government of the day that makes the worthwhile donations and it, probably alone, knows when the election period will start, that is unlikely to settle the matter as they need only be made early enough. Old case law held that it did not matter how long before the election a bribe had been given provided that it was still operative at the time of the election; however, time was material to proof, for the closer it was to the poll, the more likely the act was to be considered bribery unless the contrary could be proved.[17]

The Metherell Affair

Following the 1991 general election in New South Wales, a coalition government led by Nick Greiner held office in the 99-member Legislative Assembly with 49 seats of its own and the support of one of the four Independents. But one of its 49 MPs, Terry Metherell, resigned, first as a Minister, then from the parliamentary Liberal Party, and eventually from the Legislative Assembly itself. On the day that he tendered his resignation from the Assembly, he was appointed to an attractive position in the State public service. Normal public service procedures were not followed in making the appointment.[18] His resignation ensured a by-election in a safe seat which the Greiner government was certain to win, thereby restoring the numerical status quo ante before Metherell had drifted away from the government. The matter was subsequently referred by the NSW Parliament to the State's Independent Commission Against Corruption to ascertain whether there had been 'corrupt conduct'. Under s 8(1)(b) of the *Independent Commission Against Corruption Act* 1988 (NSW) (*ICAC Act*), that included 'any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions', provided that the conduct could constitute or involve a criminal or disciplinary offence or reasonable grounds for dismissing a public official (s 9). In this instance, that meant the Premier and Moore, another Minister, both of whom had been

15 Eg P Sheehan (1998) *Among the Barbarians: The Dividing of Australia*, Random House, p 99.

16 Finn (1977) p 210.

17 *Halsbury's Laws of England*, Vol 14, pp 218–19.

18 For a convenient chronology of events, see Independent Commission Against Corruption (1992a) *Report on Investigation into the Metherell Resignation and Appointment*, June, Independent Commission Against Corruption, pp 16–18.

involved in the pre-resignation negotiations with Metherell and in his eventual appointment.

The subsequent report by the Commissioner, Ian Temby QC, devoted a chapter to bribery as a common law offence. Counsel assisting the Commission had put it that:

> Metherell offered an undue reward, namely the delivery of a political advantage by his resignation from the Parliament in exchange for a public service appointment, which reward was intended to and did influence the behaviour of Greiner and Moore in public office, namely to show favour to Metherell in respect of his appointment ...[19]

Among the evidence received, the Commission was provided with 'a folder of materials marked "Jobs for Seats" which contained some detail in respect of 19 cases in which a member of Parliament in this country had resigned and taken up a Government appointment'.[20] However, none were to a public service appointment; diplomatic or judicial appointments (unregulated by statute) were the norm.

One such case which illustrates how complex these transactions can become was the appointment of a minority party Senator, VC Gair, to a diplomatic posting on the eve of the 1974 general election (which was to include a half-Senate election). His exit was to create a sixth vacancy to be filled in the expectation that the extra seat would be won by the government.[21] Gair had been re-elected in 1970 and so would not otherwise have been a candidate at the ordinary half-Senate election which was approaching, though he would have been in the double dissolution election which actually took place. Thus his appointment would not have been intended to affect his candidature contrary to *CEA*, s 326(1)(b), although he would have become a candidate at the later stage had he not already moved on. In the event, a hasty issue of the writ by the State of Queensland ensured that only the normal five vacancies would be available, had the anticipated half-Senate election taken place. Commissioner Temby observed that there was talk of the system having been corrupted in the Gair Affair but, as far as was known, no direct allegation of corrupt conduct by individuals.[22] As we have seen, an accusation of electoral bribery was not available. The Senate's staggered elections are unusual, but not unique in Australia; so too are the opportunities to work the margins in multi-member electoral districts.

In the light of the special requirements of the *ICAC Act*, Commissioner Temby found that the conduct of Greiner and Moore did not involve the

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19 Independent Commission Against Corruption (1992a) p 58.

20 Ibid.

21 JR Odgers (1976), *Australian Senate Practice*, 5th edn, Australian Government Publishing Service, pp 43–5.

Gair's departure was to involve a resignation, but which could also have been achieved by the disqualification from membership which acceptance of an office of profit contrary to the Commonwealth Constitution, s 45 entails.

22 Independent Commission Against Corruption (1992a) p 59.

criminal offence of bribery, but was conduct such as could constitute or involve reasonable grounds for dismissing them as Premier and Minister respectively and so reported to Parliament. Greiner and Moore resigned their ministerial positions and eventually from Parliament, but they also applied to the Supreme Court where a majority held that the test whether conduct of a public official could constitute reasonable grounds for dismissal was objective and that such a test did not exist for Ministers' dismissal by the Governor.[23]

Reverting to the problems of electoral bribery dealing with such facts, it would have been difficult so early into the current term of the Legislative Assembly to treat Metherell as a candidate for the next general election, who had been influenced not to stand. A new offence, inducing an unnecessary election or resigning from Parliament for an improper purpose, might be closer to the events. Resignation can be for improper purposes, as Commissioner Temby pointed out when rejecting the idea that a resignation could never be of relevance in a bribery prosecution.

> Let it be supposed that a Judge has reserved decision on a matter, and one of the litigants earnestly desires that the decision never be delivered. Suppose he offers the Judge a substantial money payment to resign before doing so. That would be a bribe. But on analysis the purpose would be to influence the Judge's behaviour in office, that is to say to ensure that he did not deliver the reserved decision while a Judge.[24]

This example more clearly (because the context was apolitical) involves an improper purpose than replacing an unreliable MP with a more dependable one, but it is heading in the right direction to prevent sharp practices such as took place in the Senate in 1917 when, to get rid of their votes, one Senator resigned, another accepted appointment as a Commissioner and left the country, and a third went sick.[25]

Commissioner Temby quoted extensively from a speech in the Legislative Assembly by Greiner (responding to a censure motion, the traditional political rather than legal tactic for settling guilt) over the Metherell Affair:

> Ultimately, if what was done was against the law, then all honourable members need to understand that it is, for practical purposes, the death of politics in this State.
>
> Once a political party is elected to office it will be against the law for it to make decisions which are in any way influenced by political

23 *Greiner v ICAC* (1992) 28 NSWLR 125. ICAC chose not to appeal to the High Court, see Independent Commission Against Corruption (1992b), *Second Report on Investigation Into the Metherell Resignation and Appointment,* September , Independent Commission Against Corruption, pp 5–6.

24 Independent Commission Against Corruption (1992a) p 57.

25 G Sawer (1956) *Australian Federal Politics and Law 1901–1929,* Melbourne University Press, pp 130–1.

> considerations. There will be no question of Government paying particular attention, for example to the needs of marginal seats; it will no longer be just a matter of politics — it will be against the law. What the Opposition and the media have opened up here is the very nature of politics itself — that is, the conflict between the demands of politics and the demands of public office. Under the English common law very serious obligations to act in the public interest are placed on those elected to public office, and yet our highest public officials are at the same time part of a political system which is about what is in many ways a largely private interest in terms of winning or holding a seat or holding office. This is a very difficult philosophical matter.[26]

In Metherell's circumstances, the Premier's concentration on the common law's involvement in politics was understandable. But statute is equally capable of intervening in politics — as it had in the Port Stephens Case four years earlier — and setting limits on how 'a largely private interest' might legitimately try to win or hold a seat or office. Lowenstein's observation sums it up: 'American politics consists largely of pressures and deals', but certain of these were prohibited as bribery and it is necessary to ask which ones and why.[27] Whether the boundary markers should be moved may be asked after that.

The MOU Affair

In February 1996, the existence of an agreement, in the form of a Memorandum of Understanding (MOU) between the Queensland Police Union of Employees (QPUE) and the coalition parties, the National and Liberal parties, became public knowledge. The agreement coincided with a by-election that was capable of reversing the outcome of the 1995 state election by tipping the balance of numbers in the Legislative Assembly in favour of the coalition parties so that they might take office. QPUE advertisements were hostile to the ALP government in that by-election which was won by the Liberal candidate. When the agreement was disclosed, one of its signatories, previously the Opposition spokesman on police matters and now Minister for Police, referred the matter to the State's Criminal Justice Commission (CJC), which decided to hold an inquiry and appointed a retired NSW judge, Kenneth Carruthers QC, to conduct the investigation. A parallel inquiry into a second, contemporary agreement between the Australian Labor Party and the Sporting Shooters' Association was combined with this investigation.[28]

Before he had completed his inquiry and reported, Mr Carruthers resigned — in protest against inquiries into his on-going inquiry being made by a Royal Commission which had subsequently been appointed by the

26 Independent Commission Against Corruption (1992a) p 92.

27 Lowenstein (1985) p 784.

28 This investigation is irrelevant for present purposes, although both involved allegations of a breach of the bribery provisions of the *Electoral Act* 1992 (Qld) (*EA*).

coalition government. As a consequence of his resignation, the CJC briefed two senior counsel, RW Gotterson QC and BJ Butler SC, to advise it whether any report should be made pursuant to the *Criminal Justice Act* 1989 (Qld) (which established the CJC) as a result of the Carruthers inquiry; effectively, its hearings and collection of evidence. Unfortunately, the possibility that recommendations concerning the state of the law would be made by the Carruthers inquiry had been lost.[29]

The statutory definition of bribery in s 155 of the *EA* reads (omitting its penalty provisions):

> (1) A person must not –
> (a) ask for or receive; or
> (b) offer, or agree, to ask for or receive;
> property or a benefit of any kind (whether for the person or someone else) on the understanding that the person's election conduct (as defined in subsection (3)) will be influenced or affected.
> (2) A person must not, in order to influence or affect another person's election conduct (as defined in subsection (3)), give, or promise or offer to give, property or a benefit of any kind to the other person or a third person.
> (3) In this section –
> **"election conduct"** of a person means –
> (a) the way in which the person votes at an election; or
> (b) the person's nominating as a candidate for an election; or
> (c) the person's support of, or opposition to, a candidate or a political party at an election.

Holding that the meaning of 'a benefit' had to be found in context and subject matter, Gotterson and Butler read in a public policy component:

> the subject matter of the EA is elections for members or a member of the Legislative Assembly and the subject matter of s.155, as the heading to that section states, is bribery. Thus the context in which the expression 'a benefit of any kind' is placed is an electoral bribery offence provision. If the expression 'a benefit of any kind' were to be given as broad a meaning as 'any advantage whatsoever', it would be capable of including advantages of a non-personal nature in the sense of advantages enjoyed by the public at large or by relatively large groups of persons, and advantages which flow indirectly from action by a person. On a broad interpretation, a promised reduction in taxes could be said to benefit taxpayers at large by increasing their disposable income. A promised improvement in the working conditions or [*sic*: of] nurses could be said to benefit individual nurses directly and, arguably, also the population at large indirectly by fostering an efficient and enthusiastic nursing workforce.

29 Criminal Justice Commission (1996) *Report on an Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal between the ALP and the SSAA*, Criminal Justice Commission, p 3.

> To interpret 'a benefit of any kind' so broadly can lead to the absurd conclusions that promises such as these are illegal as election bribes. That kind of conclusion confronts the contemporary democratic electoral process in which politicians and political parties run on platforms which consist of promise of action in government. If s.155 were to be interpreted so as to prohibit this kind of conduct, then the achievement of an informed electorate and informed political debate would be threatened. It is inconceivable that consequences of this kind were intended. An interpretation of the expression which prohibits conventional democratic conduct of this kind must be rejected. It cannot be imagined that such conduct was perceived by the legislature to be a mischief which s.155 was enacted to overcome.[30]

They went on to note that different techniques have been tried 'to cater for the legitimate election promise', one being the exception contained in *CEA*'s s 326(3), another the US *Model Penal Code*'s Article 240.1. They had doubts about the former as raising:

> its own interpretational issues which have not yet been considered judicially: for example, what precisely is connoted by 'a promise of public action'? Does it require that the promise be made publicly; or is it sufficient that, however made, it promise public action?[31]

and preferred the *Model Penal Code* version for better identifying appropriate criteria.[32]

> The first is that where the election promise is to advantage a group or class of persons, the promise is to benefit the members of the group or class generally — no one member or small clique of members is singled out to be specially advantaged.... The second criterion is that the promise to confer advantage by way of measures taken as part of

30 Ibid, pp 24–5.

31 Ibid, p 29.

32 Which reads:

> A person is guilty of bribery ... if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter;

and defines 'benefit' as

> Gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not as an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose. (quoted in Criminal Justice Commission (1996) pp 26–7)

> the normal processes of government. The legislature could not have intended that this electoral bribery provision would strike at promises by candidates and political parties to undertake measures in the course of the proper discharge of public office.[33]

A possible additional element comes from *People v Hochberg*, a pre-selection case where an incumbent state legislator offered a job to a possible challenger, a lesser appointment to the challenger's brother-in-law and a cash campaign donation in consideration of the beneficiary not opposing him in the pending primary.[34] The New York election law which prohibited a holder of public office from corruptly[35] using or promising to use their official authority to secure public employment in return for the giving or using of the beneficiary's political influence or action in behalf of any candidate was upheld by the state Supreme Court. Mikoll J rejected arguments that the legislation was too broad and violated the First Amendment.

> The statutes place reasonable restrictions on the use of official position and authority which is corruptive of a free elective process. No one has a constitutional right to corruptly use official position or authority to obtain political gain. Secondly, the statutes here under attack are sufficiently definite to give a reasonable person notice of the nature of the acts prohibited. They are generally aimed at corrupt bargaining to obtain public office and specifically at the use of the public payroll in such bargains. In view of the myriad ways in which the objects sought to be prohibited may be accomplished, laws framed with narrow particularity would afford easy circumvention of their purpose and be ineffectual. Thus, the statutes are neither impermissibly vague or overbroad...[36]

The MOU comprised a list of objectives and proposals, a so-called 'wish list', put forward by the QPUE executive with a list of responses as to the attitude of 'a Coalition Government' to each which ranged from 'Agreed', through 'Agreed in Principle', 'Partially Agreed', and 'Subject to Negotiation', to 'Not Agreed', and in some instances detail of what would be done to achieve or partially achieve that item. Gotterson and Butler advised:

> [w]e discern within the Responses undertakings made by the coalition signatories to pursue in government the listed objectives and proposals to the extent that they are agreed, agreed in principle or partially agreed and in the manner detailed in the Responses. In our view, these undertakings have the character of promises rather than offers or gifts.[37]

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33 Criminal Justice Commission (1996) p 30.

34 *People v Hochberg* 62 AD2d 239 (1978).

35 A word that has gone out of fashion in Australian drafting: Independent Commission Against Corruption (1992a) pp 17–18.

36 *People v Hochberg* 62 AD2d 239 (1978) at 248.

37 Criminal Justice Commission (1996) p 49.

However, the promises met the criteria to remove them from the operation of s 155. To the extent they advantaged QPUE members or groups of members, they did so indiscriminately with no individuals nominated for special advantage; as they related to the structure and efficiency of the police service, they were matters 'with which a government charged with this function is properly concerned'. It would be legitimate for a government 'to adopt and implement objectives and proposals in respect of these matters'. They were not benefits within the meaning of s 155.[38]

Conclusion

By this point, several problems have emerged. First, if the advice by Gotterson and Butler is correct, and it appears very persuasive, then the decision in *Scott v Martin* — which as it happens is the only judicial decision examined here — may be unsound. Payment of a sum of money to a group and agreement to parts of a group's log of claims are not so very different. The members of the various clubs in Port Stephens look as undifferentiated when receiving their benefits as the members of the QPUE could have been. If there were overt politicking apparent in the mode of presentation tainted the cheques, what was said about the robust nature of democratic electoral competition in both the Metherell and MOU Affairs suggests there is nothing wrong with that. Moreover, the openness of the cheques compares favourably with the original secrecy of the Metherell negotiations and the MOU document.

Gotterson and Butler usefully called attention to the distinction drawn by Brennan J of the US Supreme Court between 'those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system'.[39] Earlier in his judgment, Brennan J said: '[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy — the political campaign'[40] and quoted from *Buckley v Valeo*:

> it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.[41]

If the Australian law relating to electoral bribery is to be improved, secret agreements ought not secure the protection of the public policy

38 Ibid, pp 50–1.

39 *Brown v Hartlage* 456 US 45 (1982) at 56. It should be noted that there were special circumstances concerning the First Amendment involved in *Brown v Hartlage*.

40 Ibid at 53.

41 *Buckley v Valeo* 424 US 1 (1976) at 52, quoted in ibid at 53.

exception, for they do not contribute to intelligent evaluation by the electorate. Secret commissions legislation makes a comparable point.

A second problem is that the advice that the proposals contained in the MOU were within the bounds of propriety contrasts with the conclusion that what actually happened with the Metherell appointment was not. In the latter case, the Secretary of the Premier's Department had devised a solution which 'may have been lawful but was improper', because it favoured Metherell over all applicants for one job and potential applicants for the job to which he was actually appointed, so that there was no merit selection.[42] Nevertheless, Commissioner Temby did not think that the conduct of the Secretary of the Premier's Department provided any grounds for disciplinary action.[43] In contrast, Gotterson and Butler concluded that there was a prima facie case to support disciplinary action against members of the QPUE executive who were signatories of the MOU because of the unfair and excessive criticism of Assistant Commissioners of the Police Force they had put to the coalition parties.

Working on their particular problem, Gotterson and Butler had to regret lack of clarification by the US Supreme Court as to where the line can be drawn between what was inconsistent with democratic government and what promoted representative government. More work needs to be done on that line. The time has come to try to get back to first principles and devise a new legislative framework which would discourage what ought not to happen and make as certain as possible what ought to be allowed. Ideally, a solution ought to be as uniform as possible across the several electoral jurisdictions of Australia; that was said, more broadly, over 20 years ago.[44]

One vehicle for such a review would be one of the several Law Reform Commissions available. More likely, the subject matter is too embroiled in hard-nosed, practical politics and any proposals from such a source would be represented as ivory-towered and consequently fail to achieve the necessary momentum. A more obviously political body, a parliamentary committee such as the Commonwealth's Joint Standing Committee on Electoral Matters, or a Royal Commission mixing retired politicians with less partisan individuals and drawn from both federal and state arenas, may be preferable.

An incomplete list of the objectives which such a body should consider in proposing legislative changes would include:

- ◊ democratic government requires free and fair elections in which parties and candidates compete for support by publicly setting out the policies they will follow and decisions they will take if elected to office;
- ◊ those policies and decisions should fully comply with laws, regulations, codes of conduct and policy guidelines about process;

42 Independent Commission Against Corruption (1992a) pp 88–9.

43 Ibid, p 89. *The East Division of the Borough of Nottingham Case* (1911) 6 O'M&H 297.

44 Finn (1977) pp 223–7.

- ◊ secret promises and undertakings are undesirable and sanctions against making them may be necessary;
- ◊ appointments of members of Parliament to other public sector employment require a process that protects the public interest from considerations of partisan advantage.

It will also need to consider codes of conduct that do or could impinge on this field to ensure their justiciability in proceedings arising from allegations of electoral bribery.

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