CORRECTED EVIDENCE

ELECTORAL MATTERS COMMITTEE

Inquiry into whether the Electoral Act 2002 should be amended to make better provision for misleading or deceptive electoral content

Melbourne — 18 August 2009

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Mr M. Polden.

The CHAIR — Mr Polden, your evidence today will be taken via teleconference. Welcome to the public hearing of the Electoral Matters Committee's inquiry into whether the provisions of the Electoral Act 2002 should be amended to make better provision for misleading or deceptive electoral. All evidence taken at this hearing is protected by parliamentary privilege, as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, provisions of reciprocal legislation in other Australian states and territories. I also wish to advise witnesses that any comments made outside the hearings may not be afforded such privilege. Mr Polden, have you received a copy of the guide for giving evidence at public hearings?

Mr POLDEN — Yes, I have.

The CHAIR — Thank you. For the benefit of Hansard, can you please state your full name and business address?

Mr POLDEN — Mark Alexander Polden. My business address is 6th floor, St James' Hall Chambers, 169 Phillip Street, Sydney.

The CHAIR — Are you attending in a private capacity or representing an organisation?

Mr POLDEN — Private capacity.

The CHAIR — Mr Polden, I now invite you to give verbal evidence.

Mr POLDEN — I am very much in the committee's hands. I do have a statement which I could read from; that would take, however, 5 minutes. I do not know whether the committee would prefer to just go straight into questions. My area of expertise, such as it is, is the intersection between defamation law and political speech. I am very much in the committee's hands as to how it would like to proceed.

The CHAIR — Mr Polden, please read the statement.

Mr POLDEN — I propose to address my remarks primarily to the intersection of defamation law and political speech in the context of the committee's inquiry into whether the terms of the Electoral Act should be amended to make better provision for dealing with misleading or deceptive electoral content. There appears to be a majority view in the submissions filed with the committee that as a result of the High Court decision in *Evans v. Crichton-Browne*, section 84 of the Victorian Electoral Act does not catch publications which may mislead or deceive an elector as to the formation of a judgement about whom to vote for, as opposed to carrying into effect that judgement by casting their vote.

One submission from Liberty Victoria suggests the possibility of a test case, noting that the High Court's suggestion that the equivalent section 329 of the Commonwealth Electoral Act might catch a statement that a person who wished to support a particular party should vote for a particular candidate when that candidate in fact belonged to a rival party. It might be argued that the Kororoit pamphlet comes close to that line.

There are other arguments available from the scheme of the Victorian act, which differs markedly from its commonwealth equivalent in that the relevant provision in the Victorian act — that is, section 84 — does not fall, as is the case with section 329 of the commonwealth act, within the part dealing with electoral offences. That would be a consideration in favour of adopting the course proposed by Liberty Victoria and running a test case.

My view, however, is that given the strength of the High Court's remarks in *re Crichton-Browne*, in particular at paragraph 12 — I can provide you with the citation later, if you wish — as to the importance of freedom of speech and the practical difficulties which might result from a more expansive reading of the section, together with the fact that it creates a criminal offence and that the decision in *re Crichton-Browne* has been followed by Justice Mary Gaudron in the High Court sitting as the Court of Disputed Returns in *Webster v Deahm* — again, I can provide the citation — it seems unlikely that the challenge would succeed. That is my view on the suggestion by Liberty Victoria that perhaps one might explore this by way of a challenge.

The Victorian Electoral Commission neatly summarises the current position at page 10 of its submission, noting that in most of Australia the restricted scope of the misleading advertising provisions allow for robust debate that can lead to dissemination of statements that are misleading, while in South Australia, the effect of the

broadly worded section 113 of the Electoral Act — which I assume committee members have seen — proscribes publication of any electoral advertisement which contains purported statements of fact which are misleading.

That is an offence subject to a reverse offence defence if the defendant establishes a lack of involvement in determining the content of the advertisement and lack of constructive knowledge of its inaccuracy. The VEC has noted that in South Australia, the problem would appear to be that that broader section risks embroiling the electoral commissioner in what are essentially politically battles.

I will come to the point about defamation shortly, but perhaps I can just enter into it this way. Two submissions — from Dennis Galimberti of Hall and Thompson on behalf of Les Twentyman, and from Liberty Victoria — propose widening the current proscription. The Hall and Thompson submission suggests that conduct such as that which occurred in Kororoit is not proscribed at present and urges the introduction of a criminal offence which extends to statements described or characterised as misleading or deceptive and which are likely to influence the political judgement of an elector. On the other hand, Liberty Victoria suggests an amendment based on South Australia's section 113 with the intent element and the defence of lack of knowledge removed.

Those submissions give rise to the following three issues. Firstly, is the Kororoit conduct proscribed under existing law? Secondly, if it is not, should it be? Thirdly, if it should be, what form should the relevant provision take. I will just turn to those three questions.

In relation to question no. 1 — and this is the defamation nexus — the Kororoit conduct is proscribed both at common law and under statute pursuant to section 10 of the Victorian Wrongs Act insofar as it amounts to a criminal libel. It is also clearly sufficient in my view to ground actions in defamation under the uniform defamation acts and in injurious falsehood.

The most recent case to go to the High Court, as committee members would know, on the implied freedom of discussion on government and political matters was *Roberts v Bass*. That case in fact arose from publication of election pamphlets which the defendants agreed were in breach of section 113 of South Australia's Electoral Act. The constitutional validity of that section perhaps curiously was not challenged before the High Court, but the point of the thing was that the prosecution under section 113 which they pleaded guilty to was not a sufficient disincentive to prevent them continuing to publish, and as a consequence, those who believed they had been defamed took those people to court, and it went all the way to the High Court. That was not a criminal libel case; it was a civil libel case.

Perhaps as an interesting although perhaps slightly irrelevant sidelight, committee members might be aware the highest profile criminal libel trial ever run in Australia arose in Victoria. The statute is still on the books. That was the case in which Frank Hardy was prosecuted in October 1950 over publication of *Power Without Glory*.

Just to summarise the defamation point, in my experience — and I have done about 20 years advising newspapers and television networks around the country — the risk of a substantial award of costs such as arises in a defamation action, together with the ignominy of a jury verdict, can be a very substantial disincentive to publication. Bear in mind that the remedy in defamation often offers very significant advantages to the prosecutor or the complainant, as the material published is presumed to be false.

Contrast the situation under section 84 or South Australia's section 113 where it is for the prosecution to prove that the thing in question was likely to mislead or deceive — that is the wording of section 84 — or is in fact misleading or deceptive — that is the wording of section 113.

I have a little more. I do not want to take up too much time with the statement, but perhaps I might move on quickly to the other remaining four points.

Point number two is whether we regard the existing remedies in defamation and injurious falsehood as adequate, should publication of a matter which may mislead an elector be the subject of criminal sanction? Liberty Victoria apparently thinks so based on its submission. It points to section 18 of the Victorian Charter of Human Rights and Responsibilities Act, which, as committee members know, is the right to participate in public life. It makes no reference, however, to section 15, which is freedom of expression.

In dealing with roughly equivalent provisions, the OSCE jurisprudence coming out of Strasbourg has held that it will rarely, if ever, be justifiable to impose criminal liability, and certainly not the prospect of jail time, in relation to proscribed political speech. We should note that at present criminal sanctions only apply — and this is except in South Australia and Western Australia — to statements which in fact mislead electors in relation to the actual physical casting of their votes.

The question for the committee is whether there is a warrant to extend such a severe sanction to any person who, knowingly or unknowingly, publishes matter which is merely misleading or inaccurate. I do not believe so.

In my opinion, if the committee were to consider a broader proscription, it would do well to take pause for very serious consideration of the factors against, and they are set out in the August 1984 report of the commonwealth's Joint Select Committee on Electoral Reform, as it then was, and summarised on page 4 of the submission from Democratic Audit of Australia.

If, however, a broader form of proscription were to be contemplated, the following five issues — and they are very brief — will arise. Point one: whether proscription should extend liability to any person, thus catching those such as newspapers which republish editorial matter or editorial advertisements equal with those who originate the material who are in a much better position to judge its accuracy or otherwise.

Point 2: there is a related question of whether there should be a defence of lack of knowledge of falsity, as there is in South Australia's section 113 and Victoria's existing section 84(3).

Point 3 is whether any such provision such as in contemplation should attempt to differentiate between statements purporting to be statements of fact — South Australia's section 113 does that — and other matter. The present section 84 in the Victorian act does not differentiate; it refers merely to publication or distribution of 'any matter or thing'. As the Democratic Audit of Australia notes in its submission, the fact-comment distinction is an extraordinarily slippery one.

I might move now to the case in point — that is, the Kororoit pamphlet. I do not know if members have a copy of it there, but I will go briefly to the pamphlet. It has a heading 'Because a vote for Les Twentyman is a vote for the Liberals' and below that are two tear sheets from newspapers, one from the *Age* I believe and one from the *Courier Mail*. One says 'Lib deal for Twentyman,' and the other says 'Twentyman to get Lib preferences: Independent's poll hopes boosted'.

If a prescription applied only as South Australian section 113 does to publication of statements of fact, which are things purporting to be statements of fact but which are inaccurate or misleading, I would expect an argument to be raised that in fact that big headline on the pamphlet is not a statement of fact; it is a comment. That might seem slightly surprising, but I could refer the committee to the standard work on this. It is *Gatley on Libel and Slander* 10th edition, page 296, paragraph 12.10, where it says this:

> It is clear that a comment may consist of an inference or deduction of fact; that is, the author can assert, as his comment, on facts stated or referred to in what he publishes, some other fact, the existence of which he infers or deduces from those facts.

The application to the Twentyman case would be the facts referred to or the material referred to are in the tear sheets, and the matter in large print on the card is an inference from the facts, and qualifies as a comment.

I raise it only to show the kinds of Jesuitical summaries that are likely to be engaged in if the prescription is widened. One would expect that kind of argument to be taken as a defence. Equally one might expect an argument be raised that the Kororoit pamphlet should be understood as referring to a prediction — that is, although it is a vote for the Liberals, it will effectively be a vote for the Liberals because the sitting Labor member will potentially lose the seat, thus one less member to make up government, and as such is the prediction.

There are questions there as to whether that prediction in turn implies a statement of present facts. That is more in the area of practices law that you get into those kind of questions. The point is simply to illustrate that one can very quickly get into fairly deep water with a section which endeavours to prescribe matters of that kind.

I have two other quick points. Point 4 is that the Press Council alludes in its submission to the fact that publication of editorial matter, including comment by independent third parties, would risk being caught by a

widened provision. That has got to be right. It should be noted that there is already an exemption in section 65A of the Trade Practices Act from the misleading and deceptive conduct provisions of that act, in relation to publication of editorial matter, but not advertisements by proscribed information providers — essentially TV, radio and newspapers. In my view any attempt to broaden or rewrite the section should include media safe harbour of that kind.

The fifth and last point is a short one. Point 5 relates to constitutional validity. I believe that there is a real possibility that a section modelled on South Australian section 113 — or worse, Western Australian section 183 — would risk being struck down as not being reasonably adapted to serve the undoubtedly legitimate end of protecting the electoral process, in that it might well be seen as placing an excessive burden on freedom of political speech, particularly if it did not differentiate between fact and comment and particularly if it took in without discrimination all persons, including re-publishers such as newspapers.

I am sorry that statement is a bit wordy, but that is really the substance of what I had to say. If I can help with any questions particularly in the defamation area, I will be more than happy to do so.

The CHAIR — Thank you, Mr Polden.

Mr O'BRIEN — Thank you, Mr Polden. I was wondering if you could please summarise for the committee the additional licence that people might have in relation to defamation where it involves political content, political figures or political issues compared to defamation in relation to private citizens?

Mr POLDEN — Sure. The High Court said in *re Lange* that one needs to consider whether the speech that is in question is in fact political speech — speaks to government political matters. If it is, one then looks at whether the provision in question is something like this in the Electoral Act or whether it is an aspect of the common law burden of that speech.

So we might have an article about a politician. Let us say there is not a piece of legislation, but the common law says if you publish something which lowers a person in the estimation of ordinary, right-thinking people, you have defamed them, subject to any defences you might have, and the High Court would ask itself in those circumstances: is that law, the common law of defamation or the statute law under the uniform Defamation Act a burden on political discourse?

Yes, it may be in those circumstances. The next question is then: is it reasonably adapted to serve a legitimate end? The protection of reputation is a legitimate end. Is the statute in question — the statute as well as the common law, the uniform Defamation Act — reasonably adapted? Yes, it is.

Turning to these examples, if you looked at perhaps the West Australia provisions, section 183(5) is undue influence, and says that:

> Any person who —
>
> at any time between the issue of the writ and the close of the poll publishes or exposes or causes to be published or exposed, to public view any document or writing or printed matter containing any untrue statement defamatory of any candidate and calculated to influence the vote of any elector …

commits an offence.

I would have thought that might be liable to be struck down. The question the High Court would ask itself is: does it burden freedom of speech? Yes. Is it seeking to serve a legitimate end? Yes. Is it reasonably adapted? I am not so sure.

It is essentially the question where you are talking about a political figure, if you want to put it that way, in relation to their political activities. It is going to come down to whether you acted reasonably in the circumstances. That is really the test the High Court proposes. Are you publishing something that you know to be false that will disentitle you? Have you made reasonable inquiries? Have you spoken to the person and given them an opportunity to present their side of the story? If they have presented their side of the story, have you published it? All of those are issues going to reasonableness. That is essentially the test.

Ms BROAD — Thank you, Mr Polden, for your evidence. Can I take you to that part of your statement where you directly refer to the pamphlet which has been so contentious in relation to the Kororoit by-election

and your discussion of facts and legitimate comment, and your reference to a safe harbour for media? Is it reasonable to conclude from the statement you have made that the reproduction of the newspaper headlines and tear sheets from the *Age* and it is actually the *Herald Sun* which were headed 'Liberal deal for Twentyman' and 'Twentyman to get Liberal preferences', that those are matters which in your view should not be impeded in any way, and presumably the reproduction of media statements of that sort should be regarded as legitimate?

Mr POLDEN — I would have thought so. It is difficult. Let's assume a situation. The argument is here, I think, that they are taken out of context in that if one reads the articles, one learns that he in fact proposed not to send preferences to Liberal but to send them to Labor. I do not know if that is right or wrong but that is what I read in the articles.

My position on it would be that there should not be a statute proscribing that, and certainly not a statute imposing criminal liability for breach, and it should be left to the individual. In the case of Mr Twentyman, if he believes that that has misrepresented his position, it is undoubtedly a defamation, and he can sue.

Ms BROAD — Thank you.

Mr POLDEN — What it is saying is he is a stalking horse for one party, and he is misrepresenting himself as an Independent, and that is undoubtedly a defamation. It is presumed at law to be false and it would then be incumbent upon the people publishing that pamphlet to prove it was true.

Mr SCOTT — In your evidence previously you stated that in reference to the submission by Liberty Victoria, that evidence did not make reference to the human rights charter — I think it was section 15, 'freedom of expression' — and you raised the issue that this may in fact create a contrary argument to the argument that is run in their submission, based on section 18. Can you please expand on how those two sections would interplay in reference to the issues before the committee?

Mr POLDEN — It is difficult, isn't it, because we have not had that piece of legislation for that long, but I would have thought if it is a borderline call on whatever piece of legislation there is in Victoria — one has a look at the decision in *re Crichton-Browne*. The High Court was calling it a particular way; it decided to construe the statute narrowly.

What I am suggesting is that if one ran across a similar situation in Victoria, whether it was a fact situation — that is, does this particular publication fall within the section; or whether it is really just a matter of pure statutory construction, what does the word mean — one could not simply have regard to the right to participate in public life in isolation, one would have to look at it in balance with the other rights under the Charter of Human Rights and Responsibilities, particularly the right to freedom of speech.

We have not got a lot of experience in dealing with charters of rights here in Australia. But as I say, the cases overseas — if it is of any assistance I can provide them — suggest that it will rarely ever be regarded as legitimate to burden any kind of political speech with the prospect of jail time. Tampering with elections is another matter, but purely publishing matter which may, objectively speaking, later be found to be misleading, should not result in jail time.

The equivalent sections in overseas charters have been given that interpretation, and I would have thought that if it came down to a close-call decision, people would be trying to call in [inaudible] those decisions of overseas courts, and say, 'Look, the protection of freedom of speech under the Victorian act is not working all that differently'. I do not know if that helps.

I also wonder really whether it is correct to say that the right to participate in political life does not cut both ways as well, because one might have thought, looking at it quickly, that every person in Victoria has the right to have the opportunity without discrimination to participate in the conduct of public affairs, and I just wonder whether it might even be argued that to some extent a provision which penalises particular kinds of political discourse — whether one agrees with them or disagrees with them, thinks they are honest, dishonest, misleading or otherwise — nevertheless is some burden on the opportunity of people to participate in the conduct of public affairs.

The CHAIR — Mr Polden, thank you very much for your time. You will receive a copy of the transcript in about a fortnight's time. You are entitled to correct errors which do not reflect what you said today, but not matters of substance.

Mr POLDEN — I understand. Thank you.

Witness withdrew.