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

Members

Ms C. Broad
Ms C. Campbell
Mr P. Davis
Mr M. O'Brien
Mr R. Scott
Mr A. Somyurek
Mr M. Thompson

Chair: Mr A. Somyurek
Deputy Chair: Mr M. O'Brien

Staff

Executive Officer: Mr M. Roberts
Research Officer: Ms N. Wray

Witness

Mr M. Pearce, president, Liberty Victoria.

The CHAIR — 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 the provisions of reciprocal legislation in other Australian states and territories. I also wish to advise that any comments that you make outside the hearings may not be afforded such privilege. Mr Pearce, have you been given a copy of the guide to giving evidence?

Mr PEARCE — Yes, I have, thank you.

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

Mr PEARCE — My full name is Michael Richard Pearce, and my business address is 525 Lonsdale Street, Melbourne, Victoria.

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

Mr PEARCE — Representing Liberty Victoria — the Victorian Council for Civil Liberties.

The CHAIR — And what is your position in that organisation?

Mr PEARCE — I am the president of that organisation.

The CHAIR — The evidence will be taken down and become public evidence in due course. I now invite you to make your submission.

Mr PEARCE — Thank you and thank you for the opportunity to come and speak to you, and I also commend the committee for taking on this important assignment. You have seen a written submission that we have done, dated 3 August 2009. I will not repeat what is in that submission except perhaps just to elaborate a little more on why we think the present law is inadequate and what sort of changes to the present law we think should be considered.

The present law has been heavily influenced by a High Court decision of *Evans and Crichton-Browne*. That is referred to in our written submission. I will not go into detail on what was decided in that case, but courts and tribunals in Victoria have tended to assume that because of what the High Court said in that case section 84 of the Electoral Act can only really apply when somebody has been misled or deceived about the actual physical marking of the ballot paper. The High Court, it has been assumed, has said that section 84 or the relevant commonwealth provision, which is materially the same, does not apply at the point where the voter makes a judgement or decision about who to vote for. That, if you like, is open slather. It can be anything misleading or deceptive said that influences a voter about who to vote for, and that is not caught by the present section 84.

It is debatable whether the High Court was right and whether this view of what the High Court said is correct, and maybe that is something that could be tested in a test case that the electoral commissioner could consider bringing, but it is probably preferable to consider a legislative amendment, which is what we at Liberty Victoria propose, but in saying that, I make it very clear that we think a great deal of caution needs to be exercised in framing any kind of legislative amendment. We take the view that the shortest antidote to falsehood is the truth and the best way of correcting a falsehood or correcting anything that is misleading or deceptive is to let the truth get out there, and the truth will get out there.

By and large, with all its imperfections and all its inequalities, most of the time we think that happens. By and large, most of the time if a falsehood is circulated politically, eventually it is corrected, but there can be exceptional cases where that normal process is not allowed to happen. A typical example is when something happens at the last minute or on the eve of an election some falsehood is put out there and the party or person adversely affected by that has no meaningful opportunity to correct it, or material is handed out at the ballot booth. In those exceptional cases and where the falsehood or misleading or deceptive conduct is serious and where it might be thought, reasonably, that voters who have, let us say, a contestable vote, and we know they are probably a small minority, in those exceptional cases we think there should be some recourse under the law to that.

I make it clear that it would only be in very exceptional cases, so there would be, if you like, three elements of what we would like to see in an amendment that would make out an offence for contravention, say, of an amended section 84: that the misleading or deceptive conduct is serious; that it would reasonably be expected to

influence voters in deciding who to vote for; and that there was no reasonably practical opportunity for the adversely affected person or party to counter it. In those circumstances where these three elements are met, we think it ought to be an offence. Now, we do not think that if an offence is made out, it should affect the result of the election. We do not think we should go down that path of having elections routinely decided by court cases. I think that would be undesirable, but, like the present section 84, there ought to be some summary offence similar to what is provided in section 84.

Mr DAVIS — Mr Pearce, if I may lead off with some questions, just picking up your last couple of points, what I am curious about is if in relation to the three tests you just mentioned a matter is clearly misleading and clearly designed to influence the outcome of the election, and if, therefore, as a result of that material being circulated, the election result is different than it otherwise may have been, why would you object to the matter being corrected?

Mr PEARCE — I do not think you have quite reformulated the way I put it. The second element of the test that I propose would not be that it has affected the result of the election. The second element would be that it might reasonably be expected to have influenced voters in their choice of who to vote for. That is sort of theoretical rather than practical.

Mr DAVIS — I am assuming that it had that effect; it did influence them to vote in a way which affected the outcome of the election.

Mr PEARCE — The reason I think it would be dangerous to go down that path would be that I think it is very difficult ever to say about that that the result of the election was influenced by the material that was put about. I think that is too high a test. You would be asking a court to work out what was actually in the voters' minds, not what would have been in the mind of a reasonable voter. That is the first objection. The second objection is the one that I gave voice to a moment ago, that I think it would be very undesirable if we went down the path that the Americans often go down of having elections decided by judges rather than by voters. Let us say a candidate is found to have committed an offence against section 84 and is fined but holds his or her seat as a result. The recourse then is at the ballot box next time around, and the voting public can pass judgement next time around. I think that is preferable to handing the job over to the courts to decide the outcome of elections.

Mr DAVIS — Albeit that it might lead in certain circumstances to a change of government?

Mr PEARCE — All the more reason why you would not want to give the court that power. I think we are dealing with one set of imperfections as opposed to another set of imperfections. We are not creating a perfect system here, and we are looking at a system with, I think, the least undesirable imperfections. I would say it is more undesirable to have the courts deciding the outcome of elections than it is to let a possibly dubious result stand, because the voters get another opportunity in four years time to pass their judgement on it.

Mr DAVIS — One more question if I may, Chair. In respect, if you like, to the subject matter which has caused this inquiry to be established, I do not particularly want to narrow the discussion to that as the case study but given that we have had evidence led here — we have had the electoral commissioner's report and evidence this morning from the commissioner about the clear endeavour to mislead in relation to the material that was circulated — what I am not clear about is that in your submission you are talking about putting matters beyond doubt, which accords with the electoral commissioner's view that this matter needs to be looked at closely, whether you would see that such endeavours should be codified in a legislative sense or that that example I am using which is the trigger for this inquiry is the sort of material where, in your words, the public must be trusted to separate the wheat from the chaff of political debate, fair exchange of views and ideas as a safeguard that ensures the truth. The issue I am going to is: where is this line? The committee is looking for guidance I suppose.

Mr PEARCE — It seems to me there is a spectrum on which you can draw the line and reasonable people can differ as to where precisely you put the line on that spectrum.

Mr DAVIS — Mr Newnham had a different view about where that line should be.

Mr PEARCE — The line is presently drawn on the spectrum at one end which is for complete, almost complete, freedom of what you do and say. The line is drawn closer to that end of the spectrum than to the other

end of the spectrum. We would like to see it drawn in about the middle. I guess that is a bit of a wishy-washy thing to say. People will probably differ about where the precise middle of that line is, but at the moment we see the line a bit too far to the other end.

Mr SCOTT — Just to return to the outline of the three criterion you established for a step further to an amendment to the law, I am interested in getting some further information on 'reasonable practical opportunity to counter information which is misleading'. How would you define what a reasonable opportunity would be?

Mr PEARCE — The clear case is obviously when something is put out in the early part of an election campaign where one of the major parties makes an allegation that the other party has certain policies and the other party has plenty of opportunity by advertising and all the media presentation opportunities they have to say, 'That is not in fact our policy' and explain what their policy really is. That is a clear case where an adequate opportunity is afforded and the public can then decide. The public has got the competing views and the public can decide.

The sort of case that falls on the other side of the line is, again the clear case, where on the eve of an election some scurrilous material is put out, say, about a candidate, about a candidate's personal life. The candidate has just no meaningful opportunity to counter that. There was an example, I know, at the last federal election in an electorate in New South Wales — you are probably familiar with that.

Mr SCOTT — For Lindsay.

Mr PEARCE — Yes. That is being dealt with, I think. There have been criminal charges laid, I think, and convictions held about that. There are other cases. I know we are all here because of Kororoit, and I am not going to express a view one way or another about that but there is an instance of something very late in the campaign coming out. There might be other situations — it is difficult to be too prescriptive about it — where somebody in a major party with a lot of resources for advertising and other opportunities to get into the media puts out something about an independent candidate or somebody without those sorts of resources who has no opportunity to place full-page advertisements in the local newspaper. Like I have said, it is difficult to really codify that. That is something you have to leave to judges and possibly juries to make a finding of fact about, whether in the particular circumstances of the case the party adversely affected by the conduct had a meaningful opportunity to put out a counterview so the public could then make a judgement.

Mr O'BRIEN — Just taking up your comments there, I ask you: taking the Kororoit example where you have a major political party launching, in the words of the electoral commissioner, a misleading series of statements about an independent candidate, under your formulation would the disparity of resources mean that an independent candidate, for example, may not be regarded as having a reasonable opportunity to counter it whereas if the attack were made by the Labor Party on the Liberal Party you might say it did? As a follow-up to that question: why should a party that is unfairly misleadingly maligned by another party have to use its resources to reply to what is a slur?

Mr PEARCE — I think for the simple reason that that is the hurly-burly of politics. If you want to move to a system — and I know there are some proposals about for this — where every time one of the major parties thinks its position has been misrepresented by the other major party, and it has recourse to legal action for that, you are going to move the political debate in this country out of the court of public opinion into the courts of law, I think that would be a very undesirable result. I mean, with respect, it is a fair point you are making. Why should you have to do it? But you have to do it because that is what happens, and that is what happens in life and in people's personal lives in office politics. Everywhere you go you are often subjected to misrepresentations. To some extent you have got to cop it and answer it.

I come back to the point that is the critical consideration. It may sound trite, but truth is the best antidote to falsehood. Get the truth out there and let the truth get out there. It is only in those exceptional cases where there are no real opportunities for the truth to get out there to counter the falsehood that the law should become involved. Generally speaking that is exceptional, thankfully, in this country and in this state.

Mr O'BRIEN — I think that is something that this committee is grappling with. The current way the law has been framed, or least interpreted and applied, is that the phrase 'misleading or deceptive' applies to the casting of the vote rather than the formation of the judgement in the mind of the voter.

Mr PEARCE — Yes, the marking of the ballot paper.

Mr O'BRIEN — That is a relatively bright line. It is easy for those in the electoral process to understand; it is easy for those who have to adjudicate it, be it the electoral commission or the courts, to understand as well. What I am interested in hearing from Liberty Victoria's point of view is if you want to move that line from something that regulates — almost form to go into content — how do you draw that line in such a way that people know where the line is?

Mr PEARCE — It is a very good point, with respect. There is no doubt there would be difficulties in moving the line. The advantage of where the line is currently is drawn at the moment is, as you say quite correctly, it is very clear and it means you can get away with almost everything or anything in political debate. It makes it easier for the electoral commission because it can say, 'We cannot do anything about this'. But I am not sure that that is ultimately for the benefit of the political process, because I think there can be exceptional cases where there are no opportunities through the normal to and fro and give and take of political debate for the truth to get out there. I think my suggestion is to move the line just a little way; not a long way, but a little way. I know some other people want to move it a long way. For the reasons I have tried to articulate, we would not support that. But we think, you know, there are probably some pretty clear cases which fall on the other side of the line where it is currently drawn that might properly belong on the — —

Mr O'BRIEN — Can I just interrupt you and be mischievous and suggest Liberty Victoria may not endorse the submission of its immediate past president that misleading and deceptive statements by politicians at any stage should be criminalised?

Mr PEARCE — Our immediate past president commands great respect for his views not only within our organisation but beyond it. I understand his view, but it is not the official view of Liberty Victoria. I think for the reasons I have tried to articulate we see some serious difficulties. That really does move the line a very long way, and we think too far. We think it needs to move a little way but not quite as far as that.

Ms BROAD — Mr Pearce, you have referred in your evidence to the events in Lindsay immediately prior to the federal election, which, I think on anyone's view of the world, were extreme.

Mr PEARCE — Yes, that is the case.

Ms BROAD — And you have referred to action that has been taken in relation to those events. My understanding is that provisions in the Australian Electoral Act are very similar in their effect to the provisions in Victorian legislation and the fact that action has been taken demonstrates that it is possible to take action in relation to those sorts of events, which were very close to the date of the election, so there was very limited capacity to respond to that material. But there was a response and action was taken. Given that it was possible to deal with that very extreme set of circumstances that were very close to an election under existing provisions, can you just elaborate on why you think changes — —

Mr PEARCE — It tends to suggest that maybe the present section is adequate if it is interpreted in that way, but I think there is some basis to believe certainly that the Victorian Electoral Commission takes a more restrictive view and is not really prepared to act in circumstances like that. Maybe that is a problem with the view taken by the Victorian Electoral Commission.

That is why we said maybe the solution here is to encourage the commission to run a test case and get things sorted out properly. But we are here in the legislature and your ability and capacity to influence things is by legislating rather than by running test cases, so it does seem to us that perhaps the appropriate course is legislative amendment — but as I say, not one that would have a big impact and would move the line a long way but one which would move it a short but I think significant distance.

Mr SCOTT — I have a brief question; I know that time is running short. There are some participants in the electoral process who hold views that many people, in fact I think the vast majority of the community, would regard as almost nonsense — for instance that the Royal family head the world's drug cartels. There are participants in the electoral process who quite literally hold those views, who run material out at election time, including linking opponents to these sort of views. How, in your view, would the sort of legal changes you are suggesting impact on the participation of such persons in the electoral process?

Mr PEARCE — If you run one of those illustrations through the sort of three-stage test that I have suggested, you establish that maybe it is seriously misleading or deceptive — I suppose it is — to suggest that the Royal family runs an international drug cartel. Would it be likely to influence reasonable voters? I would have thought probably not. It will probably then fall at that hurdle and be forgotten and consigned to a footnote in electoral history.

If by some chance it got over that hurdle, the question then is whether the opponent had an opportunity to counter it, and that would then depend on the facts of that particular case. But it does seem to me that the sort of proposal that I am talking about probably would not have any impact on that sort of what you might call fringe activity in the electoral process, which I guess has always been there and always will be.

The CHAIR — Thank you, Mr Pearce, for your time. A transcript of today's evidence will be forwarded to you in about a fortnight's time.

Witness withdrew.