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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Ms J. Jacomb.

The CHAIR — Welcome to the public hearings of the Electoral Matters Committee. 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 advise you that any comments you make outside the hearing may not be accorded such privilege.

Jennifer, you have been given the guide to giving evidence at public hearings and you have read it?

Ms JACOMB — I have, Chair.

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

Ms JACOMB — My legal name is William Robert Jacomb, my business and home address is 52 Rhodes Street, St Albans 3021. I do not live in Kororoit, but I live in the next-door electorate.

The CHAIR — That is fine. Are you attending in a private capacity, or representing an organisation?

Ms JACOMB — Private capacity, sir.

The CHAIR — The evidence that you give today will be taken down and become public evidence in due course. I invite you now to make a verbal submission.

Ms JACOMB — Thank you, Chair. To be brief and concise, an easier way to do it is if I might request that learned committee members go to page 4 of my submission which is headed '1.0 Legal references'; it makes an easy and convenient way to address the core issues of the terms of reference.

First things first: in the terms of reference the issue was raised whether we could change defamation law to eliminate things like what happened in the Kororoit by-election. You will find from those references the short answer is no; they are all High Court references, except the two last ones.

The three High Court references establish that whilst the constitution, be it state or federal, does not ordain an explicit right to freedom of speech, because it ordains democratic institutions such as the Parliament, there is an implicit right to freedom of speech. This freedom of speech extends outside the issuing of a writ and can be exercised at any time, and provides a qualified privilege against defamation or any other action. You can do anything you like except say anything malicious. 'Malicious', for the purposes of those High Court decisions, is defined as saying something that you know to be untrue, and that is perhaps an excellent starting point for the submission. How can it be reckless? If person A comes up to me and says person B is a convicted murderer and I go and publish that in a political context, that is absolutely legal. It may be reckless — perhaps I should have gone to the court and checked the records — but the fact that I have not done that just means that I am reckless and I am fully protected under those three High Court decisions.

On the other hand, if person A comes up to me and says person B is a convicted murderer and I know for a fact that they are not, then I have been malicious and then you can do me. But here is your problem: if I do a scandal sheet, such as was done in the Kororoit by-election, saying something untrue, yes, you can go to court and seek an injunction but on the evidence currently in your possession you have to prove to the court that I knew it was malicious and was not being reckless. The short answer is that you most likely will not be able to do it, and in any event even if you did get that injunction, the damage would have been done. I would already have got my message out to the electorate. That is the first point I would make.

Changing the defamation laws or the electoral laws in that respect will not work. Not only that, it would violate the charter, in particular section 14 — freedom of thought, conscience, religion and belief; section 15 — freedom of expression; and section 18 — taking part in public life. Do we really want the Minister to have to provide a certification to the house that our Electoral Act is in defiance and does not comply with our own Charter of Human Rights and Responsibilities Act? The short answer is no.

The next item in the submission is section 1.2 on page 2 which deals with misleading or deceiving an elector in casting their vote. These references clearly establish, especially under Victorian law, that it is okay to mislead the elector in the formation of their intent to vote, and that was the whole crux of Kororoit and some of the other submissions you have heard or will hear.

Peter Batchelor went down in the Nunawading by-election because he created a dodgy how-to-vote card saying 'How to vote green'. Because that how-to-vote card was used in the polling place, in the ballot booth, by an elector casting their ballot — filling in the ballot paper — that tainted the election and caused the Nunawading by-election.

The same applied in the case of Muscat and the City of Brimbank, albeit in local government. Again it was an ill-conceived, improperly registered how-to-vote card, or at least in my mind improperly registered how-to-vote card, that tainted the election. And all throughout, based on the High Court decisions in Crichton-Browne. The offending act of misleading or attempting to mislead the elector into casting their vote occurs when they fill in the ballot paper, and that is weakness of the current legislation, unlike other states. We have to tighten that up so that it encompasses the issue of the formation of the intent to vote.

On the New South Wales court references, I have to be blunt: they are much wiser up there. If I mislead the elector in the formation of the intent to vote by making out I am a National Party-endorsed candidate when I am not, making out I am a mis-endorsed candidate or making a false representation, that is sufficient ground to overturn the election.

I am a card-carrying member of the ALP. I have been involved in running elections in both party work and as a campaign manager for 20-odd years. I have seen the ongoing increase in deployment of this technology. The sad part is that under the law as it stands it is absolutely legal. I do not contradict my state secretary in any way, shape, or form.

It is like the old maxim: how do you cook a frog? If you just get a pot of hot water and you drop the frog in there, the frog jumps straight out. The way you boil a frog is you set the pot on the stove, you drop the frog in and you gently turn up the temperature. That is what I have been seeing with what I call scandal sheets. In the ALP we have a much more profane term for them, and that is the professional term for them, and I am tired of it. It is a direct, fundamental attack on the democratic process.

It is bad enough that 20 per cent of the electors turn up to the polling place, based on AEC figures, not having even worked out which party they are going to vote for. How can we really hear the people if we allow documents like what went out in Kororoit to misinform and mislead the elector?

You may have noticed that at my request the executive officer of the committee handed out the VEC report. I draw your attention to the table which is about four sheets in which indicates results at a glance. You will note that on the primaries Mr Twentyman scored 20.39 per cent of the primary; the Liberal, Jenny Matic, scored 21.03 per cent of the primary; and Marlene Kairouz scored 48.50 per cent. That is consistent, even with the by-election swing. We did not need to do it but we did it anyway, and if you look at the two-party preferred, we won comfortably.

What is to stop any political party — Liberal, Labor or Greens — doing it in a marginal? At the end of the day government is formed in the marginals; it is not formed in the safe seats, and we did it in the safe one. My branch secretary told you today — because I heard the remarks from the committee — that he would do it again; and to be fair to him, he is absolutely right. The law, as it stands, permits it.

At page 3 of my submission section 1.3 refers to an English decision and a local government decision but it is directly on point because it quotes the relevant authorities. We give returning officers the power to arrest without warrant and other things, supposedly to run a clean election. The reality is that that power is discretionary. It needs to become mandatory. I have seen the power not exercised at all, and all those candidates want is a fair fight, and that is what the electorate wants: a clean fight. We do not need things like the scandal sheet; we do not need dodgy things on election day. But if the umpire is not obliged to enforce the rules and the umpire is seen — certainly by the act and the people — as the returning officer, it makes it a little difficult to have faith in the democratic process, does it not?

Section 1.4 is important. In both South Australia, in Mr Tully's case, and again in the Municipal Electoral Tribunal it was shown that if I wish to overturn an election result, just because I have committed an offence does not invalidate the result. What I have to demonstrate is the widespread nature of the offence and the gravity of the offence must be such that I have tainted the election result. I will come back to that thought in a minute because it is important.

Finally, section 1.5 refers to a grey area, which we all know anyway — an unreported judgement, which I also refer to at page 23. One of the mistakes of most appeals to the Court of Disputed Returns or the MET is the assumption that candidates are expected to behave with honour and integrity; as we know, they do not.

I have seen this technology developing, and it works. It is just getting more and more rampant. What we have to do is reduce the utility of the technology. Let me give you an example of how dangerous it is. If I wanted to roll a Labor candidate in a marginal, do you know how I would do it? Two days before polling day, on the Thursday, I would choose the polling places that were schools and create a scandal sheet which said the ALP was going to bring in mandatory gay and lifestyle sensitivity training for all secondary and primary school students. I would have it addressed to the parent; I would have my boys and girls hand it out to the kids as they left school to give to the parents. The reaction from the parents — I have done my own polling on this — would be to go absolutely feral. Yet, to the best of my knowledge, the party has no such policy; but my having done that would be no ground to overturn the election result.

Furthermore, what I could do on election day is put up a banner saying, 'Say no to gay lifestyle sensitivity training for our kids. Vote 1 Labor'. You might, and note that I use the word 'might', be able to get an injunction from the Supreme Court — I have informally checked with the prothonotary — but it is most likely that if you did get the injunction, you would have to convince the Supreme Court judge that it should be done ex parte — that is, without the other party present. You might get it by 1 o'clock. You might get it served by 2 o'clock and get the banner torn down by that time, but by then 80 per cent of the punters have cast their vote.

What if I wanted to kill off a Liberal in a marginal? That is easily done as well. All I have to do is create a scandal sheet and disseminate it in the week beforehand saying how the Liberal Party was going to bring in a $1000 a year poll tax to pay for infrastructure. Based on the experience with Kennett — absolutely believable. I have no evidence to the contrary, that the Liberal Party is not doing it, so I may be being reckless, but I am not being malicious, and that is the point. Hand it out, and then on polling day put up a banner saying 'Say no to the poll tax. Vote 1 Labor'. It would be devastating. Of course the question for the committee is: any electoral material needs to be authorised by right; what authorisation would you put on the scandal sheets? Greens every time, because that is one of the weaknesses, and there is nothing we can do about it. Yes, I have to put an 'authorised' on it, but there is no mechanism to make sure I am telling the truth. On one occasion I had to check out a scandal sheet and check the address of the authorised person. It turned out it was a drug addict who did not even know his name had been plucked from the electoral roll to put on it.

What I keep coming back to is we have got to get rid of the utility of the mechanism. At the moment if you spend money on scandal sheets in a marginal, it is the best money you will ever spend on trying to get yourself elected. How do we do it? Easy. There will be talk about test cases and all that, but at the end of the day, based on my reading of the legislation in test cases, if we modify the existing legislation to make doing a scandal sheets, if it taints the election, grounds to overturn the election, that will reduce the utility, because why would you spend the money on a scandal sheet if it does not give you what you want? I cannot remember the exact figure, but I think last time I heard the figure for doing a state election it was about 75 grand to do an election campaign. If you keep doing scandal sheets, you are just bleeding yourself of money. It is going to get you nowhere.

I have made some specific recommendations. No doubt I have upset parliamentary counsel, but I am a great believer that if you cannot suggest a solution, keep your mouth shut. What I recommend to the committee, in particular the Greens and the Liberals, is take my suggestions, have them tweaked and introduce them as a private members bill in the upper house, because I am passionate. I am loyal to my party, but I am also loyal to my state and I am loyal to my nation, and deliberately misleading the electors is a direct attack on the democratic process.

I have almost finished. I have given you the examples of how you could misuse the technology to taint an election result. Let us talk about the remedies; a couple of key points. One is that, unlike the Local Government Act, if you go to the Court of Disputed Returns you are not allowed to have a lawyer except by mutual agreement between the parties. But as the committee has no doubt picked out today from the various submissions, the law is very complicated. The very law is obscure. I think the act should be amended to permit that if you want legal representation, you should get it, because remember this: the VEC will always have legal representation. The way they do that is by appointing as their representative an internal employee who just happens to have a practising certificate. I have had that done to me in other jurisdictions.

The second thing I would encourage is that we should provide public funding for it. I am a computer engineer; I have a service drive. It is a mission-critical tool for my business. If that service drive goes down, it does not matter: I will find the money to fix it. It is the overhead of doing business. Making sure that the election process is seen as clean and aboveboard and not tainted is an overhead of a democracy. As Winston Churchill said, democracy is the worst form of government we have got; it is just that all the other ones we have tried are worse. People need to have faith in it. This learned committee has done inquiries into voter participation. I respectfully submit that perhaps a lack of faith in the outcomes of the election may be a part of the reason why voter participation has been patchy on occasion. So we should do that.

The next item of trade is we cannot be prescriptive in what will taint the election and what will not taint the election. That is what a judge is for; that is what the lawyers are for. The safeguard we have here against the abuser going to the Court of Disputed Returns and having his grounds misleading the electorate in the formation of their intent to vote I think is rule 20.3 of the Supreme Court that a proceeding is vexatious, frivolous or otherwise an abuse of process.

Trust me, the VEC will knock you out; the other side will knock you out. If, typically, based on the normal returns for the electorate, say, party A gets 10 per cent and party B gets 40 per cent and a scandal sheet goes out so party A only gets 5 per cent, yes, party A has been ripped off, but it still does not materially change the election result. So it is open to any party or the court itself to use that particular rule of the Supreme Court rules to say, 'No, stop; we are not going to spend any more public money on this, because unless you can demonstrate that the tainting was such that the overall result is in question, we are not going to waste our time'. The recommended solutions and that particular court rule mean you are not going to have people wasting the public purse on frivolous actions. They will just do a '20.3, strike out application'.

One last thing is an example I would respectfully like permission to table in the committee, only because I came across it today walking to the committee. It is a very primitive scandal sheet but it is one being handed out, of all places, outside the Australian Electoral Commission. It says:

> What can you do to embarrass the Victorian government into holding a royal commission into corruption in this state?

I am sure we all look at this as contemptible and pathetic, but that is just a simple example of what can be done. Imagine if they had someone to really write it correctly and make it a really punchy scandal sheet. At the end of the day voters should be informed, not misled. On that basis I hereby rest my submission.

The CHAIR — Thank you, Jennifer.

Mr O'BRIEN — We have been focusing in this inquiry not on the unauthorised scandal sheet, because I think for many reasons that tends to be not quite self-regulating but the risk involved in it in terms of any political party that would be associated with it would be severe, and reference was made earlier to the federal seat of Lindsay at the last federal election. That was a very public example of what happens when people put out unauthorised material. We have been focused very much on authorised material which can be misleading to voters although not misleading in terms of how they mark their ballot paper. How would you draw the line between legitimate political debate, legitimate argy-bargy: 'The Liberals are going to sack public servants, Labor is going to hike your taxes and do X, Y, Z'? Where do you draw the line between political debate that is robust and having a misleading or deceptive conduct provision which will see every single leaflet contested in a court?

Ms JACOMB — My suggestions do not result in a second outcome. I am a great believer that free speech is exactly that: it is either free or it is not. When we create the link that binds one individual, we forge the chain that enslaves all individuals. No, my solution is a little bit different. The other thing is — I mean no disrespect to the learned committee member — I would point out that all 'authorised material' means is that somebody has put at the bottom of the paper 'authorised by'. Anyone can do that, and you can put any authorisation you like, whether it is truthful or not.

Mr O'BRIEN — But by definition if you put down a false authorisation, it is not authorised.

Ms JACOMB — It depends on your definition. In terms of the act it is, because what the act requires is that at the bottom of the form or the leaflet it says 'authorised by'. In terms of the act, unauthorised material is material which does not have authorisation, whether it is truthful or not. The drawing of the line should be done

by a court of law, by a judge with the assistance of the lawyers in arriving at the truth. It will only ever apply in a marginal and will be a case of people adducing evidence — what was truth, what were lies — and leaving it up to the judge to decide whether it was sufficient to taint the election.

One of the inherent safeguards, if you look at the case law, is that judges are very loath to overturn election results. They will only ever do it if the evidence is overwhelming. So by doing it and remitting the matter to the Court of Disputed Returns we have competent lawyers who understand the relevant case law, be it the lawyers assisting the judge or the judge themselves. They can look at the evidence and come to the decision, because I cannot predict in a future election what material will be circulated and what material will not be circulated. I cannot predict what the impact will be on a given electorate. I think the real solution is to eliminate the utility of scandal sheets, be it the unofficial ones you were referring to or the official ones by the ALP in Kororoit. The real issue is to provide a mechanism.

You go down to the Municipal Electoral Tribunal and time and time again the magistrate will go to the applicant: 'What do you want, Mr Smith?'. They will stand up and go, 'I want democracy, I want justice'. He smiles at them. The correct answer is what you want or what you can have is what the act allows, which is certain candidates declared elected, declared unelected; certain candidates declared unelected, declared elected; fresh elections called; and memory escapes me on the fourth remedy.

The other point I forgot to make is offences. You can make as many offences as you like but no candidate is going to put their name to a scandal sheet. Even if they did, at the moment with the current fines, 300 penalty units — they get $93 000 a year as an MP — that is the best return on an investment I've ever seen.

So I come back to answering your question by saying: leave it up to the courts to decide. If it is a frivolous action, have no doubt they will ditch it, but if it is a substantive matter, the courts will examine it properly, and what we end up with is an election result that we can all feel comfortable with. Either candidate A is confirmed as being elected or we say, 'No, this is so scrambled we have to redo it and get it right'. You only do it because it works. If it no longer works, why would you spend your money on it?

Ms BROAD — You have made a reference at 3.3 of your submission to requiring the returning officer to uphold the law as a mandatory responsibility, not a discretionary responsibility. This committee has previously had occasion to discuss issues around, for example, the non-enforcement of the obligation to be on the electoral roll, which many people are not aware is not currently enforced. Can you elaborate on exactly what you are referring to there?

Ms JACOMB — Absolutely. I was actually having a conversation with someone on this matter last night. It comes directly out of the Balogh judgement in the Municipal Electoral Tribunal. From memory it is page 20. On my documentation it starts off at pages 67 to 72. It was a finding based on authorities dating back to the last century that unless the wording of the act is clear that the word is 'must' rather than 'may', the returning staff have no obligation; it is completely discretionary. That is why I recommend under that section you referred to that we need to incorporate that into the act, because at the moment it is completely discretionary.

I think the intent of the Parliament was to the contrary, but the way it has been interpreted by the courts, which is now binding unless the Parliament amends the legislation, makes it discretionary.

Ms BROAD — Can I just clarify; pages 67 to 72 are talking about — —

Ms JACOMB — Let me direct you to the relevant line. Go to page 68. Line 4, towards the end of it, says:

> Quite clearly the wording of section 17 of schedule 2 creates doubt and ambiguity. I would suggest that the relevant provisions of the act touching upon the duties and powers of a returning officer in respect of offences under the act, be clarified.

In the case of that text, schedule 2, section 17 — it is actually 17C of the Local Government Act which states that a returning officer may arrest without warrant any person reasonably suspected of offending the act — means engaging in conduct which attracts penalty units under the act.

The other thing I want to say is that the remarks I make here regarding the Electoral Act also apply to the Local Government Act. I know that is outside the terms of reference but you might wish to bear that in mind for the future in case you wish to initiate your own inquiry into these sorts of issues for local government.

Is there anything else I can assist the learned committee member with? I hang around lawyers too much, I know.

Ms BROAD — Thank you.

The CHAIR — Jennifer, thank you very much for that. You will receive a copy of the transcripts in about 14 days time.

Ms JACOMB — I thank members of the learned committee for permitting me the opportunity to address them.

Witness withdrew.