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 H. Whitton, ANZSOG Institute of Governance, University of Canberra.

The CHAIR — I welcome Mr Whitton via teleconference. 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 you that any comments you make outside the hearing may not be afforded such privilege. Mr Whitton, have you received a copy of the guide to giving evidence at public hearings?

Mr WHITTON — I have indeed.

The CHAIR — I ask you to state your full name and business address.

Mr WHITTON — My name is Howard Keith Whitton. My address is 35 Balmerino Drive, Carina, Queensland.

The CHAIR — Mr Whitton, are you appearing in a private capacity or representing an organisation?

Mr WHITTON — I am in some sense representing the National Institute of Governance at the University of Canberra.

The CHAIR — What is your position in that organisation?

Mr WHITTON — I am a Visiting Fellow.

The CHAIR — I now invite you to make a verbal submission.

Mr WHITTON — My general focus in terms of this committee's terms of reference has been on the efficacy of codes of conduct in regulating the conduct of candidates for election to public office of one kind or another. To that extent it is a fairly narrow selection of concerns.

My understanding was that I would today address some of the fundamental issues to do with codes of conduct as such and respond to the first questions from members of the committee. And we might then have a further discussion and indeed I might build a more detailed response into the written submission which we are currently preparing in the Institute.

So if that is a sensible understanding of the way of proceeding, then I might make some general comments about codes. Is that acceptable?

The CHAIR — That is fine.

Mr WHITTON — I hope you have received very recently the short document called "Attachment 1" and the diagram that is part of the attachment which sets out a typology of codes of conduct — from the secretariat, yes?

The CHAIR — Yes, we have.

Mr WHITTON — That is in a nutshell my summary of how codes of conduct are best understood operating in a democratic society such as Australia. Much of the European and American literature relating to codes of conduct is really talking about a different kind of instrument or a different kind of institution and is often misleading or not very sensible when applied in an Australian context.

But broadly it is possible to think in terms of codes of conduct in terms of a matrix of styles as shown in the diagram. The matrix is essentially on the vertical parameter a continuum between general principles and specific rules. And in terms of the form of the codes of conduct, we can think in terms of disciplinary codes at one extreme and aspirational codes at another.

In terms of a quick distinction between the two types, I make a distinction between what the trade calls 'Ten Commandments' codes, which are high-level, abstract statements, often prohibitions of the 'Thou shalt not' kind at the one extreme and the 'Rotary Club' codes, as they are called in the ethics trade where you have similarly high level abstractions of general principles of the 'Thou shalt' kind, usually aimed at community service, acting in the public interest, or being a good citizen, or whatever.

In recent years I think we have seen two things: the distinction of codes of ethics from codes of conduct on the one hand, and a recognition of the distinction that is possible between Justinian codes and Rotary Club codes, but at the same time in relation to both of those a preparedness to combine them in a way that gives, a new kind of approach.

It is this kind of approach in fact which the Queensland government legislated for in the Public Sector Ethics Act 1994 whereby general principles are stated — mandated in fact in an act of Parliament — which then requires individual agencies to develop, as necessary, specific codes of conduct for specific functions within the organisation, recognising that what police officers do is very different from what schoolteachers do and nurses or doctors and so forth do, and that the ethics challenges for those functions or roles will require specific guidance reflecting their different responsibilities.

So we are seeing a good deal more clarity, I think, now about the applicability of regulations or regulatory systems to make the conduct of citizens or particular classes of public officials more predictable, more reliable and more ethical, and that includes more fair, more accountable, more transparent and so forth. To that extent then it is reasonable to say that much of the ethics literature written about how you get desirable standards of conduct amongst classes of officials, the literature after about 1990, is much more useful than anything written before 1990 where it tends to be a mishmash of desiderata. As I said earlier in the documents just for the purposes of illustration, it is possible to see public service disciplinary rules towards one end of the spectrum because they are reasonably specific and enforceable directly and to distinguish those from public service codes and values, such as those which have been enunciated by the Victorian public service in recent years.

By contrast, codes of conduct for parliamentarians tend still to be of the somewhat less developed kind, less specific, more focused on a combination of some quite specific prohibitions but in addition to very general statements of obligation. The problem with general statements, as I say in the attachment, the problem with aspirational general codes is that they cannot be enforced directly.

When you think about it, it is one thing to say in a code of conduct that the class of officials to which the code refers shall act in the public interest say, but what does that mean in practice? How do you frame any kind of regulatory or sanction-based approach to action after you have come to the conclusion that something has not acted in the public interest? There is a missing step somewhere that needs to be framed in terms of precise expectations of conduct.

So for that reason we are seeing a combination of general principles or "core values" sometimes rendered as general principles, combined with specific expectations of conduct. So we see codes of conduct saying officials will avoid conflicts of interest, and then later in the document or in a subordinate document you will find the rule that says "conflicts of interest" mean X, Y, and Z, and, 'Here is what you do when you find you have got one or when someone alleges that you have got one'. So we are seeing a good deal of reasonably rational explanation of what the standard is, what it is based on, what is expected in terms of conduct, or what the consequences are if that expectation is not met.

I might stop at that point by way of general introduction to ask if there are any questions or comments that members of the committee might like to ask.

Mr O'BRIEN — Just briefly, Mr Whitton, thank you for your submission. I appreciate that. In relation to a code of conduct, given that we are talking about political material that is often released in the context of an election campaign, can you see that there would be any significant penalties that could or should attach to a breach of such a code, particularly in relation to any alleged misleading of the electorate in material?

Mr WHITTON — That is indeed the $64 question, and it I think it generates necessarily a very complex answer. It depends what the misleading conduct is.

The preliminary remark I would like to make is that we are looking here at the class of persons who are either members of Parliament who are not Members because the Parliament has been prorogued prior to a actual election. Therefore, in most states — I have not been able to check Victoria specifically but in most states — Members in that capacity are in effect ordinary citizens until such time as the election result is declared. So there is a preliminary question of jurisdiction. How do you apply any sort of code other than by statutory requirement — a legal obligation — to ordinary citizens? The other class of persons of interest here are ordinary citizens who are seeking election for the first time, and the same question applies.

Penalties, as I say, depend logically on what the offence is, what the "misleading conduct" is. In some countries, for example in Ireland, there is a requirement that members of Parliament declare their prescribed assets and interests within six months of being elected. If they fail to do so, the penalty is automatic. The relevant act simply provides that they are disqualified from eligibility to be a member, and they are automatically excluded from the Parliament simply by failing to provide their assets declaration.

That is one kind of self-enforcing penalty which requires no discretion through a further process or judgement call, either of which is possibly open to politicisation by a party in control of the relevant parliamentary committee or whatever the mechanism is. Automatic sanctions are, I think, preferable in general terms.

The other kind of sanction which I think is often overlooked is the sanction available to the electorate. I was participating in a workshop for the OECD in Eastern Europe amongst new countries emerging out of Communism and coming to the EU system for the first time, and the concern of the delegates was the quality of parliamentary candidates. This is really a comment about the way in which the party ticket system works in the EU, but nevertheless, their concern was that there should be some independent statutory agency to vet the "quality", whatever that might mean, of the candidates presenting themselves for election.

There was an interesting [inaudible] on the part of the delegates from Western countries, and the US in particular; their response was, 'Why would you need such a mechanism? If you don't like the quality of a candidate presented, don't vote for them: the ultimate sanction'.

I think that is a relevant thing to bear in mind when it comes to Australia's electoral system where in the last days before voting day, it is possible that a candidate might present information — let's be neutral — to the electorate which another candidate finds unacceptable or damaging or alleges is dishonest or whatever. At that point you might consider some formal mechanism and an institution with powers to investigate and so forth, but the objection to that process is that it all takes too long. I have seen in some of the submissions to your inquiry, a number of expressions of concern about any process which would have a sanction of overturning an otherwise valid election result on the basis of some later action for misleading or deceptive conduct.

The self-enforcing code, I think, is the preferable mechanism, but it relies upon citizens taking enough notice of what is going on to form a view about whether unacceptable conduct has occurred, and as a result to impose the sanction of voting for someone else on election day. The problem with that approach generally, though, is that in our country, which has strong party dominance of politics, at the end of the day people generally vote for a party rather than a specific candidate. There are obviously exceptions to this, but the party is the focus. Individual infractions of a particular candidate tend to become irrelevant on voting day.

I recognise that is a long answer but I think it is not a simple question and it does need to be thought of in terms of those various classes of interests and interaction.

Mr O'BRIEN — No, you are quite right. Thank you very much for the answer.

Mr SCOTT — In terms of a code of conduct applying to candidates, you wrote the original code of conduct for electoral candidates in Queensland. Could you give some explanation to the committee about that code, what it encompassed and what were the enforcement mechanisms within that?

Mr WHITTON — Indeed. That was 2001. It was a project within the Premier's Department where I was working as a public servant at the time. The secretariat has circulated, or you may have otherwise seen, a link to a current code within the Queensland Local Government Act, I think. That is a development of the mechanism that I drafted in 2001, and I think it has a number of problems which I would want to address, as I have not been associated with that document.

What I did draft was the kind of self-enforcing code which I have been talking about, aimed at obtaining fairness and due process in the election process in the run-up to voting day, recognising that we are trying to control or regulate the conduct of private citizens in a competition for votes.

But the two objectives of the exercise were important and I think are important to your exercise now. They were to in a sense ensure that the electorate was put in a position of informed consent in relation to the candidates, that the candidate should not be able to go to the election without declaring, for example, the kinds of assets and interests that they are required to declare as soon as they are elected.

We thought it important from the point of view of informed consent that citizens should know who they are voting for, what their interests are and what their connections are. Secondly, the informed consent objective implies honesty on the part of candidates. That feeds directly into the question about deliberately misleading conduct, and that is the key to all that cluster of issues around how you regulate deliberately misleading conduct when you are faced with the time frame of the last few days before voting day in particular.

The other important objective was to ensure that the electoral process underpinned or enhanced public confidence in democratic institutions. The conviction was that if we get to a situation in which citizens think that elections are just a chariot race in which all is fair and any tactic is valid or acceptable, then it debases the nature of the democratic exercise. So we were concerned to add a little to what is already in place in terms of libel laws and defamation laws and qualifications for election and so forth — and anti-bribery laws and whatnot, which are already provided.

The code was essentially aiming at a self-enforcing mechanism whereby — and here is the key to it — candidates would put up their hands beforehand and say, 'The code has been promulgated by the Premier's department on behalf of the people of Queensland. It has had broad consultation. I endorse it, and I will comply with it voluntarily'. That then is intended to put pressure on other candidates to do likewise, because the electorate might otherwise ask, 'How come Candidate A has done it, but you are not prepared to?'.

What we are talking about here essentially is, crucially, two things: undertaking to declare assets and interests in the same terms as they would be required if the candidate were elected and undertaking to act honestly. We know there is a lot of difficulty about the philosophical question, 'What is truth?, and we may have some difficulty in defining truth in abstract terms, but we sure know what dishonesty looks like. The code is essentially about candidates voluntarily and publicly saying, 'I will comply in my conduct of my election campaign with these principles and objectives for the purposes of encouraging public confidence in the integrity of the electoral process, and I expect others to do likewise'. If they do not, it is for the electors to then impose the sanction of voting for someone else or putting them on notice in some public forum and asking them, 'Why haven't you complied given that the standards are minimal and reasonable?'.

Mr SCOTT — Just to follow up on that, was the enforcement mechanism essentially the sunlight principle that it was in the public domain, people had volunteered to comply with the code and it was up to the fourth estate, electors and other candidates to hold persons to account; is that correct?

Mr WHITTON — For the most part, yes. There was also some specific provision linking to the Queensland anticorruption legislation for the Criminal Justice Commission, as it then was, in terms of official misconduct or corrupt conduct, but primarily it was about *ex ante* controls on individuals' conduct in the run-up to voting day.

The CHAIR — Mr Whitton, thank you very much. We are out of time. You will receive a copy of the transcript in about a fortnight's time. Typing errors may be corrected but not matters of substance. Thank you very much again for your time.

Mr WHITTON — It was a pleasure.

Committee adjourned.