

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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Associate Professor K. Coghill.

The CHAIR — Welcome, Professor Coghill. 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 you make outside the hearing may not be afforded such privilege. Professor Coghill, I take it that you have read a copy of the guide to giving evidence?

Assoc. Prof. COGHILL — Yes, thank you.

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

Assoc. Prof. COGHILL — My full name is Kenneth Alastair Coghill. My business address is Monash University, 900 Dandenong Road, Caulfield East. I am a staff member in the Department of Management at Monash University; a member of the Accountability Round Table; have been a member of the Australian Labor Party continuously since 1971; and formerly represented the large part of what is now Kororoit.

The CHAIR — Are you here today with us in your private capacity or representing Monash University?

Assoc. Prof. COGHILL — No, I do not seek to represent Monash University. I am here as a private individual.

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

Assoc. Prof. COGHILL — Thank you very much. I have provided a written submission and I would like to speak to that. In particular in respect of the third dot point I have had the opportunity to look more closely at the provisions of the act, and I want to make a number of suggestions about how I think those provisions could be strengthened. As I understand the effect of the act at the moment, it really only applies to influencing a decision made at the time of casting a vote — in other words, in the polling booth — whereas the matters before the committee seem to me to relate to misleading, or attempts to influence rather, voters in deciding how they will later cast their vote in the polling booth. It seems to me that in those circumstances it is important that the legislation be strengthened to confirm that it applies to attempts to influence voters in deciding how they will cast their vote, rather than simply how they actually do cast their vote at the time of voting in the polling booth. That is the first and most important threshold strengthening I would see.

Complementing that, in my view there should be a provision making it clear that an intention to mislead a voter in that way is an offence, and in the same sense it should be an offence to recklessly publish misleading material which may have the effect of influencing how a voter decides to cast their vote. Those are the three suggestions I have so far as the effectiveness of the current provisions is concerned. But I think there are a number of other matters which ought to occur to ensure that the democratic system operates more effectively.

Before going on can I say that I have read the submission of Mr Julian Burnside, and I think he makes a very powerful case, a well-argued case, that there is no reason for treating information in the political arena any differently to that, let us say, caught by the Trade Practices Act. He makes the point that the courts are very experienced now in dealing with misleading and deceptive conduct falling within the Trade Practices Act, and I am persuaded by his argument that the courts could similarly deal with information in the political arena.

In order to do that it is really important that the Victorian Electoral Commission is both as independent and as well resourced as is necessary for it to execute the powers under the act. So it strikes me that the first point should be that the Victorian Electoral Commissioner should have the same sort of status as the Auditor-General — that is, as an independent officer of the Parliament responsible to the Parliament rather than to the executive. Going along with that, it is important that the electoral commission has the necessary resources. Accordingly, those are matters which should be through the appropriation to the Parliament rather than through the appropriation to any agency of the political executive. This may be something that the committee would prefer to refer to the Public Accounts and Estimates Committee but to me it is a really important issue that should be considered. There are some matters of public expenditure and other jurisdictions which are the subject of automatic appropriation. Perhaps this is an issue that could be considered in this case.

In other words, rather than there having to be an appropriation in each annual budget, there is an automatic provision in the legislation for the necessary funds to be appropriated directly to the electoral commission.

One of the really important things the commission should be doing is educating both citizens and political parties and candidates about the way in which the voting system operates and the rights and obligations of candidates and political parties who support candidates. One of the important functions would be to educate the political parties and each candidate as to what constitutes deceptive or misleading conduct and would therefore potentially place them in breach of the act were they to offend in that way.

In order to make that practicable it is really important that election material comes to the attention of the Victorian Electoral Commission at the earliest possible opportunity. With the sort of information technology we have in Victoria there would not be a candidate or a political party or a political organisation incapable of providing that material directly by email to the electoral commission at the time of its first publication. That is one of the things that I propose. When it comes to enforcement, as I have indicated, the VEC should have the necessary resources to investigate and prosecute offences or apparent offences that it finds.

The really important thing then becomes the penalties. In my submission I have outlined penalties which I believe should be available to the court, not necessarily to be applied but available to the court, so that in extreme circumstances where a political party or a candidate has manipulated the result to the extent of undermining the will of the electors, then it should be possible to void the election of the candidate who has benefited from that, or the candidate of the political party which has benefited from that. It strikes me that with a package of reforms such as I have proposed it would be possible to have the political system operating with greater integrity and the public able to have much greater confidence in its operation. That, in its sum, is my submission.

The CHAIR — Thank you, Professor Coghill.

Mr DAVIS — I have a number of questions. Firstly, going to your oral submission and your commentary on the Burnside submission, I am a little intrigued, in a sense, that you made the comment you did. Perhaps you can clarify. It seems to me that Mr Burnside was arguing a case that in some way would limit opinion being expressed. It seems that he was arguing a case, in his submission, that there is empirical wisdom in a particular position being held and no other argument should be entertained. I just wonder how it is that candidates at an election should be compelled to comply with this unitary view of the world.

Assoc. Prof. COGHILL — I do not read either Mr Burnside's comments or the operations of the Trade Practices Act as narrowly as that. I only have to look at any advertisement for any product out in the marketplace — for example, car manufacturers will express opinions as to the merits of their product. That is not held to be something which is in breach of the Trade Practices Act. In the same way, it strikes me that it is possible to distinguish and allow genuinely held and reasonably founded opinion.

Mr DAVIS — So who is judging the 'reasonably founded'?

Assoc. Prof. COGHILL — In the cases we are dealing with, the subject of this hearing, in the end those are matters best determined by the courts.

Mr DAVIS — There is a limited time, so I might move on. In your evidence — and you alluded to your revision of your own submission, and you particularly mentioned influencing the casting of a vote — I am just curious about developing the extent to which you mean by, and I go to your words 'any matter or thing printed, published or distributed intended to influence the casting of the votes of electors'. Before going to the issue of monitoring particularly I just want to understand what you mean by 'influencing the casting of votes'. There is the mechanical function of an actually deliberative vote in a polling place, then there is the formation of the view about how one will exercise their vote, and then there is the absorption of the ether during the political campaign, which also informs. I am not quite sure where you see that boundary about influencing the casting of a vote.

Assoc. Prof. COGHILL — Firstly, I would confine it to the period of the election — in other words, between the dissolution of the houses and the actual casting of the ballot — but within that period I would be including in it any material published by candidates or on behalf of candidates.

Mr DAVIS — Any material, including a press release?

Assoc. Prof. COGHILL — Potentially, yes.

Mr DAVIS — And then that leads into monitoring, so I am assuming that you mean that the VEC should be monitoring press releases and articles submitted to newspapers or television grabs or radio interviews. I am not quite sure how far you have in mind.

Assoc. Prof. COGHILL — The first point I would make is that in as far as I am referring to material published by candidates or published on behalf of candidates, because of the information technology that is available to us now it is a very simple matter for that to be — —

Mr DAVIS — Can I just clarify ‘published’ not meaning ‘broadcast by news media’?

Assoc. Prof. COGHILL — No, I do not have in mind, for example, if you were interviewed by Neil Mitchell and that type of material, but certainly material which was prepared and published by you on your behalf or in support of you as a candidate.

Mr DAVIS — So if I had prepared a media release and submitted it to my local newspaper and that was republished by the newspaper — you are not referring to that. But what if I circulated that by general mail to my constituents?

Assoc. Prof. COGHILL — You would be publishing it to your constituents.

Mr DAVIS — But not if it was in the newspaper?

Assoc. Prof. COGHILL — In both cases you would be publishing it.

Mr DAVIS — It is a very large task that you are asking the electoral commission to take on.

Assoc. Prof. COGHILL — It is capable of being highly automated with those sorts of information technologies that are now available.

Mr DAVIS — But who is monitoring? I mean, machines do not monitor.

Assoc. Prof. COGHILL — No, but the receipt of it is a very simple electronic matter now, and it may well require some additional staff to those currently available to the electoral commission, but what I am asserting is that the integrity of the political system is far more important than issues about a few additional people being employed for the period of an election.

Mr SCOTT — The penalties that you outline relate to the capacity for people to hold office or to stand for office again; would you perceive there being any regulation therefore of third parties? Because if political speech is being circumscribed by a regulatory system which envisages such extreme penalties, what instantly strikes up in my mind is that the attack-ad style of politics would shift immediately to third parties who are not directly standing candidates for public office. So is the sort of regulatory regime that you are envisaging extending itself to parties beyond candidates and registered political parties?

Assoc. Prof. COGHILL — That is not something I have addressed in the submission, but I think it is entirely reasonable and proper that attempts to enhance the integrity of the political system affect all of the players, not just those who happen to be candidates or political parties that happen to be endorsing or supporting candidates. So, yes, there should be provisions which bind all of the actors.

Mr SCOTT — And when you say all of the actors, would you make exemptions for the media in that? And if so, how would that be defined?

Assoc. Prof. COGHILL — So far as the media is concerned I think there is a really serious problem in societies like ours of the media sensationalising issues, where the media has the effect of undermining the democratic system. So that whilst I have not turned my mind to the detail of exactly how this regime might apply to the media, I think it is really important that they accept and demonstrate a responsibility for the defence and enhancement of the democratic system.

Mr O'BRIEN — Dr Coghill, I am interested in your support for Mr Burnside's submission, and I am just wondering how you would deal with a government which goes to an election promising there will be no tolls on a particular road that it is proposing to build, gets elected on that platform and then after the election changes its mind and says there will be tolls. Should those candidates along the corridor affected by the road be disqualified? Should by-elections be held? Should the entire government be tossed out? Should they all be put in jail? What would be your response to that?

My second question is: given that Mr Burnside's view actually goes further than just during an election period and that says this should be potentially a criminal offence that should operate at all times, if we were to adopt that view and perhaps make it retrospective, and given that Mr Burnside says that telling only part of the truth is a notorious way of misleading the unwary, if we were to pass through all of the speeches that you gave between 1979 and 1996, would we find anywhere that you are guilty of only telling part of the truth, and are you prepared to be judged according to that?

Assoc. Prof. COGHILL — That is a very interesting prospect. But to come to your central points, I am confining my comments to the election period; I am not having regard to what might or might not apply between electoral periods. So I can leave that one aside. As to the matters which are put during election campaigns, I am not sure that a simple variation between something that was foreshadowed — or promised, or pledged or whatever the term might be — in an election campaign and the eventual actions in government is something that should be automatically seen as caught by the sorts of provisions that I am talking about.

Mr DAVIS — So you would distinguish between core promises and other promises?

Assoc. Prof. COGHILL — I would not put it in those terms. But I do think that there is — —

Ms BROAD — The never, ever GST.

Mr O'BRIEN — Yes, but he had an election before he brought that in.

Assoc. Prof. COGHILL — I do think that there is a genuine issue to be addressed in terms of changed circumstances, whether that be GST, water pipelines or anything else. I think that it is important that the law, however it is to operate, accommodate realistically assessed changed circumstances. What does worry me is where there is evidence before a candidate or a political party that something should or should not occur — in other words, factual information which should contribute to policy — which is misused or misrepresented in the determination of policy announced at an election. I think that there is a serious problem there, which again goes to the heart of the legitimacy of the political system and people's confidence in it.

Mr O'BRIEN — Let us take parties out of it. Governments and oppositions will always approach the same issue from different points of view. Oppositions will make things out to be worse than some might say they are; governments will always make things out to be better than some might say they are. Those are differences of opinion.

Assoc. Prof. COGHILL — And differences of interpretation of agreed facts.

Mr O'BRIEN — That is right, but sometimes even the facts are not agreed. I am just interested in how you can make justiciable what essentially some people would put down to differences of opinion. You could take an issue like the building of a toll-free road, which is a hip-pocket nerve issue for many people and will directly impact how they choose to vote, and yet you can walk away from that after the election having secured those votes and say, 'Actually we have changed our mind'. Or perhaps the truth may be they never had any intention in the first place of honouring that promise; we do not know. But if this is about keeping politicians honest and accountable, I do not see how you can say 'There has got to be provision for changed circumstances', but you are prepared to see people into court battling over what are differences of opinion.

Assoc. Prof. COGHILL — I think that the changed circumstances are a different matter in that you can look at what the available facts were, let us say in this case during the election period, and it is then possible to demonstrate that those facts or the further events which unfolded have changed the circumstances and that that is a sound basis for a change of policy. I do not have a problem about that.

Mr O'BRIEN — As an adjunct, in circumstances where a decision to reverse a promise or not honour a promise is being impugned would you therefore think that overrides cabinet confidentiality and commercial confidentiality so that an opposition party or anyone should be able to get access to the documents the government had in its possession when it originally made the promise and then when it subsequently broke that promise to determine whether the promise was ever genuinely held and whether there are actually changed circumstances or just a change of mind?

Assoc. Prof. COGHILL — Matters forming the basis for policy decisions should always be public in my view. I do not accept that there are legitimate grounds of commercial in confidence and, from my experience as cabinet secretary for six and a half years, nor do I think that it is necessary to keep the vast bulk of material coming before cabinet secret.

Ms BROAD — On the matter of changed circumstances I guess another set of changed circumstances that we can all recall would be those where the elected government argued that it was necessary to bring in tolls on a pre-existing, publicly funded freeway, being the Tullamarine Freeway, which was a source of some concern to people living in the western suburbs.

Can I take you back to monitoring? In a former life I had a good deal to do with the submission of material for broadcast for television advertising and the very close scrutiny applied before material was submitted and before it went to air around researching the source of facts and argument contained in advertising and the very large amount of resources that are devoted to that form of election material because of the very onerous requirements and the high costs involved in preparing those materials, which means that political parties do not want to find themselves in a situation where an advertisement cannot go to air because it is found to not stand up to a challenge on facts contained within the advertisement. That is taken very seriously indeed; a lot of resources go into the research and providing supporting evidence in submitting advertising, and the more contentious the material, the more resources are devoted to making sure that it is going to withstand a challenge. If that sort of approach is going to be extended to all election material, then — follow on from an earlier line of questioning — that would be an issue not only for the electoral commission but for parties. For small parties and Independents that would be a very large obligation that they would be having to take on and find a way of providing those resources for.

Do you see any scope in what you are proposing for drawing a distinction between the type of election material at one end of the spectrum, such as advertising that is being broadcast on television, and at the other end of the spectrum, such as a letter that might be going out to a single elector in the candidate's area that they are standing for election in?

Assoc. Prof. COGHILL — It strikes me that the same principle needs to apply — that is, that the integrity of the political system depends on material seeking to influence votes being soundly based. Where there is an intention to mislead or reckless publication of material which has the potential to mislead, then that should be proscribed, whether it is coming to electors from a candidate's office and whether they are a sitting member or a simple candidate who is not a member of Parliament or whether it is something that has been published by the party and involving large resources, such as a television advertisement. It strikes me that the really important thing is the principle which should be defended. In my own experience as a member from 1979 till 1996 it really was not too difficult to ensure that the material that I was publishing was accurate, was not misleading and was not likely to be fraudulent in the claims that it made or the assertions that it made.

The CHAIR — Thank you, Dr Coghill. Transcripts of the evidence you have given today will be forwarded to you in 14 days time.

Assoc. Prof. COGHILL — Thank you.

Witness withdrew.