

ELECTORAL MATTERS COMMITTEE

Inquiry into the conduct of the 2006 Victorian state election and matters related thereto

Melbourne — 28 August 2007

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Dr K. Coghill, co-director, governance research unit, Monash University.

The CHAIR — Welcome, Dr Coghill. The committee is hearing evidence today on the inquiry into the conduct of the 2006 Victorian state election and matters related thereto. All evidence taken in 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. We also wish to advise witnesses that any comments you make outside the hearing may not be afforded such privilege. Have you read the guide to giving evidence at a public hearing pamphlet that the committee should have provided you?

Dr COGHILL — I have, thank you.

The CHAIR — Please state your full name and address.

Dr COGHILL — My name is Kenneth Alistair Coghill. My residential address is 60 Guildford Road, Surrey Hills, Victoria.

The CHAIR — Please state if you are attending in a private capacity or representing an organisation. If representing an organisation, what your position is in that organisation?

Dr COGHILL — I am an associate professor at Monash University, but in the nature of these things the presentation I make is on my own behalf.

The CHAIR — Your evidence will be taken down and become public evidence in due course. I now invite you to make a verbal submission. The committee will ask questions following your address.

Dr COGHILL — Thank you very much for the invitation to appear before the committee. I have been party to two submissions; one is a joint submission with Dr Joo-Cheong Tham of Melbourne University. He is absent in the United Kingdom at Cambridge University at the moment and that is why he is unable to be with us. The second submission is in my own right solely, and it supplements and complements the joint submission and makes a recommendation which Joo-Cheong Tham and I were not agreed upon, so it goes a little further that.

Can I firstly congratulate the government and the Parliament for establishing this inquiry because I think it is enormously important to take opportunities like this to review the operation of the electoral system, and in particular to see what can be learned from the last election, which can advance the quality of democracy which we have here in Victoria, and also to help set that in the national context so we become aware of strengths or limitations of commonwealth legislation which might interact with the operation of the Victorian legislation. In most respects the last election operated very smoothly so I do not have any concerns or comments about the way in which the Victorian Electoral Commission conducted the election itself or any matters of the technical operation of the electoral process. What I do have very severe concerns about is the potential for the distortion of the democratic process and the will of the people by a number of things which occur within and related to the political parties.

I want to refer particularly to the way in which funding is attracted to the political parties from non-government sources; the extent of the expenditure on election campaigning, and the distorting effect which that may have; and the potential for reforms to electoral funding — public funding of political parties is what I am referring to there. I also wish to comment on government advertising because that is an issue which both at a Victorian and commonwealth level has become a matter of extensive public comment and serious concern. What I am referring to there, of course, is the extent to which government advertising appears to occur especially in the pre-election period before the dissolution of the Parliament and the controversy about the nature and content of a lot of government advertising with the allegation that, in fact, it is intended more to serve the political interests of the government party rather than to provide public information.

The final issue on which I wish to comment is that of lobbying — in other words, the way in which governments may be lobbied either on behalf of a third party or, for that matter, directly on behalf of particular interests who are seeking some exercise of discretion by the government, by individual ministers or by the government as a whole.

Having made those brief introductory comments, I want to comment, firstly, on the disclosure of funding. The committee will be aware that there has been recent commonwealth legislation which has greatly increased the threshold above which disclosure of donations to political parties is required. In my view there is a general issue about donations from all sources, but I will dwell on that one first. It goes very much in the opposite direction to what I would regard as international better practice. I think the most recent example of developments

internationally is the recent Federal Accountability Act in Canada, which, rather than increasing the level of donations which are permitted, has dramatically reduced them. Not only is this issue of disclosure affected but the whole issue of the amount of money which can be received from donors has been dramatically changed. The effect of the Canadian legislation is that there can be no donations received by candidates or parties from what I would term corporate entities. Corporate entities in this case includes trade unions, so it is not just businesses. The reasons for that, I find very persuasive.

The reasons are fundamentally that the electoral process should be a matter for the people as citizens and should not be open to manipulation by organised interests, whether they happen to be businesses or they happen to be trade unions or any other particular organised interest. If those businesses want to compete for ideas in the media, that is a different matter, but if they are seeking to make donations to political parties, then in the end what motivation can a company in particular have other than to attempt to influence the political process in the interests of the corporation? It is the very nature of Corporations Law in Australia and elsewhere that corporations and their directors are required to act in the best interests of the corporation, not for some idealistic motive about promoting democracy or promoting a particular ideological viewpoint which the directors of the corporation as a whole may happen to share.

There are other weaknesses with the disclosure of funding in Australia which we have outlined in considerable detail in the submission so I will not go into it in great detail. Essentially, what we argue very strongly is that the disclosure regime must be comprehensive and must not allow loopholes through which corporations or individuals can make substantial donations which are to the benefit of political parties without those being disclosed and without them being open to public scrutiny.

A further point which I would see as an ideal would be that the disclosure would occur at the time through a public register rather than being held over for many months. Generally, that leads to the major donations not being disclosed until after an election. We have included in our submission a table showing the year-by-year levels of donations to political parties in recent years in Victoria. Not surprisingly, the largest level of donor income to political parties occurs in election years, and, presumably, occurs in the months preceding the election. The effect of that of course is that the public has no way of knowing the aggregate or the particular donations might have been received prior to an election. They can only have that information much later. It would be a very simple matter, given the technology which is now available, for donations to be appearing on a public register at the time of receipt. It would be a simple matter for the political parties to transmit that information to an independent authority, being the electoral commission, and/or for them to post it on their own website, if required to by legislation. There are a number of issues there relating to the disclosure of funding which we think are very important.

On the matter of the funding of elections: as to the amount of expenditure, we have again presented some figures which suggest there is a real departure from the democratic principle of equality in the way in which candidates are able to compete and present their views. If we simply confine our analysis to the major political parties, we can see that there are very large discrepancies in the amounts of expenditure by the major political parties. That variation clearly means there is not a level playing field in the capacity of the political parties to present their case to the public. Our recommendations are that it is appropriate that there be some capping on expenditure, the idea being to ensure that there is a much more level playing field for the political parties; but the beneficiary is not intended to be the political parties, the beneficiaries are intended to be the citizens of the state so that they have a good opportunity for equal presentation of views to them, in other words that they have a similar capacity to have information about the views, policies and management skills and what have you of each of the major political parties contending for their support.

The point which we make on page 33 in section 5 of my copy of our submission is about having a ban on contributions from entities having contracts or tendering for contracts with the Victorian government. This is a principle which applies in both Canada and the United States, and we think it is an extremely important one because it is fundamental to the integrity of the system that people making donations to political parties should not be doing so in the expectation of some sort of reward. If you look at the tables which we have presented, particularly tables 4 and 5, you will see a remarkable coincidence there between the donors and companies which could expect to have a benefit from a decision by government. That benefit might be in terms of a contract, it might be in telecommunications, it might be for construction projects or it might be for the letting of a gaming licence, for example.

In our view it is extremely dangerous for the political process to be open either to the reality or simply the perception that donations to political parties are being made in the expectation that there will be some benefit coming from it. That is all the more so when one thinks of the requirements under corporation laws for directors. Directors are required to act in the best interests of the corporation, so it is not in the best interests of corporation simply to promote democracy, except in a very abstract sense. Directors are going to be much more concerned with what are going to be the factors influencing the viability and the profitability of a particular corporation. So if a corporation is active in the construction industry and the state government of Victoria lets major contracts for construction, there has then to be some considerable concern if we see that the major donors to political parties, particularly the party in government, are seen to be companies involved in the construction industry.

Similarly, in our figures here, there is a very large donation being made by one of the gaming industry's major players and again one would have to ask, what would be the commercial interests of the company in making a donation like that. The gaming industry is not something which exists to promote democratic principles; that is not its reason for existing. Its reason for existing is to ensure that the gaming industry is operating profitably and that that particular company maintains its licence and is considered favourably when licence renewal comes up. In our view there are some very major concerns there which are reinforced by an examination of the actual donations made and contracts let by government over the last several years.

There is another issue which could be considered which goes beyond that and the recommendation our analysis and recommendations simply relates to contracts and tendering, but a similar principle arises with the exercise of discretion in issues such as land-use planning. There can be enormous profits made, or profits denied, according to the exercise of discretion by government ministers on planning decisions. Our concern could well be extended to suggest that no company or related entity which makes a donation, should be entitled to receive the benefit of a discretionary decision affecting land use or similar types of discretionary approvals.

If I can turn now to the issue of government advertising. In our submission we have noted that there are two different types of guidelines which have been put forward in Victoria. One is the guidelines issued by the government and the other is the better practice suggested by the Auditor-General. The advantage of the Auditor-General of course is that the Auditor-General is an independent officer of the Parliament, so that the Auditor-General's guidelines are the guidelines which, in his view, best serve the public interest and best serve the interests articulated by the Parliament and for which the Parliament exists. Our view is that the Auditor-General's guidelines should prevail because they have been developed primarily with the public interest in mind, whereas the government ones may well have been prepared with the public interest in mind, but the reality is that they are prepared with the interests of the government as a political entity, as well as responsible for public services, in mind.

I turn finally to the issue of lobbying, and I am sure the members of this committee would be as aware as any one, that Victoria does not presently have significant regulation of lobbying, whereas we have seen elsewhere in Australia that it can be a really serious problem, compromising the integrity of government. Most recently we have seen that in Western Australia. Our view is that it is really important that this area be regulated in a very simple manner. The very simple manner we have proposed is that there should be web sites for portfolios through which people wishing to lobby, can register the lobbying activity. We have deliberately gone away from the idea of registering lobbyists because we think that is bound up with almost insurmountable definitional problems at the edge. People who run lobbying businesses are fairly easy to define, but then there are those at the edge who might be involved in public relations and sometimes do a bit of lobbying where the definitional issues become really important, and what we really have concern about is the lobbying activity rather than who is working as a lobbyist.

Our proposal is that there be websites through which anyone conducting or intending to conduct lobbying should register their activity, but that registration should be immediately public. In other words, if one of us was to propose to lobby, let us say, the Attorney-General, we would register that on the Attorney-General's web site, it would immediately show there, and it would identify us as the lobbyist. Our view is that that would be a major advance on the situation in Victoria and would be a superior way of dealing with this lobbying, compared with models that occur elsewhere, which we have outlined in our submission.

There is one matter that we have given some more thought to since the submission was made. The submission refers to lobbying being representing the interests of a third party. On reflection, we do not believe it has to be limited to a third party; that it could certainly be lobbying on behalf of a third parties, but it could also include and catch lobbying by people directly on behalf of corporations, for example. To take a hypothetical example, it might

be a representative of BHP Billiton who was employed by BHP Billiton to lobby on behalf of BHP Billiton, in other words someone who is employed directly rather than representing third parties. Perhaps if I can leave my comments at that. I would be happy to elaborate on either matters in the submission or matters that I have raised; or matters which you may wish to ask about which I have not otherwise covered.

The CHAIR — You cite the New Zealand example, with respect to corporate donations. Has there been an increase in public funding to compensate for those?

Dr COGHILL — In New Zealand?

The CHAIR — Sorry, in Canada.

Dr COGHILL — In Canada, I am unaware of there being an increase associated with the latest reforms, but when the basic regime was introduced there was coincidentally the introduction of public funding and interestingly, the level of public funding which was introduced at that time, was slightly below the level of public funding which applied in Australia, even though Australian political parties also continue to receive private donations.

The CHAIR — Has there been an election subsequent to the introduction — that was in 2006, as I recall?

Dr COGHILL — The most recent reforms were 2006, but there was an election intervening between the original regime being introduced in Canada, and the present day. The original regime was initiated by Prime Minister Chrétien shortly before he left office.

The CHAIR — I would have thought it would have been imperative for there to be an increase in public funding, given the expensive nature of modern campaigning.

Dr COGHILL — To me it is interesting, but on the figures I have seen, it appears as if the level of expenditure in Canada may be significantly less than in Victoria. I have not done the analysis in any detail.

The CHAIR — Is that subsequent to the reforms?

Dr COGHILL — Yes. I do not have earlier figures but the implication of what I have read is that the level of expenditure since the Chrétien reforms is significantly less on a per-vote basis than the Australian level.

The CHAIR — I know you do not have them on you at the moment, but do you have anywhere figures to indicate how much the expenditure has actually gone down — decreased by?

Dr COGHILL — No, it is simply a matter that I have not investigated, so am sorry I cannot help you with that.

Ms CAMPBELL — My question goes to lobbying also. In your address and in your submission you concentrate primarily on the government. One is conscious around election times that governments can change and the more likely an opposition is to become the next government the lobbying increases, as does the political donation, I would suggest. I therefore ask whether you have any comment to make in relation to lobbying within an opposition.

Dr COGHILL — It is not something that I have given a lot of thought to. In principle, the lobbying of both government and opposition should be disclosed. That is the basic premise from which I would start. The fairly obvious difference is that the government has the capacity to actually take decisions and award contracts and the like. But in a pre-election atmosphere such as you have described it does make sense for there also to be disclosure of lobbying of non-government parties, particularly if there is an expectation that the non-government parties could win the election. That is not always predictable, of course.

Ms CAMPBELL — No. In jurisdictions where there are two houses and the government may not have an absolute majority in the upper house have you got any comment on donations to the opposition and minor parties in that regard?

Dr COGHILL — I think donations should be treated similarly, no matter what political party they are going to whether it is a government party, a non-government party, a minor party, even a party which is not yet

represented in Parliament but is contesting a forthcoming election. In all cases the donations should be subject to the same limits and the same disclosure requirements.

Ms CAMPBELL — In your address to us this morning you made the comment that each minister could have a website where lobbying activities could be immediately registered. Do you have any comment on how it would be done for an opposition party or a minor party, or if it is an individual member, an Independent's website? The other component to this question is: you concentrate on it being registered with the minister; what about also being registered with the company on its own website?

Dr COGHILL — To take the first point, for non-government parties and candidates I think the logical and practical thing would be for it to be on the party rather than on the individual member's website, except in the case where it is an Independent who is contesting a seat. I do not think I can add much to that.

Secondly, you asked whether it should be listed on the company's website. It is not something I had considered but I think it is a reasonable thing to do. The most important, though, is the portfolio website because that is where the discretionary decision is going to be made, and that is the decision which has democratic implications. What a company does, who a company lobbies and what have you is of interest, but it is of less democratic significance than the influence which might be exercised over a minister or attempted to be exercised over a minister or a political party.

Ms CAMPBELL — Just fleshing this lobbying out a little more, it seems to me there could be an argument put that no matter what provisions hang around identification of the lobbyists and the amount of money, in the end what is most relevant is the ethical framework of the individual MP. From my recollection there was not anything in your submission but I know you have done work in this regard. Would you like to make any comments on that? I have been around this place for over a decade and there has been precious little in regard to training and information sessions and independent advice on what is considered appropriate.

Dr COGHILL — I think what I should do is to make available to the committee a paper which I gave last week at the Australasian Study of Parliament Group annual conference, which dealt with exactly this issue by happy coincidence. My colleagues and I argued in that paper that it should be an obligation of the Parliament to provide training, advice and counselling for members on how to address ethical questions. The argument that we put was that the role of the Parliament would not be in suggesting exactly what ethical standards or principles should guide a member in particular cases but rather, equipping the member with the skills to identify ethical dilemmas, to analyse them and then to come to a decision when they were faced with some difficult dilemma. This is done in many other parliaments — many is an exaggeration; in an increasing number of Parliament elsewhere. Within Australia the best example is Queensland, which was really a consequence of the Fitzgerald royal commission where there had been a whole government and a number of ministers involved in quite corrupt activity. Some of them went to jail; some of them just escaped conviction. The consequence of that has been that the Queensland Parliament sees training in how to deal with ethical issues as a really central part of its induction program for new members of Parliament. Given the turnover which has occurred in the last 17 years or so in Queensland there is now quite a high proportion of Queensland MPs who have had that sort of training as part of their induction into the Parliament.

Ms CAMPBELL — Is it ongoing? For example, if you are a tradesperson or a medical person you have to keep your skills and training base current.

Dr COGHILL — It is ongoing in two senses, but it does not have that formal requirement that applies in a number of the professions. It is ongoing in the sense that in Queensland, in Canada both in the provinces and nationally, and in the UK there is a commissioner. They call it an ethics commissioner in Canada and a parliamentary standards commissioner in the UK. That person is there to provide advice at any time for a member of Parliament who may have some concern, and perhaps to run a seminar or something like that from time to time when some issue becomes topical. The argument that we put in our paper is that there should be a parliamentary standards commissioner or a similar office in each Parliament, and that that officer should have responsibility for training in how to deal with difficult issues at the time of induction. They should be available to provide counselling and advice to members throughout their parliamentary career — basically to provide counselling in particular cases.

The other issue which does arise, which you have touched on in your question, is whether this should be mandatory. In fact the New York State Assembly has asked one of their committees to prepare a regime for mandatory training in ethics for both members and staff of the New York State Assembly. They have only done that quite recently so there is no information available yet on what they might propose, but I certainly regard that as a very important initiative and really part of the continuing professionalism of political careers.

Ms CAMPBELL — Could I just end with a comment that I would ask you to take on notice? Could you have a think about whether, in the absence of such an independent person or body in Victoria, perhaps the Auditor-General might well have that very framework to do such training?

Dr COGHILL — Thanks.

Mr THOMPSON — Dr Coghill, the funding limitation of \$200, do you consider that a reasonable amount, balancing the significance of that quantum and the virtue of privacy of political view as well?

Dr COGHILL — I do not see any reason to vary that \$200. I think it is an amount of money which is significant — you would not pay that for your own meal if you went out on most occasions. In other words, it is not a very frequent level of expenditure, so that it is fairly easy to identify as something special and to provide the paper trail or the documentary trail relating to it.

Mr THOMPSON — Yes. In terms of lobbying activity about which there may be concern, do you have any more expansive examples of circumstances where the lobbying has been inappropriate? You allude briefly to the Western Australian experience but in Victoria or in any other Australian state?

Dr COGHILL — The thing that most worried me in Victoria was a comment by someone who has held quite senior office to the effect that — lobbying may not be quite the right word but that representations have been used to virtually intimidate, and I use that word quite advisedly, to intimidate people making political decisions, exercising political authority in Victoria, with the threat that if certain things were done or not done that there would be adverse front-page stories in the newspaper. To my mind that is a very, very worrying scenario if that in fact is going on.

Mr THOMPSON — Is that a recent example that you are alluding to?

Dr COGHILL — The indication to me is that this would have occurred within the last year.

Mr SCOTT — A couple of issues. Firstly, I understand time is short because there is a teleconference that must happen at 10 o'clock but what aspects of the regime of disclosure funding that you have outlined would you regard as being the responsibility of the Victorian Parliament and what aspects would you regard as being for the federal Parliament, because there is an interplay of two jurisdictions here?

Dr COGHILL — Yes. I think that this issue is so important that if the federal regime has changed in such a way as to weaken the system, that Victoria should be prepared to legislate alone, even if that had the unfortunate effect of breaking down the harmonisation of federal and state electoral law. To my mind, the integrity of the electoral process is much more important than the harmonisation of commonwealth and state legislation.

Mr SCOTT — Just to follow that point up because it is an interesting point, would you regard that as, in principle, applying potentially to other aspects of electoral processes as well that the upholding of clear principles is more important than the harmonisation — —

Dr COGHILL — I would put that as a general principle the integrity of the democratic system is much more important than the harmonisation of state and commonwealth law.

Mr SCOTT — Another issue that I want to raise is the issue around third parties, because I think that is a very interesting area of regulatory process relating to elections. I would not mind you fleshing out your definition of political expenditure. By way of an example, both business and unions at the moment are running campaigns on WorkChoices, or the policy formerly known as WorkChoices, but would you regard that as being caught by the provisions of political disclosure? It is clearly by both sides and it is meant to influence the political process that is under way at the moment.

Dr COGHILL — I think we can in fact take some comfort from the fact that in both of these cases the sources of funding are very open and very public. Those two examples are a little different to the type that we have canvassed in the submission because the funding does not flow to the political parties at all but the political benefit may. My starting point would be that there should be open disclosure of the ultimate sources of the funding for campaigns which seek to influence political decisions.

Mr SCOTT — There are a number of points you make which relate to contributions. I take it as a principle you would support the Canadian position — was it Canadian or New Zealand — where all corporations were excluded from providing political donations. Would that include third parties as we have just been discussing?

Dr COGHILL — Yes, it would.

Mr SCOTT — The other issue I wanted to raise is that in Australia there have been a number of legal rulings about freedom of political speech and expression that have limited the ability of government or parliaments to regulate these areas. What enforcement mechanisms would you foresee — something like an opt-in process that to require public funding you would need to adhere to certain rules, as a mechanism to address this issue? Or did you regard it as an issue that could be successfully dealt with by simple legislation and expect that legislation to withhold scrutiny of the courts?

Dr COGHILL — I am not quite following, I am sorry.

Mr SCOTT — My understanding is that the High Court has found freedom of political expression has limited the ability of parliaments, in decisions it has already made, to limit political expenditure and you are proposing limits on political expenditure. Therefore that is a significant issue to overcome in proposing any such limits. One mechanism that sort of occurred to me, that I have known in other jurisdictions, is that instead of outlawing of activity — I know this occurs in the US in terms of disclosure — if you accept political funding as a political party you have to adhere to certain conditions which allow that disclosure regime to be tougher than it would be if it was a simple blanket ban on types of political activity, which courts certainly in the US and in some cases in Australia have not allowed. I am just wanting you to tease that sort of issue out because you are getting to the nitty gritty of how you would seek to implement the sort of provisions that you have outlined.

The CHAIR — Dr Coghill, bear in mind that we are close to running out of time.

Mr SCOTT — Sorry, it is complex.

The CHAIR — We have a minute or two.

Dr COGHILL — I think there are real problems of having an opt-in, opt-out process such as the United States has got because we are already seeing it being used, manipulated, to circumvent disclosure and other matters in the United States. You are getting into an area of the law in which we are starting to speculate because we cannot know what the court might hold. But I think it is relatively easy to distinguish between restrictions on donations and restrictions on expression of opinion. My proposal is restrictions on donations, not on expression of opinion.

The CHAIR — Thank you, Dr Coghill, you will receive a copy of the transcript in the mail in about a fortnight. Typing errors may be corrected but not matters of substance.

Witness withdrew.