

ELECTORAL MATTERS COMMITTEE

Inquiry into the Impact of Social Media on Elections and Electoral Administration

Melbourne—Monday, 15 February 2021

(via videoconference)

MEMBERS

Mr Lee Tarlamis—Chair

Mrs Bev McArthur—Deputy Chair

Ms Lizzie Blandthorn

Mr Matthew Guy

Ms Katie Hall

Ms Wendy Lovell

Mr Andy Meddick

Mr Cesar Melhem

Mr Tim Quilty

Dr Tim Read

WITNESS

Mr Mick Sherry, Electoral Commissioner, Electoral Commission South Australia.

The CHAIR: I declare open the public hearing for the Electoral Matters Committee's Inquiry into the Impact of Social Media on Elections and Electoral Administration. I would like to begin this hearing by respectfully acknowledging the Aboriginal peoples, the traditional custodians of the various lands each of us is gathered on today, and paying my respects to their ancestors, elders and families. I particularly welcome any elders or community members who are here today to impart their knowledge of this issue to our committee or who are watching the broadcast of these proceedings.

I welcome Mick Sherry, Electoral Commissioner for South Australia. I am Lee Tarlamis, the Chair of the committee and a Member for South Eastern Metropolitan Region. The other members of the committee here today are Bev McArthur, Deputy Chair and a Member for Western Victoria; the Honourable Wendy Lovell, a Member for Northern Victoria; Cesar Melhem, a Member for Western Metropolitan; and Dr Tim Read, Member for Brunswick. We may be joined shortly by other members of the committee also.

All evidence taken by this committee is protected by parliamentary privilege; therefore you are protected against any action in Australia for what you may say here today. However, if you repeat the same things outside of this hearing, including on social media, those comments may not be protected by this privilege. All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check as soon as it is available. Verified transcripts, PowerPoint presentations and handouts will be placed on the committee's website as soon as possible. I now invite you to commence with an opening statement, introducing yourself and what you consider to be the key issues. To ensure enough time for discussion, please limit your opening statement to no more than 5 minutes.

Mr SHERRY: Thank you very much. Good morning, everyone. As mentioned, my name is Michael Sherry. I am the South Australian Electoral Commissioner. This is a statutory appointment which I have held since 2017. Prior to that I also held a statutory appointment with the Australian Electoral Commission, where I was the Australian Electoral Officer for the Northern Territory, responsible for all commonwealth electoral matters within the Northern Territory. I understand I have been asked to appear before the committee this morning to talk about South Australia's unique misleading advertising provisions, so I am open to taking any further questions.

The CHAIR: Thank you, Mr Sherry. I might kick things off by just talking to you about the laws in South Australia, and in particular asking: what are some of the difficulties the commission faces in administering these laws and are there any changes or improvements that you think could be made to enable them to operate more effectively?

Mr SHERRY: Sure. The legislation was enacted here in South Australia in 1985, and it has gone through a number of iterations to where it has landed at the current time. It talks in broad terms about:

A person who authorises, causes or permits the publication of an electoral advertisement ... is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Just unpacking that a little bit, the first challenge in administering the legislation is, I guess, meeting people's expectations. I highlighted the fact that there has to be a statement purporting to be a statement of fact; it cannot be an opinion. Now, that is the first point of issue. Particularly with a lot of candidates, if you like, who are not supported by a major party, if they feel aggrieved—there is some electoral advertising out there which is merely an opinion; this has to be a statement of fact. So we take a lot of time dealing with the complainants to explain that particular provision.

The next challenging part of administering this legislation is the wording where it talks about being inaccurate and misleading. Both those provisions have to prevail for us to be able to further investigate these particular matters. The major challenge, however, is meeting the expectations of the complainants who feel aggrieved by the fact there is alleged misleading advertising out in the public domain that potentially may be influencing the way people vote. Now, we understand that issue. However, for me, who is the determiner of this, I have to be satisfied that the electoral advertisement is inaccurate and misleading, and I take that responsibility particularly seriously so I need to make sure that I have all the available information at hand.

Now, if you can imagine, during an election day if there is alleged misleading advertising put out there at, say, 10 o'clock, people are actually voting in large volumes. So if we get a complaint about misleading advertising, again the complainant expects that it will be pulled down straightaway, but I just cannot do that. It relies on the complainant first of all providing to me all the information that they believe supports their claim that the advertisement is misleading. We have not got any sort of proactive policing powers. I do not send our electoral officials out policing the state, looking at electoral advertising. We just have not got the resources for that. So it relies on the complainant, first of all, making the complaint to us, but secondly, that they provide all the information to us so I can make an informed decision very, very quickly.

As is the case with I would say at least 90 per cent of our complaints, they do not provide all the necessary information to me. That causes me to have to go back to the complainant seeking further information, and there is of course a general time delay there because a lot of the complainants are heavily involved in the electoral polling day in particular and they have got other matters on, so they take a little while to get back to us. Then, more often than not, again I would expect with about 90 per cent of our complaints I have to go back and actually seek some further information from the person who put the electoral advertising out in the first place. So this goes backwards and forwards, and I highlighted this particular challenge on page 80 of my state election report following the 2018 South Australian state election and I used an anonymous case study. That matter took 10 days to resolve. Now, that was through no delay on the part of the electoral commission, but more so delays caused by both the complainant as well as the person who authorised the electoral advertisement gathering the necessary information back to me in order for me to feel comfortable to form the view if a matter was misleading or not. In answer to that question, though it has been a very broad answer, the main challenge is meeting expectations of the complainant in order to make a decision as quickly as possible.

The CHAIR: Thank you. The laws appear to be widely accepted by political parties in South Australia. Both major parties have had opportunities while they have been in government respectively to either remove or substantially change the laws and they have not. Do you believe that the laws have acted as a deterrent and have changed behaviour and have been successful in protecting or safeguarding against some of the more fanciful or outrageous statements by the sheer fact that they have actually been in place?

Mr SHERRY: Look, it is a really good question. Of course being a statutory officer, I do and I will administer the laws provided to me by Parliament. That said, I believe my role is to identify if there are any challenges, and I did so in my state election report, which was tabled in Parliament, that I just touched upon. However, I find that in a broad sense the legislation does prevent misleading advertising heavily influencing elections here in South Australia. But to a large extent I think that is based upon in particular the heads of the two major political parties. Because they have both held those respective positions for a long period of time, they understand that if they lodge a complaint with me they need to provide all the relevant information, and in turn, if I ask for a retraction they generally act upon it reasonably quickly. So in answer to your question, the legislation in my view, although it has its challenges, does work here in South Australia. But a large part of the reason for that is the understanding of the heads of the two major political parties of this legislation and what is required for me in order to make a determination.

Now, if I could just add, the background to my answer to you then is supported by the fact that the same provisions apply in the local government elections. Now, the recent local government periodic elections we had in 2018 involved 1400 candidates. Here in South Australia the candidates are not backed or supported by the major political parties. A lot of the candidates believe in freedom of speech and they quite often do not listen to me if I make a determination that electoral advertising authorised by them is misleading. They do not agree with having to pull it down, and there is a lot of correspondence backwards and forwards. In fact I have recently prosecuted a person from the 2018 local government elections for misleading advertising. So it is worth noting from the state's election perspective: it does work from a local government perspective; it is a lot more challenging.

The CHAIR: Thank you. I might call on the Deputy Chair, Mrs McArthur, to ask a question.

Mrs McARTHUR: So in light of what you have said, you are demonstrating that there is a sort of moral obligation on politicians or political aspirants, but particularly the two major parties, who appear, from your presentation, to have been responsible. But you are sort of demonstrating that the legislation actually is cumbersome and in fact does not really work; it is just that everybody is, you know, being responsible, or the two major parties are. So do we need these rules and regulations if in effect they cannot work effectively in a timely fashion?

Mr SHERRY: Look, just following my response previously that it does work in, I guess, somewhat of a clunky sense, it is really supported by some other provisions within the legislation, but this enables me, if I form a view that an advertisement is misleading and inaccurate, to ask for a withdrawal and a retraction. It is often that I do form that view that a particular matter is misleading and I do ask for a withdrawal and a retraction. And that is acted upon in virtually every case that goes to that extent. There are a couple of exceptions, as I mentioned before, with the local government elections which we have had to take through to prosecution, but there are also provisions within our South Australian legislation that if I make a determination that something is misleading and inaccurate and I ask a person who authorised it to withdraw and publish a retraction, if they refuse, I can go straight to the Supreme Court and the Supreme Court, if they are satisfied on the balance, or beyond a reasonable doubt I should say, they can also request a withdrawal and publish a retraction. Now, we have never had to use that provision before because generally once I make a decision, the respective person who authorised the material has acted upon that, so at least it provides me with some form of protection that if they do not listen to me, I can take some further action.

Now, the issue here is the timeliness of all of this, and as I mentioned in my earlier response, my main concern is polling day, 9 or 10 o'clock in the morning, a lot of people have voted and they might have certainly decided on their vote based on some potentially misleading advertising. The South Australian legislation also considers that in its reference to section 107, and I might just read it directly out to you:

An election may be declared void on the ground of misleading advertising but only if the Court of Disputed Returns is satisfied, on the balance of probabilities, that the result of the election was affected by that advertising.

Now, although that provision has been in legislation for many years, we have never had to call upon to utilise it, so in broad terms, in answer to your question, the legislation does work, it is clunky, but we have not had to test the situation where someone either declines to follow my request or in fact the Court of Disputed Returns.

Mrs McARTHUR: Can I just also ask: if you see what you think is misleading advertising, can you act unilaterally without receiving a complaint?

Mr SHERRY: Look, yes, we can. But it does not happen in reality because of the sheer volume of complaints, and it is not just misleading advertising during an election period, as you would appreciate. There are allegations of bribery and inducement. We have got size requirements here—authorisation requirements. We just have not got the resources to go out there and actively police all of this, so it does essentially rely on a complaint. That said, if I am sitting at home at night and I see a potential advertisement which I think could be misleading, nothing stops me going to the authoriser of the material and asking for further information. But in reality, that is not likely to happen.

The CHAIR: Thank you. I might go to Dr Read next.

Dr READ: Thanks, Chair. Mr Sherry, if I could ask: if Victoria was to adopt something similar, would you argue that our electoral commission should have additional resources to manage these provisions in legislation, and can you estimate roughly how much additional resources would be consumed by policing this?

Mr SHERRY: Look, it is a really, really important question. To go back to one of my previous answers, the heads of the two major parties are very, very familiar with this legislation. They still do make complaints against each other—in fact as recently as this morning, coincidentally—but because they both understand the legislation and the provisions, they generally adhere to them. Now, the challenge in a Victorian context is that the stakeholders, the participants in an election, are not going to be terribly familiar with this, so that will result, in my view, in a large number of complaints. Now, the Victorian Electoral Commission has got a very advanced, sophisticated, complaints management system, so they can handle the volume. The challenge as I see it is in determining the truth or not of an electoral advertisement and, as I said, all the information you need to obtain to form that view.

Now, here in South Australia we have a team managed by a manager, and three or four staff. The challenge is that the legislation enables only me, the Electoral Commissioner, to make the determination if something is misleading or not. Now, that takes me away from other important activities during an election period that I need to be spending time on, so it stretches me significantly. So if you are thinking about some form of legislation, the ability for it to be delegated to, say, a deputy as well would provide a little bit of flexibility to assist with resourcing. What we also do is we do not have any in-house counsel here at the Electoral Commission South Australia, but we do work very, very closely with the Crown Solicitor's Office. They have a team of solicitors

that are essentially focusing on public administration and in particular offences against the *Electoral Act*. During an electoral period they are on call 24 hours and they respond as a matter of priority to any misleading advertising request for advice to this particular office. So getting back to your question, from a Victorian context there would need to be additional resources available particularly during the election period but also the availability of the equivalent Crown Solicitor's Office to provide timely advice.

Dr READ: Great. Thank you.

The CHAIR: Thank you. Ms Lovell.

Ms LOVELL: Thanks very much. Thank you for your presentation. Can you give us an idea of just how many staff it takes to administer it during election time in South Australia?

Mr SHERRY: Yes. Look, during the 2018 state election, we had a manager of the complaints area and there were three staff working for this particular person. They were doing other matters as well as just complaints, but I guess it needs to be considered in a scaling-up context because although electoral advertising is mainly related to the electoral period itself, you can imagine that in the lead-up to campaigning the amount of complaints increases significantly. When you have an early voting period—here in South Australia it is two weeks—of course we are inundated with political advertising. We scale up our complaints area, and then of course leading up to polling day itself. So generally our maximum staff again was one manager and three people, but then it is supported by other staff within the commission and as I said the Crown Solicitor's office for that specialist legal advice.

Ms LOVELL: Thank you. Do you extend to also monitoring online advertising and advertising through social media, and do you find that more challenging, given that some of it is pushed out through matrixes, who just, you know, target audiences et cetera? How do you deal with that?

Mr SHERRY: Yes, look, another very, very important question, and certainly valid at the current time. We do not, again, self-police. We cannot proactively monitor social media; it is just impossible. There is just so much information out there. There are different sources. It is just impossible. And then to be able to make a decision or consider: is that misleading or not, based on just reading some Facebook post? So it really relies on a complainant identifying a specific piece of electoral advertising, forming a view that it is potentially misleading, making a complaint to us. But it has to be supported with some rationale about why they believe that that particular statement is misleading. As I mentioned earlier, if they do not provide that, we have got to go back to them and say, 'Look, you've got to give us more than that for us to really consider it'. And that is the time factor; that is the challenging part. It used to be pamphlets dropped in letterboxes, for example; it used to be radio advertising—that is where the majority of our misleading complaints would originate from, and in fact the local paper. But it is slowly transitioning, as you would expect, through to Twitter posts, Facebook posts—those sorts of things. But, again, we rely on a screenshot, for example, of the relevant Facebook post, for example. But definitely more and more of the volume of the complaints are coming via social media.

Ms LOVELL: Okay. And I think you have just answered my question: my question was going to be about whether you were limited to just paid or authorised advertising or whether you could also investigate the fake news that appears as just a Facebook post or a tweet or something like that. But given that you just mentioned that, I am presuming that your legislation covers individuals as publishers of a Facebook post or a tweet.

Mr SHERRY: Yes, it talks about either being a natural person, with fines of \$5000, or it could be a body corporate, with fines more at \$25 000. But the challenge is of course if there is an anonymous Facebook post, for example, misleading advertising out there—how that is dealt with. Now, it would take a long time to track down who that person is, but I am sure you will hear from the Victorian Electoral Commission later on through your inquiry that ECANZ—the Electoral Council of Australia and New Zealand, so it is all the electoral commissioners—we work together to look at ways to improve legislation and the administering of various elections. We are working with the social media companies in order to deal with that category of electoral advertising that we cannot find the author of and getting it withdrawn as soon as practicable. Now, fortunately back in the 2018 state election we had no examples of that. Every Facebook post that fit within the provision of being, say, misleading—it was authorised by someone, we could deal with them and have it rectified. But we have got our next state election coming up in March of next year. So we are, I guess, preparing ourselves that there will be a lot of misleading advertising out there that is not authorised, and we are relying on the work we

are doing now with the social media organisations to have that particular material withdrawn from circulation as quickly as possible.

Ms LOVELL: Yes. So how helpful do you find the social media companies in identifying some of the accounts that might be just ‘PR Guy’ or perhaps, you know, ‘Social Warrior Girl’ or something like that—where they do not actually use their own name, they use a handle?

Mr SHERRY: Yes. Look, we have not had to deal with that example yet, but I am fully expecting for our next election there will be a lot in that particular category. Again, we were fortunate—every complaint we got in the state election last time we had a person who authorised it, we dealt with them directly and we rectified it. But again, I expect that the circumstances will change significantly, and that is the work we are doing with ECANZ, dealing with the social media organisations—so it is your Facebook, your Twitter and the like. Now, we are doing this in conjunction with the commonwealth as well to respond to exactly the scenario that you are talking about.

Ms LOVELL: Thank you.

The CHAIR: Mr Melhem.

Mr MELHEM: Thank you, Chair. Commissioner, thank you for your time. Now, you talked about the various commissioners from various jurisdictions. You guys get together on a regular basis. You have got an election coming up in March next year. If you are to look at reviewing current legislation and powers, what are the top three you consider need changing to make sure we are able to have that balance between freedom of speech and telling the truth in political advertising? What would be your top three?

Mr SHERRY: Look, I just want to make sure I understand your question. Can you just rephrase it in a different way so I fully understand what you are seeking?

Mr MELHEM: Yes. What are the sorts of things you would change in the current legislation you have in South Australia to be able to effectively enforce truth in political advertising while also balancing freedom of speech?

Mr SHERRY: Sure. Okay. Look, I certainly am aware of the potential issue with our current South Australian legislation that puts me in a difficult position to be the determiner of truth during an election campaign. I fully understand all of that. But I guess, with respect, my view here is to administer the laws provided to me by our Parliament. They enacted this legislation in 1985, and despite the challenges of administering it, I think that is where my role is. It is to highlight what these challenges are and to meet the expectations of certainly complainants and the like. But I did not think it was my view to put forward any form of, if you like, request to withdraw this particular provision, even though it is difficult to administer. Again, the Parliament gave us this legislation, and really it is a matter for them if they decide that there should be any changes required or not. I have regular meetings with our particular Attorney-General, and they may well be contemplating something in the future, but that is a matter for them and I am not at liberty to I guess talk at this time about that.

Mr MELHEM: No, that is fair enough. You talked earlier about during election periods the difficulty in being able to handle all of these complaints. You talked about a process of 10 days, and you did mention something about maybe, because you have got to make the decision ultimately yourself, you need to look at whatever brief you are given to make that determination. You talked about maybe appointing a deputy or delegating to a deputy, for example. Would you give consideration to a different agency to handle complaints, or would you recommend keeping it within the electoral commission?

Mr SHERRY: I guess I should choose my words carefully here. Look, as I mentioned before, it is challenging with our current legislation because I am the only one that can make the decision. And as you would expect, I need to get my decision right. I am fully aware if I make a decision to withdraw electoral advertising, you know, the parties or candidates have put a lot of money into corflutes et cetera, the importance of making sure that electors are making their decision, their vote, on actual truthful advertising. I am aware of all of that, so I do make it a priority to deal with these matters as quickly as possible. But as I mentioned in a previous answer, it takes up an extraordinarily large amount of time, and it does take me away from other very, very important matters, particularly on polling day, where as you can imagine hundreds of thousands of electors are coming up. We have got very zealous party workers and other issues going on. We have got COVID issues

to consider now and the like. I am distracted away from that, so I am fortunate I have a very, very competent deputy that can step up into the space that I would normally operate in.

So, number one, if there is an opportunity for, again, the power to be delegated to, for example, a deputy to make that decision, I think that would be warmly received. In relation to your question about another body making that decision, that is certainly I think an opportunity that should be explored. I can see some merit in that, but it needs to be understood that that other body is going to face the same problems that I have got, and that is that they are going to have to take the time to get the decision right, which means getting all of the information, and it does not take away from the fact that time is going to be taken to reach that point and people are voting. It does not matter which organisation or person makes the decision, you need a prompt decision as quickly as possible.

The CHAIR: Ms Hall.

Ms HALL: Thank you. Thank you for your time. I am interested in the kind of fake news issues on social media. You have said you do not proactively look for this sort of information, but once you are made aware of it, do you then proactively notify the community that you have identified examples of fake news?

Mr SHERRY: When you say ‘fake news’—I just want to make sure I understand—is this misleading, like we have got a misleading statement of fact—

Ms HALL: Misleading, yes.

Mr SHERRY: Okay. All right. Look, maybe I can just use an example that might help. If we get a complaint that someone has, say, for example, put a Facebook post out and there is clearly misleading and inaccurate information which might alter the effect of an election and is a statement of fact, it is not an opinion, if I form that view, I can do one of two things: I can ask for a withdrawal or, for example, to take it straightaway off Facebook and also I can ask for a retraction. Now, generally I do both. So using that example, I would contact the person who authorised the material and say, ‘Under section 113 of the *Electoral Act* I have made a determination that this particular statement is inaccurate and misleading and I ask, first of all, that you withdraw it forthwith, and secondly, that you publish a retraction’.

Now, on the retraction, we generally ask them to retract it in the same form and the same manner as their original advertisement. In this case, on their Facebook page or post or whatever it might be. Now, the other thing is the wording of the retraction. What we have found previously is that if we leave it up to the person to form their own retraction, they would quite often get it wrong and use it as an opportunity to have another crack at their opponent. So more often than not we vet the retraction, and in a lot of cases we actually word the retraction ourselves and in our correspondence to the person say, ‘We have worded this. Please put it on your Facebook post as a matter of priority’. If they refuse, we can go to the Supreme Court, as mentioned, or we can initiate a prosecution later on, but in 99 per cent of cases once I make that decision the person will retract and withdraw straightaway.

Ms HALL: In terms of time frames, how long on average would that be?

Mr SHERRY: Yes, that is the challenge. Providing all the information is provided to me straightaway and it is a very, very simple statement, once I get that information I can generally make a determination very, very promptly. As I said in my election report, in one particular case study it was 10 days because the complainant and the person who authorised the material just did not get the information to me so I could make that determination. On average, if you are looking for some form of response on that, it could be as soon as one day or it could be as much as two to three days to turn around a complaint such as this.

Ms HALL: So beyond the retraction, the electoral commission does not sort of proactively say, ‘We investigated this matter and we determined that this was misleading information’ to sort of help mitigate some of the damage that has been done or the potential damage that has been done?

Mr SHERRY: No. No, again, we have not got the resources to proactively do that. And secondly, because of the importance of this decision, I guess I am being asked to be the determiner of truth. On electoral advertising during an electoral period you have got to get it right, so it is a balance between making sure you get it right, which is the critical factor of course, but being conscious of the time that people are out there voting and potentially voting based on misleading advertising.

The other challenge we find with this is that we would send correspondence to the complainant to say, ‘The complaint you have lodged with us, we agree that it is misleading and we have asked for the person to do a retraction and a withdrawal’. Now, as it happens, quite often during an election period what the complainant then does is go straight on television, hold up my letter to say, ‘My political opponent is a liar’, so we are getting drawn into that. It puts me in an uncomfortable position, but I cannot help that.

Ms HALL: Yes. Okay. Thank you.

The CHAIR: Are there any other questions from committee members? If not, I will thank you, Commissioner, for coming before us today and for your very informative contribution. It has been very helpful in us understanding how the South Australian laws operate. Thank you for your time. If we do have any follow-up questions, I would hope that we would be able to ask those through the secretariat—to forward those on to you for some additional information. But thank you again for your time today.

Mr SHERRY: Good luck with your inquiry, and certainly I will be happy to elaborate on any of my responses if need be.

The CHAIR: No worries; thank you.

Witness withdrew.