



**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

SELECT COMMITTEE ON CAMPAIGN ADVERTISING

(Reference: Government Agencies (Campaign Advertising) Bill 2008)

Members:

**MS JOY BURCH (The Chair)
MR SHANE RATTENBURY (The Deputy Chair)
MR ALISTAIR COE**

TRANSCRIPT OF EVIDENCE

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**Secretary to the committee:
Dr S Lilburn (Ph: 6205 0199)**

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Committee Office of the Legislative Assembly (Ph: 6205 0127).

WITNESSES

GREEN, MR PHIL, ACT Electoral Commissioner, ACT Electoral Commission **16**

MACDERMOTT, DR KATHLEEN, Member, Democratic Audit of Australia..... **24**

NICHOLAS, MR ROD, Director, Performance Audits and Corporate Services,
ACT Auditor-General’s Office **1**

PHAM, MS TU, ACT Auditor-General **1**

SAWER, PROFESSOR MARIAN, AO, Director, Democratic Audit of Australia.... **24**

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Amended 21 January 2009

The committee met at 2.30 pm.

PHAM, MS TU, ACT Auditor-General

NICHOLAS, MR ROD, Director, Performance Audits and Corporate Services, ACT Auditor-General's Office

THE CHAIR: Good afternoon, and welcome to the public hearing of the Select Committee on Campaign Advertising, inquiring into the Government Agencies (Campaign Advertising) Bill 2008. I draw your attention to the privilege card. No doubt you have read it, seen it and are aware of it.

Ms Pham: Yes.

Mr Nicholas: Many a time.

THE CHAIR: Many a time. Before we proceed to questions from the committee, would you like to make an opening statement?

Ms Pham: Thank you, Madam Chair. Thank you for the opportunity to make a submission to the committee and to be here today to talk about it and to respond to any questions that the committee may have. I would like to quickly state the key points of our submission, given that it is quite a lengthy one. Firstly, the audit office supports the intention of improving accountability and transparency in government advertisement campaigns. It is important that there be clear policy and guidelines on government advertisements to prevent the misuse of public money for political purposes.

The bill intends to have the Auditor-General independently review the compliance certificate of the chief executives for campaigns over a certain threshold—currently \$20,000—or for some of a sensitive nature. I am concerned that, in performing such a review role, there will be some risk to the perception about the independence of the office. To be independent, and to be seen as independent, the office should not be directly involved in the decision-making process of a government agency.

The review process for government campaigns would occur at various stages of the development of a campaign. For example, based on the experience of the Australian National Audit Office, the review occurs at the beginning of the campaign, in terms of being informed about it, and then there is some preliminary review, some feedback to agencies and the final review. So if there is some part of the campaign which is not compliant, usually the agency has an opportunity to come back and change it and bring it back to the Auditor-General again.

During that process it could be seen that we are actually involved in the process of making the decision about a government activity prior to it being launched by the minister and the government. And that is where we think the risk is, in that people may perceive our office as being less independent if we are involved in a government decision-making process. Also, that may adversely affect our ability later on to come back and audit this activity in a performance audit function.

Also, I believe that, to be independent, an independent review process should not be influenced by the time frame specified by the agencies. But, given the nature of such advertising campaigns, it is important for the review to be timely, and to be responsive to the agency's urgent time frame. That, again, may impact the integrity of our independent audit process if somehow our processes will be influenced by the time frame set out by a government agency.

The other risk relates to what I think is an expectation gap. There is a difference between what the general community perceives as the role of the Auditor-General versus the limited role for us in the bill. A review is not an audit. A review is not about looking at the effectiveness and at whether or not the campaign money is well spent. A review has very limited assurance. But once an Auditor-General is involved, the community often think that we would clear the campaign, that the campaign is fully justified in terms of money being well spent, and that is why we are a bit worried about that expectation. Therefore, that could affect our ability to do a full performance audit later on.

Our preferred position regarding this matter is that we would not be directly involved in the review process prior to the launch of the campaigns. I believe it would be more desirable and more appropriate to examine a government campaign through the conduct of a performance audit. A performance audit would allow us to examine in more detail the effectiveness and value for money of government advertising activities.

In our submission we also make comment about the low threshold of \$20,000 and the resource implications for our small office. If, after the inquiry, the Assembly still believes that the Auditor-General should be the review body, there must be further consideration given to the resource implications and the processes that would need to be in place to ensure that the objectives of the new legislation can be achieved. Thank you.

THE CHAIR: Thank you. We will move to questions. I will go to the beginning of your submission and just work through it, if I can. You start off by clearly saying that you support the intent of transparency and accountability around spending of moneys. But you also made the comment around the public right to get information from government, and that takes many forms. Do you have any comment around what you see that to be? What do you see some of this bill applying to, as far as public information and things like that are concerned?

Ms Pham: I think the guidelines within the bill specify quite adequately the mechanism and the expectation that government should be able to inform the community about government activities. I think those guidelines are quite clear about what is perceived as informing the community, which is different from marketing the government in terms of benefit for a political party.

THE CHAIR: There is some comment around jingles and marketing tools. Do you have a comment about that?

Ms Pham: I share the view of many submissions that that particular part of the bill may not be practical or workable in practice. So I think that is a provision that needs to be reviewed by the committee.

THE CHAIR: There are federal guidelines for campaign advertising. Do you have a comment on those with respect to what they cover and the process?

Ms Pham: I believe that the commonwealth guidelines are working well. Based on our discussions with the Australian National Audit Office, they are improving the guidelines. Also, the process was reviewed throughout the last 12 months or so. I think the commonwealth Auditor-General made further submissions to a recent inquiry into how well the arrangements have worked.

One issue that I noted was the additional requirement or request by the commonwealth Auditor-General to make sure that the chief executives certify that there will be no direction from the ministers and their offices in the design and implementation of the ad campaign. So the commonwealth Auditor-General would like to see even more independence from the minister's direction or the minister's office's direction, in the way the campaign was designed or implemented. That, I think, is an additional adjustment that they learnt as they went along.

MR COE: Can I ask a question on that? You mention on page 6 the resourcing of the ANAO. Can you expand a little bit on that, from what you understand, about what an actual time burden it is for the office, and what relevance that has to the ACT?

Mr Nicholas: I have had a number of discussions with my colleagues in the Australian National Audit Office regarding this particular process. I am advised that essentially they have created a branch within that organisation to deal solely with government advertising. At the moment they have listed on their website 52 reports against this particular piece of guidance and administrative responsibility in the commonwealth. That is in a period since July last year. So that is a fairly extensive workload. That is equivalent essentially to one a week.

I have not got any great information about how much each of those review processes involves. I guess it would depend very much upon the nature of the campaigns themselves. But if there is a need to establish essentially a branch and they are working virtually non-stop on these processes, it would imply a fair amount of activity. The commonwealth has also been spending in the vicinity of \$550 million on advertising over the last three years. Obviously, I would hope that the ACT government is not doing it at that same level. But there is a fair amount of work going into the ANAO's regime. If we are looking at every campaign in the ACT over \$20,000, I suspect that virtually means that everything that requires a couple of pages in the *Canberra Times* or elsewhere will involve the ACT Auditor-General's Office.

The processes that the ANAO has applied are fairly extensive. They also adopt a review mechanism for their work, but it is a review against a fairly long list of compliance objectives, and each one of those I would expect would take a fair amount of time. So it is not a simplistic process and it could be one that is quite cyclical. It could be iterative, if you like—it goes back and forward between the agency and the ANAO, if there were changes, recommendations or suggestions from either party.

Ms Pham: Can I also add that if the Auditor-General has a role to review these advertisement campaigns, our work has to comply with the auditing standard or

review standard. So it is a much more intensive process than what is perceived by a general review by a consultant or another body. Also, our office is very small and hence we do not have the capacity to respond quickly to a demand for urgent work, especially when we could not control the number of advertisements at certain times. It is totally outside our control. So if they all come in in one week and all would like some timely review by the Auditor-General's Office, we would not have the capacity to take staff from another area to step in and do the work. The Australian National Audit Office is much bigger, with a large number of staff, so it would be easier for them to perform that additional function compared to our office in terms of resource implications.

Mr Nicholas: There is a need to establish a baseline, I guess, to find out what sort of resources you want in the first place. We do not have a great deal to go on in that respect at the moment. But, as Ms Pham is saying, one of the obvious aspects of the proposed legislation is the need for a timely response. So if we had, for example, two or three campaigns that were already being looked at and another one came in, we would need to have the resources that enable us to deal with that. At present, without us robbing other aspects of the audit office—that is, the performance audit area or the financial audit area—that just would not be possible. And I expect that we are not wanting to do that, either.

THE CHAIR: No. I have a question related to resourcing. You have got consideration of other options there, for a number of reasons. With respect to independence, I might get back to that, but just from a resourcing level, there are options around looking at an independent panel or an independent individual or firms. That could relieve you of the resource component of your concerns and allow you to come back and do that independent audit. Can you explore your thinking behind having an independent body doing this function?

Ms Pham: We believe the review body needs to be independent of the government, whether it is an Auditor-General or another review body. Because of the other roles that we perform under the Auditor-General Act, we see a risk to our office that will not be applied to another review body. Hence we would prefer a review body to be set up, either an expert panel or a committee. It is important that the appointment of that review body or committee be transparent, independent and approved by the Legislative Assembly. The government submission suggested they could appoint a body of experts to review, but it is not clear to us how the government intends to appoint this body.

THE CHAIR: To create that and appoint it?

Ms Pham: Exactly, and it is not clear to us that the independent process will apply to the set-up of that body. It would defeat the purpose of an independent review if the appointment of that review is not independent in itself and that it is done by the Chief Minister or the Chief Minister's Department.

THE CHAIR: And is there value in having the expertise around campaign advertising within that body? What sort of skill set do you see with an independent body?

Ms Pham: We never looked into advertisements before, so I have to say I do not know much about the expertise required to review a significant and complex ad campaign.

Mr Nicholas: The Australian National Audit Office has taken guidance from people within the media industry, the advertising industry. In fact, I understand that all of the persons from the ANAO who are involved in reviewing these campaigns have received some specific training, development or guidance from a group of experts. So they are fed that information to give them a basic grounding.

From our perspective, we are looking at a compliance issue, so we are trying to focus on what might be involved from a compliance perspective, if the audit office were to be involved. But it would seem to me to be quite reasonable for any person who is going to undertake a review to have a reasonable understanding of the sort of methods and practices that would be applied. Without that, I do not think that we or a review body could adequately form an opinion on matters such as the relative efficiency or potential effectiveness of the program. Certainly, they are aspects that are raised within the concept of the bill.

THE CHAIR: And that goes to the good use of the dollar, the good spend of the dollar, if it is on the mark or not?

Mr Nicholas: Yes, that is right. In either respect, whether it is the ACT audit office doing the work or whether it is an independent body, there would still be a need for a process to be set up for the referral processes, for a clear understanding of the role of that review body and a clear understanding of the nature of the report that is being presented. I cannot imagine that establishing a review body external to the ACT government is necessarily inexpensive either.

MR RATTENBURY: Firstly I want to thank you for your submission. I found it very helpful. I think it was both clear and open and explored a number of issues that the committee does need to consider. So thank you for the time on that.

I want to start on page 5 of your submission. You talk about the scope of the legislation and that it should encompass all ACT government agencies, statutory authorities et cetera. Could you talk a bit more about that? Does your legislation, for example, have that provision and how is that executed as a practical matter?

Ms Pham: Our legislation covers statutory authorities; so we do have the mandate to audit or carry out investigation of statutory authorities. We also have a mandate to do financial audits of TOCs. There is Actew and ACTTAB. The question raised in a number of submissions was whether or not this requirement to comply with the bill should apply to statutory authorities and TOCs. We believe that it should cover statutory authorities. So bodies such as the Gaming and Racing Commission or the Cultural Facilities Corporation need to be covered under this requirement to comply with the bill.

It will be a bit different with TOCs. That means Actew and ACTTAB. We are struggling with the idea of whether or not TOCs should be covered. The reason the government set up TOCs often is that they have commercial obligations and hence

they are not normally subject to a number of government policies and guidelines. So if this legislation applied to TOCs such as Actew and ACTTAB then it will be a step away from the normal government legislation coverage.

We know that the advertisement by ActewAGL at the time was questionable; it was pointed out in a number of submissions. But it is very hard for us to decide whether or not, because of that particular advertisement, the act should also cover TOCs. I think that could be very hard for government legislation in terms of complying with policy and procedure to be intended to cover TOCs.

MR RATTENBURY: In your submission you talk about statutory authorities and public companies. So that I am clear, a public company and a TOC are the same thing, in your mind? In the submission you suggest it should encompass public companies.

Mr Nicholas: Yes.

MR RATTENBURY: On page 7—and it has been touched on briefly already—there is the question of the threshold of \$20,000. You have made the suggestion that it is too low. I think that has come through in a number of submissions. I wonder whether you had any advice based on your experience of what might be a suitable threshold. I realise that is obviously a subjective question but I note you also referred to the idea of materiality in the areas that you looked at. Perhaps you could make comment on what you consider to be material.

Mr Nicholas: I might have a go first, if you like. The concept of materiality is a pretty difficult one, from our perspective. From the performance audit area, which is what I deal with, we would not consider \$20,000 to be material in most cases. It might be in certain types of transactions but generally we would not be looking at something like \$20,000.

What we are more or less saying is that we really do not have a very firm view on the dollars, other than it needs to be set at a rate that is efficient and effective for all parties involved. I guess if I was to try to investigate it, I would be looking at the sorts of expenditures that have been incurred over the last 12, 18 months, two years and try to figure out what is a reasonable balance there for a review process.

But \$20,000 does not take us very far. Incurring \$20,000 in a review does not take very much, from our perspective. If you want to balance out the sort of effort that we would put into it versus the potential benefit, \$20,000 is probably equivalent to two or three weeks work for a small team. So that is a fair chunk to be putting in for what could eventually be a couple of newspaper advertisements.

Ms Pham: If I can make a quick reaction to it: I think \$20,000 is too low; \$100,000 is maybe too high. I think something between \$50,000 and \$100,000 could be more reasonable.

The first point that needs to be made is that all advertisements should comply with the guidelines, regardless of whether it is \$200, \$5,000 or \$100,000; all of them should comply. That is the first point. The second one is: which ones should go one step further for that independent review by another body? That is where the threshold is

coming through. I did not want to give you the impression that you need only to comply if you are over \$20,000 or \$100,000. All of them should comply, regardless of the value.

I think there should be a little bit of analysis of the advertisements by government in the last, say, two years to see how many fall between the \$50,000 and \$100,000 mark. If the information indicates that it is only two or three that are about \$100,000, it does not make sense to put this scheme in place just to reveal two a year. So I think that we would really need to look at the median value for advertisements and make a sensible decision based on the data, which we do not have at the moment.

Mr Nicholas: It would also be relevant to what is included as a campaign cost. So \$20,000 is covering a lot of the back work or pre-advertisement work, if you like. It would seem to us that \$20,000 will not take us very far.

THE CHAIR: Are you saying that back work would be included in this threshold cost?

Mr Nicholas: The cost of development, production and conduct of the government campaigns is included in the definition within the bill itself. There have been other comments in the other submissions that refer to other aspects of the development of a campaign. So if all that was considered then \$20,000 probably does not take us very far. We have said in there that we do not have an ideal perspective per se of the threshold but we would expect it to be based on a realistic interpretation of what has been committed over recent times.

MR RATTENBURY: In setting a threshold like this, is there any practice of indexing those kinds of thresholds? Would that be a normal practice in trying to set something like this?

Mr Nicholas: I guess so, but it would be one of those things that one would review every now and again, I would think.

MR COE: When there are guidelines in place and there is the risk that you could be audited, if you could put it that way, especially if the minister does refer it to whoever does the audit, or if it is above the threshold and therefore it would automatically go to the auditor, does it actually create a cultural change in organisations as to how they actually behave, even for amounts below the threshold? Would it actually have much wider ramifications than just those that would mandatorily be audited?

Ms Pham: I believe so. I believe, when there is a clear expectation that agencies need to comply with legislation, there is a higher degree of intention to comply. Hence, it will deter a situation where money can be wasted for less effective advertisements. If they know that it will be subjected to independent scrutiny, there will be less chance for a decision to go ahead with a campaign that may be seen as beneficial to a political party. So I think it would change behaviour.

MR COE: It could lead to more ethical behaviour and more ethical spending?

Ms Pham: I hope so. That definitely should be one of the objectives of the bill, to

prevent or minimise misuse of government or public money.

Mr Nicholas: The certification process that is within this bill and is referred to in a number of the other submissions is quite important in that respect. If you go through a process and say, “I have done these following 15 things or 25 things or three things and I am certifying that they have been done and that the process has been met,” then I think that also encourages significant ethical behaviour.

In fact, we made mention of that on page 12 of our submission, in the second-last paragraph. It basically says that the intent of the bill can be met by its very existence, by the development of the guidelines and by the requirement of the chief executive to certify that each proposed campaign complies with the legislation and the guidelines. So that is a major step, from our perspective.

THE CHAIR: Would the feedback from ANAO, the federal body, suggest that the guidelines that are in place, and the six-monthly reporting, capture that behavioural change? There is, from ministers through the executive and all the way through the process, this checking.

Mr Nicholas: Auditor-General McPhee has said that he is absolutely certain that there has been a benefit to government expenditure in the commonwealth through the introduction of those guidelines and it is not necessarily his review process that has contributed to that. I am sure it has contributed but it is not necessarily the driver of it. It is the fact that the guidelines exist and that there is a certification process there. That is within his submission to the JCPAA’s inquiry.

MR RATTENBURY: On page 10 of your submission you talk about the bill needing to recognise a start-up time for such a scheme. Could you explain a bit more about what you mean by that?

Mr Nicholas: The introduction of guidelines—and it is a significant process—is always going to have some sort of lead time. First of all, you have got to develop the things; then you have got to make sure that they work. We would suggest that even the experience in this jurisdiction with other legislation, and probably with the ANAO’s experience in the commonwealth, shows that there has been a development of understanding of agencies in terms of the application and implementation of those processes and that, as they become more aware of it and used to it, things have got smoother all the time.

We are not necessarily suggesting you have to wait six months before you implement it but the Assembly would need to recognise that there will be a time that it will take to bed the thing in. That is essentially what we are saying.

MR RATTENBURY: That was what I was wondering, whether you are saying that, if we were to pass this bill, we need to say it would be 12 months before it could start.

Mr Nicholas: I certainly would not expect it to take 12 months. I would think that the government would be able to get something running within a much shorter period than that. But it will take a little bit of time to get used to it. We are talking about a very substantially different regime to what exists at the moment. I think that always

takes a bit of time to bed down.

THE CHAIR: On that, you made mention that the commonwealth guidelines are going through an internal review; they are tweaking them, learning from their experience and improving that. Given the settling in, is there an opportunity to go through a process of setting up guidelines and looking at the principles of the mechanics over time, getting that right and putting it out there before you implement legislation? When legislation is in place you have done the tweaking; you do not have to go back and review legislation?

Ms Pham: I think the current commonwealth guidelines, which are largely adopted by this legislation, have been implemented for the last 12 months or more. So to a large degree they have been well established and well followed by various commonwealth departments. I think that we start at an advantage point, in the sense that we can benefit from well-established guidelines. Not only are they commonwealth government guidelines but every state seems to have some form of guidelines for government advertisements. So we do not start from scratch, basically, and we do not have to reinvent the wheel. I do believe that we have sufficient guidelines and experience in place to make it work.

Any further improvement would be at the margin, rather than fundamental and significant improvement to the principle. The principle for accountability and transparency and not wasting public money is already in the legislation and in the guidelines. Again, we need perhaps three months lead time to get systems and procedures in place to make sure that there is a really good understanding between government agencies. The chief executive needs to comply with the guidelines, and a review body. But I think that is all we need. There is no need for further delay of—

Mr Nicholas: There is substantial information available through the department of finance in the commonwealth and through ANAO's experience that I think would be very beneficial here.

You asked earlier about the guidelines from the commonwealth. They have got an eight-page document from Finance that refers to guidelines but it is supplemented by a 44-page business processes handbook or handout as well. So it is not an insubstantial body of work that they have produced and prepared to make this thing work fairly smoothly. Ian McPhee, the commonwealth Auditor-General, is making suggestions every now and again, depending on how things have worked out. So they have been gradually implemented within the guidance that has been prepared by the commonwealth.

MR RATTENBURY: One of the discussions on this bill is the relative merit between legislating and operating simply with guidelines, as the commonwealth appears to have done. Are you able to offer a view on the relative merits of those or the practical implications of either approach?

Ms Pham: Our submission did not discuss whether or not there is a need for legislation because we believe that is an issue for the Assembly to decide. If I could make a general comment, usually legislation would provide a stronger push for compliance because we know that guidelines are always in government departments

for a lot of activities. Based on audit experience, many of these guidelines are not followed or are not well communicated to the right people who apply and implement the guidelines.

Often, if the guidelines are established as part of the legislation, they seem to get a higher priority and higher attention by the chief executive. In this case also, the chief executive has to sign the compliance certificate. I hope that also gets even a higher level of commitment to comply. So generally speaking, legislation has always provided additional incentive to comply, compared to just normal guidelines.

THE CHAIR: And would a certification regime to guidelines enhance guidelines?

Ms Pham: Definitely.

MR COE: In the part on pages 4 and 5 where you talk about whether the Auditor-General is the best option, in No 2 at the top of page 5, you mention that one of the options would be a small independent committee with an advisory role. Can you think of any other examples in the ACT or perhaps further afield where this style of oversight has worked? I am not prejudging the situation but are there other examples where an auditor-general has worked in conjunction with the standards board or with some sort of third party?

Ms Pham: Offhand I could not give an example that comes to my mind at the moment. The government submission mentioned a panel of experts. I think that would be similar to a form of small committee that we were talking about. As I mentioned before, the detail of how that committee is formed and how members will be recruited to it is important to protect that independence.

Mr Nicholas: No, I am not aware of any particular occasion when that has worked, but I guess it is not all that much different from saying we will take some expert advice in the preparation of a particular program or a particular project. Our view, I guess, is that it should be as independent of government as possible and, to me, even if it is not fully independent, it means that there should be some specified roles, specified outputs, processes and product, if you like, that come out of it.

THE CHAIR: Do other jurisdictions that have got guidelines—I do not know whether you are able to answer; you might have to do some internal work on it—have independent bodies? How is that independent review done in Victoria or Queensland, for example?

Mr Nicholas: I am not aware of how those other jurisdictions operate.

Ms Pham: I am aware that the issue of government advertisements has been raised in a number of jurisdictions. The role of the Auditor-General to audit the advertisements has been debated and a number of auditors-general have conducted a performance audit on government advertisements. Often they have guidelines, but I think they do not go further by requiring an independent review by another body.

At the moment, as far as I am aware, the commonwealth is the only one which goes beyond general guidelines and has to comply and have a compliance certificate

reviewed by the Auditor-General. The commonwealth may be the only jurisdiction that has done so. There is no similar involvement in other jurisdictions.

Mr Nicholas: It would not be uncommon for other jurisdictions to have a central body that was coordinating the government advertising arrangements and ads that go through that body. That provides a bit of a possibility for a check similar to this sort of thing here.

THE CHAIR: Earlier you made mention of definition and on page 11 there is a second dot point on consideration—advertising is routine or operational. Is there, indeed, a distinction?

Mr Nicholas: I am not sure there is a distinction between routine and operational, but I think there is a need to be very clear about what routine and/or operational advertising means. A number of the comments that have been cited and made in the Assembly and in the submissions relate to matters like the Electoral Commission or ActewAGL et cetera—TAMS, for example. A fair chunk of the work and the advertising that goes on there one would probably consider to be routine and operational advertising. If this bill is to capture something outside of that then I think the administrators need to understand what routine and operational advertising actually encompasses.

Ms Pham: It is always a subjective nature for this type of work. Hence it requires judgement from an independent review body when the area falls within some grey issues of whether it is routine or not routine.

Mr Nicholas: But the bill at the moment proposes that the advertisements come to the audit office if it was a campaign, other than tendering, recruitment or routine government operational advertising. If a chief executive made a decision that a particular activity was routine and operational, it would not necessarily come to the audit office or whatever review body was established. So it would not necessarily have that independent review.

One would expect, of course, as the Auditor-General was saying, that it would still go through the compliance check, if you like, internally, but not necessarily that independent check. The only way that that would be examined then by the audit office, for example, would be through a performance audit activity at some later stage.

THE CHAIR: Yes, and you would pick that up as part of that? You would look at it as part of that?

Mr Nicholas: If we were to do an audit on government advertising we would look at any advertising that was not referred to the office, if this legislation got up.

THE CHAIR: There is some comment in the bill on block-out or blackout time. Do you have a comment on that?

Ms Pham: I think we would support the blackout time, with the exception, of course, for necessary advertisements by the Electoral Commission when it is something to do with the election process. I think there seems to be merit in that provision, just to

remove any doubt that an advertisement during that time may have a political incentive behind it.

THE CHAIR: There is a caretaker period and this seems to extend that. So how do you get around, for example, the swine flu issue?

Ms Pham: There are always exceptional circumstances allowed under the act. I think that the act already acknowledges that there are exceptional circumstances for emergency or for very compelling reasons. It should always have that exception. There was a recommendation in other submissions about a cap on the total amount of government advertisements. I think that is an interesting recommendation that seems to have merit also.

MR COE: Does the audit office readily engage consultants or specialists to provide advice for specific subject areas that you may not have expertise in?

Mr Nicholas: When it is necessary, yes.

Ms Pham: And when we have money to do so.

MR COE: So not so much next year.

Ms Pham: I could tell you right now that in our budget we have no capacity whatsoever to employ expert advice.

MR COE: But generally speaking, of course, the hiring of an expert must support a more well-rounded and specific report?

Mr Nicholas: Indeed, and if we were to be given this role there is no way in the world that I would want to take that on without having a good understanding of what the advertising media is about, what the industry is about, what this sort of stuff is about, how this works. So we would certainly be looking to get external advice, whether it is from consultants or contractors or specialists or whether it is through our brethren over in the Australian National Audit Office. I have already had the offer to speak with them about it if we were to get the role.

We have not got a great deal of expertise in it. I watch TV, I listen to the radio, I have seen advertisements. But I do not believe that that necessarily gives me the full capacity to review the sorts of things that are being suggested under this piece of legislation.

Ms Pham: At the same time, given that it is an ongoing activity, year in and year out, there is merit for us to develop the expertise over time, in house, so that we can perform the function without the need to go out for consultancy. But in the beginning, perhaps that is what we need to do first before we can ensure that we have expertise in house to do so.

MR COE: Do you have any idea how big the branch is within ANAO, how many staff they have got, roughly?

Mr Nicholas: It is probably half a dozen or more but I would rather you do not take that on my word. If you want to get that information, I am sure the ANAO would be able to provide it to you.

THE CHAIR: Developing the expertise internally, though, does not take away the other comments you have made on the role of the office doing it and the independence; and that will remain. If you have the expertise internally and take the role on then those other concerns you have made comment on—

Ms Pham: We mentioned there are a risks; hence our preferred position would be not to take on risks but, should the Assembly decide the role should stay with us, we need to put in processes, mechanisms, to minimise that risk and to deal with the risk. Certainly our preferred position is to maintain the capacity to get back and do a very detailed performance audit, to really look into the question of effectiveness and value for money, rather than limit our role to a review role, which basically is a compliance role.

The community out there would expect, once the Auditor-General was involved, we would do more than just review compliance and I would worry that, if we were to be involved as a review body—the expectation actually is that we are more than a review body, that we actually clear the campaign because it is good value for money, it achieved the objective or it is effective—that is not the role anticipated for us under this legislation. Clearly an advertisement campaign, when you comply with the guidelines, may not be the best way of spending money, and we will not be able to say that until we do a proper performance audit, not a review.

Mr Nicholas: If you refer to the Australian National Audit Office's website you can see the reports that they have issued, the 52-odd reports that they have issued, on government campaigns that they have looked at. The nature of the work that they have done is quite clear from their reports; they are quite clear in terms of outlining the review methodology and the conclusion that they have reached.

That is a practice that they have built up. Obviously it refers back to the auditing standards on review reports. It is based on developing an in-house capacity to undertake this. They have their own expertise; they have built that up over time. It has only taken them 12 months or so but the people that they have got engaged, I understand, are all at relatively senior levels; so they are experienced public servants or experienced persons in the first place. They are not graduates straight off the street, so to speak. So there is a fair expectation that they do know what they are doing, and they have had the guidance that has been necessary, as I mentioned earlier.

I think the work that we would take on or the work that we would do is of a review nature; it is about certification and checking that the processes that have been applied by the agencies actually do meet the guidelines. So if there is a certification that says, "I have done this, I have done that, I have done something else," then we are checking to see that that has occurred.

We are not auditing necessarily the efficiency or the effectiveness of that process but we are looking to find that there is sufficient evidence to convince us that the activity that has been stated as happening has happened. And that is the nature of that review.

It is very different from a performance audit that might come later that would examine whether it was a worthwhile project in the first place, for example.

MR RATTENBURY: I have one quick question there. I am trying to think what the term in administrative law is. Are you reviewing the merits of the decision?

Mr Nicholas: No.

Ms Pham: No.

Mr Nicholas: We are reviewing a statement of compliance. In this case it would be from the chief executive who says, “This campaign complies with the guidelines or the legislation that has been set out,” and we are reviewing against that. So we are not asking whether this is a good decision; we are satisfying ourselves that, if the guidelines require that there be no faces of the minister in the advertisement, then there is no face of the minister in the advertisement; and so on and so forth; we are looking at that aspect of it.

It is not whether this was a good campaign to run, the best way to run a campaign or the best way to cover the particular message they want; it is only whether the certification appears, on the work that we have done, to be reasonable. It is a limited assurance review and does not provide the extent of assurance of a normal review.

Ms Pham: But that is exactly what I am concerned about. When people say the Auditor-General’s Office reviews it, they thought we would review the merit of the campaign. But the review has a very different meaning in terms of auditing standards of review, different from audit, and it has all sorts of standards in terms of limited assurance, in terms of qualification, in terms of how you go about it.

It is very different from an audit process. That is not understood fully by the general community, and we would not expect them to understand the difference between a review and an audit. All they know is that the Auditor-General had cleared it or had approved it.

That created a risk for us, because later on, if we come back and do a performance audit and if we find a number of government advertisements are totally a waste of money because they did not achieve the intended outcome to change people’s behaviour or to inform people. It looks as if we are in conflict with ourselves because we approved them in the first place if we come back and audit and say they are a waste of money. So that is where the expectations gap is in the general community and its perception overall, and that is why we worry about that risk.

Mr Nicholas: As I said, please have a look at the sort of report that the Auditor-General in the commonwealth issues. It is very specific about what his conclusion is, but I do not know whether that would necessarily get over the general public perception that something more was done by the Auditor-General.

Ms Pham: I would very much like the committee to consider during your deliberations the information we provide at page 9, because we give a very clear explanation of what is a review and why it is different from an audit; and maybe our

review may not meet what the Legislative Assembly have in mind for our review.

THE CHAIR: Thank you, Tu and Rod, for coming along today.

Meeting adjourned from 3.30 to 3.50 pm.

GREEN, MR PHIL, ACT Electoral Commissioner, ACT Electoral Commission

THE CHAIR: Good afternoon, Mr Green, and welcome to the public hearing of the Select Committee on Campaign Advertising, inquiring into the Government Agencies (Campaign Advertising) Bill 2008. I draw your attention to the privilege statement. Have you read it and do you understand the implications of the statement?

Mr Green: Yes, I have.

THE CHAIR: Thank you. Before we proceed to questions from the committee, would you like to make an opening statement?

Mr Green: Yes. You obviously have the submission that the commission put to you. The commission, in making its submission, did so using the logic that the statutory role of the commission is to conduct information campaigns and education campaigns for the Legislative Assembly elections and for the other elections that it runs. It wanted to specifically focus its submission on the aspects of the bill that would have an effect on the operation of the commission itself. So rather than look at the bill and the scheme of the bill from a wider perspective, it was quite a narrowly focused submission from that perspective.

But if, in questioning, you would like me to take my commission hat off and put on my chief executive of a statutory office hat and talk about more general ways in which this might have an effect just on a government agency in general, I am happy to do that, as long as you recognise that when I am doing that I am speaking as the commissioner rather than as a representative of the commission. Would you like me to expand a little bit on the matters that we have raised in our submission?

THE CHAIR: Yes, please.

Mr Green: The most concerning thing we have about the submission is its restriction on government advertising in the lead-up to a general election period. It provides that there will be no government advertising in the 12-week period immediately before a general election. The advertising that is conducted by the commission under the bill, as it is currently drafted, would fall within that definition of government advertising. So that is a fairly obvious thing that we would like to see fixed; otherwise we might save money in our budget but no-one might know that the election is on or how to vote formally et cetera. So we think that is an aspect of the bill that we would like fixed.

Also, there is a drafting issue with the bill where it talks about 14 weeks before a general election, without defining what is meant by a “general election”. We are suggesting that if there is a provision like that in the final bill, it actually refers to polling day as a specified day, which would put some clarity in the drafting there.

Another concern we had about the way the bill was drafted, and it is a concern that we also have with the government’s submission which is proposing an alternative scheme as to how this scheme might be run, is the notion of requiring ministerial approval of government agency campaigns. As I said, having regard to the way the bill is

currently drafted, that would also apply to the Electoral Commission's advertising and it would actually introduce a role of ministerial control over the commission's operations that does not exist at the moment.

If you look at the way the Electoral Act is structured, there is very little in there about the minister actually having the ability to control the operations of the commission. In fact, there is another inquiry running at the moment into the implementation of the Latimer House principles. We have gone into quite some detail in our submission about the whole issue of statutory independence and how important it is for electoral commissions to be seen to be at arm's length from government.

So another issue with this bill that we would like to see addressed is the notion that there would be some ministerial control or approval required for commission advertising. We think that might actually have the wrong effect of taking us away from being seen to be at arm's length from government to actually requiring government approval for something which it is quite important to the electoral process to be seen to be independent of political control.

There are also a few drafting issues in the bill to do with the definition of what a chief executive is. The commission would like to be certain that when it refers to chief executive approval it is the Electoral Commissioner that would be referred to in that sense. The way the bill is currently drafted there might be some doubt about whether they mean us or the chief executive of our parent department. Again, that is the same issue about statutory independence and we would like to see that addressed.

A more general issue with the bill, which would have a wider implication than just referring to the commission but it does specifically refer to us, is the way in which the bill defines "government campaign" and the sorts of things that are included in the meaning of "government campaign" in the bill. The way it is currently drafted, the meaning of "government campaign" is quite broad. The way that the bill defines "government campaign" is "meaning the dissemination by a government agency of information to members of the public about a government program, policy or matter which affects their entitlements, rights or obligations". It has an extremely broad application, when you look at the things that the Electoral Commission does by way of public information campaigns.

That definition would cover our website, which is there all the time. It would cover our education program in schools, it would cover the ongoing and continuous provision of information and education programs that we do. So it would not just apply to what we would normally think of as a campaign, as being a three or four-week period where we have got a formal advertising campaign with radio, television, newspaper and so forth; it would actually apply to everything that we do.

I suggest that it might help the implementation of this scheme if that definition of what a campaign is is more narrowly defined to mean those things that we normally think of as a government campaign, like the swine flu campaign, a drink driving campaign or something that has got a discrete beginning and end rather than something that is a continuous process like ours.

Also, it would be useful to have a clearer definition of exactly what costs are going to

be included in any cost modelling that goes on. Again, the way it is drafted, you could infer that the bill is asking, in our case, for an estimate of the cost of our education officer to be included in the cost of the campaign, which would immediately throw it into the hundreds of thousands by the time we factor in overheads and everything else. Again, if you are going to look specifically at campaigns then you would probably exclude staff costs, but you would look particularly at the external, additional costs of the campaign, like the actual placement and the production through a production agency and so forth. Those are really just drafting things but the practical implication of those for an agency like mine are quite significant.

Another point we made was about the restrictions on the content of the advertising. The bill lists, in its example, some things that it would take to be party political in nature, whereas the commission routinely does some of these things because, by our nature, we have to talk about parties, candidates, who are leaders of parties and who are candidates of parties. One of the things that we do, and people have asked us for this, is that we put on our website links to all the political parties. So on our political party page we list the registered officer and registered name of the parties and have a link to that party's website. We do that for all parties, so we are not being biased in any sense when we are doing that. We think that is appropriate, so we would like to see the scheme in the bill not preventing us from doing something that we would think would be reasonable. Mind you, if the Assembly thought that that was not reasonable, tell us to stop doing that and we will do that. But I want to be sure that whatever is in the bill is not going to prevent us from doing things that would not actually be in contravention of the spirit of the bill.

With respect to the implied restriction on things like slogans and jingles, I know that lots of other submissions have addressed this point, but it seems to me that it is such a blanket restriction that it is not necessarily achieving the intent of the bill. I would suggest that it would be better to focus the bill specifically on preventing particular activities rather than a blanket restriction, because I note that if you do not allow us to use slogans then all of the advertising campaigns we have ever run have included a slogan. I think the slogan we used for the last three elections was "the ACT election: shaping Canberra's future". It is a slogan but it is not a party political slogan. So to prevent us from doing that would make our ads extremely boring and people probably would not watch them or take any notice of them. So it would not be a desirable outcome.

There is mention in the bill of requirements to identify public government advertising. There is an example given in the bill of radio and television advertising having an authorisation statement at the beginning and the end of the advertisement. As we noted in the submission, there were already requirements in the Electoral Act and in the commonwealth Broadcasting Services Act that require things to be authorised. They require a statement at the end. I think, particularly if you are only talking about a 15 or 30-second ad, if you require someone to have a very quick authorisation statement at the beginning and the end of the ad, there is not actually going to be much left in the middle. Again, the commission has suggested that it might be appropriate to not duplicate what is already in the other legislation, at least in regard to authorisation of electoral matter.

That covers the things we have raised in the submission, and I am happy to take

questions.

THE CHAIR: With the restrictions—and it is true, if you look at the website, that there is an ongoing presence to encourage people to enrol and participate in elections—could that be covered within guidelines or would you think there should be more explicit or overt commentary throughout whatever legislation could be adopted?

Mr Green: If I could address that question slightly obliquely, one thing that occurs to me, particularly listening to the evidence of the Auditor-General earlier this afternoon, is that it might be possible to look at the bill and to take the guidelines out of the legislation. It does concern me that if you put guidelines in legislation, by definition they are not necessarily prescriptive; guidelines are there to be followed some of the time but not necessarily all of the time. I am wondering whether a more effective way of structuring the bill might be to put in the bill the things that you absolutely must follow and then have a requirement that the guidelines be made by the relevant minister, for example. That would focus the legislation on the absolute thing that the Assembly is wanting to do, which is primarily to prevent party political advertising happening through government advertising.

Putting the guidelines one step below the absolute prescription in the act might take away some of the difficulties that we have identified in the way that the bill is currently phrased. If you did it that way then that might enable agencies with more independence from government, such as the commission, to be able to have exemptions in there. But I would prefer, if the commission is to be exempt from various aspects of this, that that would be in the parent legislation rather than relying on the whims of the minister or the government at the time.

THE CHAIR: The auditor also made mention of the strong certification process attached to this. Can you give us your thoughts around that?

Mr Green: Yes. Again, listening to the Auditor-General's remarks, it does strike me that the way the bill is currently phrased or framed is that it is putting quite a lot of effort into certification and auditing of material that, probably in 99 per cent of cases, is going to be quite routine and straightforward. That is putting an extra administrative burden on various agencies and it might be using a sledgehammer to crack a nut, in a sense.

I am wondering whether there might be some way of relying more on agency certification for those things that are clearly not envisaged to be in any way party political and, rather than auditing absolutely everything, you have some way of narrowing down the field of things that would have to be audited separately, which might perhaps mean that we rely more on certification by the agency's chief executive, rather than referring every single thing to the Auditor-General. I have not necessarily thought that through, but having listened to the amount of work that would be involved for the Auditor-General in auditing every single campaign, as I say, I think you will find that 90 per cent of them will be perfectly straightforward.

The other issue that I am certainly thinking about was that, if the main concern that is being addressed in the bill is to do with advertising that happens in the lead-up to an election, if you do have a prohibition on advertising in the period leading up to the

election, you have got to take out of the equation any possibility of campaigns transgressing the rules, if what you are wanting to do is to get advertising away from the proximity of an election period. Again, that is going to reduce the significance of worrying about whether a particular campaign is inappropriate, because it seems to me that a lot of the issue is about the timing of campaigns rather than the content of campaigns.

THE CHAIR: Would that apply to what is considered to be routine advertising, as opposed to themed campaigns that cover a particular targeted matter? Would you consider there is a need to block out absolutely everything—every routine bit of advertising?

Mr Green: I personally think that would be going too far. The issue with routine and the issue with the way the bill is currently structured really relates to the definition of what is routine and what is not. I think the bill needs to be quite clear about its definitions of what is routine and what is an emergency situation or exceptional circumstances and so on.

MR RATTENBURY: I want to come to the issue around the authorisation requirements on page 3 of your submission, which you did speak about as well, for both the Electoral Act and the commonwealth Broadcasting Services Act. I guess I am interested in exploring that a bit more, particularly in the context of one of the suggestions made in another submission, that government advertising be tagged by the agency responsible for it—the department of health, the department of environment or whatever—so that it made it very much about the department as the intent. How would that suggestion sit with the observations you are making there about those two other acts?

Mr Green: That would be perfectly compatible with that. The way that the Electoral Act is currently structured is that there has to be identification of the name of the agency responsible for publications, advertisements or anything containing electoral matter published by ACT agencies. The name of the agency is the thing that is supposed to be put in the material.

MR RATTENBURY: As opposed to ACT government?

Mr Green: Yes.

MR COE: In the event that a central agency is used as a clearing house, does that pose potential problems?

Mr Green: Again, the way the act is phrased is that there needs to be the name of an agency taking responsibility for it. For example, if the Chief Minister's Department was centrally organising a campaign that might have started in another department, that would still satisfy the requirement.

THE CHAIR: You made mention—and I think it was raised with the Auditor-General—of the role of the minister in certifying or authorising routine advertising which indeed sits under the banner of the chief executive routinely. Do you want to tell us a little bit about your concerns with that? Maybe you could put on

your commissioner hat as well in that regard.

Mr Green: It would seem to me that if it is a routine matter, ministers are so busy that there does not seem to be a lot of point in getting the minister to certify something that is definitely routine. It comes down to the definition of what is a campaign. If it is a campaign of \$50,000 or above, for example, that is narrowly defined to be what we would normally call an advertising campaign, with radio, television et cetera, for a normal agency then that perhaps should go to the minister for approval. My concern, or the commission's concern, with the minister approving commission campaigns is that that is actually introducing an approval role into the electoral process that the minister currently does not have.

THE CHAIR: The bill has a campaigning threshold of \$20,000 at the moment. You mentioned that that could cover your website and the ongoing electoral promotion material. I would imagine that is a tad more than \$20,000?

Mr Green: It would be, yes.

THE CHAIR: So do you have a view on what would be a reasonable threshold?

Mr Green: I would probably agree with the statements that the Attorney-General made earlier. Somewhere between \$50,000 and \$100,000 feels right intuitively, without knowing what agencies typically spend on an advertising campaign. From memory, our formal campaigns—radio, television, newspaper et cetera—for an election would be in the order of about \$100,000. That is a fairly full-on, three or four-week campaign with the whole box and dice. That is just the external cost; that is not the internal staff cost. As I mentioned earlier, it is important to define what you mean by costs. If you start throwing in staff costs and internal costs like that, and hosting a website costs, those numbers will add up pretty quickly.

MR COE: With those bookings, especially radio, TV and newspaper, are they all done directly between yourself and a non-government booking agency or the actual media companies themselves, or do you do that through an ACT government agency?

Mr Green: We piggyback on the ACT government media contract. Through that, at the last election, all of our ads were placed through hma Blaze, which was the company that had the contract at the time.

THE CHAIR: And is that an arrangement for convenience, cost effectiveness or protocol?

Mr Green: There is a general government ruling that whole-of-government advertising, or whole-of-government contracts per se, should in general be followed by ACT agencies. From our perspective, it is much more cost effective to go through a contract that is already in place than for us to separately go through the whole process of having a contract that is just for us.

THE CHAIR: With respect to cost included in campaigns, do you have a view around what is a reasonable envelope for campaign activity to be included in that cost? With the design work, and the marketing geniuses that come up with slogans

and images, do you think that is a reasonable cost to include in the campaign?

Mr Green: With costs that are not absorbed within the agency, like internal staff costs, I think it would be reasonable to include things like the advertising agency's head hours, production time—all of that cost that is directly related to the preparation of external advertising campaigns. Another aspect of the sort of work we do is that we get a lot of work done by the ACT government's own publishing unit. Again, that would be something that would be useful for the bill to clearly define—whether that would include work carried out internally to the ACT government as opposed to things that are externally provided by contractors.

MR COE: Do you pay that area of TAMS a fee for service?

Mr Green: Yes, we do.

THE CHAIR: I go back to the certification process. Putting your other hat on, what are some of the elements that you think are critical in that certification? There are probably some elements of the guidelines as well. I am just trying to narrow down the essential part of the process so that it is not administratively burdensome.

Mr Green: I think it would help if the bill had a very specific set of expectations of advertising. At the moment, the way the bill is drafted, it has got quite a lot of fairly general statements in it. The judgement as to whether something does or does not comply is quite a subjective judgement. I go to clause 13:

... information in a government campaign must not be directed at promoting the government or party political interests in any way ...

That is a very general statement—to determine whether a particular advertisement or campaign does or does not fall within that, without some guidance. I could see that, with a lot of government campaigns, you could argue one way or the other, depending on where you sat, as to whether, for example, extolling the money that has been spent on a particular government activity could be read as promoting the government or party political interests, because that is the nature of politics.

I think there would be definitional and subjective questions that that sort of approach would raise. It would be helpful if the bill could be quite specific about exactly what is permissible and what is not, while recognising that there is going to have to be an element of subjectivity in there. I think—and I tried to do this—that when you actually try to come up with words that are specific enough and try and get rid of that element of subjectivity, you will find it is quite a difficult thing to come up with. When you look at the examples that are in that clause, there is some government advertising that could probably fall within that which could be argued to be quite legitimate. I think it is going to be quite a tricky thing to do.

Getting back to the question, I think it would help if you had a narrow list of things that had to be complied with and to narrow the certification process down to those things that really matter, rather than looking at whether this includes a jingle or a slogan, because I do not think that actually goes to the nub of what the bill is trying to achieve.

THE CHAIR: I am not wanting to put words in your mouth, but it is around having legislation that is more limited and targeted at the higher end principles and then underneath that having a certification and guideline process that provides the commentary and the guidance to the certification process.

Mr Green: Yes, I think that is along the lines that my thinking is heading.

MR COE: Going back to the matter of hats, that is wearing your hat as the head of a statutory authority?

Mr Green: Yes.

MR COE: But your preference, representing Elections ACT, would be that you are exempt?

Mr Green: It depends on the final structure of the bill as to whether we are exempt or whether there is simply reference to—

MR COE: The bill as tabled, as discussed. As it is at the moment, you would rather be exempt?

Mr Green: I think there are two ways you could achieve what we are after. One is simply to say that the bill does not apply to the Electoral Commission. While that would remove us from the equation and make life easy for us, I have no problem with the commission complying with the principles of the bill. It is an obvious thing that whatever we do cannot be party political in any way. That is one of the reasons why we exist. So I would not have any problem with complying with the bill. What I would like to see in the bill is something that does not, for example, capture us in a clause that says that there shall be no advertising within 14 weeks before an election. So there are really two ways that you could approach it, and I would be comfortable with either way.

MR RATTENBURY: I think you have identified a number of important technical matters for us in the legislation that are particularly relevant to the commission and probably to some other agencies. We appreciate your time in putting together a submission and drawing those matters to our attention. I think the commissioner has been very clear in his evidence.

THE CHAIR: Do you have any final comments, putting on an executive officer hat, with respect to the mechanics of how this would work?

Mr Green: I think I have covered the things I want to say. If, in coming up with its draft report, the committee wanted to float ideas by me and just get my general comments, I would be very happy to do that.

THE CHAIR: Fantastic. Thank you for coming in, and thank you for the offer to provide further advice as we go through this.

MACDERMOTT, DR KATHLEEN, Member, Democratic Audit of Australia
SAWER, PROFESSOR MARIAN, AO, Director, Democratic Audit of Australia

THE CHAIR: Good afternoon, and welcome to this public hearing of the Select Committee on Campaign Advertising, inquiring into the Government Agencies (Campaign Advertising) Bill 2008.

I direct you to the privilege statement. Have you read the privilege statement? You understand the implications of the statement and you are comfortable with that? Thank you. Before we proceed to questions, would you like to make an opening statement?

Prof Sawyer: Thank you, yes. We have been conducting an audit of the health of Australian democracy since 2002, and our capstone volume has just come off the press today. We have not seen it yet; it is in the mail. It is called *Australia: The State of Democracy*, so this is a big event for us.

Over the life of the audit, we have not been sitting on our hands. We have published 200 discussion papers and 10 reports and we have done dozens of submissions to inquiries such as this one on various issues relating to democratic health. So that is the nature of the audit. For this particular inquiry, Dr Kathy MacDermott, who is an expert in this area, has prepared our submission, and she will be taking questions on it today. Thank you.

THE CHAIR: Thank you. Dr MacDermott, do you have any opening comments?

Dr MacDermott: Yes. I will reiterate the main findings of our submission. We argued that the bill is not perfect but that the problems it has are not fundamentally systemic. We recommend that the bill, with some amendments, be passed and we would hope that it would serve as a model for legislation across other jurisdictions.

THE CHAIR: Other jurisdictions have guidelines. Commonwealth guidelines have been in place for a while, with six-monthly reports through the Department of Finance and Administration. How do you think the implementation has had an impact on commonwealth advertising, as far as the process and accountability are concerned?

Dr MacDermott: What the guidelines have to offer that is really the key from my point of view, the fundamental innovation, is that it forces responsibility onto agency heads for making decisions about the suitability of the advertising that they are offering to their minister. So they have to offer the minister something which conforms to a set of guidelines, and then the minister can proceed to launch advertising and initially approve the expenditure of the advertising.

My understanding is that there is a tendency still at the commonwealth level to rely on the Auditor-General more than on agency heads. Once you rely on agency heads, you then push down into agencies responsibility for making decisions around what is critical and what is not in advertising. I think that leaving all the responsibility with the Auditor-General is a mistake, and I think that there is probably still a tendency at the commonwealth level to do that. That is why in our submission we reiterated the importance of the public service taking responsibility for the material it puts forward

to the minister.

THE CHAIR: What has been raised here—you may have heard it earlier; I am not quite sure if you were here—is the notion, with that certification process, that the responsibility rests with the executive rather than the minister. So that is supportive of that, rather than the minister ticking off and almost directing the executive to pursue something.

Dr MacDermott: The minister has approved a campaign, approved that money be allocated by the department for the campaign, and is briefed on the campaign. But the responsibility for presenting the minister with a campaign which conforms with the legislation lies with the public service, just as presenting the minister with outcomes that conform with legislation in all sorts of other areas also lies with the public service.

MR RATTENBURY: On page 3 of your submission, in the opening comments you make this interesting observation:

It is also arguable, however, that what the public believes when it votes is to some extent conditioned by government advertising previously underwritten by the public's own purse.

Could you elaborate on that and offer some examples of cases you are aware of where that has taken place? I am not asking you to name specific ones.

Dr MacDermott: There are lots of historical campaigns. The “unchain my heart” campaign was one. The “true blue” campaign that the Labor Party had is one. Work Choices was not around an election period but it was certainly one where the attitudes of the public were being funded by public payments. So there is a whole history of analysis of campaigns of that sort. Luckily, we are in a strong position to provide you with a book that sets out a number of specific examples.

MR RATTENBURY: Okay.

Prof Sawyer: And details on expenditure on government advertising and so forth.

MR RATTENBURY: You go on to discuss the role of the Auditor-General. One of the key questions shaping up for our panel—

Dr MacDermott: Yes, I can see that.

MR RATTENBURY: is whether the Auditor-General is asked to take on that role or some sort of independent panel or review group, or some other options. Could you elaborate on the comments in your submission.

Dr MacDermott: Our comments were based on the model we are talking about which does not have the Auditor-General saying yes or no to a campaign. The role of the Auditor-General is to review the campaign and report to the minister. The role of the agency head is to certify the campaign. So that is the model that we are talking about.

It seems to me, as I said last time, it is just that it is consistent with the role of

auditors-general in governments to certify that public service outcomes conform to legislation. In terms of expense, the Auditor-General, I notice, has told you they need extra money to take on this role, and so would anybody else, and probably less efficiently, because they have actually got an organisation in place. There is no point in multiplying the entities when you have got an entity which can do the job.

MR RATTENBURY: The Auditor-General was a witness earlier this afternoon. It would be fair to say they have expressed real reservations in taking on this role.

Dr MacDermott: They have, but to be fair to them, they also quoted the commonwealth experience, which is not negative, and they agree that if the role is properly cast, if they are not expected to take political decisions, and they should not be, then it is not an improper role for the Auditor-General. It is time consuming, it is resource consuming, but it is no different from any other review role that the Auditor-General has. I can understand that they feel that some of the hoopla around the bill, about it creating political pressure for them, is making them uneasy about it, but towards the end of their submission they seem to accept that, if it has to happen, it has to happen, and they can do it.

They have talked about some of the issues around meeting time frames, and they have also looked at the way that, in the commonwealth, they have been doing an iterative process between the Auditor-General and agency heads, so that there is not any particular delay in the review process. And there is the matter of having somebody with centralised expertise that can assist agency heads while they are working through and developing the skills they need to understand how a campaign is political.

Prof Sawyer: It may be that the threshold which triggers the role of the Auditor-General is currently pitched a bit too low in this draft bill, and that would be one way to relieve the pressure on the Auditor-General.

THE CHAIR: That has been raised.

MR RATTENBURY: Yes, that is something I would like to ask about as well; I am glad you brought it up. A figure of \$20,000 has been suggested in the bill, and the government in their submission have suggested \$100,000. In your experience have you had any indications of what might be an appropriate threshold, compared to perhaps what other jurisdictions are doing or any experience you have of the sort of spend that government agencies are making on these kinds of campaigns?

Dr MacDermott: It looked low to me. The drafters did not give you an indication of why they pitched on that amount?

MR RATTENBURY: I have had some indications of why, but it is probably not appropriate to discuss that in this forum.

Dr MacDermott: But there was some sort of analysis undertaken before the number was arrived at. The issue I am raising, and essentially it was raised by the Auditor-General, is: if you are going to pick a number, you need to be able to substantiate why you have picked that number, what happens above and below that number and what current practice in the ACT is around the types of campaigns they

conduct and the cost. So it should be a properly documented number. That is all I really want to say on that. If it is confidential then it seems to me that the rationale is not transparent. There should be a transparent rationale.

MR RATTENBURY: I do not think it is my job to disclose it; the drafters can give their reasons.

Dr MacDermott: It looked low to me, but I do not understand what the reasons are or whether there is any sort of transparent research that has been conducted around that.

THE CHAIR: On the role of the Auditor-General, you made mention of the iterative process that the commonwealth has, with the Auditor-General going back to agencies a lot. With respect to the Auditor-General, or whoever is part of that review compliance process, at what point can they come back and do an independent performance audit of that agency that is inclusive of the advertising campaign? Do you think there is a quandary there? If, indeed, you are part of the process and if you are only reviewing compliance rather than effectiveness, what is your role in coming back with an independent performance audit of that expenditure?

Dr MacDermott: They make a distinction themselves in their submission between reviewing and auditing. It seems to me that that is a perfectly acceptable distinction, so they could undertake a review. Their review will be advice to the minister; it may or may not be entirely positive advice. It will be advice on the campaign. What kind of evaluation audit that the agency maybe does afterwards of the effectiveness of the campaign will not be something they will need to take into account because it will only be able to be done if the campaign has been undertaken. So there are a number of factors that they would not have been able to deal with in a review, anyway. I do not think they are tied to giving you the same answer twice, if that is what you are concerned about.

THE CHAIR: What are your thoughts around having this function done by an independent body over the Auditor-General?

Dr MacDermott: It is expensive. It asks the Auditor-General to come back and second-guess it and do a performance audit later on—if you are concerned about the review/audit distinction. But where do you get the independent body from? Who appoints it? Where does it come from? Who is represented on it? Is it a public service body or a political body? I am not sure it solves as many problems as it raises.

Prof Sawyer: From the point of view of the audit, we have always believed that the Auditor-General has a role in monitoring government advertising. We have been calling for a number of years for commonwealth implementation of the Auditor-General's suggestions as to principles that should be applied to government advertising. We were delighted when the government adopted those principles last year. But, on the other hand, we were nervous because they are vulnerable. Until you legislate, it is not enough. But we believe that those kinds of principles and the role of the Auditor-General which were enshrined in those guidelines were the right way to go. We really look forward to the ACT taking a lead in terms of legislating such guidelines, but keeping the role of the Auditor-General.

THE CHAIR: There is the matter of the definition of what is routine, what is operational, what is captured within this bill. Do you have a view on that? In addition to the dollar threshold, there is also a concept envelope there as well.

Dr MacDermott: The extraordinary circumstances examples are quite clear-cut. But what surprised me in what I read was the Chief Minister's view that advertising by the Electoral Commission of polling places would not fall under routine advertising. I would have thought that would be caught in a very straightforward way. If someone is giving legal advice to that effect, I have not had access to it, but it surprises me.

THE CHAIR: And that is from his comments?

Dr MacDermott: On 1 April, in *Hansard*.

THE CHAIR: So you have a broad definition of routine advertising?

Dr MacDermott: Requests for tender, advertising positions, obviously fall into it, and then routine advertising which is associated with an agency's function, which is the way it is defined in the bill, seems to me to be quite straightforward.

THE CHAIR: So with the Electoral Commission, for example, advertising and promoting elections and enrolment on the electoral roll, that is routine; and bus timetabling is routine as well?

Dr MacDermott: Routine would be the Electoral Commission advertising the location of polling booths. If there had been a change to the legislation around, say, people who were able to vote, which there was at the commonwealth level last time, I could see that that would actually be exceptional circumstances. You could run a campaign for young people to say, "Access to voting will be closed off early; you should get in and sign up soon." But that would fall under exceptional circumstances; I think it is section 15. The location of polling booths happens at every single election, and that would be routine.

THE CHAIR: For example, you would consider the bus timetabling, the changing of the ACTION networks, to be routine and operational public information that should be put out?

Dr MacDermott: Yes.

Prof Sawyer: So it would be excluded from the definition of campaign advertising. Even when it was campaigning, I think, to alert people to get on the roll, which might happen within the three months before the election, because we have got such a problem with youth enrolment, as you know, it is quite likely that you would be having that kind of information activity going on in that three months. But I cannot see why it should be defined as other than routine.

Dr MacDermott: That would be routine. There are extraordinary circumstances. I would have thought the change of the legislation around eligibility to vote prior to an election would be an extraordinary circumstance.

MR COE: Yes, it is not an ordinary circumstance. Dr MacDermott, I refer to your recommendations 7 through 12. I have got a particular interest in changes that can be made that can actually bring about a cultural shift within organisations. Recommendations 7 to 12, to me, would actually help bring about a change in expenditure at the very lowest level and would hopefully fix some of these perceived problems before they even occur, if that makes sense.

Ms MacDermott: These are the reporting recommendations?

MR COE: Yes. Simply because there is a risk that what you are doing will be reported or that there is a risk that what you will do will be compared to other comparable operations, that might even provide a deterrence to doing something that might be perhaps below board. Do you have any comments about the cultural shift that this might actually create?

Dr MacDermott: In the first place, the bill is very weak in the reporting area. I think it said, "You will report total expenditure." You cannot do much with that. You cannot look at how much people are spending on market research, which is an issue because in market research people can ask questions which politically advantage them, or use them in place of questions which actually go to what the public does or does not know about a policy, need to know about a policy, how you access workers with particular disabilities and so on, which is the function of market research. If you do not break down your total numbers into the components of what you are spending the money on then people can bury political activities in promotional activities, and that is a problem.

Also, the capacity to compare expenditure across agencies is very important. The capacity to compare expenditure over time is very important. We recommend that there be publicly included in annual reports evaluations so that people will have to go back and justify why they had a campaign and how effective the campaign was. I would have thought that would create much more of an environment of reflecting on a need for a campaign before proceeding, because you have to demonstrate afterwards its effectiveness. Each of those components is there because it tells you something that encourages agencies to think about how they are spending government money.

THE CHAIR: The guidelines being developed could apply across all government agency advertising, not just those that may be captured within the target of the bill. Would you support that?

Dr MacDermott: We deliberately took a step back on the question of the legislation governing statutory authorities in the ACT. I am not an expert in that area and I do not know what it is. The commonwealth legislation makes a distinction regarding Financial Management Accountability bodies, which are the ones which basically have an agency head rather than a board and who are closer to government and do not have access to public money. Their money comes through appropriations; they do not earn it outside. They make a distinction between those FMA bodies and CAC Act bodies, which are the corporations. The CAC Act bodies would be people like ActewAGL. How that is done in terms of ACT legislation, how that distinction is made, I do not know, but it seems to me to be a sensible one. You confine the legislation to non-earning bodies without boards, but bodies with agency heads, who

spend taxpayers' money directly. How you draft it to do that, I do not know, but I am sure it can be done.

THE CHAIR: Do you see merit in any guidelines applying across advertising?

Dr MacDermott: No.

THE CHAIR: You do not?

Dr MacDermott: No. I would go basically to the FMA-type bodies.

THE CHAIR: At the very beginning you say that provisions of the bill may weaken rather than reinforce. Can you highlight those areas of concern that you have not already covered?

Dr MacDermott: There are a number that I cover in my concerns—

THE CHAIR: The areas of concern, yes.

Dr MacDermott: with the bill. Some of the definitions and some of the guidelines seem to me to be unworkable. I refer to the slogans/jingles business. I can see where it is coming from but it is not necessary. I noticed on your list of witnesses you have got Graeme Orr coming, or you may have already spoken to him.

MR COE: He has made a submission.

Dr MacDermott: He has made a submission. It is his view, and I think it is a fabulous idea, that advertising should be labelled from the department in which it originates and whose agency has cleared it with the minister, rather than being labelled as “government”.

MR COE: That is recommendation 6 of yours?

Dr MacDermott: Yes. We have made that recommendation as well but he has also made it. That is not in the act either, but I think it is a pretty good idea.

THE CHAIR: For transparency and accountability purposes, yes.

Dr MacDermott: And there was one other one towards the end, I think. It was the business on opinions. I do not think it is possible to exclude opinions totally from advertising campaigns, in the sense that they, of necessity, summarise often some quite complex material. In the commonwealth guidance, the way they have put it is that the campaign should enable the recipients of the information to reasonably and easily distinguish between facts on the one hand and comment and opinion on the other. That is so that you recognise that opinion is opinion, but I do not think you can actually eliminate it from any document.

If the government has a view—and I am thinking of Work Choices—that a piece of legislation would advantage employees by giving them flexibility, that was the government's opinion. It did not, in the end, turn out to be employees' opinion. But it

was an opinion; it was not a factual statement. It is not a good example because I think that whole piece of advertising was suspicious. But there are statements that governments make: “We’ll improve hospitals by shortening waiting lists,” something like that which is an opinion. I would have thought that governments could say, “We believe we will; we intend to; we aim to; it is the intention of the bill to,” or something like that.

THE CHAIR: Because that is often the aim behind the activity that you are advertising around?

Dr MacDermott: That is the in-principle outcome that you are seeking. As long as you make it clear that it is an in-principle outcome that you are seeking, I do not see a problem with doing that. I think those are the only two which I thought were particularly difficult. I was very strongly supportive, however, of the innovation in this bill which bars campaigns prior to an election, as opposed to the commonwealth guidelines which simply say that the environment in which a campaign occurs is one factor which you need to take into account. I think that is probably pretty vague and that the ACT proposal is simpler, clearer and much more workable.

THE CHAIR: But that would then have to apply to some exceptions?

Dr MacDermott: There would be the routine and there are exceptions. Routine does not fall in in the first place and exceptional lets you deal with swine flu or anything else.

Prof Sawyer: Of course, the commonwealth has not moved to fixed term elections yet, despite urging on the part of the Democratic Audit, so it has more problems.

MR RATTENBURY: It is one advantage here that makes it easier to put a provision like that in—that we have that very clear date. I want to come back to the reporting issues. In recommendation 10 you talk about reporting in annual reports. My feeling is that it obviously contains a considerable lag and I am wondering about the possibility that, once advice has been certified, we should consider seeking to have that tabled in the Assembly, as a more immediate point of scrutiny. I wonder if you would be willing to offer any views on the merits or pitfalls of such an approach.

Dr MacDermott: You could do that but the problem is you would not get a picture of what agencies have done over a period of time; you would just get a series of one-offs.

MR RATTENBURY: You could ask for a summary at an annual reporting stage?

Dr MacDermott: Yes.

THE CHAIR: So each individual tick-off, certification, gets tabled and then the annual report involves what they have done over the year?

MR RATTENBURY: Yes.

Dr MacDermott: Tabled under the agency head’s signature; I think that would be a good reminder for agency heads: “I approve of this,” blah, blah, blah.

THE CHAIR: How do you think the six-monthly commonwealth reporting out of Finance works? That is how they cover the reporting—that six-monthly reporting?

Dr MacDermott: You mean the frequency of it?

THE CHAIR: The frequency, the quality of it, the impact, the cycle of review back to agencies on their processes and behaviours?

Prof Sawyer: It was so refreshing to get the first six months report, but the real test is when you get the election in sight, so it has not really been tested yet.

MR COE: When was that published? When was the six-monthly report? What is the lag after the term?

THE CHAIR: It is ongoing every six months.

MR COE: Yes, I know, but until 31 December, is that one published in May or April?

Dr MacDermott: June and December, I think, because this one came out on 31 December.

MR COE: Okay, until March; so a three months delay from the six months before?

Dr MacDermott: Yes. I was not impressed with the breakdown of figures. I thought we could have had a breakdown much more along the lines that we identified in the bill, but they were more just totals. I am hoping that they will do better next time. It was the first six months, they did not have a mechanism in place and it is hard to gather data from agencies because agencies collect data about their advertising in very different ways. So the agencies have got to get common formats into their systems and that is going to feed into the centralised system. I am hoping that after a year they will do better than they did after six months.

MR RATTENBURY: You made a comment in your submission, and I guess you touched on it today, about the relative merits of legislation versus guidelines. Do you want to elaborate on that point?

Dr MacDermott: You can ignore guidelines but you cannot so easily ignore legislation. Guidelines, when you have a change of government, go away; legislation does not. The point of this whole exercise is to create a level playing field. The level playing field applies across whoever happens to be in power at any given time. If you have legislation then it applies to whichever party is in power. It is even-handed. My experience in the commonwealth public service has led me to believe that subsequent governments will not necessarily keep guidelines in place that were put in place by a previous government. So the audit strongly views having this legislation as being in the interests of even-handedness.

MR RATTENBURY: One of the ideas that has been suggested to the committee in the submissions we have received is an annual cap on government advertising. Again,

from your experience, are you able to comment on the feasibility or the practicality of such a measure?

Dr MacDermott: That is one of Graeme Orr's recommendations, yes.

MR RATTENBURY: Yes, I could not remember where I had read it.

Dr MacDermott: I think it is difficult.

MR RATTENBURY: Why?

Dr MacDermott: Because of swine flu.

MR RATTENBURY: Right.

MR COE: What about a cap on routine—which is not included, so it is a bit tricky, actually.

Dr MacDermott: You do not know whether you are going to have to change your entire bus system, or whatever. It is very hard to predict these things. If you have a proper reporting system with proper effectiveness, with indicators at the end, you know whether you have got value for money, and that is what the whole exercise is about. There are already concerns about flexibility and that would certainly, it seems to me, be much more of a concern than any time lag that might be caused by people certifying.

Prof Sawyer: We would anticipate that increased transparency might reduce the amount of money spent on government advertising. Australia spends an extraordinary amount per capita on government advertising compared with the democracies we usually compare ourselves with. This kind of data appears here and in the forthcoming *The State of Democracy* book. I think partly it has grown like Topsy, because we have not had this kind of transparency which hopefully will be forthcoming in the ACT.

THE CHAIR: The other notion that has been mentioned is to allow for those definitional concerns and scopes—that the legislation concentrates on the limited key principles that are more easy to lock in, and then there are guidelines and certification processes that sit underneath that. Do you see that as a reasonable mix rather than trying to capture everything in a single piece of legislation?

Dr MacDermott: So you would have principles, you would have—

THE CHAIR: You would have the overarching intent, that you must do this and you must do that. But then you have identified that a number of people have identified the concerns around scope, definition and that type of thing.

Dr MacDermott: So how binding are these guidelines? The principles are very vague. They are motherhood and they are desirable but—

THE CHAIR: It goes to the detail of having guidelines that are quite rigorous and have a certification process.

Dr MacDermott: Attached.

THE CHAIR: That is quite rigorous as well, and binding. If you link that with good reporting processes—

Dr MacDermott: So you would make the guidelines but you would do them by regulation? How do you make them binding?

THE CHAIR: I think the overarching legislation would make them binding.

Dr MacDermott: Okay.

THE CHAIR: I personally have a concern about the mechanics and implementation—that if you put it in legislation and then, as you implement it, you come across these jarrings of definition and implementation, the mechanics across different agencies, it is more difficult to amend legislation than coming back and ongoingly reviewing and tidying up guidelines.

Dr MacDermott: But you can do that by regulation because you can just table the regulation, and that leaves them equally binding. I would not be fussed, as long as they had that kind of force. I can see that if you think you might need to go back and have another look and check this it could be a very desirable thing to have.

MR RATTENBURY: You made reference in your submission to a disallowable instrument. Somebody did; I have been reading a lot of submissions.

Dr MacDermott: Basically that is what regulations are, so that is—

MR COE: Are there many other jurisdictions that you know of in the world that have passed similar legislation?

Dr MacDermott: The UK has passed some regulation in terms of guidelines, and they used the auditor-general. Canada has fabulous reporting arrangements.

Prof Sawyer: Under its accountability legislation.

Dr MacDermott: They got in deep trouble a couple of years ago and they have passed some quite significant legislation as a consequence.

MR COE: I believe Great Britain for a long time has had a restriction on the amount that political parties can spend in campaigns. In England there are restrictions on the amount that candidates can spend on campaigns.

THE CHAIR: And parties.

MR COE: Yes. I think it is £10,000 during the defined election period for any individual candidate. But that goes to the issue of the cap and the merits of having it capped.

Dr MacDermott: This is a bit different because that would be about a political campaign during an election campaign.

MR COE: Yes.

Dr MacDermott: This is public service things in a non-campaign period, so it is a slightly different animal. I have got no expertise in the area you raise, so I cannot help.

Prof Sawyer: But Australia is out on a limb in not having expenditure limits and not having donation caps and so on. As Kathy rightly said, that is another story and not today's story.

MR COE: Going back to the reporting in Canada, what sort of regime do they have there and what sort of indicators do they report against?

Dr MacDermott: Exactly what is on this list, including market research, and they are the ones that have the evaluation arrangements.

MR COE: And how long has that been in place there?

Dr MacDermott: It has not been too long, two or three years, I think. As I say, they had a quite significant political fallout from some advertising that the government put through—I think someone who was affiliated with government in some way. They put in place some model guidelines and these were there.

Prof Sawyer: I think after the Harper government came in in 2006 the advertising regime was really tightened up.

THE CHAIR: Thank you, Marian and Kathy, for coming in.

Prof Sawyer: Thank you for the opportunity. May we leave you with some audit reports?

THE CHAIR: Please.

MR COE: When will your main publication be launched?

Prof Sawyer: The minister who was going to launch it has moved to a new portfolio, Defence, so this has caused a bit of a delay.

MR COE: He would still be the right person to have, I think, given his history.

Prof Sawyer: Unfortunately, due to his new portfolio responsibilities, he can't.

The committee adjourned at 4.58 pm.