LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Campaign finance reform)

Members:

MRS V DUNNE (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS M HUNTER

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 17 FEBRUARY 2010

Secretary to the committee:
Dr H Jaireth (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

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WITNESSES

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Amended 21 January 2009

The committee met at 10.28 am.

GREEN, MR PHILLIP, Electoral Commissioner, ACT Electoral Commission
MOYES, MR ANDREW, Deputy Electoral Commissioner, ACT Electoral Commission

THE CHAIR: I thank members for their attendance. Welcome, Mr Green and Mr Moyes, to the first of the hearings in relation to campaign financing. You have been here before, Mr Green. Have you been here before, Mr Moyes?

Mr Moyes: I have been in the audience.

THE CHAIR: Are you familiar with the contents of the buff sheet about privilege, phones and those things?

Mr Moyes: Yes.

THE CHAIR: We can therefore assume that we have read the riot act. Would you like to begin, Mr Green?

Mr Green: Yes, thank you. As I understand it, the committee has asked the commission to provide you with an introductory briefing to the ACT's funding and disclosure laws. We are still in the process of preparing a written submission to the committee. We have a draft submission that has been through one meeting of the full commission, a three-person commission, where we have discussed the contents of the report, but we have not finalised that report. We are hoping to do that later this week. We thought we would take into account the discussion that we may have at the meeting today.

We have prepared for you a PowerPoint discussion on the disclosure scheme as it currently exists. We go right back to basics and talk about the objectives of why you have a funding and disclosure scheme, we give a bit of history of the scheme, in comparison with the other schemes around Australia, we foreshadow perhaps briefly some improvements that we could suggest to the current scheme, the sorts of things we are likely to be putting in our submission, and then there are some particular issues raised in the committee's terms of reference that we thought we would go through. Have I correctly divined the committee's intention, that this is the kind of thing you wanted to hear from us?

THE CHAIR: Yes, it would be useful for the committee—if members agree—to look at how the circumstances currently apply in the ACT before we move anywhere else. I think that would be a good place to start.

Mr Green: If I could just put the caveat that what I am about to say has not been formally agreed to by the commission. Some of this is based on discussions we have had, but we have not formally registered a view on our formal submission to you. Some of it, particularly things that the commission has not discussed, might be my opinion rather than the full commission's opinion, so could we just bear that in mind.

THE CHAIR: Yes.

Mr Green: What we started to do when we looked at our submission was to go right back to the reasons why you have a funding and disclosure scheme at all. We have distilled it down to three different areas, the first being that public funding of parties and candidates can facilitate parties and candidates competing and taking part in the political process by having some guaranteed level of public funding provided so that they are not entirely dependent on private funding for the means of conducting election campaigns.

The second objective that we came up with was that the combination of disclosing sources of income of parties and candidates and providing some public funding to parties and candidates is a way in which corruption could be, if not prevented, at least minimised. The opportunities for undue influence would be minimised if there was some public exposure of sources of income and also some public contribution to the income of parties and candidates.

The third objective that we listed is that the transparency in finances of political participants informs the electorate of the sources of public money, so that voters, when they vote, have an opportunity to know where the money is coming from from the people that they are voting for and that that transparency in itself is a reason for having the funding and disclosure scheme.

As to the history of the scheme in the ACT, as you would be aware, the first two elections for the ACT Assembly in 1989 and 1992, after the granting of self-government, were conducted by the Australian Electoral Commission under commonwealth legislation. The then commonwealth disclosure scheme was modified and applied to those first two ACT elections so that the rules that applied for commonwealth elections applied also to ACT elections in the broad. There were a few tweaks to take account of the Assembly, but essentially it was the same scheme.

The public funding to parties and candidates was provided by the commonwealth in 1989. I think it was a four per cent threshold at that time. As part of the handover to self-government, funding was only provided for that first election by the commonwealth. The second election funding was not provided by the commonwealth and the ACT did not itself provide for funding, so there was no party or candidate public funding provided in the 1992 election.

Once the commonwealth passed its legislation to give responsibility for elections to the ACT Assembly after the 1992 election, as part of that big package of electoral amendments that went through in 1993-94, there was a comprehensive funding and disclosure scheme that came into effect in 1994. That scheme was based on the then commonwealth scheme. It was consciously designed to keep in step with that scheme, with the intention of minimising the differences in the jurisdiction so that those parties that were registered at both levels would effectively have the one set of obligations to meet at both levels—so that we were not creating an extra level of work for parties at two levels of government.

As the commonwealth scheme changed over time, the ACT has tended to keep in step with the commonwealth scheme. There have been some time lags while that has been going on, but in general the commonwealth and the ACT schemes have kept in step,

until the commonwealth changes in 2006, when they increased their thresholds to over $10,000. The threshold to that point had been kept, since the commonwealth scheme started in 1984, at a $1,500 threshold. So when the commonwealth moved to a threshold of over $10,000, linked to CPI—so it kept going up every year—at that point the then ACT government moved, before the 2008 ACT election, to remove that nexus between the commonwealth scheme and the ACT scheme, at least insofar as the threshold was concerned, and moved all of our thresholds to a standard $1,000 for pretty much everything.

A provision that had lasted up to that point was that the parties registered at the commonwealth level could also submit a copy of their commonwealth return to the ACT commission to meet their obligations under the ACT act. That was predicated on the two schemes being in step. So once the thresholds changed, with respect to that ability to lodge a copy of the commonwealth return to meet their ACT obligations, if the threshold at the federal level was over $10,000, the $1,000 threshold was not being met. So that was removed before the 2008 election.

Our submission will go into more detail about exactly what the scheme was like when it began and what sort of amendments were made over time. Briefly, the scheme that we now have, in 2010—and this is effectively the scheme that has applied since the 2008 election—is that it is a direct entitlement scheme for our public funding of parties and candidates. It means that parties or candidates do not have to demonstrate that they have spent the money to receive public funding. At the moment it is the same as the commonwealth scheme but it is not the same as all the other jurisdictions which have public funding, which require evidence that the money has actually been spent. The commonwealth is looking at going back to a reimbursement scheme rather than a direct entitlement scheme.

Parties and candidates have to receive four per cent of formal votes. It is within the electorate, so a party group of candidates can band together in a group, and it is a matter of the group reaching the four per cent rather than each individual candidate for a party, as to whether they get funding. Because it is electorate by electorate, it does mean that a party could receive funding in one electorate but not necessarily in all three electorates, because they have got to reach the four per cent in all three in order to get funding in all three.

The prescribed amount is adjusted by CPI every six months. It can go down if CPI goes down. I think that happened once, but in general it goes up. I notice that the 1989 funding rate was 50c per vote; for the 2008 election, it was 144.722c. With CPI adjustments since then, the rate for the current six months is 153.551c.

With regard to our disclosure scheme, there are, as I mentioned, thresholds that are now all pretty much standardised at $1,000. The scheme is a very complicated one. When I was explaining this to my commission members, they said, "Okay, this is a lot more complicated than we first thought." They had not really looked at it before, in the detail that we have had to for this submission. Generally, there are two different kinds of returns. There are election-related returns and there are annual returns. Returns that are related specifically to elections are returns by parties showing electoral expenditure on particular kinds of expenditure, things like advertising, direct mailing, opinion polling, consultants' fees—looking at expenditure that actually

occurs in that pre-election period, in the 36 days leading up to polling day. The annual return is the thing that has more detail in it about disclosure of general income and donations.

Election returns for candidates have to show gifts received by the candidates and electoral expenditure spent by those candidates. The disclosure period for gifts received varies for candidates, depending on whether they were a candidate at the previous election or whether they were declared to be a candidate some time after the previous election. So that disclosure period does vary according to effectively at what point they became publicly known as a candidate for the next election.

Broadcasters and publishers have to submit election returns showing details of electoral advertisements broadcast during the pre-election period. That is something that originally the commonwealth did. Our provisions were based on what the commonwealth used to do but the commonwealth have now stopped doing that. There are not that many jurisdictions that are doing that these days.

We also have election returns provided by other participants, which is generally called "third parties" by the commission. They are bodies that are not parties, are not candidates and are not associated entities formally attached to a party, but they might be an interest group or a business doing its own expenditure or a lobby group. If anyone spends money or receives gifts in relation to an election, they are also required to give election returns.

We have a handout which we can give you which we will formally attach to our submission. This gives more detail on what is happening in the different kinds of returns, what is in them, who has to give them, when they have to give them by and when they get made public.

Election returns are due, for broadcasters and publishers, eight weeks after polling day; all others are 15 weeks after polling day. The election returns are then made public 25 weeks after polling day, which works out, for an October election, as early April in the following year. One of the things we address in our submission—we might come back to this—is how long a period there is between the provision of the returns to the commission and when they get made public. The dates upon which things are made public is quite some months, in some cases. If you are looking at annual returns, you are looking at disclosure of things more than a year after the event has taken place.

There are also annual returns. Parties and members of the Assembly have to submit annual returns. They have to disclose the total amounts they have received from all sources, and they have to give details of income of amounts of $1,000 or more and they have to give details about where the money has come from, so the identity of either the person or the organisation that has given them money. And it could be for any purpose, so if a party owns a business or a party owns property and rents the property out, those sources of income will be disclosed. In the current scheme there is no distinction made in the party returns between income that is from donations and income that is from a business source or from rent or trade union affiliations or all sorts of things. They are all logged in as income, so it is quite difficult to work out from the current disclosure returns what the money is actually received for.

The other thing—and we will come back to this—that is significant about the annual returns is that, in working out whether a party has received $1,000 or more from a source, they are not required to take account of amounts of less than $1,000. So if someone gives a party a regular $900 every week or every day, the disclosure returns do not require the parties to disclose that amount. They can if they want to but they do not have to do that. If those payments are donations and they total a sum of more than $1,000 in a financial year, the donor has to give an annual return that would disclose that amount, so that those amounts are disclosable, if the amount concerned is classed as a donation—and, again, we will come back to this meaning of what is a donation or a gift.

Parties have to show in the annual returns two things: total amounts paid and total debts. That total amounts paid is just a single number. It is not a breakdown of what they have spent money on. The only thing that discloses what parties spend money on is in that election return and it is only in relation to expenditure during the election period.

Associated entities also have to submit annual returns. One of the amendments that went through just before the 2008 election increased the level of disclosure that associated entities were required to make. It used to be the case, when we were in step with the commonwealth, that associated entities and party disclosure rules were effectively the same. One of the amendments that went through in 2008 was to require that associated entities were to give details that give all amounts, regardless of the size of the amount. If there was a $2 donation, in theory, the $2 donation would have to be receipted and the associated entity would have to give the details of who gave them that money. At the moment there is only one associated entity that is sending returns to us, and that is the Canberra Labor Club. The other significant associated entity that, up to the year before last, was giving us annual returns was the 250 Club, which had an association with the Liberal Party, but that association is no longer the case and the 250 Club has changed its name and become a different entity which no longer considers itself to be an associated entity. So we only have the Canberra Labor Club at the moment as an associated entity.

The Canberra Labor Club obviously is a business. It sells food and drink through its clubs and it takes income from gambling. It has a very large number of members who pay a nominal membership fee. The government considered it was not in the public interest for someone who pays the club a $5 or $10 membership fee, or whatever it is, to have their name and address indicated as people paying money to associated entities. So there are some exceptions for what has to be disclosed by associated entities. If they are selling food or drink under the Liquor Act or if they are getting income under the relevant gaming laws, the identity of people buying those services is not required to be disclosed; nor are people paying a membership fee of less than $50 to a club required to be disclosed by the associated entity.

Associated entities also have to disclose details of people who have deposited capital with them and details of debt—total debt—as well as details of all people to whom $1,000 or more is owed. Again, they are also required to show details of expenditure, but they are not required to show details of where that expenditure occurs. For example, the Canberra Labor Club is not required to indicate how much money it

gives to the Labor Party. The Labor Party is required to disclose how much money it gets from the Labor Club, but the corresponding amount that the Labor Club gives to the Labor Party is not required to be disclosed.

Donors to parties, MLAs and associated entities in a financial year are also required to submit donor returns if they give $1,000 or more to a party, MLA or associated entity. Unlike parties, they have to take account of amounts of less than $1,000 if they sum to more than $1,000 given to a particular party, MLA or associated entity. We will come back to these kinds of returns because this is one of our problem areas, if you like, with regard to enforcement.

With donor returns, if a donor who gives money to a party, MLA or associated entity is also given in their own capacity gifts from another donor—if an intermediary or something gives them a gift and they in turn go on to give a gift to a party—then they also have to give details of gifts to them if they are of $1,000 or more. There is also a provision in the Electoral Act that says that if someone is acting as an intermediary they are actually not the real giver of the gift. It is the real giver of the gift who is required to be disclosed as the giver of the gift. For example, if a fundraising company is set up to raise funds for a party, it is the origin of those funds rather than the fundraising company that is the entity that is meant to be disclosed. Obviously that is an enforcement issue if you have got to go back through the books of each link in the chain to find the ultimate source of the income. That is one of the big challenges to getting a disclosure scheme—that disclosing the actual source of the income is just working out where the money is originating from.

Annual returns are due 16 weeks after the end of the financial year for parties, MLAs and associated entities which, in an election year, I think is the day after polling day.

Mr Moyes: Yes, it was the Monday after polling day in 2008.

Mr Green: When no-one is really interested in looking at it because you are doing other things. For donors it is 20 weeks after the end of the financial year, except in election years when it is 24 weeks, which gives people a bit more time to get organised. Then annual returns are made public at the beginning of February in the following year. So you can see that in February 2010 we made available the results for the 2008-09 financial year. Donations made before the 2008 election were not made public until February 2010.

Comparing our schemes with the various other schemes around the country, South Australia does not have a funding or disclosure scheme; Victoria has a funding by reimbursement scheme. The amounts of funding that the various jurisdictions pay will be in our submission. It is also in the commonwealth green paper. The thing to note about the funding amounts paid by the other jurisdictions is that, while the dollar per vote amount is within the $1.50, $2.50 kind of range, all jurisdictions, other than the ACT, the Northern Territory and Queensland, have two houses of parliament. For example, in a commonwealth election, if a person votes for a particular party in both the House of Representatives and the Senate then that party is going to get two public funding amounts, not just one. You have actually got double the rates in some of those jurisdictions when you work out how much parties are getting per vote.

Victoria do not have a disclosure scheme, but they have a requirement that parties have to submit copies of their commonwealth returns, which does not really add any value. They have a limitation on donations from casinos and gambling licensees. Amounts of greater than $50,000 are prohibited from being received. There are not many prohibitions on receipt of money. That is probably the most significant one.

Tasmania has no funding or disclosure scheme in general, particularly for its House of Assembly elections, but there are some restrictions on Legislative Council elections. I am sure you are aware of the way in which Tasmania works. The House of Assembly has a general election for the entire parliament on one day, but the Legislative Council has two or three seats going every year. It has staggered elections. They are not general whole-state elections; they are just part-state elections. They have some restrictions.

Candidates in Legislative Council elections have to disclose all expenditure and provide receipts for items of greater than $20. I suspect they have not changed that threshold for a long time. Election expenditure for council candidates is capped, as at 2008, at $11,500. Parties are prohibited from incurring expenditure on Legislative Council elections. As we will come to later, there is constitutional case law on the regulation of free speech in election campaigns. It would be very interesting if those kinds of prohibitions on expenditure were challenged. I would find it interesting to see what would happen if someone took "a party cannot spend money on an election campaign" case to court. I think they might be in trouble.

I will give you a handout that is derived from the commonwealth green paper report on disclosure. In a nutshell, the states of Queensland, New South Wales, Western Australia, the ACT, the Northern Territory and the commonwealth all have funding and disclosure schemes. They are broadly based on the commonwealth scheme. There are some variations. A notable variation in Queensland is that when any single donor reaches $100,000 within a half-year period that disclosure has to be made within 14 days of the $100,000 being reached, but in general the schemes are pretty similar.

New South Wales has a system of reporting every six months. Queensland reports every six months. Thresholds now vary. They were pretty much standardised on the commonwealth's $1,500, but when the commonwealth moved to over $10,000, Queensland, the ACT and New South Wales moved to $1,000 thresholds. That is what the incoming Labor commonwealth government had suggested it was going to do, but that proposal did not get through the Senate. All the states and the ACT moved to the $1,000 threshold, but the commonwealth still has not. I will not go through the rest of that, but that is the information that is in the commonwealth green paper. We will attach this as an attachment to our formal submission.

Looking at things in our current disclosure scheme that the commission thinks could be improved, and again we will go into these things in more detail in our formal submission, the provision that I mentioned earlier where parties—when I say "parties" I also mean MLAs and associated entities; I will say "parties" just to keep it shorter—receive amounts of less than $1,000, the current law—and this is based on the Commonwealth Electoral Act provisions—requires that parties do not have to take account of amounts of less than $1,000 when working out whether a donor has given more than $1,000 in a financial year. We have discovered in audits that some donors

or people giving money to parties were giving amounts of $990, which, suspiciously, is just under the threshold. I am just generalising. When it was a $1,500 threshold, they were $1,490 or $1,499 amounts. The parties are not required to take account of those amounts, even if those amounts, taken together, come to more than $1,000.

Donors are required to give a donor return that would indicate that they have given that amount in the financial year. The problem we have with that in an enforcement sense is that, if the parties do not tell us about them, the only way we can find out about them, if they do not voluntarily give us a donor return, is to audit the party's books. We do that once in the life of every parliament but we do not have the internal audit skills within the commission; so we have to hire audit firms to do our audits for us. We do not have a dedicated budget for that. It is money we have to find. Our budget is getting tighter and tighter as the years go by. It is a problem for us to do it, particularly if we were to do audits every year; we simply do not have the funding for that.

A simple way of fixing that is simply to require parties to take account of all amounts of income when they are working out whether someone has given them more than $1,000. It is a simple amendment to make. That would plug that potential loophole in the system.

Something we are noticing more and more in the auditing that we are doing relating to the disclosure returns—and it is not just here; it is also happening in the other jurisdictions, probably more in the other jurisdictions than here—is that the definition of "gift", which is the thing that drives whether someone is required to give us a donor return or not, talks about parties and associated entities receiving income for no consideration or for inadequate consideration. What has been tending to happen is that fundraising events are being staged, particularly by the major parties, where they provide a dinner, a speaker or an opportunity to meet a minister or a member, and the people attending those functions are saying: "It is not a gift. I am actually getting a service. I am getting this opportunity to meet someone at a $1,000 dinner. These are not gifts; they are payments for services rendered."

The way that the definition of "gift" is based, it has to be disclosed by the party if the amount is more than $1,000. If the dinner is a $900 dinner and you go to 10 of them over the year, you have given $9,000. The party does not disclose that they have received that $9,000 because the individual amounts were less than $1,000. The people giving the money do not think they are donations. They think they are paying money for a service. The current disclosure scheme simply does not pick up those kinds of activities, largely because of this definition of "gift". People claim that what they are doing is not giving a gift; they are actually buying a service.

An issue that becomes apparent when you go through the annual returns, particularly from the larger parties—and we are highlighting this in our submission—is that the income of parties basically boils down to three different ways that you can categorise it. There is the public funding they get from the ACT Electoral Commission and the Australian Electoral Commission for federal elections, the funding they get from sources that are disclosed and the funding they get from sources that are not disclosed. The funding they are getting from sources that are not disclosed is funding that they are receiving in amounts of less than $1,000.

When you go through and actually calculate those different amounts—and we have got a table we are going to include in our report—you find that hundreds of thousands of dollars every year are going to parties and you do not know, from those returns, where that money is coming from. There are various reasons for that. Some of them will be lots of people giving them money in amounts of less than $1,000. Some of them will be fundraising moneys in amounts of less than $1,000 where there is no obligation on anyone to tell us who the source of that money is. Some of it is levies on parliamentarians who do not see that as a gift, so they do not disclose it as a donation; they see it as part of the duty of being a parliamentarian.

There will also be amounts, for example, if they are renting a property and the individual payments for the rent are less than $1,000 per payment. Again, that will not be disclosed. Even if the sum is more than $1,000 over the year, because it is rent it is not a donation, so it would not have to be disclosed by the giver as well.

When you look at the amounts disclosed, some of them are up to $800,000 in a financial year from a particular party where you do not know where the money is coming from. That, I think, has issues for this objective of achieving transparency on where the funding for parties is coming from.

When we look at ways of trying to address this, we are wondering whether the whole definition of "gift" is a bit of a red herring and whether it would be advantageous to get rid of the notion of "gift" and simply look at all sources of income to see where it is coming from, impose a threshold if you think a threshold is important for privacy reasons or for reasons of administrative convenience if you have got small fundraising events where people are buying a $20 raffle ticket. You have to find a balance of what you want to find out about and what you do not want to find out about.

But you have got to be careful that, as soon as you start making exceptions, if you say you do not have to show amounts paid for a raffle ticket for less than $50, if someone buys 1,000 raffle tickets at $5, they have given you $5,000. They might want the prize badly but they are probably more wanting to give money to the party. Coming up with a scheme that is going to catch everyone is the real challenge for this kind of scheme.

We also looked at whether there is a need for donor returns if the scheme was amended so that parties were required to disclose amounts of less than $1,000, to work out whether they come to the total amount of more than $1,000. What we find is that generally the donor returns simply mirror what the party is disclosing. If an entity gives a party $5,000, the party will disclose receiving $5,000 and the donor return gives a return that says they have given $5,000. Occasionally that does not match; mostly it does.

What regularly happens is that the party will disclose a source of income that we do not have a donor return for. Part of the work that we do is that, firstly, we see whether we can ascertain from the party whether that amount was received as a donation or whether it was received for a service, particularly parties that have rental properties. Their income is not a donation, it is just a business transaction, so there is no requirement for a donor return.

Because the returns do not distinguish between income for particular reasons, we have to get to the bottom of whether an amount shown in a return is a gift or a payment for a service or whatever. If we think we are owed a donor return and we have not got one from the donor, we will write and attempt to seek a return from them. Sometimes they will give us a donor return. Sometimes they will say it was not a donation, it was a payment for service. Sometimes the letter we write comes back "return to sender", that the name and address is no longer a valid name and address. Sometimes we hear nothing at all.

If it is a case of someone who has given a donation to a party, who has an obligation to give us a donor return but who has not given us a donor return, we could prosecute them for that. We have never prosecuted anyone for any breaches of the disclosure laws and I do not think the commonwealth has—

Mr Moyes: Not that I am aware.

Mr Green: ever fined anyone under their disclosure laws either. In those cases, because we know that these people have donated, through the party's return, the fact that they have made this donation is already on the public record. Prosecuting them is not really serving any of the values of transparency that are involved. We weigh up the public value when prosecuting. Where there is no lack of disclosure, it is simply the lack of getting the form signed by someone, we tend not to pursue those but we do write them several letters before we eventually give up.

Because mostly the information shown in the donor returns is simply replicating what is in the party annual returns, particularly if we tighten up on what a party is required to disclose, what we are wondering is whether there is a need for donor returns at all. The commission is divided on this. We think, on the one hand, pursuing those who do not give us a return when we know that they have given a donation is a bit of a pointless exercise. On the other hand, it is possible that a donor's return might throw up something that a party has not disclosed that perhaps they should have disclosed. There is a bit of ambivalence there.

Another issue we are addressing in the submission is the question of anonymous donations. Our law, which was based on commonwealth law, currently provides that parties are not able to retain anonymous donations of more than $1,000. If they do receive them and we become aware of them, they actually become a debt to the territory to be paid into consolidated revenue, effectively. I do not think that that has ever happened.

But the way the act is currently framed, if parties receive anonymous donations of less than $1,000, they can receive any amount of those. So, if someone wanted to get around the disclosure laws by giving someone a brown paper envelope filled with nine hundred dollars every day or every week or every month, there is nothing stopping the party receiving those if the party honestly believes and declares that they do not know the source of the income. So we are wondering whether it might be worth looking at this question of anonymous donations and actually saying, "You can receive up to $1,000, but once you have reached $1,000, if it is anonymous, then you are not allowed to retain it and you pay the amount over as a debt."

You would have to look at the definition of "anonymous"—if it is $50 in a raffle at a fundraiser, is that an anonymous donation or not? So there are issues around that. But it is one way in which parties can receive large amounts of money without knowing where that money is coming from.

THE CHAIR: At least there would be no corruption—if they genuinely did not know where that money was coming from.

MR HARGREAVES: In the parties' returns, what sorts of numbers are we talking about with anonymous donations?

Mr Green: As I mentioned, and as we are going to put in our submission, I think one party last financial year got $800,000 where the source of those incomes was not disclosed.

THE CHAIR: But that is not necessarily an anonymous donation?

Mr Green: It is not. But we do not know where it is, and until we go and audit the books we do not know where that has come from. It is obviously a mixture of all sorts of things.

THE CHAIR: Was that the Greens?

MS HUNTER: I think it can be confirmed that, no, it was not.

THE CHAIR: You wish!

Mr Green: Another aspect of anonymous donations is that, if third parties who are either undertaking electoral expenditure on their own account or are giving money to parties or MLAs for associated entities receive anonymous donations, there is no prohibition on them receiving anonymous donations. Whether you could actually police that is another issue, but at the moment that is another potential area where money can be received without the true source of the money being known.

Another suggested improvement to the scheme is to look at the timetable in which information is supplied and in which the information is made public. There are now different models of how that is being achieved around the country. Some of the jurisdictions now have six-monthly disclosure. There is a commonwealth bill before the Senate that has not been able to get through the Senate, but I think it is also proposing six-monthly disclosure.

Mr Moyes: I believe so, yes.

Mr Green: So that is going some way towards increasing the frequency of disclosure.

There is a reference in the parliamentary agreement between the Labor Party and the Greens that suggests having more frequent disclosure, particularly during the lead-up to an election period. I think, if you are going to get value out of a disclosure scheme, the more frequently disclosures are made the better, particularly in the lead-up to an election. If voters can go into an election knowing what has happened in the lead-up

to the election, that is a much more valuable source of information than if they find out, as they currently do, some months after the election what happened in the immediate period before the election. I think there would be value in seeing if we could achieve that.

The ACT Electoral Commission is currently in discussions with the Australian Electoral Commission about an online method—parties, particularly in relation to their annual returns, having an online system where they enter their donations as they receive them. One of the models being looked at is where the parties' actual bookkeeping system could be incorporated into the AEC's online system, so that the books would actually be kept on the AEC system and, according to whatever the law was, you could then extract the relevant information for making public as the law would provide. We hopefully have an opportunity of combining with the AEC and having a joint system that would suit both our needs and the commonwealth's needs.

Potentially, technology being what it is, you could have a system where parties could, for example, within 14 days of receiving a donation be required to put it into this online system, which then could be made public almost instantaneously, depending on what sorts of checks and audits you want to put through it before it goes public. So there is a technological possibility of having really fast disclosure, if that is considered desirable.

You would have to really think about whether you would be putting stuff up that had not been properly audited beforehand and whether there would be risks involved. But technologically I think that would be possible. The submission will go into a lot more detail about the sorts of disclosure time frame issues that we think might happen.

The submission also raises various things that are mentioned in the committee's terms of reference for this inquiry. They are not necessarily things that the commission might recommend off its own bat, but they are issues raised in the terms of reference that we have looked at. The question of direct or indirect public funding—and I am assuming by indirect public funding that you are thinking of making payments to parties through things other than money, like the provision of broadcasting time or resources of the Assembly and so forth. The commission does not really have a view on that. That is more of a policy question than a practical question. We have tried to keep our focus on practical implementation issues rather than issues of policy.

With the issue of reimbursement versus direct entitlement, most of the rest of the country has a reimbursement scheme and the commonwealth is thinking of going back to a reimbursement scheme. The history of both the commonwealth and the ACT is that we started with a reimbursement scheme where the parties and the candidates had to demonstrate that they had spent the money before they got public funding—up to the maximum amount. Then both the commonwealth and the ACT moved to a direct entitlement scheme where they would simply get an amount of money and, if the party or candidate spent less than that, they would have made a bit of profit on the exchange.

The reason that both the ACT and the commonwealth moved away from verifying that the moneys had actually been spent by parties and candidates was that it was an administrative nightmare for everyone concerned, the parties and the electoral

commissions, and in almost all cases the expenditure outstripped the funding entitlement. In our submission we have a table showing the amount of expenditure declared by the parties and the amount of public funding they have received. In the history of the ACT—

Mr Moyes: I think I have gone back to 1995.

Mr Green: Going back to 1995, which was the first election where we had our funding scheme in operation. Since then the only people who have received funding that was greater than their expenditure were the Osborne Independent Group, in either the 1998 or 2001 election, and then in the 2004 election, where Dave Rugendyke and Paul Osborne ran their own ballot groups. They are the only occasions where expenditure has not outstripped their funding entitlement. Looking at the results of the 2008 election, all those who received funding spent a lot more money than they received in funding as part of their expenditure on that campaign.

So, while I can see that it seems odd to give a political player more money than they have spent in their campaign, it very rarely happens that way round, and the moneys involved are getting more and more, so there is a balance between the amount of work that that imposes on all concerned—as to whether it is worth putting all that effort into justifying expenditure when in almost all cases people are getting expenditure in a much greater amount than their entitlement.

The terms of reference of this committee talk about regulating political donations and expenditure, and we are assuming that that is particularly looking at whether there should be caps on expenditure and caps on donations received. The commission, again, does not really want to make any comment on whether that is good policy or not. That is really a matter for the policy makers in the Assembly. So, in our submission, we have looked at the legal considerations of such an approach and the practical considerations of such an approach.

There are various constitutional issues which would be relevant. The submission cites some of the case law, and there is quite a good paper written by Dr Anne Twomey on behalf of the New South Wales government, I think it was, which we quote in our paper. It does effectively conclude that limitations on receipts of income and expenditure of income may well fall foul of the constitutional right of free speech, looking at things like the Capital Television case. Obviously, the commission are not lawyers and we are not qualified to give legal advice, so that is something that legal advice might need to be sought for, if the committee is wanting to go down that way.

The enforceability of caps on spending and donations would be an issue. If you are starting to place limitations on how money can be spent by particular players then experience in other jurisdictions, particularly in places like the United States, shows that other players will pop up. So you will have third parties spending money effectively on encouraging votes for particular sides of politics, but the money is being routed in different ways. It seems to me that is an issue that will be very difficult to get around, if indeed you do get around it, or you just put up with it.

There is also a practical consideration: is it actually possible to cap donations and expenditure without having some kind of limitation on the expenditure by third parties

that would be permissible under the constitution? My personal feeling—this is not the commission speaking now—is that I do not think it would be achievable to come up with a scheme that would effectively cap donations and expenditure without leaving ways around it that people would be able to exploit. I would be happy to be proved wrong on that, but I find it very difficult to see how people could do that.

The other consideration, if the ACT were to go it alone on capping donations and expenditure, would be how much we could impose on parties that are registered federally or parties that are registered in the other states. One of the things we point to in our submission is that the ACT parties routinely receive money from their national secretariats and from branches of parties in other states. They are not considered donations, so the parties do not disclose where they got that money from. It would be difficult to come up with a scheme that capped donations in the territory if the commonwealth branches of the parties can still receive any amount under the commonwealth law. I think it would be very difficult for the ACT to come up with a scheme that applied in the ACT that could not be got around through the national branches or the other branches of the parties.

Looking at the enforcement issues with the Electoral Act, one area that I have already referred to where enforcement raises its head has been where we are aware that there are people not complying with the law—where we have got donors not giving us donors' returns and where we have identified from the party returns that they should have given us returns. But we do have the disclosure on the public record so we do not see that as a particularly significant issue.

If the law were to be tightened to provide for a greater level of disclosure and for a greater requirement for enforcement, the commission, with its current resources and its current funding, really does not have the wherewithal to do any serious enforcement over and above what we are currently doing. So more money would be involved if that was where the Assembly was heading.

There are other things in play at the moment which we think need to be taken into account, particularly the commonwealth green paper on donations, funding and expenditure. That was published in December 2008. Hopefully, some time soon, there will be some further movement on developments at the commonwealth level. Essentially, the recommendation that the commission comes down to in its draft report—hopefully this will not change between now and the final report—is that if the commonwealth is to introduce a disclosure scheme that meets the objectives of transparency and the other things that we have identified, it would be an awful lot simpler if the ACT and the commonwealth could remain in step and there was no need for a separate disclosure scheme in the ACT.

In fact, my personal view is that, if we had a decent national disclosure scheme that provided proper disclosure, you do not need state and territory disclosure laws because the commonwealth laws could cover all of the requirements of the states and territories. And having one body overseeing funding and disclosure regulation would actually be preferable to the eight or nine bodies that we currently have doing it.

A significant issue at the moment is the difference between the disclosure thresholds of the commonwealth and the ACT schemes. Until that is addressed, the ACT does

have to go its own way.

THE CHAIR: Thank you. Going to your second-last point first, the one about enforcement, you highlighted that one particular problem that the commission has is with chasing up donor returns. Am I reading too much into it by saying that if we had a different class or type of party return, we would not need to have donor returns? If the rules about declaring donations were somewhat different for the parties, you would not have to have that donor return and your resources could therefore be put into auditing the parties rather than this sort of double-checking mechanism?

Mr Green: Essentially, yes. If the requirements imposed on parties were effectively to disclose everything they received from everyone above a certain value, which is not currently the case, the only thing you would get from having donors' returns would be either corroboration that the parties had correctly disclosed what they had received from the donors or you would get an indication that for some reason the parties have made a mistake or have hidden something. Again, my gut feeling is that if there is a deliberate hiding of a donation happening, it is unlikely that one or other of the two ends of the transaction are going to let the cat out of the bag.

Mr Moyes: Auditing of the books of the party would pick up any errors in the return, in any case.

THE CHAIR: I want to go back to the point that you made about unreported income or undisclosed income. Does the Electoral Commission see that there are a whole lot of different sorts of income and that it could be income from assets that an entity might have that helps the running of the organisation or it could be a range of undisclosed donations? You touched on some of them; you touched on member levies, anonymous donations, rental income. Are there things that you are more concerned about as a regulator? Are some things of more concern than others or are they all equally of concern?

Mr Green: The audits that we have done in the past—and we have not done one since the 2004 election period—did not really focus on this issue. We were more concerned with ensuring that donors had been correctly identified in previous audits. We did not really focus on this very much, but we are intending to focus on that issue in the audit we are going to be conducting soon of the last financial year's returns. It is more the quantum of the amounts that concern me. Up to $800,000 in a financial year is an awful lot of money to be coming into a party when you do not know where it is coming from.

I am sure there are good reasons why those sources have not been named, and presumably, for a start, all of those amounts are less than $1,000 so the parties are not required to take account of them. But if what you are wanting to achieve is transparency for the public, the voters, in knowing where the money is coming from, in this particular case I think it is over 60 per cent of the party's funding is coming from sources where you do not know where it is coming from.

THE CHAIR: That is 800 people who have donated $999?

Mr Green: And that could be what it is. If that is what it is then it would even be to

the advantage of the party if that fact could be known. But currently the disclosure scheme does not go into those kinds of details.

MS HUNTER: One of the things you raised was the benefits of breaking down the income and expenditure, to get greater detail. I wanted to pick up on what you were raising at the end. You referred to the fact that we do have greater technology these days and an ability to have more timely disclosure by using those technologies on line; there is input and so forth. As part of your submission, have you looked at the costs or resourcing that the commission might need if these strategies come online?

Mr Green: We have not put dollar figures on these things. We do have some capital funding for upgrading our IT systems for the next two or three years, leading up to the 2012 election. An online disclosure system, in conjunction with the AEC, is something that we are hoping we might be able to use some money from that on. We have not got any costing from the AEC. We are still a bit in the dark as to how much that will be.

It also depends very much on whether our regime is consistent enough with the commonwealth regime that a single point of entry would work for that. If our scheme was significantly different from the commonwealth scheme, that might mean we need to implement a scheme of our own, which would be more expensive than running with the commonwealth.

MR HARGREAVES: Have you considered that having an online system will have an imposition on the parties themselves? The major parties will not have any difficulty in doing that because they are reasonably adequately resourced in their systems but newly registered parties are not. When some parties start off, they only have a life for a couple of elections. They usually are quite poor and do not have a lot of resources, certainly not the IT systems that you are envisaging. Have you given any thought to the possible disadvantage those smaller parties might have?

Mr Green: Yes. I know the AEC has been talking to parties, I assume it was the larger parties, about whether they would be willing to engage in a system like this. I think they are quite keen to use it. The kind of system we are talking about would, I imagine—I have not seen the specs for it—be fairly straightforward. It would be like a simple accounting system where, if you receive a donation from an entity, you just put the name and address and the amount. It would be a web-based direct entry form. We are not talking about a complicated scheme.

That might be a benefit to the smaller parties, particularly the ones that do not have significant accounting systems. We do find, when we do our audits, it is the smaller parties that struggle most because they do not have the systems in place. It might be of assistance to them if we provided them with a package that was straightforward to use. I am hoping it will be a benefit rather than a hindrance for the smaller parties.

THE CHAIR: I am mindful of the time and I am also mindful that the commission is putting in a formal submission. You touched on the constitutional problems of limitations on funding, disclosure and donations. There have been some substantial changes in other jurisdictions. You touched on the United States, New Zealand, Canada and the UK. Without appearing to pre-empt the submission, I was wondering

whether you might be able to reflect on those changes in other jurisdictions, from the commission's point of view, and the limitations you could see on those, without asking you to give legal opinions and the like.

Mr Green: We have not really gone into overseas practice very much. The commonwealth's green paper does that to an extent. We are only a very small commission. We do not have a large research capacity. That was not something we were intending to go into in any great detail because that has been in the commonwealth's green paper process.

THE CHAIR: You have had some overseas experience?

Mr Green: Yes, but not so much in the funding and disclosure area. It was more counting systems that I have been involved in. It is the sort of thing where I think legal advice is the thing that is most needed because it seems to me that our constitution is limited. This obviously does not apply in those other jurisdictions. In regard to things that work in other jurisdictions, our constitution may well simply say it is not on. That is probably the threshold thing to get to grips with. What exactly will our commonwealth constitution allow a disclosure scheme to get away with?

THE CHAIR: We will see your submission when it comes in. It may be appropriate to call the commission back. I thank you for your time today. I think it helps to set the context for the way we are going.

The committee adjourned at 11.30 am.