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, 3 MARCH 2010

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

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

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Amended 21 January 2009

The committee met at 10.02 am.

TWOMEY, DR ANNE, Associate Professor, Faculty of Law, University of Sydney

THE CHAIR: Good morning, Professor Twomey. I am Vicki Dunne. I am the chair of the justice and community safety committee, and I am here with the committee secretary, Hanna, John Hargreaves, who is our deputy chair, and Meredith Hunter, who is a member of the committee, and there is a small audience in the committee room.

Before we start, there are privilege matters that we have to address. There is a privilege statement which, for your benefit, I will read, Professor Twomey, as you are appearing via telephone link, because normally a copy of this is put in front of you. It says:

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That is the outline of the privileges that apply to these committee hearings. Professor Twomey, can I thank you for your time and your contribution to this inquiry. We are conducting an inquiry into the operation of campaign finances and what sort of reforms should be undertaken. I gather that Hanna has sent you the terms of reference, and we have a copy of the paper that Premier Rees published; that was your paper that was published in 2008. At the outset, would you like to give a general exposition on the paper?

Prof Twomey: No, I do not really have a general overview to give on it. It addresses a number of issues like the potential for placing caps and limitations on political donations. It addresses limitations on expenditure. They are pretty well two sides of the same equation. It also looks at public funding for political parties—again, which is part of the equation if you limit political donations and political expenditure—and it also deals with general issues about equality.

I suppose the one point I would like to make is that in some places the paper has been rather misrepresented, particularly in the newspapers, because they suggested that the

paper that I gave said that the state of New South Wales could not go it alone for constitutional reasons in dealing with placing caps on donations to political parties. That is not what the paper said. It said that because of the existence of our federal system and the fact that political parties operate at a federal, state or territory and local government level, it would be far more sensible and far more effective to do this reform on some kind of a national, cooperative basis.

The concern I have is that if New South Wales, the ACT or wherever tries to go it alone and limit donations and increase public funding, there is a serious risk that there will be evasion of that through back-door methods because you cannot really isolate your own state or territory from the rest of the country in doing this. And that might undermine any steps you put forward to limit the corrosive effect of political party donations.

My own preference is for it to be done properly, and if is going to be done properly, we really need to get something done on a national, cooperative level. But I can see the advantage of New South Wales or the ACT trying to lead the way, more as a catalyst to get the commonwealth and the rest of the country together, to get some later national reform. So it might well be that you are the trailblazer to achieve this, and I think that would be a good thing. But, ultimately, if you just do it on your own, there will always be allegations that it is ineffective because money will be coming in through the back door in other ways.

THE CHAIR: Yes, I see the point. I think that is fairly clear in your paper. On the subject of the cooperation of a federation, you touch in your paper on the US experience. One of the things that I personally would be interested in having a better understanding of, and you may be able to point us in the direction, is that Canada has legislated in this area. Do you have an understanding of how the interaction of a federation works with the Canadian laws?

Prof Twomey: Yes. I think Canada is a really interesting example. People often say, "Well, why don't we just pick up what the Canadians did, because that seems to work really well?" There are a couple of reasons why it would not work in Australia. The first—this is my general understanding; someone might be able to correct me on it—is that my understanding is that the political parties in Canada are isolated to the different levels of government. So you would have one party that deals with the federal level of government but a different party would deal with the provincial level of government. So they do not have the same situation that we have where, for example, a political party like the Labor Party would, in its branch in the ACT or New South Wales, collect money that goes towards not only funding of your local state or territory candidates but also the funding of your national candidates and national elections. They do not have that problem in Canada because they just have different parties working at different levels. So that is reason number one as to why it is different.

Reason number two as to why it is different is the Canadian charter of rights and freedoms. If you compare the jurisprudence of Canada with that of the United States, you see that, with the Canadian charter, the courts have placed much more emphasis on the equality rights in the Canadian charter than on the free speech rights. You will see in a lot of the jurisprudence here that it ends up as a clash between, on the one

hand, protecting freedom of political communication and, on the other hand, trying to get some kind of a level playing field so that everybody is treated equally. In Canada, there seems to be a bit more emphasis on equality and the level playing field because of those equality rights in their charter. In the United States, however, you see much more emphasis placed on freedom of speech. It does not matter whether you have got a level playing field as you are not supposed to be picking winners; you just have to make sure that everyone has got free speech.

We in Australia are much more like the American system, because we have got the implied freedom of political communication. That is a constitutional constraint. We do not have any constitutional provisions requiring equality. So if you are looking for comparative jurisprudence, it is actually the United States that would be more comparative to Australia than the Canadian position.

THE CHAIR: On the question of implied freedom of speech, you touch in your paper on the Capital TV case—the case in about 1991 or 1992 that went to the High Court in relation to free speech. What do we learn from that that we have to take into this sort of discussion?

Prof Twomey: Some people come out of that case saying, "It means that we can't place limits on political advertising." I don't think that is true. The case itself concerned political advertising and an attempt to ban all political advertising, particularly by third parties—that was completely banned. In relation to political parties, there were going to be certain amounts of political advertising—and this was just on broadcasting, so it was television and radio. Political parties were going to be allowed to have free allocation of time, and that was based upon their representation at the previous election, so on the number of seats they got at the previous election.

The problem with that, and one thing it did tell us, is that the High Court do not like electoral laws that favour incumbents, because they can see a political prejudice lying there. So that was one of the problems with that particular law. Another problem was it did not like the idea of third parties having their ability to advertise in the electronic media completely banned. So both those areas are areas of concern.

However, if you wanted to reconsider electronic political advertising, I do not think the case means that you cannot limit it; I think you just need to do it in a way that is fair. So the test that the High Court put out was: is the law reasonably appropriate and adapted to achieve a legitimate end? And avoiding corruption or the appearance of corruption is a legitimate end. So is it reasonably appropriate and adapted to achieve that, but in a way that is compatible with the system of representative and responsible government? If what you are really trying to do is favour a political party, it is not going to meet that test. If what you are really trying to do is to establish a system that is fair and that gives a reasonable chance for third parties such as business groups, unions, environmental groups or whatever, to have their say as well, then you can probably limit political advertising but not ban it outright.

THE CHAIR: Also, I suppose, the test is then that the people who are advertising or participating in the debate get to choose how they spend their money, whereas the law as it stood in the early 90s limited people's access to, say, the electronic medium.

Prof Twomey: That is right, yes.

THE CHAIR: Okay. Questions, members?

MR HARGREAVES: I was curious, Professor Twomey, about the constitutionality of limiting donations and expenditure. You talk a little bit about that. If I remember it correctly, the Tasmanian experience exists because nobody has actually challenged it in the High Court. Am I off the base here?

Prof Twomey: No, there are real issues about it, but, as with all things, if you do it carefully and sensibly, you are probably okay. You just do not want to go to extremes and to be too rash about it. For example, with political donations, if you banned all political donations, full stop, to political parties, you are going to have a problem. In the United States, they take the view that the making of a political donation is a form of political communication in itself, because you are saying, "I support this party by giving them my money." In other words, "I am putting my money where my mouth is." So to the extent that individuals have a right to freedom of political communication, banning all forms of political donations outright is probably going to head you into an area of unconstitutionality.

If, however, you took a more reasonable stance and you placed some kind of limitations on political donations—for example, you might place a cap on political donations of individuals to $1,000 or something or you might ban political donations by corporations or other bodies but not individuals, because it is individuals who have a right to vote—then that sort of thing is probably going to be more acceptable.

It is the same with limitations on expenditure. If you limit the capacity of political parties to expend money so that they are not capable of then presenting their political views and their policies to the electorate in a reasonable way then you are going to have problems. But if you allow them to expend a sufficient amount so that they can put forward a reasonable campaign that allows people to know what their policies are, but you limit that expenditure so that they do not have to go completely over the top in some kind of an advertising war, that sort of thing is likely to be okay. So, in the end, it is all about moderation.

MR HARGREAVES: When you talk about it being acceptable and reasonable, to whom is it, in your view, acceptable? Is it to the High Court or the community at large, in your view?

Prof Twomey: Ultimately, if it is being challenged constitutionally, it is the High Court that get to make the decision. But the test that they use is the test set out in the Lange case—that is, is the law reasonably appropriate and adapted to achieve a legitimate end in a manner that is compatible with the system of representative and responsible government? So you have to start asking yourself: is there a legitimate end for doing this? What is the purpose of what you are trying to achieve? Is it for a purpose of trying to avoid corruption in reality or the perception of corruption, the undermining of the system? That is important as to how you do it.

For example, in the United States, there are arguments about what they call the millionaires' amendment. If you happen to be a particularly rich person, and there are

limits on other people in relation to the donations that they can receive but you, being extremely rich, can then spend enormous amounts of your own money, what is the limitation to then put on the amount of money that you can spend, as an extremely rich individual, as opposed to other people who are getting donations and have limits on their ability to get donations?

The US Supreme Court then said: "Well, hang on a minute. Stopping millionaires spending their own money has not got anything to do with a legitimate end of preventing corruption." Stopping political donations from corporations has got something to do with preventing corruption, but not stopping people spending their own money. So you have got to see that the types of amendments that you are making are directed at achieving a legitimate end.

Once you get past that, there is this question: is the system you are putting in place reasonably appropriate and adapted to achieving that end? And they will take into account whether it is really for some other purpose, like favouring a political party. And you have to consider whether it is compatible with the system of representative government. So that brings in some elements of fairness and representation.

MS HUNTER: Professor Twomey, obviously you played a significant role in the New South Wales inquiry. Could you give an update of what has happened there and what you think might happen in New South Wales?

Prof Twomey: The answer is that I think it is still anyone's guess. The committee itself was under some quite tight time lines; it needed to report soon because if it was wanting to put anything in place before the next election it really needed to move towards drafting and getting proposed legislation out pretty soon. The committee, when it met—and I appeared before it—seemed very conscious of the fact that it needed to report quickly and propose a system that was sufficiently simple and easy to administer that it could be brought in before the next election.

As far as I know, they have not reported yet. There have also been comments in the newspaper about whether or not they are likely to achieve a political consensus on this. I gave evidence in the afternoon, and that morning the secretaries of political parties had attended, and there seemed to be different views as to how close they were to achieving consensus or how far away they were from it. I think the chair at the time was telling me that it looked like they were relatively close to achieving consensus, but the report in the newspaper said they were nowhere near it. I do not know any more than what the newspapers say at this stage, I am afraid.

MS HUNTER: I am just picking up on your opening comment that the way that it had been reported in the newspapers seemed to imply that this was impossible and your view was that New South Wales and the ACT are jurisdictions that probably need to lead the way and be a bit of a catalyst to get the rest of the country going. What sorts of things do you think would start that process? If we were to take a bit of a lead here in the ACT, what sorts of things would start that?

Prof Twomey: Something that you need to keep in mind in your drafting of a proposal is whether it is something that could then be compatible with the way other states work, with the way the commonwealth works—so instead of tailoring

something completely to the unique circumstances of the ACT, trying to draft something that could be easily implemented or used as a model for some kind of a national approach. That is what I was suggesting to the New South Wales parliament as well, to try and look at it with a broader view of it being a step towards a final national approach rather than just being something completely parochial. That is something to keep in mind in the way that you do it. But, ultimately, it is a matter of politics rather than laws that is going to encourage the commonwealth to come to the party in some sort of a cooperative deal.

I suppose the best way of achieving that is getting something that works and is practical. One of the problems with these sorts of things is that you do not want to end up in a circumstance where you tie everybody up in such huge amounts of red tape that the political parties are completely paralysed as to what they do and what they cannot do and it turns into a big mess. You need a system that is relatively simple, easy to administer, without having enormous numbers of exceptions and requirements for checking and all those sorts of things. So you need clear boundaries. If you do that and it works and people think, "Hey, this is a marvellous thing," that will put pressure on the commonwealth to do it overall.

MR HARGREAVES: Are you aware of the contents of the ACT's Human Rights Act, Professor Twomey?

Prof Twomey: Yes.

MR HARGREAVES: I think we are the only jurisdiction that has something as tight. Victoria has followed a bit. I am wondering whether, in terms of the constitutionality of it with respect to our Human Rights Act, that would be a barrier to limiting expenditure and donations.

Prof Twomey: I think that is a really interesting question, and I am glad you raised it. It would be helpful if someone sat down and did an analysis of it. I know, for example, that the Canadian charter had a big effect on the way that the Canadian electoral provisions and political funding provisions are interpreted, but, of course, their Canadian charter is a constitutionally entrenched one. So you cannot legislate to override it. The ACT and the Victorian provisions ultimately—although they may be given a higher status intellectually—are just pieces of legislation that can be changed if the legislature sees a good reason to do so.

I also think the sleeper in all of this is: what are the commonwealth going to do with regard to a national charter of rights or the like? Again, if they introduce something like that, that will also have an impact. It is then that you will start seeing an interplay between free speech rights and equality rights, and that will affect what you can do in your legislation.

THE CHAIR: We have had informal discussions with the Human Rights Commission here to look at these issues. I think the human rights commissioner is probably the person best placed to do that. Could I go to something that is moderately topical. There was a case in the US Supreme Court recently about third party donations. Given your previous statement about the jurisprudence being similar, how do you see that case—which was a finely balanced decision, as I recollect—having

any implications in the ACT, if we were to change the laws?

Prof Twomey: It would probably not have a big influence here. It is always an issue as to whether your free speech rights extend to corporations, and that was the issue in that particular case. But the High Court in Australia has so far not been inclined to give free speech rights of that kind to corporations. I think that is probably a step further than we would go.

The other thing to remember is that our freedom of speech rights, at least at the national level, to the extent that they are constitutional, are confined to freedom of political communication, whereas the United States obviously has a broader first amendment. That does make a difference for us as well. I think you would find it would be hard pressed for the High Court of Australia to come out and give rights to freedom of political communication to corporations per se because corporations cannot vote. Ultimately, it comes down to the notion that these rights that we are talking about relate to the informing of people and the way they vote. So there are much stronger connections towards voters than towards corporations themselves.

That is not to say that the High Court will not say that corporations should have some capacity to express views during an election campaign. I think we saw in the ACTV case that the fact that third parties were not able to express views was a problem. But I do not think that the court would give them 100 per cent rights to do whatever they like. I think—of course, this is speculation—the court would accept that it is reasonably appropriate and adapteed to limit those rights so that they can express their views but they do not have to swamp the community with those views.

THE CHAIR: I want to move on to some other jurisdictions that have gone down this path in various forms. The UK has caps on spending per constituency so that, for campaigning in constituency, members can spend, I think, £10,000 in their constituency. Are there limits on what might be called universal, englobo sort of campaigning, so that if the Conservative Party, the LDP or whoever has a national campaign there are limits in those areas?

Prof Twomey: From recollection, there are. From memory—I would have to check back in my report—there are two sorts of limits in the UK. There are limits as to the constituency, for particular candidates. My recollection also is that those limits only apply for a short period—approximately the period of the campaign. What tends to happen is that if political parties want to pump huge amounts of money into marginal seats, they do it in the period before those limits for particular candidates come into effect. That is one way in which you can avoid all these things.

The other limit applies in relation to the spending of parties in the year prior to the holding of the election. I have just found it; it is on page 26 of my report. The limit there is £30,000 per electorate contested, which amounts to approximately £90 million for the major parties. They also have a floor to their expenditure limits so that you get to expend up to the level of 27 seats, regardless of whether you are in just one seat or 26 seats. So there is a certain level that you can expend up to, but after that the limits work on the basis of £30,000 per seat.

That limit runs for a year. That means you have to be a bit more controlled in your

spending. Of course, the difficulty in the United Kingdom is that you never know exactly when the election is going to be and when that period of a year starts. You have got to be a little bit canny in the way that you spend so that you have got enough to spend at the end for your campaign.

MS HUNTER: You raised in the paper that some of these things, such as that particular issue, obviously can be easier in jurisdictions with fixed terms like New South Wales and here in the ACT.

Prof Twomey: Absolutely.

MS HUNTER: We have fixed terms as well.

Prof Twomey: Much easier.

THE CHAIR: Would you like to reflect on the New Zealand experiences, from your perspective?

Prof Twomey: For New Zealand, the spending of candidates is capped at a certain level—$20,000 per electorate—and then the spending of parties is capped at $1 million plus $20,000 for each electorate in which the party stands a candidate. My recollection also—and this applies to both the UK and New Zealand—is that a big difference there is in relation to political advertising. I think both of them have the sort of system where you have certain amounts of political advertising allocated to you for free or for cost and then limitations on what you can spend. Because most expenditure in Australia actually comes down to political advertising in the electronic media, the cost of running elections in New Zealand and in the UK is actually much lower proportionately.

THE CHAIR: Can you bring me up to date on something. Someone said to me in passing yesterday that they thought that the New Zealand legislation had been repealed or significantly modified. Is that your understanding?

Prof Twomey: I do not know. It may well have happened recently. The last time I looked at this was in 2008, when I was writing this paper. I have not gone back and looked, because, of course, they have got a new government in New Zealand, and it has been changing quite a few things. It is quite conceivable. The electoral act that I was referring to when I wrote this paper was the Electoral Finance Act 2007, which is pretty recent. But it is not inconceivable that it has completely changed the whole thing since. I just do not know.

THE CHAIR: I probably had not put two and two together and realised that you had written this from a 2008 perspective. It is something that we might ask the committee secretary to chase up.

MS HUNTER: Professor Twomey, obviously at the federal level the Australian government has put out its green paper. Were you involved in that process with respect to putting in submissions, giving evidence or being part of it in any way?

Prof Twomey: Only in a very indirect way. The paper that I prepared for the New

South Wales government in 2008 was really for the purposes of them submitting to the commonwealth for the purposes of their green paper. I think that the point of writing it was really to make sure that the commonwealth, when it was thinking about these things, did not just take into consideration the political aspects of it. Of course, these sorts of issues are of great interest to political parties, and one often finds that it is the experts and the gurus in the political field who are thinking about these things. The idea was to make sure that they were aware of the various constraints, the various technical issues and practical issues that they would need to consider. My understanding is that it was sent to the commonwealth government. I do not think it is actually referred to in the green paper, so I am not sure whether anyone paid any attention to it. But the point of writing it was to contribute to that process.

MS HUNTER: That was going to be my next question—whether you felt that your work had been reflected in the green paper.

Prof Twomey: It is hard to tell. It is one of those things; you never know. With respect to the people in Canberra, there are lots of intelligent people there who could think the same things as me, anyway, regardless of whether they read it or not. But I am sure that it at least had some impact. I was at a conference on election law which also involved political funding, and Daryl Melham was there. I think he is on one of the parliamentary committees that deals with these things, and he had certainly read the paper and was across all of the issues. So I think it has been filtering through at least parts of the commonwealth. But I think the real issues will probably be fought out at the political level, in which I am not really involved at all.

THE CHAIR: This gets back to my original question, Professor Twomey, regarding the interplay of federations. The UK is not quite that, but how do you see the interplay between, say, the autonomous parliaments in Scotland and Wales and the Westminster parliament? How do they interplay one with the other?

Prof Twomey: That is a good question. There is a big difference there in that ultimately certain things are reserved for the Westminster parliament to control, so Westminster gets to control anything particularly important. My recollection is that there are significant differences in the devolved governments. For example, Scotland has a fixed-term parliament as opposed to Westminster having a flexible one. When you have got a fixed-term parliament, you can more easily set your rules about when limits apply and all those sorts of things.

I think there are some interesting experiments going on there. One aspect of it is that we often talk about the benefits in a federation of experimentation. You can probably see that in the way they have been dealing with these things in Scotland. But the difference there is that the ultimate control is completely in the hands of Westminster as to how to deal with these sorts of things, and it can always override its devolved governments if it needs to, whereas in Australia you have got to have a lot more negotiation going on. The commonwealth does not constitutionally have the capacity to interfere in the constitutional business of the states, particularly in relation to elections. The ACT, of course, is in a slightly different position. You are much more vulnerable. You are a bit more like Scotland, I suppose, to the extent that if the commonwealth ultimately wanted to interfere, it may well do so, as it did in relation to euthanasia and things like that.

THE CHAIR: Thank you for reminding me of that. I thought of asking you about it when I was thinking about this last night. You have touched on what might be the limitations for the ACT in that the ACT is, dare I say, a creature of the commonwealth parliament. Do you see that there are other limitations apart from the capacity of the commonwealth to override our legislation? Are there other constitutional constraints that may not apply to states, who were the founders of the commonwealth?

Prof Twomey: That is a good question. I am just trying to think of what other significant differences there are. I suppose one difference that arises is that, again, my understanding is that in the ACT you can entrench things, effectively, in your constitution. That cannot be done in the states. States are limited in what they can entrench by reference to the constitution powers and procedures of the parliament, whereas in the ACT, you have a capacity to entrench things beyond that.

THE CHAIR: And we have already entrenched some electoral matters.

Prof Twomey: Yes, so that could be interesting. I am not sure how that would play out in the end. Firstly, if you have already got things that are entrenched, there may be difficulties with unentrenching them if you have to follow a particular method. So keep that one in mind. Secondly, it may well be the case that if you want to put in place a system that cannot be overturned simply by the next government that comes along that sees a political advantage in doing a particular thing, you have a much easier method of entrenching something or other on a long-term basis. But, of course, with those things, one should always be very careful about what one entrenches because you never know when it is going to become supremely inappropriate and very difficult to get rid of. So there is a big warning on that one.

THE CHAIR: Yes, it is an interesting point. Further questions, members?

MR HARGREAVES: No. Thank you very much, Professor Twomey.

MS HUNTER: Yes, thank you.

THE CHAIR: Thank you, Professor Twomey, for your participation this morning. It may be that, on reflection, there are other things that arise, and we may communicate with you in writing in the course of this inquiry, because you do touch on all the things that we have to be cautious about. I want to thank you for the little table that is on page 25 of your paper, because it is pretty much a checklist of all the things that we have to be careful about. It is a formidable list, I have to say. But thank you very much for your time. Thank you very much for the paper that you have written; although it was not written for us, it has been very helpful to us.

Prof Twomey: I am more than happy to help. And best of luck with it all.

THE CHAIR: Thank you very much.

The committee adjourned at 10.39 am.