LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AMENDMENTS TO THE ELECTORAL ACT 1992

(Reference: Amendments to the Electoral Act 1992)

Members:

MR M GENTLEMAN (Chair)
MR A COE (Deputy Chair)
MR S RATTENBURY

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 29 MAY 2014

Secretary to the committee:
Ms L Gell (Ph: 620 50435)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 11.32am.

WILLIAMS, PROFESSOR GEORGE AO, University of New South Wales

THE CHAIR: Good afternoon everybody, and welcome to the third public hearing of the Select Committee on Amendments to the Electoral Act 1992. The select committee was established on 20 March 2014 to inquire into the proposed expansion of the size of the Legislative Assembly, the implications for the ACT of the High Court's decision in Unions NSW v New South Wales, Elections ACT's report on the 2012 ACT election, and related issues as set out in the terms of reference. The committee has received and published 12 submissions to date, and the committee is to report by the last day of June this year.

On behalf of the committee I would like to welcome Professor George Williams from the University of New South Wales. Professor Williams is giving evidence by telephone from Sydney. Can I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement which the secretary has sent to you. Could you please confirm for the record that you have read and understand the privilege implications of the statement, Professor Williams?

Prof Williams: That is correct.

THE CHAIR: Can I also remind you that the proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Professor Williams, we have your submission, which we have received and published as submission 3. Before we go to any questions, would you like to make an opening statement?

Prof Williams: Yes, I am happy to do so. I should note that my submission just focuses on the issue of the size of the Assembly, but I also make some comments about how the Unions NSW case may affect existing provisions within the ACT electoral law. I do that with the benefit particularly of looking at the submissions of the Electoral Commission and of the Attorney-General.

Firstly, on the size of the Assembly, that is something I have spoken and written about now for many years. As now an outside observer and as someone who looks closely at legislatures around the country and internationally, it certainly strikes me that the current size of the Assembly is inappropriate for its responsibilities, and it is well documented as to why that is the case and why also it may well not foster good government within the territory.

My strong view is that an increase is justified. I recognise that would have significant financial implications, but my view is that the benefits to good governance will certainly outweigh that in the longer term and that the lower quality of services in the ACT that is likely to result from not having sufficient numbers of people in the Assembly is something that will be outweighed in terms of the cost of actually making the increase.

Twenty-five does make sense to me as the number. I reached that view some years

ago, based upon the work that Philip Pettit and others had done. If you only look at the population increase, it does give you a number of about 25, and it gives you an independent, separate reason why you would choose that number, free of any politics or other partisan considerations. So it seems like a sensible outcome to me. So long as the actual districting is left to the independent authority, that would seem like an appropriate step to take.

As to the Unions NSW case and the particular provisions that I know you are looking at, there is no doubt that the electoral authority is correct in saying that there is now some doubt about existing provisions within your legislation. The Unions NSW case is a case that has quite broad-ranging possibilities for a range of areas of electoral law, particularly dealing with political finance. That said, the case is a difficult one to read. It does not contain any specific guidance, particularly on areas not relating to the sections and issue in that case. You are a very brave person if you think you can predict how the High Court will apply that logic to other areas. We simply do not have enough litigation to have certain answers. It does mean, for the provisions that you are looking at, that you can reach judgements, but you cannot be certain.

The one, of course, that is most vulnerable is section 205I(4), in dealing with the restriction of gifts or donations to people on the electoral roll. You would have to say that there is a high probability that that would be struck down by the High Court, given the similarity to the New South Wales provision. It is fair to say, though, that it has not been struck down to this point; it continues to operate—and, in the absence of any challenge, it will continue to operate. So a factor in your consideration is not simply what the High Court might say, but if no challenge is in the offing or likely, there is nothing to prevent the provision from continuing to operate.

There is also a problem with the Unions NSW case—that is, the similar provision was struck down because the High Court, quite oddly, found that the provision simply had no legitimate purpose. They could not identify it as a non-corruption measure. They could not see that it really served any object. It may well be that you have material that might actually give you a purpose, that might suggest it can be distinguished from the New South Wales provision. I think it is unlikely, but it does mean that if this was not repealed you would at least have some credible arguments that could be put as to why your provisions should be treated differently, even if it is not likely to lead to a different outcome.

On the aggregation provisions in sections 205F, G and H, I agree with the view that has been expressed in the submissions, including by the attorney, that I think there are sound reasons to say why these provisions are distinguishable from those struck down in the New South Wales legislation. They do operate much more narrowly and, critically, they do forge a strong link between the aggregated entities and the MLA or the political grouping. And that does mean you knock out the biggest concern to the court—that is, that you could have the aggregation of expenditure across groups that were quite disparate in their objects, and that is an inappropriate outcome that does not seem likely to occur in your more narrow drafting.

There is certainly doubt about it, but I think there is certainly a real prospect that your aggregation provisions could survive. I would not be saying it is in the same position as the former donation provision. I do not think the same strength of argument applies

there as to why repeal might be considered.

THE CHAIR: Thank you, Professor Williams. You have answered a couple of my questions already. I go to a question on 205H concerning the expenditure cap on third-party campaigners and any other person acting in concert with them. Do you think that would satisfy the High Court test as being reasonably appropriate and adapted to a legitimate end?

Prof Williams: The hard thing here is that the Unions NSW case does not itself actually answer that question. They do not get to that "appropriate and adapted" test for the New South Wales provisions, and that is because what you do with that test is to say, "Does it have a legitimate purpose?" If yes, "Is it appropriate and adapted to that purpose?" Here they simply said it did not have a legitimate purpose in the first place. So the case does not actually give you guidance on that. I think, clearly, you can identify a purpose here. I think this does fit into a grey area. I would acknowledge that, but I cannot give you any certainty of advice on that because, like many provisions, you would say, yes, it is potentially challengeable, as many areas dealing with caps in expenditure are, but you would also say that there are reasons to think that it could be successfully defended.

MR COE: Professor Williams, I have a question with regard to funding of election campaigns. At present in the ACT political parties get a dollar amount per vote in addition to public funding for administration of political parties on a per MLA basis. Something that this committee is looking at to various degrees is the political funding of campaigns. I was wondering whether you have any views about that as a general principle but also with regard to how such a scheme could operate, such that it does not actually serve as a barrier to new parties and unaligned candidates.

Prof Williams: It is a good question and obviously very pertinent considering the debate in New South Wales about moving from a like system to a full public funding system. My view is, for both policy and constitutional reasons, that it is appropriate to have a limited form of public funding, but that that form of public funding must still leave room for separate fundraising by candidates and political parties.

The constitutional reason for that is that I think if you remove the ability to attract those sorts of donations, that is the sort of problem that Unions NSW suggests may well be invalid. Although, as I have indicated, the case is a bit hard to read on occasion, there is still a strong argument that that would be the case. You have to leave room for donations, even if it is subject to caps and the like.

I think that, on the policy front, it is quite appropriate that candidates are out there in the community seeking support financially for their campaigns, and that is one traditional, expected way that candidates forge links with the community and demonstrate community support—and, equally, the community demonstrate their support for candidates. I think it is important to retain that rather than moving to some sort of centralised funding model.

Another problem with such a funding model that you have adverted to is that I cannot see how you could design that effectively for new entrants. It is very hard to know how you could say prior to the election what level of funding they would receive, and

there is a very strong possibility they would be either underfunded or overfunded. They are the sorts of policy and constitutional issues that, again, I think would knock any attempt to move beyond partial funding to full funding on its head.

MR COE: Are you aware of any jurisdictions elsewhere in the world that are doing a good job in this space, whereby they have a good balance of public funds but still have room to solicit support?

Prof Williams: Yes. I am certainly not aware of any system that has gone to full public funding, for the sort of reasons I have suggested. So they are all examples of systems with partial funding. I think there are always debates about whether the level of funding is sufficient. I do not have information on that. That really comes down to the expenses of parties. Also I think it is a matter of keeping a cap on what can reasonably be spent in these campaigns.

In terms of funding models, Australia seems to stack up pretty well. I see no suggestion that it does not fare well internationally when it comes to these models. When you look at funding within caps and expenditure, the New South Wales system itself is pretty good. It is quite rigorous and comprehensive. The problems in New South Wales at the moment actually do not relate to the law itself; they relate to enforcement of the law. The problem there that ICAC is suggesting is that what you have are suggestions that people are simply disobeying the law. That is not a problem with its design but with its enforcement.

MR RATTENBURY: Professor, I took from your earlier comments that you have the view that the ACT provisions that limit donations just to ACT electors would be invalid based on the New South Wales decision.

Prof Williams: Very likely, but not certain.

MR RATTENBURY: The question then becomes: do you think there is a formulation that we could put together that seeks to restrict donations and how might we put that in place? Do you think there is a way that that can be done if we wanted to do that from a policy perspective?

Prof Williams: I do not think there is any doubt you can impose caps. I think the High Court decision leaves room for that. That, of course, was not directly challenged but it seems to be part of the logic of the case—you can impose caps on expenditure and donations. You are able to move from a complete ban to what might be a rigorous system of caps. In particular, I know you already have a $10,000 cap there, but you could consider caps on people or organisations who are not electors of a lower level—maybe $1,000 or some lower level that is not a ban but still is restrictive enough that corporate, union or other interests cannot give a donation of a sufficient size that might give rise to the actuality or perception of undue influence.

That is what I would be looking at. I would be looking at just a very low cap. You still have it being vulnerable to challenge, particularly if the cap is of a different size to your $10,000 cap, but we just do not know the answer to that. Here, parliamentarians have to be a little bit robust. You cannot just second-guess the High Court and make policy on a basis that may prove to be ill-founded. Given we do not know what the

High Court will next say, my advice would be to recognise that, yes, your existing provision is likely to be invalid. If you are particularly attached to it, you could keep it and have a challenge but you are probably going to lose, or if you want to keep that policy as much as possible then consider a very low cap and, if that is challenged, be prepared to fight for it.

THE CHAIR: Do you have a view on the recent changes in Queensland on the caps coming from $1,000 up to $12,400?

Prof Williams: I think you are really talking there about disclosure, aren't you, in terms of the level at which they need to be disclosed? I think there are suggestions that it may apply to the level being granted as well. I am certainly very concerned about what I am seeing in Queensland. These are issues that parties across the spectrum have struggled with for a long time. Queensland was on the way to a better system, but that is an unfortunate development. In particular, I am very strongly of the view that the community has a right to know who is donating to candidates and political parties, and that any ability to donate large amounts, $10,000 or more, without clear transparency is a major problem. I think that also needs to be made clear prior to the election itself, as they do in the US and elsewhere, where you have real-time disclosure. People should know who is giving money as it is something that may well influence their vote.

MR RATTENBURY: I might go to a rather different topic. One of the issues that has come up in the committee is the issue of people being fined for failing to vote. It is not so much a constitutional issue; perhaps it has been discussed in the context of democracy—whether that fine should be increased to a greater penalty. Do you want to offer a view on that?

Prof Williams: What is the fine at the moment? Is it $50 or $100?

MR RATTENBURY: Twenty dollars.

Prof Williams: Twenty dollars? Oh wow!

THE CHAIR: It is a bargain.

Prof Williams: The lowest fines on the book. It is a bargain, that is for sure. I am a strong believer in compulsory attendance. It is not compulsory voting. People can attend and fill in a ballot paper however they want, and they can vote informal if they want. I see voting in your elections, as elsewhere in Australia, as a bit like jury duty. It is the price you pay to live in a civilised democracy. I think there ought to be consequences, so I do support the idea that non-attendance leads to a fine. Twenty dollars does seem to me to be very low. I would not support, if you like, a crippling or significant fine. It needs to be of a level that particularly people of modest means can easily pay. Maybe if it is 20 bucks you should be looking at increasing it to $100 or $200, in that order, so that there are consequences, without it being of the same order as many other fines within the statute book.

MR RATTENBURY: I am sorry to put you on the spot on that. It is one of the interesting issues that has emerged in the committee and on which I do not think we

have a clear view yet. So I appreciate your thoughts on that.

Prof Williams: Twenty dollars may have made sense 20 years ago, but I imagine it is just something that has not been increased. I think it should be a small, nominal fine but $20 does seem particularly low.

MR COE: I would like to ask your opinion on much more of a policy issue rather than a constitutional issue. Here in the ACT, with our Hare-Clark electoral system, there is always a bit of a battle with regard to how boundaries are drawn and how electorates group communities of interest. Do you have any views about whether individuals' electoral power or electoral influence should be standardised across a jurisdiction or whether it is appropriate to have different size electorates in terms of the population and different quota thresholds, in order to group communities of interest? So they might not necessarily all be the same size electorates but you would get more appropriate boundaries. Do you have a view on that issue?

Prof Williams: It is something I have thought a bit about, particularly when the prior report into the size of the Assembly, the independent report, looked at these issues. I attended a roundtable, gave evidence and gave them a submission. I can understand why this is a burning issue in this context. My view is that the legislation on increasing the size of the Assembly in dealing with electorates should, so far as possible, take the heat out of these questions and, of course, leave the pertinent decisions to an independent body. You are very much blessed in the ACT with the strength of your electoral authority. It is certainly known around Australia as being one that is particularly strong. So having their involvement is important.

That said, I think you have to be cautious about how much discretion you give that body. If it is completely open ended, such that you have 25 members but without any direction as to size of electorates or other matters, you give them a very difficult task because it is such an open-ended question. I do favour the idea of just going for five by five because I think it is simple and direct, and then you leave it to the Electoral Commission to work out how those five electorates should be distributed in order to maximise communities of interest, taking into account appropriate geographic boundaries. There I think you simply can adopt not only legislation you already have but you could look to the other states and the commonwealth to find the sort of wordings, which tend to be pretty vague, and then essentially you do put faith in your commissioner and the commission—but I think it would be well placed. As I say, I would just be concerned if it was so open ended that they had almost an impossible task.

MR COE: With regard to the population, and say you have five electorates of five, at the moment you have plus or minus five per cent. Do you think plus or minus 10 or 20 per cent would be acceptable in terms of population variance?

Prof Williams: I would not go to 20; I think that is too large. What I would do is look to other comparable jurisdictions. They suggest that 10 might be the outer limit that you consider. I certainly would not be looking at larger than 10, but if there are policy reasons for that, that may be acceptable. I do recognise that there are some real issues as to how the five electorates in the ACT would be divided. There are a number of geographic and other problems with doing that, and that might be a justification for

increasing from five to 10. You would want to know that there is a strong justification, because in the main it should be as low as possible. Five would be desirable unless there is a strong countervailing reason for a higher level.

THE CHAIR: Professor Williams, I think that draws to a close the questions for you from the committee today. Thank you very much for your time today. We will get a copy of the transcript to you in the next week or so, so that you can check for any transcription errors. Thanks once again for joining us today.

Prof Williams: My pleasure, and good luck.

THE CHAIR: This hearing is now adjourned.

The committee adjourned at 11.54 am.