TASMANIA
LAW REFORM
INSTITUTE

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17 April 2019

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

By email: haveyoursay@justice.tas.gov.au

Dear Madam / Sir,

Electoral Act Review

The Tasmania Law Reform Institute (***the Institute***) welcomes the opportunity to provide feedback on the *Electoral Act Review Interim Report* (the ***Interim Report***).

We broadly endorse the proposed amendments set out in Section 1, and are supportive of the removal of restrictions on political reporting in newspapers on the day of the election to ensure that voters have timely access to information that may influence their vote. We note that many of these proposals have been given effect by the recent passage of the *Electoral Amendment Act 2019*.

Our brief comments below address legal considerations in relation to the publication of electoral matter, regulation of political donations, and election spending. In summary, our recommendations include:

- Introducing a mandatory disclosure scheme for political donations above $1,000 (one-off or aggregate), with disclosures to be made within 21 days of the donation
- Introducing mandatory reporting on election spending for House of Assembly elections, similar to provisions in place for Legislative Council elections
- Initiating a comprehensive review of 2018 Tasmanian election donations and spending, to be undertaken by the Integrity Commission or a Joint Parliamentary Inquiry. The review will provide rigorous data to support any future regulation of donations and spending by candidates and third parties
- Ensure any definition of 'donation' in amended legislation encompasses gifts of property, services, and in-kind support
- Narrowing the deeming provisions for what constitutes "electoral matter" to material relating the current election and candidates at that election
- Clarifying the application of authorisation requirements for electoral matters published on social media, including exemptions for personal commentary
- Removing the requirement for candidate consent to publish any electoral matter that includes their name
- Strengthening offence provisions for misleading and deceptive comments in relation to candidates
- Requiring routine publication of Ministerial diaries and summaries of meetings

1. Donation disclosure requirements

The High Court recently reiterated the centrality of representative government in the Commonwealth Constitution. In their joint judgment in *Unions NSW v New South Wales*, Kiefel CJ, Bell and Keane JJ stated that the requirement of ss7 and 24 of the Constitution that representatives be "directly chosen by the people" is designed to:

> guarantee the political sovereignty of the people of the Commonwealth by ensuring that their choice of elected representatives is a real choice, that is, a choice that is free and well-informed.[1]

The Institute believes that transparency is a fundamental tenet of a robust democracy in which there is public trust in election processes and the integrity of government decision-making, and in which voter choice is well-informed.

In his foreword to "*Funding of Political Parties and Election Campaigns: A Handbook on Political Finance"*, former Chair of the Global Commission on Elections, Democracy and Security, Kofi Annan, said:

> Governments should regulate political donations and expenditures effectively. This will require full transparency and disclosure of donations, with penalties for noncompliance. Effective monitoring and enforcement of regulations are also crucial.

The submission made by our colleagues at the Institute for the Study of Social Change to the earlier review of the Tasmanian *Electoral Act 2004* outlines the difficulty currently faced by the public in ascertaining the quantum and source of donations to political parties in Tasmania.[2]

A mandatory disclosure scheme for political donations in Tasmania would facilitate public access to information about the scale and source of donations to political parties and candidates. Timely access to this data will help to inform voters' decisions.

Various reviews of corruption allegations in other jurisdictions have ultimately recommended greater transparency in relation to donations. Examples include the Queensland Crime and Corruption Commission's 2017 Operation Belcarra report[3], and the NSW ICAC's Operation Spicer probe into electoral funding for the NSW Liberal Party[4], the 2014 review of election funding, expenditure and disclosure[5], and a 2010 report into corruption risks from political lobbying[6].

According to Transparency International Australia:

> The risks of corruption are heightened by inconsistencies in Commonwealth and State legislation relating to electoral finance, disclosure and lobbying.

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[1] *Unions NSW & Ors v New South Wales* [2019] HCA 1 at [40], per Keifel CJ, Bell and Keane JJ

[2] Professor Richard Eccleston and Nicholas Gribble. 2018. *Submission to the review of the Tasmanian Electoral Act 2004, July 2018* (Institute for the Study of Social Change, University of Tasmania)

[3] Queensland Crime and Corruption Commission. 2017. *Operation Belcarra A blueprint for integrity and addressing corruption risk in local government* – available at http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland

- [4] Independent Commission Against Corruption. 2016. *Investigation into NSW Liberal Party electoral funding for the 2011 state election campaign and other matters (Operation Spicer).* Available at https://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/220

[5] Independent Commission Against Corruption. 2014. *Election funding, expenditure and disclosure in NSW: strengthening accountability and transparency.* Available at https://icac.nsw.gov.au/docman/preventing-corruption/cp-publications-guidelines/4538-election-funding-expenditure-and-disclosure-in-nsw-strengthening-accountability-and-transparency/file

[6] Independent Commission Against Corruption. 2010. *Investigation into Corruption Risks Involved in Lobbying*. Available at https://www.icac.nsw.gov.au/docman/investigations/reports/3678-investigation-into-corruption-risks-involved-in-lobbying-operation-halifax/file

Locally, the Legislative Council Select Committee Inquiry into the Tasmanian Electoral Commission also found that "[m]andatory disclosure of candidate campaign donations would provide transparency as to the source of political donations" and recommended legislation for "compulsory disclosure of campaign donations from all sources".[7]

Table 1 of the Interim Report demonstrates the current breadth of approaches adopted across Australia, but shows a dominant trend towards the following:

- Disclosure of donations above $1,000
- Prohibition on anonymous donations above $1,000
- Requiring donor returns to be lodged
- Requiring third party campaigners to lodge election spending and donation returns

The Institute supports greater consistency regarding the regulation and disclosure of political donations, and recommends that the Tasmanian government adopt disclosure and reporting thresholds consistent with the majority of Australian jurisdictions. Legislative provisions should also ensure that disclosure obligations apply to aggregate donations. This will be important to avoid transparency objectives being undermined by the making of a series of smaller below-the-threshold donations to avoid disclosure requirements.

The Institute also supports timely disclosure of donation data throughout a political term, rather than restricting disclosure obligations to declared election periods. Given recent reforms in Queensland, Victoria and New South Wales to require disclosure within 7 – 21 days of a reportable donation being made, technology should be readily available to facilitate and manage such disclosures.

The Institute notes the distinction drawn between 'gifts' and 'donations' in the *Local Government Act 1993* (Tas), compared with the broad definition of 'gift' in the *Commonwealth Electoral Act 1918*. We recommend that, for the purposes of any donation disclosure requirements, the Act include a definition of 'donation' that encompasses gifts of property, services etc.

2. Expenditure disclosure

Transparency in relation to donations should be complemented by timely disclosure of details of election expenditure.

Part 6 of the Act already provides for disclosure and scrutiny of Legislative Council election spending. While those provisions are in the context of an expenditure cap imposed on candidates at Council elections, details regarding notifiable expenses and reporting and scrutiny of returns could be replicated for House of Assembly elections even in the absence of a spending cap.

The Institute supports the introduction of expenditure disclosure provisions for all candidates and parties at all Tasmanian elections.

3. Regulation of third-party donations and expenditure

The High Court has considered on a number of occasions the validity of legislative efforts to regulate donations and election spending by third parties.

In *McCloy v New South Wales* [2015] HCA 34, the High Court upheld provisions in the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) which capped donations that could be made within an election cycle and specifically prohibited political donations by property developers,

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[7] Legislative Council Select Committee. 2015. *Final Report on Tasmanian Electoral Commission*. Parliament of Tasmania, p 20. Available at http://www.parliament.tas.gov.au/ctee/Council/Submissions/TEC%20submissions/gab.inq.tec.rep.FINAL.ne.001.pdf

gambling, tobacco, and liquor industry representatives. The restrictions were imposed following several ICAC reports outlining the role of these stakeholder groups in funding previous elections.

All parties accepted that the provisions burdened the Constitution's implied freedom of political communication because they 'restrict the funds which are available to political parties and candidates to meet the costs of political communication'.[8]

However, the High Court recognised that "representative government", as protected by ss7 and 24 of the Constitution, provided for equality of participation in the political process and allowed for some regulation to ensure the opportunity to participate was not unduly skewed towards particular stakeholders. A majority of the Court was satisfied that these restrictions served a legitimate purpose and did not impermissibly burden the implied freedom.

In *Unions NSW* the High Court considered the validity of amendments to the same legislation to reduce the election spending cap for third party campaigners to $500,000 and prevent coordination between campaigners.

The High Court again recognised that legitimacy of legislative efforts to "prevent drowning out other voices in the political process by the distorting influence of money." However, Justice Gageler also noted that third-party campaigners "must be left with a reasonable opportunity to present its case to voters."

Ultimately, the High Court was not satisfied that the means adopted to achieve the protection of representative government satisfied the *Lange* tests. As Gageler J held at [101]

> In short, it is not possible to conclude that the $500,000 cap on the electoral expenditure of a third-party campaigner set by s 29(10) of the EF Act is justified because it is not possible to be satisfied that the cap is sufficient to allow a third-party campaigner to be reasonably able to present its case to voters. Without satisfaction that the amount of the cap is justified, the imposition of the cap in that amount stands unjustified.

Most recently, the High Court has considered whether a prohibition on political donations from property developers under the *Electoral Act 1992* (Qld) and *Local Government Electoral Act 2011* (Qld) is valid. In *Spence v State of Queensland*, Spence argued that the Operation Belcarra report relied upon to justify the ban on donations by property developers had not identified any corruption influence on State elections (as compared with Local Government elections). On 17 April 2019, the High Court pronounced that the prohibitions did **not** impermissibly burden the implied freedom of political communication.[9] The High Court's reasons are yet to be released, and will provide further guidance on the potential for legislative restrictions on donations and expenditure under Tasmanian laws.

The invalidation of s.302CA of the *Commonwealth Electoral Act 1918* by the High Court removes any need to consider potential conflict with that provision.

Two things are clear from these cases:

- Restrictions on donations and election expenditure can be a justifiable burden on the implied freedom of political communication; and
- In order to be justified, legislative burdens must be supported by evidence that the particular restrictions are appropriate and proportionate.

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[8] State of NSW, 'Annotated Submissions of the First Defendant', Submission in *McCloy v NSW*, Case No S211/2014, 2 March 2015, 7 [28], quoted in Twomey, A. "McCloy v New South Wales: Developer Donations and Banning the Buying of Influence" (2015) 37(2) *Sydney Law Review* 275

[9] *Spence v State of Queensland* – pronouncement of orders. See [2019] HCATrans 80 (17 April 2019). Note, the Institute supports the Tasmanian Government's submissions as intervenor in *Spence v State of Queensland* regarding the invalidity of s.302CA of the *Commonwealth Electoral Act 1918*, and notes the decision of the High Court that s.302CA is wholly invalid.

In other states, notably Queensland and NSW, comprehensive reviews were undertaken to identify campaign spending trends, the source and volume of donations, and any actual and potentially distorting effects of political donations. This information has not been available in Tasmania to date, despite clear public concern regarding the impact of donations and third-party spending on the 2018 House of Assembly election.

The Institute recommends that the Tasmanian Government initiate a review of the 2018 election, to be conducted by the Integrity Commission or by way of Joint Parliamentary Inquiry, to provide a sound basis for future legislative reforms to regulate donations and election spending. Rigorous analysis will be required to apply the structured proportionality approach adopted by the High Court and to determine whether proposed restrictions can be justified.

4. Other matters

Electoral matters

Definition

As noted in Consultation Issue 4, the definition of "electoral matter" in s.4 of the Act is very broad. The Institute generally supports a broad definition, focussed on whether the purpose of the matter is to influence voting behaviour in the particular election. Currently, any material which refers to any of the matters listed in s.4(2) of the Act is taken to be an "electoral matter", even where it discusses previous governments or candidates without any reference to the current election.

The Institute recommends that the deeming provision in s.4(2) be revised to include only matters referring to the relevant election, candidates and parties nominating for that election, or any issues of policy or public interest in relation to that election.

As outlined below, the Act should also include clear protections for personal commentary on election issues to promote debate and discussion.

Authorisation

Consultation Issue 1 asks whether the application of authorisation requirements under s.191 of the *Electoral Act 2004* (***the Act***) to social media publications should be reviewed.

As a preliminary comment, the Institute notes that the section heading of s.191 refers to "campaign material", which is not a defined term in the Act. The section itself refers to "electoral matter", which is broadly defined. The heading may give the impression that s.191 applies to a narrower category of "campaign material", suggesting some degree of coordination or affiliation with a party or candidate is required.

To ensure that the scope of s.191 is understood, we recommend that the heading be amended to read "Electoral matter to be authorised".

Section 191(1)(b) requires authorisation of electoral matter published "on the internet". The TEC Handbook for candidates offers limited guidance on how authorisation is to be provided:

> The Electoral Commissioner recommends that candidates and other persons with websites (including 'Facebook' pages) containing electoral matter should ensure that the name and address of the responsible person appears on each page. For example, an appropriate place to include authorisation on a website would be on a footer, or on 'Facebook' at the end of a post that contains electoral matter.[10]

Given the rise of electoral advertising through bulk messaging services, the Institute recommends that an inclusive definition be inserted.

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[10] Tasmanian Electoral Commission. 2017. *Information for candidates– House of Assembly elections*, p11

For example:

- Section 321D(1) of the *Commonwealth Electoral Act 1918*:

  Examples of matters that may be covered by this section include internet advertisements, bulk text messages and bulk voice calls containing electoral matter.

- Section 293A(2) of the *Electoral Act 1992* (ACT) defines "social media" as follows:

  internet -based or mobile broadcasting-based technology or applications through which individuals can create and share content generated by the individual.

  Examples: internet forums, blogs, wikis, text messaging, online or mobile broadcasting social networks

TEC Handbooks should also be updated to include guidance on how authorisations are to be given across a broad range of electronic communication services.

While the Institute supports the ongoing requirement for authorisation of electoral matter, it is important not to unduly regulate public conversations regarding political matters. We generally support the current definition of "electoral matter" recommend a clear exemption be inserted for general online commentary, such as that provided in s.293A of the *Electoral Act 1992* (ACT) or s.321D(4)(d) of the *Commonwealth Electoral Act 1918*.

These exemptions are limited to personal expressions of political views and exclude any paid commentary or advertising.

The Institute also recommends that any person who inadvertently breaches authorisation requirements be given an opportunity to remedy the breach. Section 190(1)(c) of the *Electoral Act 1992* (Qld) provides a clear defence where:

> (c) the person was not aware that the act or omission concerned was a breach of the provision when it occurred and took all reasonable steps to remedy the breach when the person became aware that it was or may have been such a breach.

Candidate consent to publication

Consultation Issue 2 asks whether the current requirement under s.196 of the Act to obtain the consent of any candidate named in material published during an election campaign. The Institute shares the concerns outlined in the Issues Paper that this could unduly restrict the public from disseminating and receiving information, opinions and arguments concerning government and political matters, contrary to *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

Any restrictions on political communication must be proportionate and necessary to address legitimate concerns. Candidates may be concerned by the potential publication of inaccurate material, including false How to Vote cards. However, the Institute considers that requirements for authorisation of electoral material and prohibition on the publication of misleading and deceptive material are sufficient to protect against false statements being made about candidates or How to Vote cards.

We support the removal of s.196.

Section 197 could be strengthened to address concerns regarding misleading personal information by adding a provision similar to that in s.163(2) of the *Electoral Act 1992* (Qld):

> **Misleading voters**
>
> **(2)** A person must not for the purpose of affecting the election of a candidate, knowingly publish a false statement of fact regarding the personal character or conduct of the candidate.

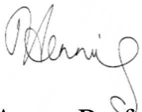
Publication of Ministerial diaries

In addition to financial or in-kind donations, meetings with government officers can provide opportunities to influence government decision-making. In New South Wales, all Ministers are required to routinely publish their diaries, including summaries of meetings and details of attendees.[11] Details are available on the Department of Premier and Cabinet website, allowing the public to scrutinise which stakeholders have had access to Ministers during the previous quarter.

The Institute recommends that the Tasmanian Government consider implementing similar requirements.

If you wish to discuss these comments, please do not hesitate to contact us.

Yours sincerely,



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[11] See https://arp.nsw.gov.au/m2015-05-publication-ministerial-diaries-and-release-overseas-travel-information