

The Secretary
Select Committee on Campaign Advertising
Legislative Assembly for the Australian Capital Territory
Civic Square, London Circuit
CANBERRA ACT 2601

Inquiry into the Government Agencies (Campaign Advertising) Bill 2008

Thank you for the invitation to make a submission to the Select Committee on Campaign Advertising *Inquiry into the Government Agencies (Campaign Advertising) Bill 2008*.

The ACT Electoral Commission's submission is attached.

If you would like further information, I can be contacted at elections@act.gov.au or on 6205 0033.

I would also be available to give evidence at a public hearing if desired.

A handwritten signature in black ink that reads "Phillip Green".

Phillip Green
Electoral Commissioner

27 May 2009

**Submission by the ACT Electoral Commission
to the Select Committee on Campaign Advertising**

Inquiry into the Government Agencies (Campaign Advertising) Bill 2008

Introduction

This submission is provided to the Select Committee on Campaign Advertising in response to its Inquiry into the Government Agencies (Campaign Advertising) Bill 2008. The submission addresses the issues listed in the Committee's terms of reference for this inquiry.

The Commission does not consider it appropriate for it to offer a view on the policy objectives of the Bill. Rather, this submission focuses on the Commission's views on the potential impact of the Bill on the Commission's information campaign activities.

In particular, the Commission notes with great concern that section 14 of the Bill would appear to prevent the Commission from conducting its normal election information campaign in the lead up to each Legislative Assembly election.

Specific issues of concern are discussed below. The following discussion is based on the Commission's understanding of the relevant legal provisions. The Committee may wish to seek formal legal advice on these issues.

The proposed restriction on any government campaign in the 12 week period before an election

The restriction in section 14 on any government campaign in the 12 week period before an election would appear to prevent the Electoral Commission from conducting its normal information campaign in the lead up to each Legislative Assembly election. While this restriction is no doubt unintended, the Commission suggests that the Bill should explicitly exempt the Electoral Commission from the operation of this section.

In addition, a drafting issue with section 14 is that it does not clearly define when the 12 week period commences and ends, as it refers to "the 12-week period immediately before a general election". The Bill presumably means the 12 week period ending on polling day for a general election, but the wording of the existing clause is not clear as there is no legal definition that ties the phrase "general election" with "polling day" – in practice there is a 36 day election period set out in the Electoral Act. The Commission suggests that section 14 should be amended to clearly refer to polling day as the ending date of the ban.

Concerns related to statutory independence

Sections 10 to 12 are of concern to the Commission as they indicate that the responsible Minister is responsible for agency advertising and (in section 11) that the Minister actually conducts advertising. In the case of the Commission the relevant Minister does not play a part in approving the agency's advertising campaigns – indeed it is arguably improper for a Minister to do so.

In order to respect its independence, the Commission suggests the scheme should be recast to delineate the responsibilities of independent agencies such as the Electoral Commission from the responsibilities of Ministers.

The definition in the Dictionary of "responsible chief executive" arguably does not include statutory officer holders such as the Electoral Commissioner, as the definition refers to the Auditor General Act, which in turn refers to the Financial Management Act, which in turn does not recognise statutory officer holders as chief executives. If this definition could be taken as making the chief executive of the Department of Justice and Community Safety the responsible chief executive under section 11 for Electoral Commission advertising, then this would violate the Commission's statutory responsibility and its statutory independence.

The Commission suggests that the Bill be amended to provide that, where it requires approval of a campaign by a chief executive, in the Commission's case the relevant chief executive should be the Electoral Commissioner.

Definitions of "government campaign" and "campaign costs"

The Commission notes that the definition of "government campaign" in section 8 and the definition of "campaign costs" in section 9 are very broad as they appear to apply to all means of dissemination of government information in any form at any time – they are not confined to more formal "advertising campaigns" that have a discrete beginning and end.

The Commission conducts a continuous information and education program, distinct from but linked to its specific election information campaigns conducted before each general election. It appears that the Bill as currently drafted would include this activity in the definition of "government campaign" and would therefore require this activity (including staff costs) to be separately costed, approved and audited. This would impose an additional workload for arguably no significant benefit. The Commission already reports on its information and education activities in its Annual Reports.

The Commission therefore suggests that the Bill should clearly define what activity and expenditure is included in the meaning of "government campaign", ideally to exclude ongoing information provision services by the Electoral Commission.

Restrictions on content of advertising

Section 13 of the Bill would place restrictions on content of government information campaigns. These restrictions include mentioning the party in government or election candidates, and linking to political websites.

By the nature of its work, the Electoral Commission routinely makes mention of political parties and candidates in its information campaigns. The Commission's website also provides web links to all registered political parties and to candidates, by public demand. The Commission submits that its publication of these details is appropriate and consistent with the Commission's independent, apolitical role.

Therefore the Commission suggests that the Bill should be amended to ensure that any restrictions on mention of political parties or candidates, or links to political websites, should not apply to the Electoral Commission.

Authorisation requirements

The requirement to clearly identify that material is part of a government campaign in section 13(3)(g) duplicates the authorisation requirements in the *Electoral Act 1992* and the *Commonwealth's Broadcasting Services Act 1992*. Therefore this provision is arguably unnecessary, while creating doubt as to whether compliance with those other Acts would be sufficient to meet the new requirement. For example, the implied requirement in the example that a radio or TV advertisement would need an authorisation at both the start and end of an advertisement would conflict with the existing requirement for a statement only at the end. The existing requirements in the other Acts are superior in that they have very specific requirements that must be met, whereas the Bill's requirement is not specific.

Therefore the Commission suggests that the Bill should refer to the authorisation requirements in the *Electoral Act 1992* and the *Commonwealth's Broadcasting Services Act 1992* rather than impose additional identification requirements.

Conclusion

The ACT Electoral Commission is concerned that the regulatory scheme in the Bill may have an unintended detrimental impact on the Electoral Commission's advertising and information campaigns. The Commission suggests that the following elements should be adopted in any final scheme adopted by the Legislative Assembly:

- Any restrictions on information campaigns by government agencies during the period leading up to polling day for an ACT election should not apply to campaigns conducted by the Electoral Commission;
- To preserve the Commission's independence, any information campaigns conducted by the Electoral Commission should not be subject to Ministerial or departmental chief executive approval or authorisation, as is currently the case;
- Accordingly, if the scheme requires approval of a campaign by a chief executive, in the Commission's case the relevant chief executive should be the Electoral Commissioner;
- The scheme should clearly define what activity and expenditure is included in the meaning of "government campaign", ideally to exclude ongoing information provision services by the Electoral Commission;
- Any restrictions on mention of political parties or candidates, or links to political websites, should not apply to the Electoral Commission; and
- The scheme should refer to the authorisation requirements in the *Electoral Act 1992* and the *Commonwealth's Broadcasting Services Act 1992* rather than impose additional identification requirements.