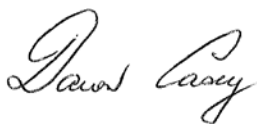


ACT Electoral Commission supplementary submission to the ACT Legislative Assembly

Select Committee Inquiry into 2016 ACT Election and the Electoral Act



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29 June 2017



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Supplementary submission by the ACT Electoral Commission to the Select Committee - Inquiry into 2016 ACT election and the Electoral Act

Recommendations

The Commission has made the following recommendations in this submission:

Recommendation 1

The Commission **recommends** against the introduction of legislation in the ACT aimed at regulating truth in political advertising.

Any other relevant matter

Truth in political advertising

Summary

The Commission provides this submission as a response to the inclusion of the matter of 'truth in political advertising' in the "other areas for consideration by the Committee" of the *Inquiry into the 2016 ACT election and the Electoral Act – Discussion paper* released by the Select Committee in April 2017.

The purpose of this submission on truth in political advertising is to provide the Committee with the Commission's considered position on the practicality of legislating for truth in political advertising in the ACT and to provide detailed background on the issue from the experience of other Australian jurisdictions.

The idea of legislating for truth in political advertising has been discussed in depth at both federal and state levels numerous times over the past 30 years. When proposed, typically inquiring committees or parliaments have deemed it unworkable in practice and it has not reached legislation. It has been enacted once federally, where it was repealed the following year, and twice at the state level; where either there has been no appreciable effect on political advertising or it has been interpreted narrowly so as to exclude claims against policy statements and other such advertising.

The Commission maintains a view consistent with those determinations against legislating for truth in political advertising due to concerns about enforceability, the perception of neutrality of the Commission and the potential for exploitation during the pre-poll period.

Current related legislation

Under section 297 of the *Electoral Act 1992* (Misleading or deceptive electoral matter) it is an offence to disseminate, or authorise to be disseminated, electoral matter that is likely to mislead or deceive an elector about the casting of a vote.

This section of the ACT Electoral Act substantially mirrors s329(1) of the *Commonwealth Electoral Act 1918*, which prescribes that a person shall not, during the relevant period in relation to an election under the Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

This offence was considered by the High Court of Australia in *Evans v Crichton-Browne* [1981] HCA 14 where it was held that the words "in or in relation to the casting of his vote" (which was how the offence was phrased at the time at s161(e), prior to a reworking of the Act which sees the relevant clause now listed at s329(1)):

“refer to the act of recording or expressing the elector’s political judgement e.g. in obtaining and marking a ballot paper and depositing it in the ballot box, and not to the formation of that judgement.”¹

This ruling effectively limited the view of this offence to the act of recording or expressing the political judgment which the elector has made rather than to the formation of that judgment. Accordingly, material aimed at affecting the formation of an elector’s voting decision, i.e. material (it is assumed) that is hoped to be captured by truth in political advertising legislation, was not included by this ruling.

As s329(1) of the Commonwealth Electoral Act and s297 of the ACT Electoral Act are substantially similar, with the later drafted using the former as a basis, it could be argued that the High Court’s ruling in *Evans v Crichton-Browne* is applicable within the ACT context. Accordingly, it could also be argued there is no current legislation in the ACT legislating for the inclusion of truth within political advertising.

Instances of truth in political advertising in other Australian jurisdictions

The issue of truth in political advertising has been considered by parliamentary committees at both Commonwealth and State level numerous times over the past three decades. Legislation has been in place and repealed previously at a Commonwealth level, and a form of truth in advertising legislation remains in force in South Australia and to a certain extent within the Northern Territory.

Commonwealth

In 1983 the federal parliament, acting on recommendations made by a Joint Select Committee on Electoral Reform (JSCER), amended the Commonwealth Electoral Act to prohibit untrue electoral advertising. The legislation prescribed at s161(2) that:

A person shall not, during the relevant period in relation to an election under this Act, print, publish, or distribute, or cause, permit, or authorise to be printed, published or distributed, any electoral advertisement containing a statement –

- (a) That is untrue; and
- (b) That is, or is likely to be, misleading or deceptive.

However, a subsequent second report by the JSCER in 1984 found the subsection unworkable and that “any amendments to it would either be ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising”.² Accordingly, the subsection was repealed.

¹ *Evans v Crichton-Browne* [1981] HCA 14, 13

² JSCER, *Second report*, 1984, p. 26, para 2.41

Since then the federal parliament has experienced a number of parliamentary inquiries that have delved into the issue of truth in political advertising or the introduction of bills that have sought to amend the Commonwealth Electoral Act, with each failing to see legislation either proposed or successfully introduced.

- In 1994 a Joint Standing Committee on Electoral Matters (JSCEM) report concluded the Committee had heard no evidence to persuade it that truth in political advertising legislation would be more workable than when the former provision was repealed in 1984.³
- The Australian Democrats introduced an amendment in the Senate to a bill in 1995 to reintroduce a truth provision to the Commonwealth Electoral Act which was not supported by the House of Representatives.⁴
- In 1997 a JSCEM inquiry again found the truth provision inappropriate due to the previously identified shortcomings but recommended the introduction of legislation to prohibit 'misleading statements of fact'.⁵ The Government rejected the recommendation.
- The JSCEM report into the conduct of the 2001 election considered that regulation of truth in political debate would be unwise and unworkable, particularly if the AEC was appointed to undertake such regulation.⁶
- The JSCEM report into the conduct of the 2004 election, discussed truth in political advertising but made no recommendations for legislative amendment, stating that "there is a high risk that the introduction of so-called "truth" legislation would traverse the implied freedom of political speech underpinning the democratic principles which govern our electoral processes."⁷

³ JSCEM, *The 1993 Federal Election: Report of the Inquiry into the conduct of the 1993 federal election and matters related thereto*, November 1994, para 8.1.5

⁴ Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002] Electoral Amendment (Political honesty) Bill 2000 [2002] Provisions of Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No 2]*, August 2002, para 5.17

⁵ JSCEM, *The 1996 Federal Election: Report of the inquiry into the conduct of the 1996 Federal election and matters related thereto*, June 1997, para 7.9

⁶ JSCEM, *Report of the Inquiry into the conduct of the 2001 Federal Election, and matters related thereto*, June 2003, para 3.143

⁷ JSCEM, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005, para 12.170

South Australia

South Australia is the only Australian jurisdiction with current legislation in place that actively governs truth in political advertising. Section 113 of the *Electoral Act 1985* (South Australia) provides for an offence if a person authorises, causes or permits the publication of an electoral advertisement if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Where the repealed Commonwealth enactment sought to limit any statement, including expressions of opinion which were ‘untrue’, the South Australian provision provides for a narrower scope, limiting the law to regulating statements of fact as either inaccurate or misleading.

At a 2001 Finance and Public Administration Legislation Committee hearing, the then Australian Electoral Commissioner, Andrew Becker, who had also previously served as the South Australian Electoral Commissioner, opined that the South Australian legislation had not had any appreciable effect on the nature of political advertising in South Australia and that the legislation opened up opportunities for individual candidates to disrupt the electoral process by lodging nuisance complaints.⁸

Northern Territory

While the Northern Territory Electoral Act includes “offences relating to campaign material” (s270) and “false and misleading statements” (s287) that appear to create offences in relation to truth in political advertising, a narrow interpretation has historically been applied by the Northern Territory Electoral Commission in its enforcement of such provisions.

In practice the Northern Territory Electoral Commission has taken a view similar to that taken by the High Court in *Evans v Crichton-Browne* [1981] where such an offence is only committed when the advertising material is in direct relation to the actual conduct of the election and the act of the elector casting their vote.

International

New Zealand

There are no provisions in the *Electoral Act 1993* (NZ) that deal with false and misleading advertising, or making false statements which may mislead voters in the casting of their votes. All electoral advertisements must be authorised.⁹

⁸ Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002] Electoral Amendment (Political honesty) Bill 2000 [2002] Provisions of Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No 2]*, August 2002, para 5.60

⁹ Information sourced from:
http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp13#QUEENSLAND

Canada

In Canada, the relevant statute is the *Canada Elections Act 1990* (Canada). It has various sections relevant to the issue, but no equivalent provision to section 113(1) of the South Australian Electoral Act. For example, section 261 requires that all advertisements must be authorised; while section 264 provides that 'every person who, before or during an election, knowingly makes or publishes any false statement of fact in relation to the personal character or conduct of a candidate is guilty of an illegal practice and of an offence'.¹⁰

United States

The First Amendment to the United States Constitution provides that: 'Congress shall make no law ... abridging the freedom of speech'. This restricts the scope for legislatures in the United States to pass truth in advertising laws, particularly given that the First Amendment has its 'fullest and most urgent application precisely to the conduct of campaigning for political office'. Despite the width of the guarantee of free speech in the United States Constitution, several States prohibit the making of certain types of false statements, such as those that impact upon the reputation of a candidate in political campaigns.¹¹ In September 2014 a federal judge rejected an Ohio law requiring truth in political advertising, issuing a significant First Amendment ruling.¹²

United Kingdom

Political advertising laws in the United Kingdom are split into two distinct sectors of print and broadcasting. Paid political advertising is permitted in newspapers and billboards and is restricted only by electoral finance laws. By contrast, political adverts are prohibited on television; major parties, and in some cases minor parties, are allocated rationed blocks of free airtime for "party election broadcasts" (PEBs). These PEB rules largely prevent television advertisements generated and paid for by third party campaigners. Freedom of speech is protected in the UK's communications regulator Ofcom's Broadcasting Code, which states that editorial control of PEBs rests with the party. Party broadcast are therefore free from the commercial advertising consumer protections of truthfulness. Political freedom of speech in press advertising is unregulated; exempt from the complaints process administered by the commercial regulatory body.¹³

There are two areas where campaign material is specifically regulated.

¹⁰ Ibid

¹¹ Ibid

¹² Information sourced from: <http://www.washingtontimes.com/news/2014/sep/11/federal-judge-rejects-ohio-law-requiring-truth-in-/>

¹³ Information sourced from: https://www.corwin.com/sites/default/files/upm-binaries/11718_Chapter4.pdf

- Section 106 of the *Representation of the People Act 1983* prohibits the making or publishing a false statement of fact about the personal character or conduct of a candidate at an election.
- There is a legal requirement that campaign material should include an authorisation statement of who has published the material to ensure voters can identify the source of the campaign literature.¹⁴

Following the recent EU referendum in the UK, the Electoral Commission published a report into the conduct of the election. The report discusses the issue of truthfulness within the campaign but ultimately states:

“One thing we have not recommended, however, is any role for the Commission in regulating the ‘truth’ or the content of what campaigners say. At every electoral event, there is fierce questioning about the accuracy of campaign arguments, and this poll was no different. It is right that campaigners and the media should scrutinise each other’s contentions and that information is widely available for voters to do the same. But we do not believe that a role as a “truth Commission” would be appropriate for us given the breadth of our other functions.”¹⁵

The ACT Electoral Commission’s view

Regulatory authority

While the Commission believes strongly that truth should be at the heart of an election campaign, it has a number of concerns about putting forward legislation to regulate it. Assessing political statements inevitably requires complex and often subjective judgments of concepts, policies, figures and theories. It is the Commission’s view that such assessments are outside of what the Commission considers to be its statutory function. The Commission therefore holds no experience or expertise in such matters.

Such investigations, if required of the Commission, could also impose a significant increase in its election period workload, and demand a sizable percentage of the Electoral Commissioner’s focus, at such a crucial period as to interfere with its core functions of conducting a free, fair and transparent election. The Commission notes that the AEC has expressed the same view about performing this function.

If such a regulation were to be introduced, consideration needs to be given to whether a separate independent body, such as the proposed ACT Integrity Commission, should be empowered to administer complaints, commence investigations and ultimately recommend prosecutions into these matters.

¹⁴ House of Commons Briefing paper, *Referendum campaign literature*, no.7678, 15 February 2017

¹⁵ *The 2016 EU Referendum: report on the 23 June 2016 referendum on the UK’s membership of the European Union*, Electoral Commission, September 2016

The Electoral Commission maintains concerns that if required to scrutinise political advertising and act as the final arbiter on the truth or otherwise, the consequence of determinations made, one way or the other, by the Commission would inevitably raise accusations of political partisanship. The reputation of the Commission, based inherently around neutrality and independence, would likely face unprecedented attacks; attacks that could ultimately have a serious impact on the community's perceptions of the ACT's democratic system.

Enforcement

The Commission agrees with the sentiments outlined by the Australian Electoral Commission in its response to the JSCEM inquiry into the 1996 federal election¹⁶. There would be little point to regulate truth in political advertising if the legislation did not allow for resolutions during the critical pre-election period, when any purported damage to a political campaign is being done. If such enforcement was to be left until after the election had concluded, political participants may decide to risk post-election sanctions in the hope of electoral advancements. Alternatively, if the consequence of a positive prosecution for a breach of truth legislation was the potential for a disputed election, such legislation could provide for long periods of political uncertainty following the conclusion of each election.

The most obvious resolution to any complaint during an election campaign would be the use of court injunctions which would force a cessation to the advertising of the offending material. Section 321 of the Electoral Act provides for such injunctions. The risk of invoking such action, aside from the concerns relating to political neutrality referenced above, is the opportunity it could provide to political participants wishing to manipulate the campaign period through exploitation and misuse of such provisions. It is the view of the Commission that such enforcement would open the potential for a party or candidate to vexatiously claim against the legislation with the aim of simply disrupting the campaign of its rival. Accordingly, the Commission would be reluctant to engage such court action during a campaign to avoid being caught up in such political gamesmanship.

¹⁶ JSCEM, *The 1996 Federal Election: Report of the inquiry into the conduct of the 1996 Federal election and matters related thereto*, June 1997, para 7.15

Legislative scope

If the Assembly moved to introduce truth in political advertising legislation, careful consideration must be given to the parameters to which such legislation was to extend. It is assumed that the initial intention would be to legislate advertisements, published by any means, in print, radio, television and online. However, advertisements are not the only means through which candidates, political parties and third party campaigners communicate. Each of these entities has the potential to broadcast their political thoughts and claims via the media, through interviews and sound grabs or even via personal social media accounts. Such entities may, if limited by truth legislation governing advertisements, use such media opportunities to make statements that would now be at risk if stated through advertisement. Consideration must therefore be given to whether the Assembly intends to capture publicly made comments or social media comments also. But in doing so must also carefully consider whether such legislation may impermissibly burden the freedom of political communication implied by the Commonwealth Constitution.

Consideration should also be given to the time parameters to which such legislation extends. It is unlikely that the Assembly would desire to legislate, for instance, to allow for a government to be legally held to account for promises made during a campaign, which it failed to implement? Under this circumstance the law could potentially extend to the term of a government and allow for the associated political party to be prosecuted for an advertising falsehood three or more years after the campaign advertising took place.

For the proposed restriction scheme to work effectively in the ACT, it would be necessary to provide careful measures to prevent the enforcement of the law extending to such scenarios.

Current protections

Those against introducing truth legislation often argue that it should be up to voters and a vigilant media to judge the veracity of claims made in political advertising. To this end, current electoral law provides for ensuring that electors can ascertain who is responsible for publishing the advertised material.

To enable voters to judge the accuracy, balance and fairness of published electoral material, current electoral laws require this material to identify the person or organisation responsible for writing or publishing the material. This usually means either printing an authorisation statement on the material, or otherwise clearly identifying who has published the material.

In other words, the authorisation rules are intended to prevent “irresponsibility through anonymity” – that is, making it unlawful to publish electoral material that does not identify the author, so that voters are unable to judge whether the material is coming from a source with a particular interest in the election. The authorisation rules also mean that people cannot hide behind anonymity to make irresponsible or defamatory statements about election matters.

Conclusion

With consideration of the practicality and enforcement issues addressed above, with particular focus on the potential for accusations of partisanship against the Commission and the potential for the Commission to be caught up in political gamesmanship through vexatious complaints, the Commission **recommends** against the introduction of legislation in the ACT aimed at regulating truth in political advertising.