

Submission to the Standing Committee on Government Administration B

Inquiry and Report into the *Electoral Disclosure and Funding Amendment Bill 2024*

The Government wishes to reiterate a number of points made previously in relation to the amendments proposed by the Tasmanian Greens in the Electoral Disclosure and Funding Amendment Bill 2024.

The Reduction in Disclosure Threshold from \$5000 to \$1000

The Bill proposes to make amendments to lower the disclosure thresholds for donations in the Act from \$5,000 to \$1,000.

The Government regards the current \$5000 disclosure threshold in the Act as measured and appropriate.

It is the Government's view that the \$5000 threshold in the Act provides for transparency of electoral donations, while also ensuring that the Act does not undermine the ability for people to engage with the electoral process.

This threshold is similar to South Australia and considerably lower than the current Commonwealth threshold of \$15,200.

Ban on Corporate Donations

There is no precedent in Australia for a ban on all donations from non-natural persons. No other Australian jurisdiction has chosen the non-targeted banning of all donations from non-natural persons.

The Government is committed to ensuring that political communication is not curtailed any more than is warranted by evidence.

The Final Report of the Electoral Act Review said in relation to bans:

"Given the lack of data on the extent of third party activity, it is difficult to make an informed judgment on whether any bans on donations may be required in Tasmania in future. Recent High Court judgments have indicated that it is possible to ban donations from certain entities or individuals however there are complex legal assessments required to ensure the constitutionality of such a ban."

Beyond foreign donations, the Government has significant concerns about bans on donations in general without a firm evidence base. The High Court has been very critical of limitations on the ability of individuals and groups to contribute to political debate without firm evidence that any limitation is appropriate and adapted.

Consequently, there is a live question as to whether a ban of this extent is constitutionally sound.

The Reduction in reporting timeframes

The proposed amendments in this Bill would see the donations disclosure period in the Act shortened to 7 days year-round, except for in the week leading up to Polling Day, when donations must be disclosed within 24 hours.

The proposed amendments represent a significant increase in the administrative burden of reporting. There is currently no evidence that there is a significant benefit in reporting to occur as frequently as the amendments propose.

The *Electoral Disclosure and Funding Act 2023*, as passed, aims to balance transparency and accountability with preventing unnecessary administrative burden.

Under the *Electoral Disclosure and Funding Act 2023*, Party Agents and Official Agents have a regular six-monthly reporting requirement. At the end of the financial year and the calendar year, all disclosable donations can be compiled and reported to the Tasmanian Electoral Commission (TEC).

Of particular concern is the burden on independents and small parties. Under these proposed provisions, these people would bear the burden of reporting donations received well outside of an election period within seven days. In instances where an independent or small party had a contracted or casual administrative person doing this work for them, this may be a significant compliance risk for them.

The proposed amendment in Bill creates too significant an administrative burden without evidence that such a burden is warranted.

Reduction of timeframes for publication by the TEC

The proposed amendments shift the wording in relation to the TEC's requirement to publish declarations within seven days by providing that publication must be as soon as practicable but, in any case, no later than seven days.

The Government has every faith that the TEC operates so as to ensure statutory timeframes are met. The Government does not regard it as necessary to specify that the TEC must publish as "soon as practicable".

Cap on Donations

The Final Report of the Electoral Act Review said the following in relation to caps on both donations and electoral expenditure;

"The High Court has found that caps on political expenditure can limit the implied constitutional freedom of political communication and require evidence as to their justification.¹ This would suggest that if the Tasmanian Government decided to introduce caps, then a clear evidence base as to the need for caps and the level of caps would have to be established. Currently, there is no data on electoral spending by candidates, parties or third parties in House of Assembly elections. In the absence of this information it would be very difficult to calculate an appropriate cap for participants and campaigners and to demonstrate that the level of the cap was appropriate."²

¹ Unions NSW v NSW [2019] HCA 1

² Final Report page 69

The introduction of the new system in the *Electoral Disclosure and Funding Act 2023*, with the majority of provisions due to commence 1 July 2025, will enable the TEC and the public at large to be able to see the size, frequency and source of donations in the State.

The data collected through this new system will provide a basis on which to assess whether a cap is warranted and at what level such a cap should be set.

The making of donations to political parties is part of the democratic process in our society. It would be undemocratic and likely challengeable in the High Court if arbitrary caps were placed on donations from a single source with no evidence to back this cap up.

A cap set too low would inhibit the dissemination of ideas and policies by all involved in the electoral process. A cap set too high would achieve nothing.

On a practical level, the cap in the Bill refers to a four year period. This aligns with neither the parliamentary term (which is not fixed) nor with the “electoral campaign period” as defined in the *Electoral Disclosure and Funding Act 2024*. This would mean that a four year period may span over two different parliamentary terms. Compliance and enforcement of such a model would be difficult and burdensome.

Electoral Expenditure Limits

The Government remains opposed to imposing expenditure limits on House of Assembly elections, at this time. The Government’s position reflects Recommendation 4 of the Final Report of the Electoral Act Review that any decision in relation to caps should follow the analysis of evidence gathered under the new disclosure regime.

As articulated above, the Final Report of the Electoral Act Review recommended that any limits and caps be considered following the collection of robust data under the new disclosure and funding scheme. Therefore the Government does not support the imposition of electoral expenditure limits at this time.

It should also be noted that the Greens amendments include an electoral expenditure limit for candidates, Members, parties, and third party campaigners but does not cover associated entities. Associated entities are an entity defined under the legislation that operates for the benefit of a registered party. There is therefore a significant risk under the Greens amendments that electoral expenditure could be funnelled through associated entities so as to circumvent the electoral expenditure limit of a party. This would therefore undermine any benefit of the limit entirely and would likely see the proliferation of associated entities created specifically for this purpose.

Similarly, placing a limit on a third party campaigner but not regulating co-ordinated campaigning between multiple third party campaigners serves only to encourage the creation of multiple third party campaigners so as to reap the benefit of multiple caps.

Expenditure caps are not supported by the Electoral Act Review Final Report, and there is an insufficient evidence base to introduce them at this time.

Truth in political advertising

The Greens Bill has included provisions at clause 16 that are often referred to as “truth in political advertising” laws. The wording of the bill largely reflects the provision currently in place in the ACT and South Australia which prohibit the dissemination or publication of an

electoral advertisement that contains a statement (purporting to be a statement of fact) which is inaccurate or misleading to a material extent.

Whilst it is acknowledged that there is support for the concept of truth in political advertising laws amongst some stakeholders and, potentially, in the wider community, the Government holds significant concerns about the practical operation and administration of such laws.

For example, in its report on the 2020 ACT Legislative Assembly election, the ACT Electoral Commission expressed concerns that the assessment of political statements requiring complex and often subjective judgment of concepts, policies, figures and theories, and is outside of what the Commission's statutory function should be. It was also suggested that investigating complaints would significantly increase the Commission's workload during election periods.

In addition, the ACT Electoral Commission was concerned that its determination of the truth or otherwise of political advertising could raise accusations of political partisanship and affect the Commission's reputation, which is based on neutrality and independence. The ACT Electoral Commission also raised issues around enforcement, suggesting that political participants may decide to risk post-election sanctions in the hope of electoral advantage. If the consequence of a positive prosecution for a breach of the truth in political advertising laws is a formally disputed election (through the Supreme Court) – this could provide for potentially long periods of electoral uncertainty following the conclusion of each election.

The "truth in political advertising" issue is complex. Any proposal to introduce such laws would require careful consideration and consultation. This has not occurred at this stage given that the issue was out of the scope of the Electoral Act Review and was not included in the draft Bills which went out for consultation during the development of the *Electoral Disclosure and Funding Act 2023* and the *Electoral Matters (Miscellaneous Amendments) Act 2023*.

The proposed provision gives the TEC power to determine if advertising is misleading, and this is outside of the Commission's normal functions. It could put the TEC in an invidious position, and there would be complex additional work involved.

There are particular aspects and constraints of the scheme proposed by the Bill that make that work even more complex. It is not necessarily easy for members of the public to understand the nuances of laws or for the TEC to determine how they would apply.

One very important aspect is that they only apply to electoral advertising, not to all things that are said during the course of an election campaign. For example, it would not capture comments made in media interviews or at campaign events.

Further, in order to fall within the ambit of the provisions in the Bill, the statement in an advertisement must purport to be a statement of fact. Statements of opinion, questions and insinuations may not be construed as statements of fact and may not attract the operation of the law.

These particular aspects of the Bill are likely to lead to many complaints being made, and having to be process by the TEC, in circumstances where the Act does not apply to matters that are the subject of the complaint.

Further, these laws risk politicising the TEC, which in carrying out its functions must be neutral and independent. Being required to make a finding that a person, particularly a

candidate or party member, has made inaccurate or misleading statements may tend to call into question the neutrality of the TEC.

Such activity both has the potential to undermine the TEC in the carrying out of its other functions and lead to time and resources being wasted by the Commission.

Significant TEC staff time will be required during election campaigns to administer laws such as these. In addition to the resourcing implication, the scope of enforcing the “truth in political advertising” provisions falls outside of the ordinary functions of TEC employees, which poses issues of whether sufficient expertise can be maintained by the TEC in respect of this highly specific regulatory function.

Such provisions have proven to be complex to implement in other jurisdictions. The South Australian Electoral Commissioner, Mick Sherry, has acknowledged the challenges in administering this legislation, most recently when appearing before the Joint Standing Committee of Electoral Matters (JSCEM) on 30 November 2022.

In particular, Mr Sherry is quoted in the transcript of that session that while the Commission has a good reputation in the electorate, “it is a reality of administering misleading advertising provisions that we are drawn into the political debate”.

Significant points made by Mr Sherry are:

- The process to assess each complaint before making a determination is resource heavy, and this is in addition to the usual complaints received during an election such as electoral authorisation issues. In addition to requiring additional staff in the Electoral Commission, it requires the Crown Solicitor’s office to be on standby for a 2 week period to provide quick legal advice and investigative resources.
- It is rare that a complaint is resolved in a very quick period of time, even with the investigative resources of the office of the Crown Solicitor.
- Many complainants still don’t understand that complaints must be based on a statement of fact, not an opinion, with many complaints lodged having no supporting information.
- In the two weeks before polling day, the majority of the Electoral Commissioner’s time is spent dealing with these matters, which draws him away from other important administrative aspects of the election.
- The number of complaints which related solely to misleading advertising increased from 38 in 2018 to 122 in 2022, mainly attributed to the increased use of social media. Despite this increase, the number of complaints which were determined by the Commission to be misleading under the Act remained about the same (20 in 2018, 14 in 2022).
- Of the matters determined to be breaches of the legislation, most are dealt with by retraction or cessation of publication, with very few matters having been prosecuted since 1985.
- That if the Commonwealth is contemplating introducing similar legislation it requires a lot of time to implement and education all participants, as well as additional funding to develop the capability with the AEC.

Given that this Bill appears to be adapted from the South Australian legislation, there is no reason to think that the significant challenges identified above will not also apply in the Tasmanian context. Indeed, the smaller size of this jurisdiction and the consequently smaller electoral commission could well magnify some of these issues.

Further, some of these same problems have been identified as issues when such laws have been considered at the Federal level.

One of the terms of reference of the JSCEM Inquiry into the 2022 Federal Election was consideration of the potential for 'truth in political advertising' laws to enhance the integrity and transparency of the electoral system.

The Australian Electoral Commission (AEC) made written submissions to the JSCEM, with the Electoral Commissioner Tom Rogers appearing at hearings of the committee in September 2022.

The AEC outlined "strong" views that it is inappropriate for the AEC to be the arbiter of such matters and could damage the AEC's standing as an independent and nonpartisan electoral administration body.

As can be seen from these comments, and particularly from the South Australian experience, there is a range of real and substantial concerns with laws such as those proposed in this Bill.

If "truth in political advertising" laws are to be introduced in Tasmania, then significantly more work needs to be done to develop appropriate laws and undertake broad consultation to ensure that law are functional, understandable and operate as Tasmanian expect, without compromising the important functions of the TEC.