Submission re Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No. 9)

I thank the Committee for the invitation to make a submission and also both Houses for the recent successful establishment of a standing joint electoral matters committee. Concerning the Bill in question, my comments are below. I have not had the time to consider absolutely all aspects of the proposed Bill.

In summary I support the proposed reduction in the donation disclosure limit and I am generally supportive of timely disclosure requirements depending on the details. I have reservations about the proposed level of donation caps and about the general concept of spending caps, as well as some aspects of the proposed implementation. I do not support "truth in electoral advertising" legislation.

Proposed reduction in donation disclosure limit to $1000

I support the proposed reduction in the disclosable donation threshold to $1000 as I believe it is a fair point at which to infer a line between a donor who is overwhelmingly likely to merely be showing support and a donor who might realistically be seeking to gain political influence (such that the voters should know about it). In the event that there is not sufficient political will for this change to be made I also consider that reduction to, say, $2000 would be a significant improvement on $5000. I do not agree with the argument that having passed the reforms at $5000 that particular reform needs to be tested as passed rather than considering further changes. That the reforms were only passed at that level was a product of the makeup of, and political decisions made in, the previous parliament, rather than any necessary merit of the $5000 limit. Also, while it is probable that a $1000 public declaration threshold would result in lower levels of donations than a $5000 threshhold, this is counter-balanced by the increase in public funding resulting from the Parliament agreeing to base funding on votes received by party tickets rather than specific candidates. The Parliament could have offset this by reducing the amount of public funding per vote but did not.

Timely disclosure

In general I strongly support the principle of causing donations to be disclosed promptly, especially during campaign periods. I agree with proposed amendment that outside of campaigns weekly disclosure is unnecessary and monthly would be satisfactory. I agree that there could also be issues with requiring disclosure within 24 hours but think that that time should be made as small as possible. Regarding the proposal for disclosures to be faster if made within seven days of an election, I would actually increase this to within fourteen days given that a substantial number of voters these days cast their vote more than seven days prior to polling day.

Donation and spending caps

In general I am cautious about capping donations and electoral spending. I think that it is very common for the impact of election spending on outcomes to be overstated, eg the claims that various Tasmanian elections were "bought", or claims about the impact of the United Australia Party which continues despite massive spending to poll only a small percentage of the national vote. Money certainly helps but no amount of spending will sell a bad political product. In every case where I have seen a Tasmanian election described as "bought", the losers made poor policy or campaigning decisions from the perspectives of the concerns of average voters.

I am unconvinced a donation cap anywhere near as low as $3000 per term is necessary. I think the most important aspect of donations reform is that voters know promptly who is making significant donations, not that these are necessarily prevented to such a degree. The $3000 figure is taken from a Senate committee report from 2018 but there it applies to a federal parliamentary term that is nominally three years, whereas Tasmania's is nominally four. It seems to me that if there is to be such a low limit then $4000 being four times the disclosable amount would be more intuitive. A note also that on my reading of the report of the Senate Select Committee into the Political Influence of Donations (2018) it is a mystery how the $3000 figure came to be considered a recommendation of the committee at all as the Labor dissenting report said it needed more consideration and the Coalition dissenting report opposed it.

Spending caps are an area prone to perverse incentives and unexpected discrimination. The proposal to cap spending at $83,000 per candidate but $830,000 per registered party disadvantages independent candidates and encourages them to form fake parties if they wish to spend at high levels. A registered party intending to run a single candidate can spend ten times more than an independent candidate can spend. There is no logic in this, and it would place great pressure on independent candidates to register front parties to be able to spend more money.

In a previous Tasmanian debate about proposed spending caps (Electoral Amendment (Electoral Expenditure and Political Donations) Bill 2013.) a point was made that two parties in a coalition (as Labor and the Greens at that time were) might in theory gain an advantage over an opponent by being each able to spend up to the spending cap. A similar concern has appeared with unions in states where spending caps have been imposed on third parties – if there are many unions in a state all backing the same party but relatively few similar bodies backing the other, then the former party may have an advantage in terms of how much third-party spending it can benefit from.

Overall I think spending and donation caps should not be proceeded with at this time and that it is better to see how the changes passed, with any amendments that might be made in other areas, function at an actual election.

Proposed truth in electoral advertising clause 16

There were some comments in debate to suggest this clause may not be proceeded with if there is insufficient support and I did not see the clause argued for in this year's debate. However I comment on it in case it may be proceeded with now or in future.

Concept of "advertisement" is not defined.

A specific concern I have about the proposed clause is that it includes the concept of an "electoral advertisement" that is "published by any means (including radio and television)" but there is no definition of what an "advertisement" is in the context of publication on the internet, particularly social media.

The inability for stakeholders to know what an "electoral advertisement" is in a Tasmanian online context has been one of the critical issues with Section 196 of the current Act, or at least with its implementation. Following a complaint about a 2020 Facebook video that named an opposing candidate without consent, the TEC eventually issued seemingly sensible advice for the 2024 election. That advice stated things like Facebook posts "could be considered closer to a radio interview or public debate" that were not covered under the limitations on items that were a "advertisement, 'how to vote' card, handbill pamphlet, poster or notice".

However in the 2024 campaign the TEC still managed to determine that an obviously mock advertisement by Juice Media produced for political satire purposes might be an "advertisement" for the purposes of the Act and asked for it to be modified. This apparently farcical interpretation brought the TEC into national disrepute on social media; I intend to discuss this further in my submission to the newly formed Tasmanian JSCEM. Even if the TEC's ruling was correct –I do not believe that it was – this case shows the difficulties for people who have to follow Tasmania's electoral laws in understanding what sorts of material are affected by those laws.

I am not aware of difficulty identifying what is an "advertisement" applying in South Australia which has similar legislation, and perhaps this is somehow a problem confined to the TEC. Nonetheless I think there is a need for the concept "advertisement" to be clearly defined in Tasmanian laws that seek to regulate electoral advertising. Certainly it should include material that a party, candidate or other electoral actor pays to have published or boosted in someone else's medium (this would include conventional media advertisements or paid social media advertising.) However for such laws to not be trivially easy to route around they would need to also include robocalls, text message campaigns, attack websites and party websites, but not general commentary by observers or third-party mock advertisements.

Truth in electoral advertising in general

I am generally sceptical about the desirability of having "truth in electoral advertising" laws, as opposed to (already existing) laws about material that misleads electors in relation to their vote. I believe that broader truth in electoral advertising laws create a danger that valid opinions may be suppressed (at least temporarily) because of errors in the interpretation of such laws. The damage done to democracy by a single possibly valid opinion being suppressed is far greater than the damage done by thousands of false claims being made in a domain where they can be rebutted and where those making them can be judged negatively by those who care about honesty in politics. In my view if a true (or even not clearly false) claim were to be incorrectly suppressed under truth in electoral advertising, that could be reason for the election affected by that action to need to be voided and rerun.

Truth in electoral advertising laws appear to be a popular proposed remedy, especially recently, for the rise of political disinformation and the prominence of Trumpian candidates and campaigning. Support was also fuelled by grievances over the defeat of the Voice referendum, although in my view misinformation and disinformation (i) were very far from confined to one side of that campaign and (ii) did not even nearly determine the result anyway.

The idea that truth in electoral advertising laws will solve such problems is misconceived. Trumpian candidates will delight in coming into conflict with officialdom and use it to get attention and boost claims that there is an elite conspiracy against them. Disinformation spreads rapidly via organic means on social media (eg "death tax" federal 2019), or simply by candidates making false claims that get reported.

Much of electoral discourse involves claims that would not be captured by truth in electoral advertising. Is saying that Labor, the Greens and the Jacqui Lambie Network would if they won sufficient seats form a "coalition of chaos" that would "crash the economy" a "statement of fact that is inaccurate and misleading to a material extent?" No, it is a predictive claim concerning a hypothetical situation. In a similar category is "Labor will tax you to death" from the 2019 federal campaign, even though this was a dogwhistle to a prediction that Labor would introduce a death tax, which itself was started when the Labor leader said he wouldn't do so.

For interest I have tried to identify some examples of material from the state campaign that could fall under the proposed law depending on the range of material it targeted. I could not remember many but some included:

- A claim on a party website that the Liberal Party paid a very large sum of money for an internet domain attacking the Jacqui Lambie Network (premised simply on it having been listed for sale for that price previously and apparently false).
- A reported text message campaign that said that "Every independent candidate says they'll give the Liberals 14 years." This was clearly false as there were 29 independent candidates many of whom had stated no intention regarding the formation of government at all.

- An online advertisement that said “Labor say that they won't do a deal with the Greens, but they always do" This is clearly false as Labor did not do a deal with the Greens in 1996.

It might be useful as part of the discussion around “truth in electoral advertising” for proponents to present examples of material that had actually been sighted in recent Tasmanian campaigns that in their view would breach the proposed law, and for whether these examples actually would breach the law to be then debated.

Tasmania is a small place where conflicts of interest are common. I have concerns about who would administer “truth in advertising” legislation in the state and whether they could do so successfully and competently. I also think that requiring electoral authorities to administer general truth in advertising laws detracts from their key mission, is very likely to affect perceptions of their neutrality, and drags them outside of their primary expertise. For this reason I am completely opposed to the TEC being ever required to police a general truth in electoral advertising requirement.

Also while laws regulating misleading and materially incorrect comments may be easy to interpret when it comes to routine facts (such as economic statistics, whether a person had said a certain thing, facts about a candidate’s biography etc) I think these laws could be troublesome if electoral authorities and the courts are required to rule on culture war controversies. There are scientific consensuses that, for example (i) climate change is real and is primarily caused by human activity (ii) vaccines are effective in reducing COVID mortality. But if someone’s political identity is tied up in making claims otherwise is it appropriate for a court or an electoral commission to arbitrate complex arguments about such matters at short notice in view of the urgency of election timing? To effectively say that if someone’s political identity is founded on going against the scientific consensus then they cannot seek support for their movement seems to be too great a limitation on freedom of speech and again plays into the hands of those who claim they are being oppressed by elites.

I also advise the committee of two recent fine contributions expressing doubts about truth in electoral advertising that raise many more concerns than I have covered here: Michael Maley https://insidestory.org.au/truth-rears-its-ugly-head/ and Anne Twomey https://www.youtube.com/watch?v=BCQzjtIKDhQ

(Dr) Kevin Bonham

12 July 2024