Robin Banks

18 February 2025

Ms Meg Webb
Chair, Joint Standing Committee on Electoral Matters
Parliament of Tasmania

By e-mail to: electoralmatters@parliament.tas.gov.au

Dear Ms Webb

Inquiry into Electoral Amendment Bill 2024 (No. 25)

Thank you for your invitation for me to make a submission on the Electoral Amendment Bill 2024 (No. 25).

Section 196 and recent developments

Section 196(1) of the *Electoral Act 2004* (Tas) states:

> **196. Candidate names not to be used without authority**
>
> (1) A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.
>
> Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 12 months, or both.

This provision expands on the previous section 243(4) of the *Electoral Act 1985*, which was repealed by the *Electoral Act 2004* (Tas):

> (4) If a person prints, publishes, or distributes a matter to which this section applies which contains the name of a candidate without the written consent of the candidate, that person is guilty of an offence and is liable on summary conviction to a penalty not exceeding $5000 or to imprisonment for a term not exceeding 12 months, or both.

Proposals to amend or repeal section 196

I note the Tasmanian Government when it announced its intention to again attempt to remove section 196, describing it as 'anachronistic'.[1] In 2022, the then Liberal Government, led by The Hon Jeremy Rockliff, presented to the Tasmanian Parliament the Electoral Matters (Miscellaneous Amendments) Bill

2022. Clause 26 of that Bill, had it been passed, would have amended section 196(1) to read:

> (1) A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute ~~any advertisement, "how to vote" card, handbill, pamphlet, poster or notice~~ or keep on display, any how to vote card which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.

This is the same as the amendment in the current Bill.

This amended provision would not prevent misleading election advertising in any form other than how-to-vote cards. The proposed amendment is based on a recommendation contained in the *Electoral Act Review Final Report*[2] (the 'Electoral Act Review'). That report notes the Legislative Council had considered reforms to section 196 but found there was insufficient evidence to support changes.[3] The Electoral Act Review noted that, in its consultation, there were various reasons presented for amending section 196:

> … including that:
>
> - There is uncertainty about whether the provision applies to material published online prior to the election period but accessible during that period.
> - The provisions does not appear to be consistent with freedom of speech – a guiding principle of this Review.
> - The provision is not consistent with requirements in other Australian jurisdictions.
> - The provision is outdated and inconsistent with the principle of holding politicians and candidates to account.

I will briefly address those reasons later in this submission.

The recommendation in that report is to limit section 196(1) to "'how-to-vote' material including, for example, how-to vote cards, social media, and contact via telephone". As noted above in relation to the amendment proposed in 2022, this would not prevent the use of a candidate's name, etc, in other ways that are misleading. While section 197 seeks to address particular forms of misleading conduct, these do not relate to seeking to mislead electors as to, for example, the views or policies of another candidate. Section 196(1) provides some protection against this latter form of misleading conduct.

The importance of section 196

Section 196(1) – like its predecessor provision – provides some protection against misleading conduct in election campaigns. It has the effect of preventing a person or campaign from falsely attributing statements or positions to a

particular candidate or using their image in attack ads. It is a provision that seeks to ensure some level of truth in political advertising, and is currently the only mechanism available to raise potentially misleading electoral conduct with the TEC.

The importance of truth in political advertising is currently a matter of significant concern, not only in Australia, but in comparable democracies around the world. In October 2023, the Australia Institute reported on a survey it conducted following the federal referendum held in that year. It reported that its exit poll indicated that:[4]

> … an overwhelming nine in 10 Australians support truth in political advertising laws, regardless of how they voted in the referendum or their political affiliations.

Concerns about truth in political advertising have a long history, and laws to protect against misleading conduct in campaigns have survived constitutional challenges. For example, in 1912 a case in the High Court of Australia sought to overturn the requirement for electoral material to contain the name and address of the authorising person. In that case, Isaacs J, upholding the validity of the law, stated: [5]

> Parliament can forbid and guard against fraudulent misrepresentation. It would shock the conscience to deny it…
>
> But the public injury, so far as political results are concerned, is as great when the opinion of the electorate is warped by reckless, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified, and therefore the mischief may be equally provided against if Parliament thinks fit.

A recent article by Kieran Pender usefully considers the question of the interrelationship of truth in political advertising laws with Australia's implied freedom of political and governmental communication.[6]

While the current provision is an important protection, it may not be sufficiently robust in terms of the scope of misleading content we are seeing emerge with the rapid expansion of AI and its use in campaigning in Australia across a diverse range of media.[7] This raises the possibility that the protections should be strengthened and expanded to the extent that this is constitutionally possible given the implied freedom of political and governmental communication.

Breaches of section 196

During the General Election there were several incidents where electoral materials included content relating to a particular candidate without that candidate's authority. As you would be aware, this is a breach of section 196 of the *Electoral Act 2004* (Tas). Media reporting about these breaches indicated that the Tasmanian Electoral Commission contacted those who had authorised the materials and this resulted in the materials being withdrawn. As I understand

it, some of the breaches were by newcomers to the electoral processes and laws in Tasmania. I submit that, in relation to such participants, it is quite appropriate for the TEC to take this warning approach. There were, however, several instances where more experienced campaigners engaged in such breaches. They too were simply warned of the breach and, as I understand it from media reporting, no further action was taken. This is not the first time that this has happened. For example, in 2014, the TEC issued a media release indicating there had been five incidents identified in the 2014 House of Assembly election campaign.[8] These included apparent breaches authorised by:

- Jacquie Lambie (which she denied she had authorised): a newpaper advertisement for Palmer United Party;
- Clive Palmer: a pamphlet for Palmer United Party;
- Sam McQuestin, then Liberal Party State Director for Tasmania: an newspaper advertisement and pamphlet;
- M Tighe: a pamphlet for Right to Life Australia.

The TEC noted previous breaches of this provision had resulted in 'monetary penalties of $500 and $850. It indicated that, in relation to the five apparent breaches listed in the media release, it had 'decided … that it will not seek to initiate proceedings against any person'.

I have been unable to locate the earlier cases in which monetary penalties were imposed. There is a reference in *R v Purdie and The Advocate Newspaper Pty Ltd* [2008] TASSC 15 (30 April 2008) to *The Advocate* having previously been found in breach of section 196, but no further details are available.[9]

The effectiveness of the prohibition in section 196(1) is significantly undermined by the failure to prosecute repeat offenders. By the time the TEC raises its concerns about a breach with a long-term participant in our electoral processes, the damage has been done: electors have received misleading information that could have an influence on their vote. This is not undone by the removal of the material. Rather than repeal or limit section 196, more needs to be done to ensure it addresses contemporary mechanisms used in election campaigning to mislead votes and to recognise the seriousness of breaches through prosecution.

Responding to the reasons put forward for significantly limiting section 196

The first of these, that there is 'uncertainty about whether the provision applies to material published online prior to the election period but accessible during that period' highlights the need for reform of the provision to address the changing nature of communication. To some extent, this could be addressed by adding the words 'or keep on display or publicly accessible' to section 196. It

does not, however, deal with the related issue of why such conduct is permitted outside of the specific election period. I consider this further below.

The second reason is the concern about potential infringement of freedom of speech. I have addressed this argument above and urge that this should not be the basis for removing a protection against conduct that could mislead electors through irresponsible purported exercise of this important freedom. There are many examples of laws that limit the exercise of freedom of expression, including for example the prohibitions on sedition found in federal law, prohibition of defamation found in state and territory laws, the prohibition of obscene materials and more. As such, freedom of expression is properly understood to be a freedom that can be subjected to legislated limits on grounds permitted in relation to that freedom and that are reasonable, necessary and proportionate means to achieve a valid legislative objective. Under international law, the exercise of the rights set out in the *International Covenant on Civil and Political Rights*[10] in respect of freedom of expression (article 19) 'carries with it special duties and responsibilities' (article 19(3)). Article 19(3) goes on to detail how the right to freedom of expression can be limited:

> It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The third reason is that the 'provision is not consistent with requirements in other Australian jurisdictions'. This seems to suggest we need to 'keep up (or down) with the Joneses'. With the exception of the ACT, other jurisdictions also do not operate the Hare-Clark system or apply the Robson Rotation to ballot papers. Both are important elements that provide particular strength to Tasmania's representative democracy and ensure that our parliament is, arguably, the most representative of the views of electors.

The fourth reason given is that 'the provision is outdated and inconsistent with the principle of holding politicians and candidates to account'. It is not clear how it is outdated and so this reason is difficult to respond to. While it may, in its current form limit the extent to which the views of candidates may be accurately reported (although it is not clear that it has prevented the media reporting on the views and positions of candidates), it does have the capacity to hold politicians and candidates to account in terms of not misleading electors about candidates.

Strengthening section 196

One criticism of the current section include that it does not apply outside the period of the election and, as such, misleading conduct could be engaged in at other times with impunity. As I indicated in my evidence to this Committee in relation to the conduct of the 2024 General Election, this could be a matter for potential amendment, although it is arguable that the effect of such conduct outside the period of the election may have less impact on electors as less attention is being paid to such conduct.

Another criticism is its application to community organisations and similar. As noted above, the TEC has discretion to simply warn such organisations if they inadvertently breach the provision. Consider could also be given to amending the provision to apply particularly to political parties, candidates and related entities. This would need to be carefully crafted to ensure appropriate coverage.

It is my view that there is important work to be done here in Tasmania and across Australia (indeed, the world) to strengthen protections against misleading conduct in political advertising and campaigning. This could usefully be the subject of a much more expansive inquiry with terms of reference specifically seeking to determine appropriate and effective measures to provide such protections.

I would welcome the opportunity to discuss any aspect of this submission with the Joint Standing Committee.

Yours sincerely

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Robin Banks PhD

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1 Guy Barnett, 'Section 196 of the Electoral Act' (Media Release, 20 March 2024) <https://tas.liberal.org.au/news/2024/03/20/section-196-tasmanian-electoral-act>.

2 Department of Justice, *Electoral Act Review: Final Report* (2021) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0009/659700/210030-DPAC-Electoral-Act-Final-Report_16-Feb_wcag.pdf>.

3 Ibid, 26.

4 The Australia Institute, 'Overwhelming support for truth in political advertising laws following referendum' (Media Release, 19 October 2023) <https://australiainstitute.org.au/post/overwhelming-support-for-truth-in-political-advertising-laws-following-referendum/>.

5 *Smith v Oldham* [1912] HCA 61; (1912) 15 CLR 355 at 362 per Isaacs J.

6 Kieran Pender, 'Regulating truth and lies in political advertising: Implied freedom considerations' [2022] SydLawRw 1; (2022) 44(1) *Sydney Law Review* 1 <https://classic.austlii.edu.au/au/journals/SydLawRw/2022/1.html#fn35>.

7 See, for example, Courtney Gould, 'Queensland Premier Steven Miles slams opposition for posting AI-generated attack ad on TikTok' (ABC News online, 22 July 2024) <https://www.abc.net.au/news/2024-07-22/qld-premier-slams-opposition-for-ai-generated-tiktok/104126936>; and Courtney Gould, 'Federal Labor caught using artificial intelligence to mock Peter Dutton's nuclear plan' (ABC News online, 23 July 2024) <https://www.abc.net.au/news/2024-07-23/labor-questioned-over-ai-generated-tiktok-of-peter-dutton/104131228?utm_source=abc_news_app&utm_medium=content_shared&utm_campaign=abc_news_app&utm_content=mail>. While both examples are clearly AI generated and satirical, they demonstrate the increasing capacity of AI to present misrepresentations of the positions of candidates in a form that can be widely distributed.

8 Tasmanian Electoral Commission, 'Apparent breaches of section 196 of Electoral Act' (Media Release, 1 April 2014) <https://www.tec.tas.gov.au/house-of-assembly/StateElection2014/media/10%20-%20Section%20196%20mattersw.pdf>.

9 *R v Purdie and The Advocate Newspaper Pty Ltd* [2008] TASSC 15 (30 April 2008) [8] <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASSC/2008/15.html>.

10 Australia is a party to this Convention (the ICCPR). Australia's constitutional implied right to freedom of political and governmental expression is a more limited right to freedom of expression than that found in the ICCPR.