

DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Electoral Matters (Miscellaneous Amendments) Bill 2022

check Hansard for delivery

Mr Speaker, I move that the Bill now be read a second time.

As discussed during the Second Reading Speech of the *Electoral Disclosure and Funding Bill 2022*, the Final Report of the Electoral Act Review (the Review) recommendations have formed the basis for this Bill.

The Terms of Reference of the Review were to consider:

1. modernising the current Tasmanian *Electoral Act* with specific examination of sections including 191(1)(b); 196(1) and 198(1)(b);
2. whether state-based disclosure rules should be introduced and, if so, what they should include; and
3. the level of regulation of third parties, including unions, during election campaigns.

The Review has been guided by two governing principles: protecting freedom of speech, with regard to Constitutional implications, and minimal cost to the taxpayer.

The Review has incorporated a public consultation on the Terms of Reference, the development of an Interim Report, a public consultation on the Interim Report, passage of an amendment Bill and then the development of a Final Report with recommendations for reform.

The Final Report, which was delivered in February 2021, makes 11 high-level recommendations for proposed reform to modernise our current system and create a political donations disclosure regime specifically for Tasmania. The recommendations broadly fall into four areas:

- recommendations of a technical nature that will ensure our electoral system is effective and contemporary;
- recommendations relating to a new disclosure regime for candidates and political parties;
- recommendations relating to the regulation of third-party campaigners, donors and associated entities; and
- a recommendation in relation to the public funding of election campaigns.

I am pleased to be delivering the further legislative reforms as a result of the Electoral Act Review, namely *the Electoral Disclosure and Funding Bill 2022* – which has already been considered by this Place – as well as this Bill: *the Electoral Matters (Miscellaneous Amendments) Bill 2022*.

The Electoral Matters (Miscellaneous Amendments) Bill 2022 proposes legislative amendments in response to the first and second recommendations in the Electoral Act Review Final Report. Recommendations 1 and 2 addressed the first Term of Reference for the Review which was ‘modernising the current Tasmanian Electoral Act with specific examination of sections including 191(1)(b), 196(1) and 198(1)(b)’.

This Bill represents the second tranche of reforms in relation to Term of Reference 1 of the Review. Broadly, it addresses the recommendations made by the Final Report in relation to the sections of the *Electoral Act* specified in Term of Reference 1, namely sections 191(1)(b) and 196(1), as well as several other matters in relation to modernising the *Electoral Act* and related legislation.

These additional matters have been raised by stakeholders, including the Tasmanian Electoral Commission (the TEC), during the initial consultation process on the Terms of Reference for the Review in 2018.

Mr Speaker, I will now turn to the proposed amendments in this Bill.

Definitions

The Bill proposes a new definition of ‘electoral matter’. This is an important change as the term ‘electoral matter’ is a fundamental element of the authorisation requirements under the *Electoral Act* and it is also an important term in the new Electoral Disclosure and Funding Bill.

The current definition of ‘electoral matter’ in section 4 of the *Electoral Act* means matter which is intended to, is likely to, or has the capacity to, affect voting in an election. The definition goes on to specify a number of matters that are taken to be intended or likely to affect voting in an election.

During consultation on the Terms of Reference, concerns were raised that the current definition of ‘electoral matter’ is extremely broad, as it captures matter which refers to a current or previous Governments, opposition parties, Members of the Commonwealth or of another state or territory. It was submitted that there is a potential for confusion and difficulties in compliance and enforcement, particularly when the election period overlaps with election periods in other jurisdictions.

The Final Report recommended that the definition of ‘electoral matter’ be amended to apply a ‘dominant purpose’ test consistent with the definition in section 4AA of the *Commonwealth Electoral Act 1918*. The Final Report noted that the Commonwealth definition was the most recently drafted definition of ‘electoral matter’ in Australian electoral legislation and that the new definition had appeared to provide greater certainty to political parties and third-party campaigners.

The Bill, therefore, proposes a new definition of 'electoral matter' which is based upon the Commonwealth definition and includes a dominant purpose test.

Under the new definition, 'electoral matter' is matter that is communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote in an election. There is a rebuttable presumption that the communication of matter expressly promoting or opposing a party, candidate or Member of Parliament (MP), is for that dominant purpose.

In addition, the proposed new definition sets out a non-exhaustive list of matters that must be considered in determining the dominant purpose of the communication. Some examples are whether the communication would be to the public, whether it would be by or on behalf of a party, candidate, Member, associated entity, significant political donor or third-party campaigner, whether the communication contains an express or implied comment about a political entity or Member, whether the communication is or would be received by electors near a polling place, and how soon an election is to be held.

Under the new provision, there are a number of exceptions including, amongst other things, for news reporting; communication for a dominant purpose that is satirical, artistic or academic; certain private communications; and communication by a person in their capacity as a public officer.

Authorisation Requirements

Another significant feature of this Bill is the proposed reform of the authorisation requirements in the *Electoral Act*.

The Terms of Reference for the Review specifically mentioned section 191(1)(b) of the Act which prohibits, during the period between the issue of the writ for an election and the closing of the poll, the publication of any electoral matter on the internet without the name and address of the responsible person appearing at the end of the electoral matter.

The Review received a number of submissions on this issue, recognising the importance of authorisation but suggesting that the current requirements are outdated and should be revised to take account of social media and other new platforms for communication.

The Final Report recommended that the *Electoral Act* be amended to clarify the application of authorisation requirements to online, social media and digital communication content, consistent with the Commonwealth legislative requirements and with appropriate exceptions and defences similar to other jurisdictions.

Accordingly, under the proposed new section 191, a person is prohibited from communicating, or permitting or authorising another person to communicate, electoral matter unless the authorisation particulars are displayed in the applicable manner.

As with the current provisions, this prohibition applies between the issue of the writ for an election and the close of the poll at that election. The authorisation particulars are:

- the name and address of the person who is the author or who authorised the communication of the electoral matter;
- a statement to the effect that the person is the author of authorised the communication of the electoral matter;
- if the communication was made on behalf of a disclosure entity, which includes a party, Member, candidate, associated entity, significant political donor and third-party campaigner, a statement to this effect; and
- any other matters that are prescribed.

The manner in which these authorisation particulars are to be displayed depends upon the type of communication. This is clarified in detail in the proposed new section 191(4).

For example, for hard copy documents or objects, the authorisation particulars are to be legibly shown on the document or object. For social media, the authorisation particulars are to be legibly shown at the end of the communication, or if this is too many characters (for example, for tweets), then at an electronic address included at the end of the communication or as part of the information commonly included under the “About us” or “Contact us” section of the account. For telephone calls, such as robocalls, the authorisation particulars must be spoken at the beginning of the call.

The existing exceptions in section 192 of the *Electoral Act* still apply – so that things such as clothing, lapel buttons or badges, pens, pencils and balloons, business or visiting cards do not have to be authorised.

In addition, the proposed new section 194A provides exceptions including:

- a communication for personal purposes;
- an opinion poll or research relating to voting intentions that is not intended to encourage a person to vote for or against a particular party or candidate;
- a communication by way of social media that forms part of a person’s individual personal political views (if the person is not paid to express those views) and is not a candidate or Member;
- an internal communication;
- a communication at a meeting if the identity of the person communicating and the disclosure entity on whose behalf they are communicating can be reasonably identified;
- a communication on radio or television by a licence holder under the *Commonwealth Broadcasting Services Act 1992*. This exception, based on a similar exception in the ACT legislation, is because the *Broadcasting Services Act* already imposes authorisation requirements in relation to electoral matter broadcast on television or radio.

Another provision which is specifically mentioned in Term of Reference 1 of the Review, is section 196 which prohibits the printing, publishing or distribution of advertisements, how to vote cards, handbills, pamphlets, posters or notices that contain a candidate's name, photograph or likeness, without that candidate's written consent.

It was noted during the Review that this restriction does not exist in any other Australian electoral legislation. There was general consensus amongst the submissions to the Review that section 196 is problematic for reasons including that it hinders scrutiny of candidates and freedom of speech.

The Final Report also recommended that section 196(1) be amended so that it only applies to how to vote cards. Accordingly, the Bill includes this change.

As part of the consideration of section 196, the Review also looked at section 197 of the Act relating to misleading and deceptive electoral matter. The current section 197 prohibits printing, publishing or distribution of electoral matter that is intended to, is likely to, or has the capacity to mislead or deceive an elector in relation to the recording of his or her vote. During consultation on the terms of reference for the Review, some submitters had suggested that this provision should be enhanced.

The Review considered relevant provisions in the New South Wales *Electoral Act 2017* and concluded that they would be a beneficial addition to the Act. Accordingly, the Final Report recommended amendments to section 197 along the lines of the provisions of section 180 of the New South Wales Act to prohibit the printing, publishing or distribution of electoral matter that:

- (i) contains incorrect or misleading information about whether a person is or is not a candidate, Member of/endorsed by a registered party;
- (ii) uses the name or derivative of a name of a party in a way intended to or likely to mislead any elector;
- (iii) could result in an elector casting an informal vote;
- (iv) contains a statement (express or implied) to the effect that voting is not compulsory;
and
- (v) contains a statement intended or is likely to mislead an elector that the material is an official communication from the Electoral Commission or the Electoral Commissioner.

The Bill substitutes section 197 with a new provision in accordance with this recommendation. As was also recommended in the Final Report, this new section 197 is not limited to the period between the issue of the writ and the closing of the poll, and applies to broad types of communication of electoral material, such as print, display, broadcast, internet, email, and phone.

This provision includes provisions to address political advertising that prevents the dissemination of misleading information by making unlawful the publishing or distribution of any misleading or deceptive electoral matter. Our Government is confident that it strikes the right balance and builds upon the existing provisions already contained within the *Electoral Act*.

Compliance and Enforcement

Mr Speaker, other significant reforms made by the Bill relate to compliance and enforcement.

During the Review, it was identified that whilst the Act confers a number of functions and responsibilities upon the TEC, including responding to complaints regarding potential breaches of the Act, its powers of investigation are limited.

The Final Report recommended that the Act be amended to provide the TEC with investigative powers to meet its current responsibilities under the Act, particularly in relation to its functions under section 9(1)(f), which are to investigate and prosecute illegal practices under the Act.

The Bill accordingly introduces a new Division into Part 7 of the Act – Division 8 Investigations. This new Division includes a number of provisions conferring powers on the TEC to require the provision of documents, information and things which may be relevant to the enforcement of the Act.

Under these new provisions, the TEC can also require a person to answer questions about any matters in respect of which information is reasonably required for the purposes of the enforcement of the Act, and to attend at a specified place and time to answer questions or produce documents or things. Failure to comply with a requirement (without reasonable excuse) is an offence, as is providing a document that the person knows or ought to know is false or misleading in a material particular, in that it is of significance and not trivial or inconsequential.

The new provisions also provide for the appointment, functions and powers of inspectors including allowing an inspector to apply for a warrant to enter and search land, premises, vessels, aircrafts or vehicles and to seize relevant documents or things in certain, specified circumstances.

These investigative powers are consistent with powers set out in the *Electoral Disclosure and Funding Bill 2022*.

In relation to enforcement, the Bill also proposes amendments to offence provisions in sections 186, 187 and 188 of the Act. Section 186 establishes a number of offences in relation to voting including, amongst other things:

- destroying a nomination form or ballot paper;
- forgery or uttering in relation to a ballot paper or a declaration required by the Act;

- impersonating an elector for the purpose of voting at the election;
- applying to vote in the name of a fictitious person or in the name of any other person;
and
- voting more than once at an election.

Currently all section 186 offences are crimes punishable on indictment under the *Criminal Code Act 1924*, regardless of the severity of the conduct concerned.

During the Review, it was suggested that, in many cases, it may be appropriate for an offence under section 186 to be dealt with summarily, given the nature of some of these offences.

Summary proceedings are generally more timely and less costly. However, in some cases, it may be more appropriate and fitting to proceed on indictment. For example, where the conduct has been undertaken on a larger scale such as the destruction of a large number of ballot papers.

To this end, the Final Report recommended that electoral offences under section 186 of the Act be made mirror offences, whereby there would be an indictable offence and summary offence for the same conduct, and to allow for offences to be charged on complaint or indictment, depending on the circumstances of the case.

The Bill proposes amendments to section 186 in accordance with this recommendation. Under the proposed amendments, a court of summary jurisdiction may deal with an alleged offence under section 186 if the court is satisfied it is proper do so and the defendant and prosecutor consent. More serious offences will still be able to be prosecuted on indictment.

The Bill also makes changes recommended by the Final Report in relation to the offences of electoral bribery and electoral treating, in the current sections 187 and 188 respectively.

As noted in the Final Report, the Director of Public Prosecutions raised concerns that these offences are extremely broadly defined and lack an element of fault or improper conduct making them difficult to enforce.

The Final Report recommended that these provisions be amended by including appropriate fault provisions. The Bill introduces a fault element into both of these sections by clarifying that they apply to conduct undertaken dishonestly or for an improper purpose.

The Final Report recommended a number of changes to the party registration process which have been incorporated into the Bill, including requiring an application for party registration to be accompanied by a copy of the party's constitution. This is a common requirement in all other Australian jurisdictions, including the Commonwealth.

Parties that are already registered under the Act must provide a copy of their constitutional documents within six months of the commencement of the amendments, and up to date constitutional documents must be provided to the TEC during the party review process.

Another proposed amendment to enhance the party registration process is that the member statutory declarations required to accompany an application for registration must have been made no more than 12 months prior to the date of lodging the application to ensure that these declarations are not out of date.

The Bill also includes a number of technical and administrative changes to the *Electoral Act* recommended in the Final Report, including:

- amendments to allow postal vote materials to be provided in person to an elector. For example, the postal vote material will be able to be issued to a family member to hand deliver to the elector;
- an amendment to require that the express and interstate pre-poll ballots are printed with the word 'postal' on them so that they are less easily identified when counted;
- an amendment to clarify that a ballot paper is to include instructions that are consistent with the requirements set out in section 102; and
- an amendment to clarify that where polling is adjourned at a polling place, for example due to a polling place being closed for safety reasons such as storm damage or bushfire, only electors who have not already voted and who are entitled to vote in that particular Division, are entitled to vote at the adjourned polling.

In addition to the *Electoral Act* reforms, the Bill also makes amendments to two other Acts – namely, the *Constitution Act 1934* and the *Legislative Council Electoral Boundaries Act 1995*. The amendments to both of these Acts relate to a change in name of the body currently known as the Redistribution Tribunal. Under the Bill, this body will be renamed the 'Augmented Electoral Commission'.

The *Legislative Council Electoral Boundaries Act* provides for the periodic review of electoral boundaries for Legislative Council divisions to ensure fair and equal representation consistent with the 'one vote, one value' principle.

Under the *Legislative Electoral Boundaries Act*, the Redistribution Committee consisting of the Electoral Commissioner, the Surveyor-General and a representative of the Australian Statistician make proposals for redistribution of electoral boundaries. The Redistribution Tribunal is then formed to undertake a process of public consultation and provide a further redistribution proposal and a determination with reasons.

The Redistribution Tribunal comprises the members of the Redistribution Committee along with the Chairperson and remaining members of the TEC.

During the consultation process for the Review, concerns were raised that the Redistribution Tribunal includes members of the Redistribution Committee. The Review found that the composition and operation of the Redistribution Committee and Redistribution Tribunal is consistent with the ACT and the Commonwealth, with other states and territories having only one body to conduct the whole redistribution process. In the ACT and the Commonwealth, the equivalent authority to the Redistribution Tribunal is called the 'Augmented Electoral Commission'.

In Recommendation 2 of the Final Report, the Review recommended that the current composition of the Redistribution Committee and Redistribution Tribunal be retained but that the name of the Tribunal be changed to more accurately describe the role of that body in the redistribution process.

In accordance with Recommendation 2, the Bill changes the name of Redistribution Tribunal to the Augmented Electoral Commission, which is the same as the equivalent ACT and Commonwealth bodies, and reflects the composition and role of the body. The Bill updates all references to this body in the *Legislative Council Electoral Boundaries Act* and the *Constitution Act*.

There has been extensive consultation throughout the Review process including on this Bill, which was released for public consultation along with the Electoral Disclosure and Funding Bill.

Whilst there were many submissions received in that consultation process, unsurprisingly most focused on the Electoral Disclosure and Funding Bill. There were only a small number of submissions that commented on this Bill and the responses were supportive of the proposed changes.

I thank those people, groups and entities who made submissions, not only on this Bill but throughout the Review process. I would also particularly like to acknowledge the contributions of the TEC to the consultation on the Review and the Bill. I also wish to thank my Department, including the Office of Parliamentary Counsel, for their extensive work throughout the Review and the development and drafting of these Bills.

This Bill is an important step, representing many years of work by our Government to review and assess the complex issues of progressing meaningful and appropriate reforms to Tasmania's electoral laws.

I am confident that this Bill, along with the *Electoral Disclosure and Funding Bill 2022*, will increase transparency while ensuring that the public continues to have confidence in the outcomes of elections into the future.

Importantly, these reforms will bring Tasmania in line with other jurisdictions and introduce state-based requirements for the disclosure of political donations and expenditure, and provide for a modern and appropriate electoral system that the Tasmanian community expects and deserves.

Mr Speaker, I commend the Bill to the House.