Tasmanian Greens

Thursday, 20 February 2025

Joint Standing Committee on Electoral Matters
Parliament House
Hobart, TAS, 7000
Via: electoralmatters@parliament.tas.gov.au

Dear Committee Members,

Thank you for the opportunity to make a submission in respect of the *Electoral Amendment Bill 2024*.

The bill amends section 196 of the *Electoral Act 2004*. Section 196 prohibits a person from publishing or distributing "any advertisement, "how to vote" card, handbill, pamphlet, poster or notice" containing the "name, photograph or a likeness of a candidate or intending candidate" without consent. The proposed amendment would effectively limit this provision to applying to how to vote cards only.

The original prohibition has been interpreted to include social media posts. This in effect makes it unlawful to comment on a candidate via social media during an election.

The Greens are surprised that a case even needs to be made for this amendment – it should be obvious on its face that a ban on social media discussion of a candidate during an election campaign is unjustifiable and has a harmful effect on democratic participation.

It is the Greens' understanding, based on legal advice supplied by Cassy O'Connor MLC, that this provision is likely to be unconstitutional (see Appendix). It is not difficult to understand why preventing people from discussing a candidate by name during an election would infringe on the constitution's implied freedom of political communication.

We note that during the debate in the Council, a range of poor conduct during an election campaign was discussed. We submit that an outright ban on people discussing candidates is neither a proportional, nor reasonable, means to attempt to curtail inappropriate conduct.

We also submit to members that, as likely unconstitutional law, it is inappropriate to keep this provision as drafted in the statutes. The only purpose this could serve

is to intimidate people into silence with laws that would be unlikely to survive a high court challenge.

While the Greens support truth in political advertising laws, banning any and all speech about a candidate is not an acceptable stopgap. Controlling untruthful or hateful speech, with an outright ban on all speech, is manifestly not justifiable.

We believe Tasmanians would be alarmed if they knew it was currently unlawful to name a candidate in a social media post during an election campaign. It is, frankly, the sort of law that has no place in a democracy. Freedom of political communication is essential for a functioning democracy, not a luxury.

It is an embarrassment to the State that this remains on the statutes, and we urge Members to recommend supporting this bill as a matter of urgency.

Yours sincerely,

Damien Irving
State Convenor
Tasmanian Greens

Appendix - Relevant legal advice

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:7117

26 August 2020

Mr Daryl Coates SC
Director of Public Prosecutions
Level 8, 15 Murray Street
HOBART TAS 7000

Dear Mr Coates,

Cassy O'Connor MHA

I act for Ms Cassy O'Connor. It has been alleged by the Tasmanian Electoral Commissioner that a Facebook post on 25 July 2020 contravenes s 196(1) of the *Electoral Act 2004* ("the Act").

For the reasons set out below the allegation is misconceived, without merit and a prosecution based upon it would be contrary to the public interest.

The Facebook post is alleged to have occurred in the following circumstances. My client is the leader of the Greens in Tasmania. The post was allegedly published on 27 July 2020 and concerned the election for the Upper House seat of Huon held on 1 August 2020. Robert Armstrong was the sitting member. Bastin Seidel was the ALP candidate. Pat Caruana was the Greens candidate.

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The post allegedly published is set out below:

> *"If you live in Huon and you want to get pokies out of our community, your only choice in this Saturday's Legislative Council election is to vote Green.*
>
> *Pat Caruana for Huon has pledged to vote against the Liberals' pokies plan, which would see these harmful machines remain in pubs and clubs until 2043.*
> *Incumbent MLC Robert Armstrong is one of the Liberals' biggest allies in the Legislative Council, and if re-elected will undoubtedly go against his community's interests to back their pokies laws.*
>
> *But a big question remains for another frontrunner in this field of candidates.*
>
> *As a doctor, Labor candidate Bastian Seidel would well know the terrible health consequences of pokies. On the other hand, he's standing for a party who have walked away from their election promise to Tasmanians, and will instead back in the Liberals to keep pokies in pubs and clubs for another 20 years.*
>
> *The voters of Huon deserve to know where Dr Seidel stands. Is the health and well-being of his community or his Labor party membership more important?*
>
> *In such a key election, how can voters trust someone who seems to be dodging this crucial question?"*

At the outset, we make the obvious point that the post is a communication about political and government matters concerning candidates standing for State electoral office in a pending election. As such, it is the kind of communication that lies at the heart of the political communications that have long been recognised as essential elements of freedom of speech in a democracy. It is also the kind of speech that lies at the heart of the constitutionally implied freedom of political communication. The approach of the Courts to protecting that freedom from legislative intrusion was, relevantly to the present context, stated by Gummow and Hayne JJ in *Coleman v Power* (2004) 220 CLR 1:

> *"[185] First and foremost is the fact that s 7(1)(d) creates a criminal offence. The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a*

legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.

...

[188] ... Once it is recognised that fundamental rights are not to be cut down save by clear words, it follows that the curtailment of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as "narrowly limited"."

Section 196(1) is as follows:

"**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."

We accept that by reason of the definition of "publish" in s 3 of the Electoral Act the section would extend to material falling within the section that is published on the internet.

The first observation to be made is that the publication by way of a Facebook post is not "an advertisement, how to vote card, hand bill, pamphlet, poster or notice" with the consequence that the post is not material falling within the section.

The second observation to be made about s 196 is that it appears unique to Tasmania. I have not been able to find a provision in such terms in the electoral legislation of the Commonwealth, NSW, Victoria, Queensland, South Australia, ACT, NT or Western Australia. Section 196 was found in like terms in the *Electoral Act 1985* as s. 243(4), and before that as s. 154(d)(iii) of the *Electoral Act 1907* (inserted in 1930). If one traces the text, context and purpose of the like provisions enacted in 1930 and in 1985, as well as the present provision, it is clear that those provisions were directed towards ensuring the integrity of the electoral process and not at targeting political communications in the course of that process.

The third observation is that the Act contains an entirely separate statutory scheme in relation to political communications by reason of the definition of "electoral matter" defined in s 4. The allegation by the Tasmanian Electoral Commissioner fails altogether to recognise that and would appear to treat s 196 as if it were drafted in the following terms:

> 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~~ electoral matter which contains the name, photograph or a likeness .....

The fourth observation is that the text of s 196 makes it clear that it relates to material in the nature of an advertisement, "how to vote card" etc. relating to a candidate that one would expect would only be distributed with the authority of a candidate. So much is made clear by the heading to the section, its subject matter and the requirement of written consent of the candidate. That interpretation would give effect to the statutory purpose of protecting the integrity of the electoral process in a manner that does not target political communications, which are an integral part of the electoral process.

Some guidance in that regard may be derived from the observation of Crawford CJ in *Bruce Taylor v George Town Residents* [2012] TASSC 16 at [14], where his Honour was considering the analogous prohibition of "electoral advertising" in s 278(3) of the *Local Government Act 1993* (Tas). The Chief Justice at [14] drew a clear distinction between electoral advertising (which was prohibited) and "information some electors might find useful in the exercise of their democratic right" (which was not prohibited).

The Facebook post likewise contains information some electors might find useful in the exercise of their democratic right as it:

(a) is a discussion of policy;

(b) is conducted in a temperate and civilised manner;

(c) is not advertising;

(d) could be neither characterised as misleading nor an attempt to mislead by use of the name of the candidate or intending candidate;

(e) is not material of the kind that one would expect would only be published with the authority of the candidates referred to in it.

When one considers the text, context and purpose of s 196(1), the interpretative principle discussed above of "narrowly" limiting its operation to not target political communication and s 3 of the *Acts Interpretation Act 1931* (Tas), it is clear that a Court would not construe the subsection as applying to a political communication of the kind alleged to be published by our client. If, contrary to our view, the subsection was construed as applying to that political communication it would plainly be invalid. But we would make the broader point that if it were so construed it would apply to all political communications in relation to a candidate in the context of a pending election. That plainly would be an absurd and unintended result.

The allegation by the Tasmanian Electoral Commissioner that has given rise to this letter is a matter of great concern to our client. We would be appreciative of receiving your early indication that you do not propose to commence a prosecution against our client.

Yours faithfully,
FITZGERALD AND BROWNE

[redacted]

Roland Browne
[redacted]