Submission re the Electoral Amendment Bill 2024 (No. 25 of 2024)

Dr Kevin Bonham

Recommendations

- The Parliament should pass the Bill irrespective of whether any other changes in regulation of electoral speech are agreed to.
- The Parliament should consider also (and perhaps together) passing new laws restricting some new narrowly defined forms of false or misleading electoral material (for instance deepfakes, material that misrepresents its own source, and material that mimics Tasmanian Electoral Commission material).
- The Parliament should treat calls for "truth in electoral advertising" legislation with a high degree of caution and in particular should not make the passing of this Bill conditional on introducing full-scale "truth in electoral advertising".

The Section 196 Problem

I previously covered the Section 196 problem in my submission to the Inquiry into the 2024 Tasmanian Election[1] and in verbal evidence.[2] I wish everything I said in those cases and in the previous Government Administration Committee B inquiry into the Electoral Disclosure and Finding Amendment Bill 2024 to be considered in this inquiry too, though a fairly large proportion is repeated in this submission.

Section 196 prohibits the distribution of 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*."

The problems with this section have been:

- It limits political debate of a form that normally occurs in other Australian elections
- The original reason for the section has not been established
- Attempts to apply the section to internet material have produced bizarre interpretations, particularly surrounding what is a "notice" and what is an "advertisement"
- Because it is impossible to understand how nebulously the section is going to be interpreted if someone complains, it is impossible for electoral actors to know what is permitted and what is not, and this is no way to run an election

The section is likely to be unconstitutional because it limits free electoral debate in a way that is not well adapted to any particular purpose, especially as it is unknown what its actual purpose is.

[1] https://www.parliament.tas.gov.au/__data/assets/pdf_file/0025/84922/13.-Dr-Kevin-Bonham.pdf
[2] https://www.parliament.tas.gov.au/__data/assets/pdf_file/0031/88636/JSC-on-Electoral-Matters-6-November-2024.pdf

Facebook Video Example

A recent case of the problems with Section 196 occurred in the 2020 contest for the Legislative Council seat of Huon. A Tasmanian Greens Facebook video on Cassy O'Connor's Facebook page that mentioned the Labor candidate's name was the subject of a TEC request for removal. On request for clarification, the TEC stated that the post "could be considered a "notice"". The Greens refused to remove the video and obtained legal advice that they were not in breach. Subsequently the Director of Public Prosecutions declared that there was no reasonable prospect of conviction.

In the 2024 Candidates Handbook the TEC published a statement suggesting that such a Facebook video could be considered "closer to a radio interview or a public debate" than to any of the forms of material covered in Section 196. The Commissioner stated:

"Therefore, while I will continue to ask individuals to refrain from actions that may breach section 196 of the Act, I am currently of the view that some publications on social media, including those in the nature of the Facebook post in question, are not likely to present a sufficiently compelling case to seek the commencement of criminal prosecution."

Even this is an unsatisfactory situation – individuals are being requested to take down material (effectively a threat of prosecution) when the Electoral Commission is only of the view that the material *may* breach the section. It would be better that they were simply advised that the TEC was aware of a possible breach and that the individuals concerned should seek their own advice.

But there was worse to come in the 2024 campaign where the TEC's actions in one example appeared inconsistent with the standard it had set down concerning social media material.

Juice Media Example

As noted in my previous submission and public hearing appearance of Nov 6, a farcical situation occurred at the 2024 state election when a mock advertisement produced by Juice Media for political satire purposes was deemed to be likely to be an advertisement and the company was asked to remove an image of Premier Rockliff.

It is deeply disquieting that this occurred after the TEC had initially sent the Liberal Party a letter stating that the words "notice" and "advertisement" would be understood to have their normal meaning. Somehow by the time the Juice Media video was assessed this had morphed into a view that (as summarised in the TEC's testimony) the mock advertisement was an "advertisement" because it comments on the performance of government. This is not the normal meaning of "advertisement".

In my view the advice provided to the TEC about this matter must be published so that it can be the subject of comment from electoral experts and constitutional lawyers, and in order to determine whether the Government was being incompetently advised. Publication of this advice as a matter of urgency could be useful in consideration of the current Bill.

I do not consider there was any significant loss of electoral free speech in this incident (Juice Media is not a Tasmanian company and its material is not exactly a profound contribution),

but it highlighted the potential for free speech about future Tasmanian elections to be affected by interpretations that are contradictory or simply don't make sense. It is especially strange that the Juice Media video was impugned by the TEC when they had already found that social media videos on Facebook could be considered to be more like a radio interview or public debate.

In my view the TEC made a mistake in asking for this video to be amended, but it sounds like they were in receipt of some very strange legal advice. The matter resulted in Tasmanian electoral law being brought into national disrepute in a widely-viewed follow-up video.

Purpose Of Restricting How-To-Vote Cards

As the former Anti-Discrimination Commissioner Robin Banks has been frequently cited in defence of at least not quickly abandoning S 196, I wish to comment on her comments re the How-To-Vote card provision from the public hearing on 6 November.[3]

Dr Banks states:

"I think if we understood what the breadth of those concerns are, then perhaps there are amendments to the provision and not the one that's proposed that is simply limited to how-to-vote cards, because I don't see what the point of that would be. I really struggle to understand what protection that provides. In fact, it's the one place I would have thought that you should be able to name who the candidates are because they're listed [..]I don't see the point of it, because a how-to-vote card is, by its very nature, going to list candidates' names, and that seems to me to be a completely acceptable way to communicate about who the candidates are."

The purpose of continuing to apply the provision to how-to-vote cards is to prevent the use without permission of how-to-vote cards that rank candidates for a party in a regimented order, because this interferes with within-party competition between candidates in the Hare-Clark system. This is why how-to-vote cards in Tasmanian elections, unlike federal elections, are in fact the one place where names should **not** be listed without consent.

This problem was seen in the 2002 Tasmanian election where Brett Whiteley, who was elected at that election, pleaded guilty to issuing how-to-vote cards that used the names of other Liberal candidates without their consent. The matter was so serious that it was unclear for some time whether Whiteley would be able to take his place in Parliament.

Possible Remedies: The Bill As Presented

There has been some wariness concerning removing the bulk of Section 196 because it does act as a protection against some forms of disinformation and also image-based abuse, especially in the age of deepfakes. However, simply accepting the Bill as is would just place Tasmania on a similar footing to federal elections and elections in most states and territories –

[3] https://www.parliament.tas.gov.au/__data/assets/pdf_file/0031/88636/JSC-on-Electoral-Matters-6-November-2024.pdf

with protections against misleading electors in relation to the casting of their vote but nothing broader. Although occasionally seen in the leadup, deepfakes were not a significant problem in the 2024 Queensland election campaign.

As noted in my hearing evidence there is also the possibility that Section 196 as it exists could act to *prevent* a candidate from refuting disinformation. A candidate who had been involved in an incident with another candidate would not be able to use vision of the incident to correct false claims about the incident if the other candidate objected.

Possible Remedies: Extra Preventions

If it is desired to provide some new protections against misleading material without going down the problematic route of full-scale "truth in electoral advertising" laws, it would be possible to have legislation specifically banning the use of deepfakes and other inauthentic or altered images of a candidate that are not obviously satirical in nature (eg the use of cartoons should be permitted).

Deepfakes are among a number of cases where misleading material might be able to be narrowly targeted. Other possible examples that I mentioned included cases where material appeared to have been issued by someone who did not issue it (for example how to vote material that gives a fake visual impression of being produced by a different party) or material that gives a false impression of being official electoral material.

Truth In Electoral Advertising

I have a view, as expressed in the Electoral Disclosure and Funding Amendment Bill 2024 (No. 9) hearings[4], that full-scale "truth in electoral advertising" laws are undesirable for Tasmania. My concerns include

- That there are risks of true or at least reasonable statements being suppressed by such laws, especially in an environment where we have seen some overreach in the handling of the far simpler Section 196
- That such laws are fashionable because of the presence of "Trumpian" candidates who have no regard for the truth or falsity of their material – but will actually be ineffective in discouraging such candidates
- That proponents of truth in electoral advertising for Tasmania have generally failed to present an evidence-based case for the reform by stating what specific examples of false statements would have been affected at previous election campaigns.
- That such laws actually cannot address much of the negative campaigning that people think they would be able to address, especially scare campaigns that are speculation

[4] See https://www.parliament.tas.gov.au/__data/assets/pdf_file/0020/83450/13-Dr-Kevin-Bonham.pdf and also transcript of verbal evidence at https://www.parliament.tas.gov.au/__data/assets/pdf_file/0030/83685/HA-GAB-26-July-2024-Final-transcript.pdf

about what a party would do, rather than being claims with a clear true or false value at the time they are made

- That Tasmania does not possess the expertise and institutional neutrality to successfully administer “truth in electoral advertising” type legislation
- That requiring electoral commissions to administer such legislation harms perceptions of their political neutrality.

As usual I have had limited time to prepare this submission and would be happy to answer questions at a hearing if desired.