ELECTORAL AMENDMENT BILL 2024 (No. 25)

Second Reading

[12.36 p.m.]

Mrs HISCUTT - Mr President, I move -

That the bill be now read the second time.

The bill amends section 196 of the *Electoral Act 2004* to limit section 196 to applying only to 'how to vote' cards. The wording of section 196 will also be modified to ensure that the now-limited prohibition extends to 'keeping on display' as well as the initial act of printing, publishing and distributing. Section 196 currently provides that:

> (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.

Section 196 is unique to Tasmania, with the original provision prohibiting just the use of a name without consent, introduced into electoral legislation in 1921. When the *Electoral Act 1985* was introduced, the equivalent provision was expanded to prohibit the use of a photograph or likeness of a candidate.

While the original reason for introducing a restriction on the use of a name of a candidate has been lost over time, the Tasmanian Electoral Commission made a submission in 2019 to the review of the *Electoral Act* stating:

> There is some conjecture that this provision was included in earlier versions of the *Electoral Act* primarily to address concerns about the use of how to vote cards (HTV cards) at House of Assembly elections.

This is quite unique to the Tasmanian context and the Hare-Clark system, where candidates compete not only against candidates from other parties but also with candidates from their own party.

The Tasmania Law Reform Institute made a submission to the Electoral Act Review. The TLRI expressed concerns that section 196 could unduly restrict the dissemination and receipt of information, opinions and arguments concerning government and political matters, contrary to the High Court decision of *Lange v Australian Broadcasting Commission*. The TLRI indicated that it supports the removal of section 196, submitting that:

> Any restrictions on political communication must be proportionate and necessary to address legitimate concerns. Candidates may be concerned by the potential publication of inaccurate material, including false HTV cards. However, the Institute considers that requirements for authorisation of electoral material and prohibition on the publication of misleading and deceptive material are sufficient to protect against false statements being made about candidates or HTV cards.

There does not appear to be any reason to retain the section 196 prohibition more generally, other than for HTV cards. There was general consensus during consultation on the terms of reference for the Electoral Act Review that the provision is problematic, and it was also noted that these restrictions do not apply in other Australian jurisdictions.

Recommendation 1 of the Final Report, Electoral Act Review included amending this clause. In line with the final report, an attempt was made to amend section 196 as part of the Electoral Matters (Miscellaneous Amendments) Bill 2022; however, this clause was voted down in the Legislative Council in November 2023.

So, as part of the 2030 Strong Plan, the government has committed to amend section 196 of the *Electoral Act 2004* to remove the prohibition on the use of names and images of candidates in advertising. This bill will fulfil that commitment.

I commend the bill to the House.

[12.41 p.m.]

Ms FORREST (Murchison) - Mr President, perhaps some of us would not have quite expected this bill to come on so quickly, and so may not be fully prepared. However, I also recall the long and somewhat tortuous debate we had on the electoral reform in 2023, where we are now blamed for not respecting the wishes of the government at the time and not removing section 196 as the government had sought to do.

I acknowledge the information provided in the briefing today and also the TLRI's work. Its work is very important to inform the law reform in this place. We need to be very cautious here about not taking things in isolation. We have all, in this place, obviously faced elections. Some of us more than others. The member for Elwick in her very recent election faced significant abuse of her image and name in the course of the election period, with very little recourse and very little protection.

As is mentioned in the briefing, with the very rapid emergence and development of AI, particularly generative AI, we are now greatly at risk of our images, and any candidate's image, being used to generate images that may be less than flattering. I know this has been raised with legitimate and genuine concern. It is a big and wicked problem. It does not apply only to candidates standing for election, it applies to everyone in every area of our lives. It is a problem much bigger than this, but, and I say but, when someone is standing for election they, and most of us - I would say all of us - work really hard during an election campaign period to get out and knock on doors, try to meet as many people as they can, and I speak particularly for the member for McIntyre and me, we have massive electorates. This is in our House; other members in other places have larger geographic electorates but often a team, unless you are an independent standing in those, but the only independent member we have is in the tiniest electorate that you could literally just about spit over. So to think that I, or the member for McIntyre in particular - there are others who have big electorates too - could actually go out and knock on every door so people can see what we look like, ask us where we stand on things, correct any misrepresentations that may have been put out there, is a nonsense.

Okay, we can write opinion pieces, we can write letters to the editor, we can put out our own flyers with our information, we know how effective that cannot be sometimes. If you are using Australia Post because you literally cannot doorknock every door or drop them in every letterbox, I have seen Australia Post, with one of my elections, dump in the gutter a pile of my flyers that were paid to be delivered.

Mrs Hiscutt - I have seen it, too.

Ms FORREST - And it is even worse now to try to use Australia Post, because the only time they deliver into someone's letterbox is if there is other mail going in too. We know now there is less snail mail, hard mail going into letterboxes. To think someone's image or name misrepresented in this way can be adequately dealt with through other mechanisms, I would argue. In the briefing and from what other members have said, it has been put that you can use other mechanisms to deal with this. I would dispute that. Sometimes the comments of others trying to reflect on a position you may have on something can help your campaign when they are completely off the mark and people know how stupid it is. However, you cannot rely on that. We have seen the emergence of fake news. We have seen political candidates in other jurisdictions blatantly lie and not be held to account.

Is it right to remove this provision now? I acknowledge the comments that we are unique, but sometimes as the wheel turns and circumstances change, Tasmania may be unique in providing this last-ditch protection. With the emergence of AI to the degree it has and the capacity to broadcast false or misleading information - we do not have truth in advertising legislation, which we could have had but do not. That is sadly not brought in with an amending bill, though the government could have, but chose not to. I do not know that it is right to remove this last bit of protection without some other form of protection, whether it is another piece of legislation, even at the federal level, that deals with some of these very real and difficult problems. I also know we do not want to stymie political expression and debate. Democracy relies on that. It is critical to democracy. We can have the contest of ideas and we can have other viewpoints being put forward. I would hope they would be put forward in a truthful manner, but sadly they are not.

In my most recent election, another candidate was doing all sorts of TikToks - I do not use TikTok, but that was the main platform for this person - that were completely wrong. Most people knew that what this person was saying. There are not a huge number of people in my electorate who use TikTok.

Ms Rattray - There are so many people who are not engaged and would not know whether it is right or wrong.

Ms FORREST - There are a lot of young people on TikTok, some of them too young to vote, who are influenced. This is why people are called influencers. They are on TikTok and the other socials influencing people. They influence people with lies as much as they influence them with the truth. Even though most people knew and would not have to look too far to check if this person's comments about me were correct and that this person got the wrong end of the stick and misunderstood the reality, deliberate or not. It may have been an innocent error on their part, I do not know. In any event, there were suggestions that I had acted inappropriately, almost corruptly. It was weird stuff.

The point is, I chose not to respond or engage as I thought the reach, in my humble opinion, was not that broad. I felt that my community knew me better than that. I had the advantage of 18 years of service to those people. They had ample opportunity to find out what I really did think. I am visible on my social, not on TikTok, but on Facebook, LinkedIn. I keep off that horror show X.

Ms O'Connor - Twitter. We still call it Twitter.

Ms FORREST - I call it X because it is a horror show, the former thing called Twitter.

Ms O'Connor - He is a terrible person.

Ms FORREST - Yes, an absolute misogynist. Anyway, not to be diverted.

I chose not to respond for those reasons. But if I was a brand new candidate, someone out there trying to unseat me, I would hope that what is put out there about them is true and fair to them, so they have a red hot chance of being understood as they are. And if they beat me, well, all power to them. Good on them, but for a new person coming up, wanting to actually put themselves out there, and the risk of absolute falsity being put about in an advertisement or in a 'how to vote' card. I could see the argument around the 'how to vote' card business, but in Legislative Council elections, you cannot even use 'how to vote' cards. Well, you can use them, but you cannot use them on election day.

Ms O'Connor - You cannot use them in a state election either.

Ms FORREST - No, but be we cannot even stand outside an electoral booth.

Ms O'Connor - Federal you can, but not in any state election.

Ms FORREST - My mistake, sorry, that is right. You cannot either.

Ms O'Connor - Which is a good thing.

Ms FORREST - It is a good thing. It is quite intimidating. Even if you know how you are voting and you can eyeball them and say, do not. Most people do not like to eyeball them, they feel quite intimidated, sadly. So that is a good provision. I was getting the federal and state mixed up there.

I wanted to read from the email here. I was going take bits of it, but because I got to my feet first, I have not had time to organise my thoughts. This arrived from, as members would know, our former anti-discrimination commissioner, Dr Robin Banks. She sent an email that I thought is worth considering in relation to this bill, shortly to be presented before the Council for debate. It was sent at 11.12 a.m., just over an hour ago.

> As you may recall, I have made a submission to the current inquiry of the Joint Standing Committee on Electoral Matters …

I did not know that because I am not on that committee, but that is fine.

> … that includes consideration of section 196 of the Electoral Act.

And she tells us where submissions are available.

> I note that the Bill had a very easy passage to the House of Assembly and urge you to ensure it gets more fulsome consideration in the Legislative Council. While there may be concerns about interpretation of the provision in its current form, including its impact on our implied right to freedom of

> political and government communication, such concerns should be fully considered rather than simply removing one of the few, potentially effective protections electors have against clear and unambiguous misleading conduct. You will see in my submission that I address the argument that section 197 …

This was referred to in the briefing, which relates to the process of elections rather than the candidates themselves.

> … provides that protection including that it is not a provision that could be readily acted on during the campaign period and that capacity is an important part of any protection. I also note that, as far as my research indicates, there have been no successful challenges to the current provision on the grounds that it infringes our implied freedom.

And, Mr President, that could be because it has not been tested, which is fine. It is obviously not a major problem, but it does provide some notional protection.

> Cases where breaches by legislative provisions of the implied freedom of political and governmental communication are raised consider three questions.
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> 1. Does the law effectively burden freedom of political communication?
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> 2. Is the purpose of the law legitimate. in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
>
> 3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

That comes from *Coleman v Power* and *McCoy* [2004] HCA 39.

> In this case, it is clearly arguably that section 196 burdens freedom of political communication as it limits what can be communicated in election campaigns. It is, however, equally clear that there is a legitimate purpose to the provision: protecting electors from false and misleading communications that associate (through name or image) a particular candidate with specific views or conduct. This is an important protection in our constitutionally prescribed system of government. The third question is important and raises the question as to whether the provision could be improved. Considering such improvement could provide a mechanism that ensures the continued protection and alleviates concerns about impacts on the implied freedom. I note that the government has previously presented legislation that has subsequently been found by the High Court to infringe the implied freedom (the successful challenge the *Workplaces (Protection from Protesters) Act 2014);* here we have the government seeking to use that very freedom to urge for reduced democratic protections.

> It would be appropriate for the Legislative Council to consider a referral of this Bill to the Joint Standing Committee on Electoral Matters. This would allow more fulsome consideration of the arguments for and against the current proposed amendments and alternatives to overcome the concerns identified as the reason for the current amendment Bill.

I have read that email pretty much in full with a bit of paraphrasing and my own comments. So where to from here? The fact that this is part of the '2030 Strong Plan' -

Mrs Hiscutt - Where are my colleagues? I feel a bit lonely here.

Ms FORREST - Not one of them is here, Leader. They have all gone.

Is that a reason to pass it? No, absolutely not. Is it something that requires more thought. Does it require additional inclusions in the Electoral Act to ensure if this protection - and it is a protection - is removed, that there is an adequate provision for protection through a truth-in-advertising requirement? I would possibly say 'yes' to that.

The other thing - and it was raised by the member for Nelson and was also a matter that crossed my mind as I spoke yesterday on the Judicial Commissions Bill, not knowing that there had been an amendment downstairs - what gender impact assessment has been done on this? We know that women's appearances are commented on, critiqued, criticised and abused far more in public life than men's. That is a reality. We know there has not been a gender impact assessment done on this, according to the information provided at the briefing. Without that, I do not think we can possibly proceed with this at this point. Either we leave it to sit, we refer it to a committee or we vote it down until that work has been done.

Ms O'Connor - What work, sorry?

Ms FORREST - A gender impact assessment. As I said, we know that women's images and women are abused far more than men in public life for their appearance, for how they speak, for what they say and for what they stand for. An example of that, in my very first election in 2005 and sometimes since then, is when I attended a candidate forum down in Circular Head. There were five candidates. We had to all speak to a number of questions, all run-of-the-mill sort of stuff. I cannot remember exactly what they were now because it was quite a long time ago, but they were particularly relevant at the time. I think one was around the protection of agricultural land policy, which was a pretty big thing at the time.

Then I had questions from the floor. One person stood up to ask a question and they wanted only me to answer it. What do you think that question might have been about? It was my view on abortion. They did not want to ask the four other men what their view was on abortion. They only wanted to hear mine. Now, how gendered is that? I got up and answered and one of the blokes who was sitting next to me said, 'Jeez, I am glad they did not ask me'. I felt like getting up and asking all the other three -

Sitting suspended from 1.00 p.m. to 2.30 p.m.

ELECTORAL AMENDMENT BILL 2024 (No. 25)

Second Reading

Resumed from above

[3.07 p.m.]

Ms FORREST (Murchison) - Before I was rudely interrupted by the 1 o'clock bell, I believe I was in full flight talking about whether or not a gender assessment is being done on this legislation that we are contemplating here. I was talking about my experience in my very first election, where I was the only candidate of five and the only woman, asked about my views on abortion. I was about to say I desperately wanted to jump to my feet and ask the other four male candidates what their view was. This is the sort of treatment that women get. We are singled out to be asked the questions that are more contentious to try to put us on the back foot. You only have to look as far as our very first and only female prime minister, the disgraceful things that were said about her by the former leader of the opposition, Tony Abbott, and the number of people that commented on her appearance and the way she spoke. It is absolutely unacceptable and disgraceful. In that case it was Mr Abbott who had such vitriol in a number of occasions there. Sadly, what we also see sometimes is women attacking other women and it breaks my heart to think that is what goes on. I know that was the case for the member for Elwick and when there was another woman who was standing against me who chose to use those TikTok videos or whatever you call them.

In any event, I think there is pretty clear evidence that this provision in the *Electoral Act* that this bill seeks to remove - I do hear and acknowledge the TLRI's comments and recommendations that this be removed, but we should do so with great caution if we are to do that and make sure there are protections in place. We are seeing so many people harmed by social media and by other forms of online and AI abuse. I do not know if anyone in this Chamber has been, but anyone who has been impacted by the use of a deep fake would understand or hope that those who have not had an experience would appreciate how truly devastating that can be - and we are seeing that used more and more - particularly for young women and the lifelong trauma that causes people.

We need to be very careful we do not put adequate protections in a highly paced, fast- moving world of AI and technology that has become very much part of election campaigns and those processes. The printed matter is the end result of that because you use generative AI to create an image or to create content. Some platforms will not allow you to do stuff that is obviously nasty, but it does not stop you doing things that are not true, unless there is some element to it that would sort of verge on criminality. That is not all platforms; that is just some of the ones that have perhaps more of a protective mechanism built into them.

I have concerns about this bill as it stands without truth-in-advertising provisions as well. I will listen to other members' contributions on this. I do not think there is a rush to deal with this and to get it done because, really, the only reason it was put here, according to the Leader, was it was part of the 2030 Strong Plan and they committed to -

Ms O'Connor - It came up last year. It has been advocated for by the TEC for some time.

Ms FORREST - Yes, but without the rest of the recommendations that have been made in terms of truth in advertising and other spending caps and things like that, that your party has advocated for. Okay, we are just doing one thing in isolation here; why are we not looking at all those other things?

Ms O'Connor - Because there is no appetite from the major parties.

Ms FORREST - I know there is not, but that is not why we pass things in here, though. I do not care if there is no appetite from the major parties, but the member for Nelson has established the Electoral Matters Committee and, as I understand it, they are looking at a lot of these things. The lower House committee that looked at the Greens' bill also made reference to truth in advertising in their recommendations being looked at by that joint committee. I am concerned about dealing with this one standalone matter in isolation, but I will listen to other members and respect and acknowledge the TLRI's position on this. We have to proceed cautiously if we are not going to do the whole amount of reform required. That was the problem with that electoral donations bill, where there was a whole range of matters like spending caps and publicly funded elections, so they need to go together.

The member for Nelson did a huge amount of work trying to make that happen and the Labor Party at the time did it, but anyway, we did not see some of that proceed and we end up with this half-baked electoral law. That is why I am saying that this on its own is problematic for me. If it were part of a bigger suite of legislative reform to address some of those very real challenges that were identified in this place at an earlier time, then I would probably be a bit happier, but at this stage I do not know that I can support it.

[3.14 p.m.]

Ms RATTRAY (McIntyre) - Mr President, that was a very compelling contribution by the member for Murchison and I could possibly sit down and say I agree with everything. Some of the examples she presented are on discrimination, if you like, against the female gender. I cannot necessarily say I have had that experience, but it is very clear to me we do not need to pass this just because no other jurisdiction in the country has this, that is not any reason at all that Tasmania should not keep it. It is a protection and, yes, it may well be some extra work for the Electoral Commission, absolutely, but isn't that their role to take phone calls from candidates, work through issues? That is exactly their role and if they have not got the staff to do it then they need to speak up, not just expect legislation to change because it might make it easier.

Ms Webb - The funding is reserved by law and they could ask for it.

Ms RATTRAY - That is right. I have no hesitation today, if we are going to proceed with this, to not support this legislation, this amendment, none whatsoever. I know the member for Murchison read out some information that was received by Robin Banks this morning. I want to add a little bit of information we received back on 11 September from Dr Banks, a well-respected person who attends this Chamber on regular occasions, so she knows how this place works, a former anti-discrimination commissioner, very interested person in Tasmania and what happens particularly in this place and how to fix Tasmania. She wrote:

> I am writing to provide you with a copy of my submission to the current inquiry of the Joint Standing Committee on Electoral Matters because it directly addresses the current Bill to amend the *Electoral Act 2004*.

And we know that we have had a go at that last year.

> I share the concern of many Australians that there are insufficient protections against misleading conduct in electoral campaigns. This concern is

> heightened by the expansion of AI as a tool for creating content of wide dissemination.
>
> Section 196 provides a protection against the misleading use of candidate's images and names by other candidates or third parties. Such use can mislead electors. -

And we have heard a number of examples being given by the member for Murchison:

> For the reasons set out in my submission, I urge you to vote against the proposed amendment as it significantly weakens the current protection, making it almost pointless. Limiting the prohibition to the content of how- to- vote cards means that a party could not produce a how- to- vote card listing all of the candidates in a particular electorate unless all of the candidates consented to their names being listed. It is not at all clear what benefits such a prohibition serves. A how-to-vote card is simply an indicator from a candidate or party as to the number they encourage electors to put against the names of particular candidates on their ballot paper.
>
> It would be more consistent with protection of democracy and the communities trust in the political process to maintain and strengthen the provision through expressly covering the use of AI-generated content as well as other content.

It goes on to say:

> While there may be concerns about the interaction of the current or a strengthened provision with the implied constitutional freedom of political and governmental opinion (recognised in the High Court's decision in *Lange v Australian Broadcasting Corporation*), there has not been a challenge on this basis to the existing provision which has been in place in some form since 1921. In many ways the existing of section 196 reflects Tasmania's leadership in electoral matters, -

The member for Murchison talked about how things come back around and this may well, given the way that society is these days. This section 196 may well be a very advantageous aspect. Why would we take it away?

> - which should be continued rather than watered down as it is proposed in the Electoral Amendment Bill. The protection against non-consensual use of images or names in electoral material has a very clear and legitimate purpose and is a clearer protection than that provided by the prohibition of misleading and deceptive material found in section 197. For a successful prosecution under section 197, it would be necessary to establish that the material was intended to or had the capacity to mislead or deceive an elector. This is much harder to establish than it is to establish whether or not a candidate gave consent to use of their name or image. Further, the TEC can much more readily identify potential breaches of section 196 during the campaign period that it could identify potentially misleading or deceptive content. This

> enables action to be taken to prevent the further dissemination of the material during the election campaign.

That is an important part, 'during the election campaign'. Any one of us who has been through an election campaign knows it does not take much to get you stressed, particularly if you want to keep your position, if you want to get re-elected. To be able to ring the TEC and ask for something to be investigated, it is an absolute right to be able to do that if you feel that it is against what is being presented.

I will go on from Dr Banks's information:

> It is almost a daily occurrence to hear of or see AI generated political content. One recent example is that provided by independent Senator David Pocock to highlight the threat these pose to elections.

Then there is a link to have a look at that. The last part of it says:

> It is vital for our democratic electoral processes and community trust in those processes to ensure such content is clearly prohibited. Section 196 already provides such a prohibition that needs to be supported by stronger prosecutorial action.

Again, there is an urge to vote against this and the limiting of this important protection. It was important to add that to what the member for Murchison provided in her contribution.

The reason that has been put forward as part of the 2030 Strong Plan, again, I do not believe is any reason for this House to decide this is an appropriate pathway and certainly not at this time when there are no other aspects that can protect people when we do not have that truth.

Ms O'Connor - It is not just people, it is candidates. We are talking about protections for one class of people: MPs and candidates. Is that fair?

Ms RATTRAY - Why is it not fair?

Ms O'Connor - Why should we have more protections than people in ordinary society?

Mr PRESIDENT - Order.

Ms RATTRAY - The member for Hobart will have her opportunity. I am making the point I will not be supporting this. Yes, we did earlier, after the resumption of a government, in this place set up a number of committees. We sat in this place and we put our hand up if we wanted to be part of them. There is an Electoral Matters Committee established. Perhaps this is one, and I know there has been some discussion on whether this particular bill should head off to that committee, a perfect opportunity to use the committee structural process we have in this place.

If we continue on and we do not send it to a committee and we take a vote, I will be voting against it, and those people who are not around and will need their five-minute run will need to run.

[3.24 p.m.]

Ms LOVELL (Rumney) - Mr President, I will make a contribution on this bill. I will start by saying I will support the bill. Labor has supported the bill through the other place. This has been part of a package of reforms we have supported for a long time.

Ms Rattray - Be a rebel.

Ms LOVELL - I will tell you why I will support it personally also, but I will get to that.

This is a matter that obviously sparks some significant interest in this Chamber and certainly in the other place, and I understand why that is. I have listened to the contributions that have been made so far. I listened to contributions that were made last time we debated this issue in this place, and I have also listened to the conversations we have had outside this Chamber. I have brought myself back to having a look at what we are actually doing with this bill. It is a small bill. There is only one section of the act it is amending, but it is significant.

I have gone back to the act itself, the *Electoral Act*, to look at what section 196 covers currently, and what it would cover, or what changes would apply were this bill to be supported.

Section 196 in the act, currently, says:

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 ...

I will not go into all of that.

Subsection (1) does not apply to any matter printed, published or distributed by the Commission or the Commissioner in the course of promoting public awareness of elections and parliamentary matters.

Should the amendment bill be supported, the change will mean the clause will read:

A person must not between the issue of the writ for an election and the close of poll at that election print, publish, distribute or keep on display a "how to vote" card which contains the name, photograph or a likeness of a candidate or intending candidate.

And the rest goes on.

The reason I went back to that is we need to be very clear about what it is that this current provision in the act does at the moment. It only covers that period of time between the issue of the writ for an election and the close of poll at the election. That can be a very short period of time.

It only covers electoral matter that is printed, published or distributed - any advertisement, 'how to vote' card, handbill, pamphlet, poster or notice.

It does not cover much of what we see on social media. It does not cover an anonymous pamphlet that somebody might put into a letterbox that is not authorised and not approved election material. It does not cover questions at candidate forums. It does not cover a whole range of things that all of us deal with all of the time.

That is not to say that those things are not okay. I cannot say all of us. Many of us, no doubt, have had experiences that are nothing short of horrendous; we have heard some of those examples today and I am sure we will hear more of them. As public figures, we all carry that risk all of the time. And to be clear, I have no issue with being held to account as a public figure. I have no issue with being questioned. I expect nothing less. In fact, I encourage it, because I want people to be able to make an informed decision about who they vote for. I have no problem with that, but that is not how it always works in reality and we know that. With the rise of social media, we see more and more online material being published about public figures. We know that people do not always have good intentions.

So, the question for me, then comes back to what this provision in the act currently provides, and what it would provide should this amendment bill be supported.

I come back to the TLRI report and their comments on this section in the act, in particular:

> Any restrictions on political communication must be proportionate and necessary to address legitimate concerns. Candidates may be concerned by the potential publication of inaccurate material, including false How to Vote cards. However, the Institute considers that requirements for authorisation of electoral material and prohibition on the publication of misleading and deceptive material are sufficient to protect against false statements being made about candidates or How to Vote cards.

Any restrictions on political communication must be proportionate and necessary to address legitimate concerns.

As I said, I have heard members share their experiences, outside of this Chamber and in this debate, and this kind of behaviour is inexcusable, it should be called out. But the question for me in considering this bill is whether this provision is a proportionate and necessary response to address legitimate concerns.

I, too, have had experiences that I would have preferred not to have as a public figure. It was during the state election campaign in, I believe 2021, when for unknown reasons another public figure - he was not a candidate in that election, he was not an elected member of parliament, but he had in the past been a candidate for election - that person decided to target me online, probably because I was one of the campaign spokespeople for the Labor Party.

At the same time, and the member for Hobart might remember this, or she might not have seen it, I do not know, but he picked out me, the member for Hobart, who at the time was a candidate for Clark, the former speaker of the House of Assembly, who at the time was a candidate for Clark, and the former leader of the opposition, who at the time was a candidate for Lyons. This person targeted us.

Ms Forrest - You are all women, by the sound of it.

Ms LOVELL - All women. I have no doubt there were absolutely misogynistic motivations behind it, evidenced by the fact that we were identified on Facebook as the biggest man-haters in the Tasmanian parliament. Maybe there is a contest for that, I do not know, but apparently, it was us. We won that contest. I remember at the time screenshotting one of his posts because he would deliberately choose unflattering photographs, screenshots probably. The member for Hobart probably knows who I am talking about and may remember this.

I remember taking a screenshot of one and sending it to the former leader of the opposition. The man had put together a shot of the four of us, and all of us had our eyes closed. I sent her a message and said, 'Oh, we hate men so much we walk around with our eyes closed, just in case we see one', because it was so ridiculous. But it went on and on. It extended through that entire campaign period. It was not just the content that this person was posting, but also the comments that he left unchallenged and the people who follow this person's page are among, probably, the more extreme people who you would find following Tasmanian politics. Some of those comments were pretty hideous and they were quite frightening.

Is this behaviour okay? Absolutely not and we should not be subject to that kind of behaviour and it should be called out, but would it have been covered by these provisions? No. I was not a candidate at the election. It was not an advertisement. It was not a notice. It was not a pamphlet. It was not a 'how to vote' card. It would not have been covered by these provisions anyway.

The member for Murchison spoke about discrimination that she faced at a candidate forum. Again, inexcusable. It should not be something that we have to deal with in 2024 or whenever that was, but absolutely it should not be something that -

Ms Forrest - It was in 2005.

Ms LOVELL - Even in 2005 we should not have been dealing with things like that. We still do, often. We should not be but, again, we would not be covered by these provisions. In fact, most of the experiences that we have talked about in debating this bill and in debating these provisions either would not be covered by these provisions or happened with these protections already in place. So then, I have come back to the fact that there are really two issues for me here. The first issue is the protection that these provisions provide each of us as individuals in terms of misinformation on a personal level that might be put out there about ourselves.

The second issue is the information or misinformation that might be presented to voters who are trying to make an informed decision about who they vote for. For me, that is the critical issue here: what information is available for voters and is there a risk of misinformation being presented to voters? You could argue either way with these provisions that they provide a protection against misinformation or that they impinge on people's ability to publish information, true information, for people to be able to make an informed decision. So that brings me back to the TLRI comments, which said candidates 'may be concerned by the potential publication of inaccurate material' and when I am using that in this context, I am talking about inaccurate information being presented to voters.

> However, the Institute considers that requirements for authorisation of electoral material and prohibition on the publication of misleading and deceptive material are sufficient to protect against false statements being made about candidates on How to Vote cards.

I am reassured by that and by the other provisions that are in place, the requirements for authorisation of political material. I am reassured that this provision, as it stands, does not add enough of an additional protection against misinformation for voters that it should outweigh people's right to freedom of speech and freedom of political expression.

The issue around AI and deep fakes has come up throughout this debate, and there is obviously work to be done on that matter. This is an emerging issue that is going to become more and more of an issue for people who are trying the best they can to inform themselves about the people they are voting for, trying to make an informed, accurate decision and having to sift through and figure out what is accurate and what is not accurate. There is work that needs to be done, but that is not going to be prevented by keeping this provision in this bill either.

I do not disagree that there are issues that we need to deal with. I strongly agree that there is further reform that we need in our electoral system; we know that. I will note, and there have been comments about appetite for reform from political parties, we are still waiting for the proclamation of the bill that was passed last year. We said at the time we did not believe there was an appetite for the government to progress that bill. It feels like that has been proven true. We are still waiting for proclamation of that bill, of those amendments that were passed to make further amendments and further reform our system.

This reform was part of that original package that was supported by the Labor Party. It still is a reform that is supported. I have listened carefully to the concerns that have been raised and I keep coming back to those questions. What does this provision cover currently for a limited period of time, limited materials? These are limited protections, and I will add, these are protections that nobody else gets; if we put aside the misinformation side and we look at the personal protection that it provides for us as candidates and other candidates, nobody else applying for a leadership role gets that level of protection. Nobody else who is going for an elected position in an organisation, chair of a board or a head of a union, they do not get those provisions. That is something that we get and only we get. We still get the provisions that everyone else gets - the protection against defamation and slander. We still are covered by the same protections that everyone else is, but are these limited protections worth the restrictions on free speech and political expression and the ability for voters to be able to educate themselves and be as informed as best they can? In my view, they are not. I do not believe that these restrictions are proportionate and necessary. I do believe that candidates for elected office have the same protections other citizens have and that that strikes the right balance for me, personally, between freedom of speech and political expression, and protection against defamation or slanderous conduct or misinformation.

I support this amendment because I believe it is in line with what our community would expect. Listening to the debate, I know this is a matter that people are taking very seriously and I understand why this is something that impacts on all of us personally. However, when I think about it in terms of what we are delivering for the community and what we are delivering for the people who are voting for those who will make decisions on their behalf, I feel comfortable that this is what they would expect and hope to see.

[3.39 p.m.]

Ms ARMITAGE (Launceston) - Mr President, the first thing I would say is what does our community expect? I think they expect truth and that is really important. To me, what is the benefit of taking this out? I am concerned about dealing with this matter in isolation, particularly with no truth-in-advertising provision. I do not believe we should be removing this section in isolation, which provides some form of protection, perhaps not a lot but some form of protection.

The period of time has been mentioned - the time of writs to the election. That is a really important time because it does not give you a lot of time if something has been said about you or you have had a picture put up, you do not have a lot of time to counter that. That is probably the most important time, when people are out there voting. There is not a lot of time to respond. I do not believe people's images or names should be misrepresented. It goes back to: what does our community expect? They read and see, and they expect what they read and see to be the truth. If you have such a limited amount of time to respond, how can you get out there and respond?

As an independent member, we cannot afford silks. We cannot afford lawyers to go and take something to court, which serves no purpose in the end because you are not getting the truth out there. To me, that is really important. If the current provision in the act stops some people from misrepresenting others, regardless of if they are incumbents or new candidates, then it is important, in my view, to keep it in. I would hate to see the media publish that: 'Gosh, this has been removed' and some people think, 'Wow, this has opened the door'. You really do not know. You can take legal action. That is all very well if you can afford it, but it does not serve much purpose when untruths may be out there for some people.

I appreciate the member for Murchison mentioning the issues that happened during her last election. How do you get the truth out there to that number of people? Particularly, like the members for McIntyre and Murchison, in the size of their electorates. It is not as if you can get out there and -

Mrs Hiscutt - Currently, it would not stop that anyway.

Ms ARMITAGE - I appreciate it would not stop it, but in some people's minds -

Ms Rattray - It would be a deterrent.

Ms ARMITAGE - In some people's minds it would be a deterrent. I appreciate it has been mentioned that it is not in any other jurisdiction. If that is the case, and the TEC has limited funding, then let us fund it so it can actually do its job. I really do not see an issue here; I do not see why we would be taking this out at this time, when there are other ways it could be looked at and, as has been mentioned, there is a current, live committee that could look at it.

Ms Forrest - To be clear on when I was referring to my experience at that forum, I was not referring to the bill at that point, I was referring to the gendered nature of abuse against women who stand for public office.

Ms ARMITAGE - Oh, I was not speaking about that.

Ms Forrest - You were not saying that, but it has been said.

Ms ARMITAGE - I meant the other one you were talking about, the TikTok.

Ms Forrest - For the TikTok one, that person was actually using my image and my name.

Ms ARMITAGE - Absolutely. That was the one I was referring to.

Mrs Hiscutt - This bill and these changes would not have stopped that. It still would have happened.

Ms ARMITAGE - Mr President, I understand the Leader making comment from the side. I can appreciate what you are saying, that the bill would not stop it, but I still believe it would act as a deterrent to many people. They would see this and think, 'I cannot do that.' Some people might not. I also appreciate that, but I really do not see a benefit of taking this out, or why it has become so important now. As far as I was concerned, there were far more important things in the last bill that did not get up when we dealt with it previously.

I am not going to repeat what has been said by many members. I will not support the bill before us. I do not consider that it is appropriate at this time to do that. I have concerns that we do not have truth-in-advertising provisions. As far as I am concerned, we should not remove this without having something in place to protect people. Whether it is incumbents, new candidates, it does not matter. Giving people the opportunity to get the truth out there to the community if someone has been misrepresented in the public forum, particularly between the time of issuing the writs and the election. This is a very short period, and certainly no time for anyone to be able to come back and put their side of the story.

[3.44 p.m.]

Ms O'CONNOR (Hobart) - Mr President, the Greens maintain our strong support for the repeal of section 196 of the *Electoral Act 2004*. It has been a really interesting debate so far, as it is every day here. Every day is a school day. I have learned things and perspectives which are interesting and informative. Ultimately, what we should be talking about here is what provides the greatest benefit to democracy - the free and fair exchange of ideas during an election campaign; how we can make sure Tasmanians, in our case, are best informed about the positions of people who are running for public office. There is no question that section 196 as it is drafted causes problems for the Tasmanian Electoral Commission in its interpretation - and I will get to that shortly - but it does have a chilling effect on the exercise of free speech and the free exchange of ideas during an election campaign.

In the briefing this morning I relayed an anecdote of our time in a community group, Save Ralphs Bay Incorporated, who worked very hard as a community to protect the Ralphs Bay Conservation Area and sand flats and all the beautiful birds down there from a Gold Coast-style canal estate. One of the things we regularly did was produce a newsletter that we walked out into the community everywhere south of Rokeby, basically. In the 2006 election campaign, when the Liberal Party had taken a position of opposing the Project of State Significance that would be legislated to allow for the assessment of the canal estate, I had a position of opposing. Labor was rabidly supportive of the canal estate under then-premier Paul Lennon.

We put out a newsletter to locals that listed the candidates and their positions on the canal estate. Then I got a call from Bruce Taylor, the then-electoral commissioner, basically saying that we were - and that I would take responsibility for, ultimately - in breach of section 196 of the *Electoral Act.* He said it was problematic because we had not received the permission of candidates to publish their names in a newsletter, which was regarded as an advertisement for the purposes of the act. You can imagine how a little community group, which is just desperately working to try to save a place for nature and for the birds, would feel when a call comes in from the electoral commissioner that the editor of that newsletter may have committed a criminal offence and face up to 12 months imprisonment - which is what section 196 does. It had a chilling effect on our community group.

The second example of my collision with section 196 was during the Legislative Council periodic elections in 2020, when then-member for Huon, the predecessor to Mr Harriss, was running for the seat of Huon. I did a short Facebook post with Pat Caruana, who was our candidate, and it very simply stated a position that was taken by the then-state Labor party. The question was asked in the Facebook post, which was no more than 60 seconds long: 'What is Dr Seidel's position on pokies, given that he knows what the harms are? Will he tell voters where he stands on this issue?' That is unarguably fair political comment posted on Facebook. Not an advertisement, not a 'how to vote' card. However, I did say Dr Seidel's name. I identified him, and I had not asked him.

Now, I ask members who have made a contribution whether you think that it is reasonable that a candidate in an election campaign - whether it be a state election or Legislative Council elections - should have those special protections where you cannot even say their name or raise a question of policy. I did not say Dr Seidel is a bad guy. I did not say he was dishonest.

Ms Rattray - You could not have done because we want not any of those.

Ms O'CONNOR - I know. I understand that well. I am also a massive fan of truth in political advertising, truth in political commentary. I just told the truth. Pat Caruana, who was our candidate then, made some observations that were not highly political in nature. Anyway, next thing you know, a call comes in from the Electoral Commission asking that I remove that post from my Facebook page. I decided not to because I thought it was ridiculous and I thought, on advice, that it was worth testing. In response to the member for Launceston's comments about independents not being able to afford legal advice, I paid for my own legal advice because it was a point worth taking up and making and because I felt, as did my advising lawyer, Roland Browne, that to be asked by a state Electoral Commission to take down fair political comment during a campaign was not only not reasonable, but in all likelihood in breach of the implied right to freedom of political communication that is in the Constitution.

There was a face-off then because a decision had to be made by the Tasmanian Electoral Commission whether to refer me to the Director of Public Prosecutions. These are serious consequences that a person - so just make me a person for a moment, just an ordinary person - faces should they make reasonable political comment during a campaign about another candidate. This comes back to a threshold issue here.

Section 196 of the *Electoral Act* provides a special protection to political candidates, as the member for Rumney pointed out, that is not afforded to anyone else in our society. Ultimately, through one interpretation, it is a protection from legitimate political criticism and

we should not be countenancing that. Why would we accept it is reasonable for us as a class of people to have more protections under the law than the people we represent?

It does not pass the pub test and I totally hear what the member for Murchison was saying about the gendered nature of attacks on people in public life. I totally hear it, but this legislation is not the place to deal with that. There is a whole body of engagement, educative work and positive affirmative work in our community dealing with gender inequality, attitudes towards women and girls, basically from birth, that will help or should help to improve gender equality and improve attitudes towards women and girls, but that cannot and should not be the lens through which we view this amendment bill.

As to why we are not looking at every other aspect of electoral reform, pardon my cynicism, but the Greens have been working towards electoral reform pretty much ever since we were born as a party. If we were to wait for that golden day when the best, most complete package of electoral amendments comes forward altogether as a cohesive and agreed whole, we will be waiting forever, because it is not going to happen.

It is not going to happen. There is limited appetite amongst the major parties here for donations reform, for example, for restrictions on donations from corporations, private developers, foreign interests and the like. If something has been identified as problematic in our electoral law framework - as this has, by the Tasmania Law Reform Institute and the body that has to oversee it and deal with the issues, the Tasmanian Electoral Commission - then I think we have a responsibility to address it.

Back to the Seidel situation, just briefly. We ended up seeking some further advice from Ron Merkel KC because the consequences were very significant. A letter was presented to the DPP on my behalf that was informed by advice from Ron Merkel KC through Roland Browne.

The member for Murchison talked about the High Court case, *Coleman v Power 2004*, and it has a really key statement in it, in relation to if a state is to enact any legislation that potentially restricts freedom of speech, then it has to be very narrowly limited. In *Coleman v Power*, in the judgment:

> 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'.

The problem with the interpretation and application of section 196 is that it has not just been limited to an advertisement, for example, a prohibition on a misleading advertisement. It has actually been applied to cover all electoral commentary, which is what the Bastian Seidel situation demonstrated.

As this correspondence to the DPP said:

> A Facebook post identifying another candidate in their policies, without more, is not an advertisement, how to vote card, handbill, pamphlet, poster or notice.

Section 196 is not concerned, nor should it be concerned, with the publication of electoral matter, the seminal but much broader concept in the act. If parliament had wanted to ban publication in any form of something which identifies a person, parliament simply would have drafted section 196 like this: 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 electoral matter which contains the name, photograph or a likeness, et cetera.

I do not think we should continue a situation where, during an election campaign, people feel that they might be captured by this provision and face up to 12 months jail, simply because they have made political commentary on a Facebook page where they disagree with a candidate or strongly challenge their views. They might face up to 12 months in jail.

We know there are some really vile people out there. I am not talking about that particular very small demographic in our communities, little misogynist keyboard warriors who invariably will attack women, I am talking about the broader community here and the chilling effect that section 196 can have on the free and fair exchange of ideas during a campaign. The letter goes -

Sitting suspended from 4 p.m. to 4.30 p.m.

ELECTORAL AMENDMENT BILL 2024 (No. 25)

Second Reading

Resumed from above.

[4.31 p.m.]

Ms O'CONNOR (Hobart) - Mr President, I was thinking about it over the afternoon tea break. At its core, section 196 is undemocratic. We should acknowledge that because it does have a potentially very restricting capacity on the free flow of speech. As legislators, I believe we should be doing everything we can to strengthen the foundations of our democracy. I do not believe we should accept our laws or clauses in laws that provide special protections for us in the event of an election. We need to be realistic that the provisions of section 196 apply relatively infrequently, once every three or four years for a month during a state election campaign and each year during the periodic Legislative Council campaigns. If we take the state election as an example, you have four weeks within - in a normal period - a four-year period where section 196 applies. For the whole rest of that time our images, names and reputations can be distorted, manipulated and trashed.

Why do we think it is reasonable to keep section section196 given its limited application? I know that what we are talking about here is amending section 196 to clarify it, but why would we accept a provision which stifles free speech, which, although it has not been tested, in all likelihood unconstitutional, and which treats us as a separate class of people under the law? I do not believe that is reasonable.

If you look back at the history of where section 196 came from, as I understand it, it first arrived in a 1907 electoral act of the parliament and then 1905, and then it made its way into the 2004 act we are seeking to amend today. I understand the arguments about 'well, maybe this arcane provision has come back to be relevant and modern and therefore potentially

Tasmania could be a leader here'. I am not exactly sure a leader at what, because the protection of a particular class of people - political candidates - only applies for the campaign period.

We are talking about a provision in law that is more than 100 years old, which the Tasmanian Electoral Commission itself has asked to be amended, which the Tasmania Law Reform Institute has recommended reforming, which psephologists like Kevin Bonham, for example, passionately advocate for reforming. These are people who are, particularly for the TEC and Kevin Bonham, deep in the electoral process.

What has happened and the Bastian Seidel situation shows that section 196, as it is currently used, has been read to extend to cover any comment on political matters that is published. It does not have to be an advertisement or a how-to-vote card. Any comment on a political matter is potentially captured here.

If we go to the advice on the implied freedom - I know other members want to talk but I want to read this in - the question we asked the DPP at that time in our submission was: how can there realistically be a free exchange of political ideas in an election if a person is prohibited from discussing the policies of another candidate or intending candidate if they cannot identify that very candidate or intending candidate?

The High Court has reiterated on numerous occasions that the Commonwealth Constitution prohibits legislative interference with the freedom to discuss matters such as the suitability of a candidate for public office or a person holding public office. *Nationwide News v Wills 1992* was a case about whether a provision of the *Industrial Relations Act 1988*, a Commonwealth act, was invalid as it made it an offence through writing or speech to use words calculated to bring a member of the Industrial Relations Commission into disrepute. The High Court ruled the provision to be invalid as it was inconsistent with the implied freedom and Justice Brennan said at the time:

> To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential; it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.

His Honour went on to say:

> By parity of reasoning, the representative democracy ordained by our Constitution carries with it a comparable freedom for the Australian people and that freedom circumscribes the legislative powers conferred on the Parliament by the Constitution. No law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose.
>
> …
>
> [T]he Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests

> and, in any event, not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions.

I understand there is a mood not to support this amendment bill, I was obviously not here late last year when the reform of section 196 was previously prevented.

We have now had a year in public life, in this Council or the Assembly - and the Assembly has passed this - to think about this issue knowing that it would come back. The government made it a policy announcement during the campaign. We have had a lot of time as a Council to consider this matter and I know it has come on today in part because of a change to the order of business which was agreed to by the House. It feels a little bit rushed even though this bill has been sitting in our bills trays for some months. We have had time to consider this issue. We have before us a request from the Tasmanian Electoral Commission, which has to deal with the mess that section 196, as it is written and interpreted, presents to them. After all the kerfuffle, we ended up with a letter from the DPP on 15 September 2020:

> Mr Brown,
>
> Thank you for your letter of 26 August 2020 and your helpful submission on the question of whether your client, Ms O'Connor, had breached section 196 of the *Electoral Act 2004*. Please be advised I do not intend to charge your client with breaching the act.

Well, that was an almighty relief.

A week after that, I received a letter from Mr Andrew Hawkey saying that they had been advised by the DPP that there was no reasonable prospect of conviction and he would not prosecute the matter. However, Mr Hawkey noted the following things:

> The Electoral Act became law before the development of social media and the use of social media for electoral and election discourse.

I truly do feel that is part of the reason it has become even messier in recent years.

> The relatively recent rise of social media appears to fall between the historical discourse of delivered material and verbal/social/personal communications. It may be arguable that your Facebook post is political discourse that could be considered closer to a radio interview or public debate than a handbill or how to vote card or notice.

I was reminded that a breach of section 196 is a criminal offence with severe consequences and a potential imprisonment term of up to 12 months.

> As the Electoral Commissioner, I have an important role to encourage and enforce compliance with all electoral laws and to review and respond to possible breaches. Therefore, I'll continue to ask individuals to refrain from actions that could be possible breaches of section 196 of the act. I'm 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.

I think the Electoral Commission, Mr Hawkey particularly, over the course of that journey and that incident - it was a few months - hours and hours of the Tasmanian Electoral Commission's time were put into responding to a complaint that was made by a member of the community, undoubtedly a member of the Labor Party or a Labor Party volunteer. The TEC had to deal with that complaint and the process took months - a waste of time and a waste of money in an attempt to apply an interpretation of section 196 that you would have trouble convincing yourself the original drafters thought that provision should apply to all political commentary or speech during a campaign.

If you look back through the rationale of this clause in the three bits of legislation, it does seem clear that the original intention was to prevent false or misleading information in advertising material about another candidate without their permission during the campaign. Where we have got to now is that section 196 has a chilling effect on communities and free speech. It potentially restricts the free flow of dialogue and discussion of policy ideas during an election campaign to the detriment of our democracy. As I was saying earlier, the TEC itself has asked for an amendment and we should respect that it has to administer it.

I have a feeling about how a number of members will vote on this, particularly given the history of this bill in this place, but it is well overdue for change because what we would be doing if we accepted this amendment is this, we would have a clause that says:

> A person must not between the issue of the writ for an election and the close of poll at that election print, publish, distribute or keep on display a "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.

That is a very reasonable clause to have in an electoral act.

In closing, I will say this: when we make a decision to run for office and for people who step up to be candidates, that takes some courage, but we do so knowing that you if stick your head above the parapet, someone will kick it. Someone will. That is the nature of political life. Not necessarily public life, but political life. It does not make it fair or reasonable, but as my mother always said to me, life is not fair. It is not.

So, we are in here because we made a choice and a decision to step up to represent our communities. We should be prepared in an election campaign to deal with reasonable criticism. We should not have to deal with, of course, the kind of awful treatment that recent candidates have and others of us, particularly women, have. In a democracy you kind of have to wear the slings and arrows, Mr President, because the effect of section 196 right now is that only comments that say nice things or positive things about a candidate are likely to get through that test or, certainly, if you want the candidate's permission to identify them by name or photo, you will only get that if you are going to say something nice about them. That is not how democracy rolls.

We are in this business, and all of us here today, in a contest of ideas and values; that is roughly 80 per cent to 85 per cent of issues on which we can all largely agree, which is always

very heartening, but in here we should be looking after democracy. We should be looking after freedom of speech, exercised responsibly, yes, but also the free and fair flow of ideas about politics and policy and their implications for our island and its people. That has to be something we celebrate and strengthen in an election campaign.

I strongly support this amendment bill.

[4.48 p.m.]

Ms THOMAS (Elwick) - Mr President, I thank members for their contributions to this debate. It has been interesting to listen to the different perspectives. I continually question and reflect upon my own view as I take in others' contributions. I am always open-minded to hearing others' views and to changing my mind accordingly, so it has been a really useful debate.

The bill amends section 196, as we have heard, of the *Electoral Act 2004*, to limit section 196 to applying only to how-to-vote cards. As we heard in the second reading speech, the original provision to use the name of a candidate without their permission was introduced in 1921. In 1985, the provision was expanded to also include a prohibition on the use of a photograph or likeness of a candidate without their permission.

We have heard the specific section read in through the second reading speech and other members have also referred to the specific section, so I will not read it out. However, I note that the penalty within the act for a breach of section 196, including publishing or distributing a poster or notice which contains the name, photograph or likeness of a candidate or intending candidate, is a fine not exceeding 300 penalty units or imprisonment for a term not exceeding 12 months or both. It is a significant penalty, which suggests that when this provision was drafted it was considered a serious offence.

The second reading speech notes that the original reason for introducing a restriction on the use of a name of a candidate has been lost over time. That is a shame. What do we do when the meaning of legislation is lost? That is what I have turned my mind to. Do we scrap it, or do we consider how it might perhaps be relevant and necessary today? Do we turn our minds to what problem may be solved by redefining the reason that has been lost, by keeping it and strengthening it?

Things have changed since 1921, and further since 1985. Social media platform Facebook was launched in 2004, which, coincidentally, is the same year of the introduction of the *Electoral Act 2004* which we are amending. Over the past 20 years, social media has increasingly played a role in election campaigns. It is not unfair to say that the legislation governing elections has not kept up with the rapid rise in the use of social media for election campaign purposes. We live in a world, sadly, where keyboard warriors thrive, allowed to disseminate baseless claims about individuals, including candidates in an election, with the intent and sometimes the effect of influencing how people vote.

This free rein to spread misinformation and defamatory mistruths about individuals also serves to discourage good people from putting their hand up to nominate for election. During the 2024 Legislative Council election I witnessed, and personally experienced, instances where a candidate's name and image were shared in a way that spread defamatory mistruths, with the intention of influencing the way people vote. This occurred despite section 196 of the *Electoral Act 2004* prescribing that the name and image of a candidate is not to be published without

their permission. When this breach of section 196 of the act was reported, the TEC requested that the publisher remove the Facebook posts. In response to the Leader's interjections earlier suggesting the current provisions do not stop people's image being used, they may not stop it but there is at least some action taken when people do breach this provision.

Publication of material like this often has the intent to, and certainly has the potential to, influence the way people vote and damage the reputation of a candidate. In addition to these impacts, it can also impact on the wellbeing of family members and friends of a candidate, as well as the candidate themselves.

The hateful world of keyboard warriors continues to grow at a much more rapid rate than legislation can keep up with. Without protection specific to the conduct of elections, many good people are discouraged from nominating for election. I will always stand up for an appropriate level of protection for candidates, balanced with the right to free speech. The fear of personal attack and reputational damage, and the subsequent impact on their mental health, career and wellbeing of their family and friends, all serve to put skilled people with good values from putting their hand up to serve in public office.

I certainly do not feel the need to share the name or photo of other candidates during an election. As an independent candidate, my approach has always been to focus on what I can offer, not on what others cannot. I focus on influencing others to vote for me, not not to vote for someone else. I find it interesting, in hearing the debate, that the party members are all for this. I offer that, maybe, given they are all for it, a compromise could be that the parties give each other permission at the start of an election period to share the individual names of individual candidates. Then they are able to use those provisions accordingly, without the negative impacts being experienced by individual, and particularly independent, candidates.

The member for Hobart asked why is it reasonable for us, or candidates for election, to have more protections under the law than the people we represent? In response, I ask, when the people who we represent apply for a job or for a board position, are they subject to, or at high risk of, defamatory, misleading information being conveyed to their prospective employer? Ultimately, elections are like a four-to-eight-week job interview or a job application process. The point of difference is that employers or selection panel members argue the case publicly about who is the best person for the job, where selection panel members who are, in our case, electors, can and do resort to carelessly disseminating lies and misinformation in order to sway the thinking of other panel members or electors.

Let us ponder that idea for a moment. Candidates for election are subject to different processes and experiences in the manner in which they are selected for their position. I argue it is, in fact, reasonable that they are accordingly provided with different protections under the law.

If anyone has information about the integrity of a candidate that voters ought to know, this can and should be reported on through appropriate channels where it can be investigated and reported on. It is not acceptable that voters are influenced by baseless claims their candidate can only refute via costly and lengthy defamation claims. It is my strong view that provisions in relation to the use of a candidate's name and image without their permission ought to be strengthened, not removed.

Section 196 needs to be strengthened or replaced so that the TEC and DPP will pursue prosecution when requests to remedy breaches of section 196 of the act are ignored. It floors

me that we have legislation that people can blatantly breach without penalty for fear of the legal risks of prosecution.

While section 196 of the *Electoral Act 2004* may not be perfect, it is the only protection specific to the conduct of elections that candidates have right now. While some may ignore it and go unpenalised, despite the significant penalties provided for under section 196 of the current act, if it deters some others then it means there is less misinformation and mistruths spread, which means the world is a better place. That is what I support. Therefore, I cannot support the bill.

[4.56 p.m.]

Mr HARRISS (Huon) - Mr President, I will not be long. I do not intend to go over things that have been discussed. Briefly, I will not be supporting the bill. There a couple of things that I will touch on. I appreciate the member for Hobart's contribution, she mentioned a waste of money.

Ms O'Connor - And time.

Mr HARRISS - Money and time. I could go through a fair list in the public arena where we waste a lot of money and a lot of time doing things that are not necessary.

Ms O'Connor - You have not got time for that.

Mr HARRISS - I will not, but it is relevant that we pick and choose sometimes. On that, as well, with advice, and I take it the TEC have provided advice that they suggested it be removed. In this place, we quite often receive advice from all different types of people, and we choose whether we accept that advice and follow it or whether we go down a different path. That is a part of democracy and a part of us having a voice and a vote in this place.

This does offer some protection for candidates, and it should. The member for Elwick raised a good point that you can give consent at any time to go, 'Yes, happy for you to go out and do whatever you wish with the name or the picture'.

Ms O'Connor - If you say nice things about us.

Mr HARRISS - That would not be a very big list of mine.

Ms Forrest - That might be disingenuous. It might backfire.

Mr HARRISS - If the government wants to pursue it, I think truth in political advertising is where it should be. We should not be cherry-picking this particular amendment, so I will not be supporting it.

[4.58 p.m.]

Ms WEBB (Nelson) - Thank you, Mr President. It has been an interesting debate. I thank members for their contributions.

We are really engaged with this, because it is something that does fundamentally impact a core thing that we all experience, which is election time, when we do ask the community to give us a job or continue to give us a job, if we are seeking re-election. It is an interesting

situation that we are making arguments about how that is handled and it is difficult, potentially, because it could be seen to be self-serving in some ways. However, I think it is quite marked that we are hearing a fairly concerted, comprehensive shared view come from independents in this Chamber, for example, about what is being proposed here. It is interesting because, were this bill to pass and we would have the newer, more slimmed-down version of section 196 in place, I am probably the first independent in this parliament to face election under that in May next year. For me, it is probably, of everybody here, the most pointed result and outcome that is likely to be faced. I am mindful of making a contribution standing in that position, and I certainly hope I am going to be as open and clear about my position as possible, that is seen to be a well-thought-through position and not a self-serving one.

I do not broadly support the removal - or in this case, the significant cutting down - of section 196. Not because section 196 is perfect or exactly what we would design to provide protections if we were starting with a blank page. I do think section 196 currently provides certain protections that, if we were to remove them, we would feel the effect of. It is not just about the protection of candidates. We have talked a lot about the protection of candidates in this debate. I have heard that from many people. It is beyond that. Yes, it is about how we might be protecting candidates or providing discrete protection to candidates as a class of people. More broadly, it is about protecting democracy: faith in our democratic process; faith that information is used truthfully and accurately; and faith that voters can go to a ballot box and make their choice on the basis of being exposed to information and assertions that are true or can be tested to be true is a fundamental health that our democracy requires.

When we are talking about the protections that are maybe provided under section 196 at the moment and contemplating their removal, we are not only talking about protecting candidates, we are talking about protecting democracy and whether, in removing section 196 in the way proposed here without anything accompanying it to come in behind and fill the gaps that it leaves in the ways we have deemed to be appropriate and relevant, we are posing a potential problem.

Ms O'Connor - There is already a problem: the chilling effects.

Ms WEBB - Not just for me when I front up for my election in May next year, but for our democracy.

It is an interesting thing for us to be contemplating in an ongoing way. We need to more forthrightly and proactively address this so we can determine what is appropriate in the way of protection in a forward-looking way, not just about defending section 196. It is interesting that the member for Hobart spoke about how we talked about this a year ago and quite soundly rejected the idea of changing section 196. Here we are, a year later, having exactly the same debate.

The failure there is not of the members of this Chamber whose view on the concerns raised a year ago has not changed. The difference is that the government has brought us back something exactly the same as a year ago. That is a failure on the part of the government, quite frankly. Had they been listening here in this Chamber a year ago, listening with the intent to understand, collaborate and respond proactively and positively, they would not have brought back this bill, which is exactly the same thing we rejected a year ago. They would have acknowledged concerns raised. They would have approached us in this intervening 12 months. We would have had conversations about the specific nature of the concerns held, the specific

things that we felt perhaps needed to be protected. We could have co-designed potential solutions so that when we did come to contemplate, as they wished to do so, removing section 197, we could have contemplated something to accompany it that may have weighed against what we were losing there with something positive in the way of protections and reasonable responses to put in alongside it.

That did not happen. It is a shame and a missed opportunity. When we comment on the 12 months that have elapsed since the last time we squarely rejected this prospect of removing section 196 in its substantive nature, no member here is at fault for maintaining the same view they had 12 months ago. It is the government who is at fault for bringing us back something that is exactly the same, without having had a conversation about how we could progress beyond that in contemplating it again.

That is something I absolutely assert. What a shame. I think the community expects politics to work a little bit differently now. We now have the mechanisms in this parliament to work differently if we want to: more collaboratively. If the government is looking for an outcome and wants to actually deliver a strong plan for our state, I tell you what, a bit of collaboration would not go astray. They could have been winning the day if that had happened and we could have all been moving forward with an electoral act that was improved, addressing the issues that section 196 presents. I agree there are issues that section 196 presents, but that could have worked to alleviate the things that would also be lost with changing it.

We have heard that other jurisdictions do not have a similar provision in their electoral statutes, and that is true, but I think that is a really simplistic justification to say that is why we should remove it from ours, as I said in the briefing this morning, given the changing context in which we hold elections now in a modern age with social media and the like. With AI, with people able to make deep fakes and all those things barrelling down on us and developing at a pace of knots, it may be that we are the best-protected jurisdiction. Others will start to think about - not necessarily adopting our section 196, I do not think anyone would do that because it is flawed - how to adopt some of the protections that are in it and put them into their own arrangements going forward so that people are better protected. That is what we should be doing here.

The argument being made - because I heard responses saying that section 196 is flawed, I think it is absolutely acceptable to admit that - is before we remove it, we have something else alongside to address the concerns of the valuable things that will be lost when we remove it. Why should we be left without the protections that it does afford in some positive ways, when thought and care has not been given to putting something in place to replace it?

I think the community value the idea; all polling done on this matter certainly shows that they do. They value the idea of truth in political advertising and truth in politics, quite frankly. I know it seems a novel concept to many of us who are in this space but there has been recent research, through the Susan McKinnon Foundation, looking into how people regard truth in political advertising laws that are present in other jurisdictions, and it has been very positive in its findings. The report that has come out of the Susan McKinnon Foundation research - they have had an interim report with various stakeholders who are involved in truth in political advertising laws, such as current and former premiers, ministers, MPs, electoral commissioners, political party directors, secretaries, civil society groups. They looked primarily at South Australia but they also did interviews with people from New South Wales and Victoria, jurisdictions that currently do not have those laws. That report found that truth in

political advertising is generally well supported. Truth and political laws, I should say, are generally well supported.

It was considered that it has changed the face of electoral campaigning in South Australia. It was considered that the electoral commission of South Australia's reputation for impartiality was unaffected by administrating those truth in political advertising laws that they have in that jurisdiction, and the Electoral Commission continues to enjoy strong public confidence there.

It considered that truth in political advertising laws have been increasingly used as a political tool, and they may not adequately deal with matters such as misinformation, disinformation and artificial intelligence. They are not perfect but they are quite positively regarded and are not having some of the detrimental effects that we are warned of. I firmly believe that we need to proactively look at such arrangements for this state. If we were, we would be in a better position to contemplate addressing matters relating to section 196.

I think there are current community concerns about negative, attacking election campaign behaviour. I think section 196 likely alleviates some of that in this state. We do not know.

Ms O'Connor - That is a big call. That is a really big suppositional call.

Ms WEBB - We do not know that. I am about to say we do not know that because I do not believe it has been looked into, to make an assessment about the degree to which there is a more generally protective function occurring through the presence of section 196 that means we do not get the sorts of negative attacking campaigning here that we might see in other jurisdictions.

In seeking to make the assertion that section 196 has no value to offer us, if you have not actually looked into whether it is providing a protective mechanism, then we cannot say that it has no value. We have not assessed that. I asked in the briefing if that had been assessed in the terms of the TEC requesting or putting forward the idea that the act could be amended to reduce section 196 in the way that the bill provides for. Has the TEC made a full assessment of the role that section 196 currently plays in our elections? They have certainly been able to be clear they feel they are not well resourced to deal with it or that it is burdensome for them to administer. That is fine. We can accept that as information from the TEC. That certainly presents things to be resolved or dealt with. Resourcing can always be discussed and potentially dealt with. However, in terms of the actual impact on the tenor of our election campaigns, I am interested know what section 196 actually does before we contemplate gutting it.

I acknowledge there are concerns regarding freedom of speech and the right to holding one's individual point of view and being able to express that freely. Those sorts of things are fundamental cornerstones of our democracy. However, it is widely recognised, both via court deliberations as well as more broadly in the community, that none of us have an absolute right to freedom of speech. There is also a reasonable expectation if you choose to engage in public debate and share your personal opinion that some effort has to be made to make informed speech or truthful speech.

During an election campaign, this is particularly sensitive. It is incumbent on everyone to be accountable for how they may try to seek to influence both the conduct and the outcome of elections. The expectations of responsible accountability cover candidates and the broader electorate. Of course, ideally that is what we would like to see play out.

Section 196 does seek to promote that and ensure that accountability for candidates and campaigners and the broader electorate. It is for only a very limited period of time, from the writs for the election to the poll day. It is not entirely constraining what people can say. It does constrain in specific ways. The reasons it is constrained to that time frame is because that four-week time frame is when people are casting their vote. That is when, if there is, for example, a determined spread of misinformation about a candidate, it is going to influence the way people vote and there is no mechanism that candidates can use potentially to address that except section 196 at the moment. You cannot bring an action of defamation in time to be able to then correct the record before people are walking in to vote.

You may not be in a position to be able to spend your way out of it and put the correct information so broadly into the community - certainly not with our spending caps in this place - to counteract the misinformation being put out about you.

It is very different to a regular citizen going for a regular job somewhere else. This is not the same as a normal job and a normal job interview process or the other. What we are seeing in this situation is about people seeking a job, but it is also about the functioning of our democracy. The functioning of our democracy requires free and fair elections. The functioning of our democracy - a healthy democracy - requires informed voters who are able to cast an informed vote on election day. The four-week period leading into that - and, in fact, voting happens, as we know now, through early voting in the weeks leading into an election - is a very important period of time in which our democracy and the health of it is being given effect to.

There is every reason for us to contemplate how we protect truth during that period of time. That is how I would emphasise it: not how we protect candidates but how we protect truth. If we were to be going forward, looking at how we might most constructively do that in future, if we wanted to modernise and move away from section 196, that is where our focus would be. It is actually not about protecting candidates in that four-week period. It is about protecting truth and protecting voters and their right to be informed, truthfully, leading into an election and placing their vote. That is probably where we would look if we were thinking about better ways to be protective of our democracy. It is a by-product that in protecting our democracy, candidates will have some forms of protections conferred on and around them because protecting the process, most likely, is going to involve protection of candidates to some extent.

I have other points here. I am aware that many other members have made similar points, and I am appreciative of that. We have talked about a modern context. We do live in an age of information overload. There is a lot of information coming at us. Sometimes it is hard to judge what is true and what is not. There are all sorts of ways, as a community, we are contemplating how we can protect ourselves broadly as citizens in our communities and our societies when it comes to matters relating to misinformation, disinformation, deepfakes and the like.

The context of our democracy and our electoral systems is one aspect of that. I have no doubt that it warrants and requires specific consideration in terms of protections and arrangements to deal with these modern contexts. Does section 196 do that now? Absolutely not. However, it does do something and if we remove it without putting something in behind it to start the task of addressing our modern context and the protections that are going to be required, then we are just leaving ourselves short of relatively light protections at the moment.

People can use candidate names in all kinds of contexts during that four-week period that are not captured by section 196. I can put out a media release with the candidate's name in it and make comments about it. The member for Hobart could have done that instead of making a social media post in the illustration of the example she provided to us. It could have been put in a media release during that campaign and that would have been entirely acceptable.

Ms O'Connor - Why should it be so restricted?

Ms WEBB - I am pointing to the fact that it is entirely restricted.

Ms O'Connor - These are surprising arguments coming from you, I have to say.

Ms WEBB - Yes, it is a difficult and complex situation. I do not think anyone has stood here and said that they insist section 196 should stand as it is forever. I think we all accept that, ultimately, it needs to be looked at and developed. There are ways we can do that. A logical and responsible course of action is to refer this matter to the Joint Standing Committee on Electoral Matters. That committee was established to look at issues such as this: matters relating to our electoral laws and the way we conduct elections. We have the committee before us. It has already been referred to in this debate when other members were quoting from correspondence from Dr Robin Banks. Dr Banks made us aware of it - it is in the public domain; it is on the website at the moment - that she had made a submission to the Joint Standing Committee on Electoral Matters in the current review of the elections from earlier this year. The issues around section 196 were raised in that submission and that is why she brought it to our attention for this debate too.

In some ways, that committee is already contemplating, potentially, because it is in evidence before it and I am not pre-empting the committee in any way in how it may contemplate that evidence. It certainly has evidence before it that references this matter. That is a natural opportunity. It is an opportunity that I would hope we might contemplate in this Chamber as a constructive way forward. Having a close look at this through a committee process allows us not just to do the straightforward cut that is there at the moment in this bill, cutting back section 196. It allows us to think about what might go alongside that, given the clear concerns and issues that have been raised, not just in this place but by others elsewhere.

Mr President, that is probably a longer contribution than I had thought to make, to be honest, given others' very valuable thoughts being shared on this. I do not support this bill as it stands, just as I did not a year ago. I am disappointed to be having to address it again in exactly the same form essentially, when we could have collaboratively contemplated differently if we had spent the intervening time talking to each other about this and acknowledging things that were raised in the previous debate. I would not be as worried about supporting this bill if we had put truth-in-political-advertising arrangements in place. I would not be as worried if we had, in other ways, strengthened our democracy and our electoral system through better donation disclosure and campaign arrangements. The more we strengthen and make our democracy healthy through rigorous arrangements on those fronts, the less it is problematic when we want to potentially contemplate removing protections like this.

I hope we move forward on all those matters. I believe and hope that, as a Chamber, we are going to contemplate sending this for a closer look, given the concerns that have been raised here. I really hope that this time around, it has been a take two for the government and we can work together to look at how to take this forward in a way that is not just seen as negative by

a whole lot of people in this Chamber who are representing their community and are cognisant of the impact that it might have.

[5.22 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Mr President, I have a bit of summing up. Some members have raised concerns about the need to prevent comments or material that misrepresents information about candidates. It is important to emphasise that section 196 does not target misrepresentation. It is an equal bar on people publishing truthful material in good faith. It is a significant fetter on free communication on electoral matters. It is very arguable that the extent of the prohibition is not reasonably appropriate and adapted to prevent misrepresentation when it bars truthful representation to an equal extent as required to avoid unconstitutional burdening of political communications. That is an overall statement.

There is a response for the member for Murchison. In relation to the issue of gender and the operations of section 196, and the undertaking of gender analysis in relation to section 196, several limitations need to be taken into account. At each election there is a varying gender balance. Any analysis of complaints is obviously a reflection on those complaints made, not contraventions of the prevention. For example, there may be contraventions that are not complained of. The breakdown of complaints by gender also does not provide an indication as to whether the nature of the contravention reflected a gender bias or discrimination.

Over the break, the department has been in contact with the TEC to ascertain what data is available in relation to complaints under section 196. Although there have been isolated instances of personal attacks that have led to a complaint under section 196, the TEC indicated that this was not the norm. No trend or prevalence of gendered focus in complaints was noted.

I can report that, at the last election, there were 23 complaints under section 196. Three complaints related to a female candidate and all these were in relation to the former leader of the ALP. The government acknowledges the concerns raised by the member regarding the gender impact that could arise from some of the commentary that may be made in relation to some candidates.

Ms Forrest - If I may, Mr President. I was asking whether a gender lens has been put across like a gender legislative index applied, because you do not necessarily have to have evidence from the last election to know what the potential risks are. I appreciate that information, but it is not strictly what I was asking.

Ms Webb - It is not about what has been complained about. It is about what has been prevented from happening by having it.

Mrs HISCUTT - In response to the member for Rumney, I can advise that the *Electoral Matters (Miscellaneous Amendments) Act* commenced, except for certain enforcement provisions, on 1 July this year. The Electoral Disclosure and Funding Bill is due to commence on 1 July 2025, along with the remaining provisions of the *Electoral Matters (Miscellaneous Amendments) Act*.

I have sat there and listened to members here today and understand that there are a range of views on our electoral legislation and this section in particular. It is important that freedom

of political communication is protected while also noting the concerns raised in relation to the potential for vexatious use of a candidate's name or likeness if this section was amended.

The government considers this is an important reform. However, we acknowledge the concerns raised by members about the need to consider whether any complementary reforms are required. While the government does not consider that it is the case that there is a need for additional protections for candidates at elections, it is accepted many members consider that there is a need for additional examination of this bill. I have sat there, and you may have seen me running around like a bee in a bottle. My intention, at the will of the House, is to adjourn debate on this bill and then to move a motion to have it referred to the electoral matters committee for further consideration.

Debate adjourned.

MOTION

Electoral Amendment Bill 2024 (No. 25) - Referral to the Joint Standing Committee on Electoral Matters

[5.27 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council)(by leave) - Mr President, I move -

> That the Electoral Amendment Bill 2024 (No. 25) be referred to the Joint Standing Committee on Electoral Matters for consideration and reporting.

Mr President, I do not feel I need to speak further to that motion, having explained I have listened carefully and I would like to keep this bill alive. If the committee were to have a look and report back, we may very well get the same answer we have here today. I will see if that motion is allowed.

[5.27 p.m.]

Ms WEBB (Nelson) - Thank you, Mr President. I support this going to the committee; that is an appropriate way to look at it. It will be looked at in a context that sits within a committee that is looking at other matters relating to this similar area and the same piece of legislation. That is a positive outcome and I thank the Leader for listening and being collaborative about that. Hopefully, one of the things that will be the case is that the committee is a Joint House committee and has membership from across both places and also a range of parties and independents, so there is going to be an opportunity for very balanced consideration of it there.

Motion agreed to.