ATTACHMENT B

Government Agencies (Campaign Advertising) Bill 2008

COMMENTS

by

DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

This Bill would be difficult to implement successfully in its existing form. If it is to operate effectively as intended, it would require significant amendment. However, it is arguable that the Bill is fundamentally flawed and that the scheme set out in the Bill is unlikely to achieve its objective. In addition, the Bill fails to adequately address the situation of independent statutory officer holders such as the Electoral Commission.

Specific issues of concern are discussed below.

1. The stated objective of the legislation (clause 5) is "to prevent the use of public funds for advertising or other communications for party political purposes."
   - The expression "party political purposes" is not defined. This legislation cannot operate without a clear understanding of what kind of information is not permitted in an advertising campaign.
   - Clause 6 of the Bill includes a statement of the general principle (c) that information programs and education campaigns must not be "conducted for political party purposes." That clause also expresses the principle (b) that governments may use public funds for information programs and education campaigns "to explain government policies, programs or services and to tell members of the public about their entitlements, rights and obligations." The Bill appears to assume a clear distinction between the programs and campaigns described in paragraphs 6(b) and (c). It is likely that every program or campaign undertaken by an agency will invite argument about whether there is a "party political purpose" involved.
2. The prohibition of activity is centred on the concept of a "government campaign". Clause 8 defines this very broadly, to mean the "dissemination by a government agency of information .... about a government program, policy or matter which affects their entitlements, rights or obligations", and includes information to explain the program, policy or matter.
   - Paragraph 8(c) excludes jobs and tender advertising, and also (apparently) seeks to significantly narrow the scope of the legislation by excluding "other routine advertising carried out by an agency in relation to its operational activities." [see 8(c)(iii)].
   - The term "government campaign" is defined so broadly that it can arguably include the dissemination of any information by an agency, and the exclusions are not sufficiently clear to avoid argument.
   - In particular, the expression "routine operational activities" might be considered to be all-inclusive (i.e. everything the agency legally does relates to its operational activities), or the exclusion might be taken to be negated entirely by the presence of any party political content at all. Similarly, the exclusions for jobs and tender advertising might be negated by political content.

- Further, what is "routine"? If this is interpreted narrowly, so that the information relates entirely to functions such as parking inspection or lawn mowing, on one hand one might ask why any campaign material would be disseminated. On the other hand, those are precisely the kinds of activity that attract political debate.

3. Clause 10 of the Bill obliges the Auditor-General to report to the responsible Minister, if asked, in relation to a campaign. A minister must ask the Auditor-General to report if the "campaign costs" of a campaign are "likely to" exceed $20,000, and may ask if (inter alia) the costs are "not expected" to exceed $20,000. Consideration might be given to whether "not expected" and "are likely" are mutually exclusive expressions. More importantly, perhaps, the clause raises several concerns about appropriate process and governance.
   - The amount of $20,000 appears to be arbitrarily determined, presumably to represent the threshold for a significant campaign. The imposition of such a threshold is likely to add to the already significant uncertainty generated by this legislation. This particular area of uncertainty is (ultimately, along with the others) thrust upon the Auditor-General who, in order to report to the Minister, must determine:
     (a) the likelihood that costs will exceed $20,000 – a request will have been made under either paragraph 10(1) or 10(2), and it is not satisfactory to simply consider a request to have defaulted to (b) if the Auditor-General considers that costs are "not expected" to exceed $20,000. The Minister's discretion should be preserved.
     (b) whether the campaign complies with the Act, which would involve the Auditor-General grappling with all of the issues raised in relation to the legislation.
   - The provision reduces the Auditor General's discretion to allocate her resources across a number of audit subjects, compelling the Auditor-General to allocate (possibly significant) resources to a particular issue. If too broad a net is cast, and a large number of matters are referred for reporting, this requirement could take up a large proportion of the Auditor-General's available resources.
   - When the Assembly has appropriated money to the Executive, the Executive can spend it. 'Micro management' by the Assembly of the Executive's functions in this way arguably constitutes an inappropriate interference in the functions of the Executive.
   - This submission assumes that the Auditor-General, or the Under-Treasurer, has commented on issues relating to the *Financial Management Act 1996*.

4. The prohibition on conducting certain government campaigns appears in clause 11. The Minister may conduct a campaign only if the responsible chief executive certifies that the campaign complies with the Act. If the campaign costs "are likely" to exceed $20,000, the Auditor-General must also have reported in relation to compliance with the Act.
   - It is only in this clause that the Minister appears to be the one "conducting" a campaign. Other relevant provisions refer to campaigns being "conducted", "undertaken" or "proposed" by a government agency. Perhaps this is a drafting or instructing error.
   - If it is not, it is arguably most inappropriate for the Minister's discretion to be statutorily fettered by the requirement for certification of his or her chief executive.
   - There is a positive requirement for the chief executive's certification of compliance.
   - In contrast, the Auditor-General need only report – there is no requirement for the report to state that the campaign complies with the Act. This is probably more appropriate, as there appears to be no consequence of non-compliance, except that a Minister will be compelled to acknowledge that a campaign proceeded without certification.

5. The requirement in clause 12, that the responsible Minister must prepare a statement of the "total campaign costs" for a campaign, is unclear and burdensome.
   - The term "campaign costs" is defined in clause 9, and would appear to encompass all that is intended to be included in those costs. If that is the case, the word "total" should be omitted from the Bill. If not, then "total campaign costs" should be separately defined.
   - Given the potential scope of this legislation, the requirement for a statement of costs for each campaign will add considerably to the public cost of administering the functions of agencies, and should be accounted for in a regulatory impact statement for the Bill.

6. Clause 13 states that the Minister [administering this Act] must prepare guidelines consistent with the object and general principles set out in clauses 5 and 6. Guidelines are a disallowable instrument.
   - Whilst the proposed provisions for inclusion in guidelines reflect laudable aims, they are neither particularly relevant to the object of the legislation nor (necessarily) appropriate to every government campaign.
   - Several of the proposed (mandatory) inclusions raise particular concerns.
     (a) Paragraph 3(b) requires objectivity and fairness, which seems reasonable but will invariably invite challenge from stakeholders or non-government politicians. Further, the ban on comment, opinion or promotion of the performance of the government of the day leaves one wondering what any campaign material might contain and avoid challenge or argument about its compliance with this legislation. Annual reports of agencies would be significantly reduced. Brochures, pamphlets, flyers, discussion papers, etc would be in breach of the guidelines if they contained anything more than established fact. Clause 8 probably extends this prohibition to an invitation to people to contact the agency for an opinion or advice about the material. Example 4 does not fit easily with this provision.
     (b) The prohibition, in paragraph 13(3)(c), on the use of "slogans or other advertising techniques" would appear to be completely unworkable. By definition, any advertising must use advertising techniques. In addition, to be effective as a communication tool, even government advertising has to attract and retain the attention of its audience. Barring the use of slogans and jingles would severely restrict the effectiveness of government advertising without necessarily achieving the objective of the Bill.
     (c) The scope of paragraph 3(e) might be clarified by removing the words "the government or" after "promoting". Again the difficulty seems to be that there is no separation of the notions of "party political" interests/purposes and the interests or objectives of the government of the day, regardless of the political party that forms it. In other words, it might be legitimate for a publication to say, in effect, "This is where this government is going with this particular issue, and another government might do the same, or might issue another publication expressing a different view." That will not be the case if the intent of a publication is to promote the political party in power, rather than the business and objectives of the current government. The meaning of "designed effect" is not apparent.
     (d) The closest the Bill comes to defining "party political purpose" is in the examples given under paragraph 13(3)(e). However, the examples really illustrate how difficult it is to arrive at a clear definition. By way of illustration:
        i. Example 1 is "mentioning the party in government or the party leader by name". There are many examples of why it would be appropriate to include this information in government publications, not least that government information contains frequent references to the name of the

government party leader – the Chief Minister – and legitimate references to political party names (e.g. in Electoral Commission publications).

ii. Example 4 is "designing to influence public support for a political party, a candidate for election, a Minister or a member of the Assembly". Given that the Bill acknowledges (in clause 6) that it is appropriate for a government to use campaigns to explain government policies and programs, it is arguable that it would be impossible to rule a line, between advertising that simply explains a government policy, and advertising that is designed to influence support for that policy and, implicitly, the governing party and the responsible Minister or Member.

iii. Example 5 is "mentioning or linking to a website of a politician or a political party". The Electoral Commission website, for example, contains links of this type as the voting public have asked for them. The information is arguably appropriate, given that links are provided equally for all parties and candidates participating in an election.

(e) Subclause 13(3) includes a range of other restrictions that, arguably, would restrict the effectiveness of government information campaigns without necessarily assisting with the goal of preventing party political advertising. In particular, the restrictions on expressing comment or opinion, or statements promoting the Government's performance, are arguably unworkable. Analysis of government advertising would indicate many cases of advertising that would be entirely appropriate (in the sense of not being party political and reasonable in the circumstances) that would nonetheless indicate comments, opinions or statements that could be taken as promoting the government's performance. For example, Government health warnings and road safety campaigns could be identified as including comments or opinions (for example, "you're an idiot if you drink and drive") that would nonetheless be appropriate.

(f) The Bill does not expressly state what is meant by 'compliance'. Rather, it provides for ministerial "guidelines" to be made consistent with the object and general principles of the Act, and that they must include a stated set of provisions. The Bill arguably implies that failure to follow the guidelines would constitute failure to comply with the Act, but it does not expressly state that.

7. The restriction, in clause 14, on any government advertising in the 12 week period before an election would be clearly unacceptable to most agencies, but in particular to the Electoral Commission – this is the time when the Commission must conduct an information campaign. The Bill clearly would make the Electoral Commission information campaign illegal – this would have to be corrected if the Bill were to proceed.

- It is not clear why there is a need to ban government campaigns in the lead up to an election if the campaigns pass the "no party political content" test.
- Another significant problem with the proposed ban is that the definition of "government campaign" in clause 8 is so broad that it applies to all means of dissemination of government information in any form at any time – it is not confined to more formal "advertising campaigns" that have a discrete beginning and end. Therefore it appears that clause 14 would require all government agencies to remove all forms of its public communications from public access during the 12 week period – including removing website material and pamphlets and, arguably, refusing to provide information in any form about a government program, policy or matter which affects their entitlements, rights or obligations, such as telephone and counter enquiries and replies to letters and emails. This situation would be clearly unacceptable.

- In relation to the general body of information potentially covered by this Bill, it would be extremely damaging for a government, of any political persuasion, to be seen to be shutting down public information immediately before an election.

8. Clause 14 does not clearly define when the 12 week period commences and ends, as it refers to "the 12-week period immediately before a general election". The Bill presumably means the 12 week period ending on polling day for a general election, but the wording of the existing clause is not clear as there is no legal definition that ties the phrase "general election" with "polling day" – in practice there is a 36 day election period set out in the Electoral Act. If this section is to be retained in some form, it should clearly refer to polling day as the ending date of the ban.

9. However, given the above concerns, the proposed ban is unworkable. If a ban is to be imposed, it should be constrained to specified types of communication campaigns (such as formal advertising campaigns) and should not cover normal communication activities such as the provision by agencies of information on websites, in publications or by personal contact.

10. The requirement, in paragraph 13(3)(g), to clearly identify that material is part of a government campaign duplicates the authorisation requirements in the *Electoral Act 1992* and the Commonwealth's *Broadcasting Services Act 1992*. Therefore, it is arguably unnecessary. The other Acts contain very specific requirements that must be met, whereas the Bill's requirement is not specific. The implied requirement, in the example that a radio or TV advertisement would need an authorisation at both the start and end of an advertisement, would not be realistic given the brevity of those ads and the costs of added time, if the ads were thereby made longer.

11. Clause 15 provides for the exemption of a campaign from the Act.
    - It might be argued that paragraph 15(2)(b) falls within paragraph (a). It is noted that "emergency" is not defined in this Bill or in the *Legislation Act 2001*. Perhaps the reference in (b) is to urgency in relation to something that is not an "event". The definition in the *Emergencies Act 2004*, which would not apply to this Bill, is:
      > " ***emergency*** means an actual or imminent event that requires a significant and coordinated response. "
    - The expression "other extraordinary circumstances" might be very broadly interpreted.
    - When the Auditor-General is informed about an exemption in accordance with subclause 15(3), is there an implied obligation upon the Auditor-General to comment or report? If so, then all of the comments in relation to clause 10 are applicable to this provision.
    - Subclause 15(3) states that an exemption is a disallowable instrument. It will be difficult to separate scrutiny of compliance with this legislation from party politics, and it is difficult to imagine when a disallowable instrument under this provision would be supported. Even when subclause 15(2) can be met, an exemption would be unlikely to succeed. Resort to the provision might therefore be avoided although, in an emergency, the provision is probably redundant if the campaign relates to the event itself, as the event will generally have passed when the instrument comes before the Assembly for consideration. Two questions arise:
      a. Might this legislation create circumstances in which vital information is disseminated slowly because of the procedural requirements of this legislation? For example, might the preparation of the community for a possible outbreak of 'swine flu' be inadequate because the campaign required certification, and subclause 15(2) did not apply?

b. Might this legislation result in a general retraction of public information because of the significant additional procedure and cost involved in demonstrating compliance?

12. The following paragraphs contain extracts from Hansard. They reflect a diversity of views on the separation of process, policy and politics. The first example relates to debate about subordinate planning legislation (including the Territory Plan and the *Planning and Development Regulation 2008*). The Territory Plan, and related information documents about development assessment, would arguably be covered by paragraph 8(a) of the Bill. It is difficult to glean from the extracts a clear statement of:
    - the extent to which politics should intervene in the processes of agencies;
    - the distinction between policy and party politics;
    - how a public statement of policy might be seen <u>not</u> to promote "party political purposes"; or
    - the extent to which subordinate planning legislation should be read by the community in the context of this public debate (i.e. in light of the political statements made about the subject matter).

"Good planning brings together the communal, economic and environmental needs of our society. And, yes, bringing these goals together can be a difficult balancing act. ..... At one extreme, there will always be calls to "let it rip", and at the other there will always be calls for "not in my backyard". And our local politics will always throw up representatives of these views. But Labor in Canberra will always hold the middle ground. Above all else, this is why the government is determined to keep politics out of planning. This city will not go the way of Wollongong. ..... Making development application assessment a statutory function handled at arm's length from government was a major reform. Mr Corbell's legacy to our city is that politicians do not make decisions on individual development applications. ..... I genuinely look forward to the day that this becomes a cross-party consensus in Canberra, but until then I am content to fight for it as Labor's view: "no" to short-term partisan politics and "yes" to long-term, evidence-based policy." [Mr Barr, 31 March 2009, p1580]

"For the most part, I support the comments made in [Mr Barr's] statement, including those about keeping politics out of planning at the individual level. At the micro level, at the level of getting involved in individual development applications, I support this wholeheartedly. The recent reforms to our planning system ensure that our development assessment process is at arm's length from the politicians, which is where it should be. However, this is something which I do not believe can, or even should, happen at the macro level. At the macro level, I believe that the government, the Assembly and the community at large should stay involved in planning." [Ms Le Couteur, 2 April 2009, p1779]

"We are keen to see neighbourhood planning and master planning used as a key tool to reduce the level of community angst about developments. We believe it is the key to ensuring that the territory plan reflects the aspirations of the residents of Canberra. It was a key part of our agenda in the Labor-Greens agreement and it is a key part that the Greens want to see strengthened in our planning system." [Ms Le Couteur, 2 April 2009, p1781]

"The framing of the argument was quite extraordinary. [Mr Barr] made the statement that he wants to take the politics out of planning and went on to say that Labor is always right. He then said that we did not want to be like Wollongong where Labor was in charge and managed to corrupt the process." [Mr Seselja, 2 April 2009, p1782]

"The development of the Canberra spatial plan and the development of the sustainable transport plan are long-term planning frameworks that today are guiding the future growth and development of our city. The Liberals are so prickly on this issue because they have no long-term vision of their own." [Mr Corbell, 2 April 2009, p1786]

"I note Mr Seselja's comments in response where he sought to try and tar the work of the ACT planning authority with very poor practices in place in places such as Wollongong City Council. I think Mr Seselja fails to understand the point that the minister and indeed the Labor government have sought to make, and that is that we should not see elected officials involved in decisions on individual development applications unless there are exceptional circumstances."
[Mr Corbell, 2 April 2009, p1827]

13. Similar issues are raised by another recent Assembly debate, this in relation to social housing. In this instance, the proposed consultation process [caught by paragraph 8(b) of the Bill] might be called into question, as the public record clearly demonstrates a divergence in the preferred approach of the parties represented in the Assembly. The "campaign" would be seen as reflecting, and possibly promoting, the "party political purposes" of the party in government.

"If we wish to make political issues, I implore the Assembly to make political capital out of another issue. Let us not make political capital out of something as horrible as homelessness. I would hope in my heart that what we share is a need to do something about it."
[Mr Hargreaves, 2 April 2009, p1771]

"Item (3) calls on the chamber to support the ACT government's commitment to a multi-partisan way forward, commencing with a consultative forum relating to social housing. We have already agreed, via my motion, that the ACT government, prior to issuing tenders for stage 2 of the project at the end of this financial year, conduct a consultative forum ..... I am somewhat uncertain as to what the minister is proposing with his due [sic] consultative forum and am cautious as to whether it may redirect our previous agreement ..... I know that many community organisations are very pleased with the previously agreed approach ..... I do, however, welcome the government's commitment to a multi-partisan approach and look forward to the minister's engagement with the Greens and Liberals on these issues. I also hope that there is a realisation that, by passing this motion, it does not mean that the Greens and Liberals give their support to Labor's way forward ..... The amendments I propose welcome an approach by Labor that seeks consensus and incorporates ideas put forward by all three parties."
[Ms Bresnan, 2 April 2009, pp1772, 1773]

"It is very disappointing that the Greens are in fact supporting the government's attempt to try to fill their agenda ..... It is in stark contrast to what you might imagine from all the advertising that the government did last September and October. Again, we heard the minister, Mr Hargreaves, say that housing is above politics, that we should not be talking about housing in this place perhaps. Is that what he is suggesting? Are we not allowed to question the minister's ideas when it comes to housing? Are we not allowed to challenge the minister when it comes to housing? Are we not allowed to give alternative ideas when it comes to housing? I do not know what the minister means when he says that housing is above politics. Perhaps we should not be scrutinising Housing ACT. Perhaps we should not be saying that we should be raising the bar in the ACT. Perhaps we should not be putting political pressure on the minister to try to raise the bar. Instead, the minister says, "No, housing is above politics". In short, 'Don't question me; don't give me any hard questions.' "
[Mr Coe, 2 April 2009, p1774]

14. The material reproduced in paragraphs 9 and 10 above do little to resolve the question of how to define the scope of the Bill. The purpose for their inclusion is to illustrate that the Bill fails to recognise the relationship between politics and the functions of agencies.

15. The Bill does not contain any transition provisions to allow for government campaigns that are underway when the Bill commences. Given the very broad definition of "government campaign" and the fact that it covers almost every method of public communication made by agencies, there will presumably be a need for the certification by chief executives and the Auditor General of many "campaigns". Transition provisions would be needed to allow existing campaigns to continue while certification is obtained.