LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into 2020 ACT Election and the Electoral Act

Submission Number: 005

Date Authorised for Publication: 28 April 2021

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8 April 2021

The Committee Secretary
Standing Committee on Justice and Community Safety

(by e-mail)

Inquiry into 2020 ACT Election and the Electoral Act

Thank you for the opportunity to provide a submission to the inquiry into the 2020 ACT Election and the *Electoral Act 1992* (the Act).

I am a PhD student at the Australian National University, studying political science and the public understanding of law. During the 2020 ACT Election, I worked as a research assistant on the *Smartvote Australia* project: a research project in collaboration with the *Canberra Times* to develop a better understanding of electoral behaviour.

This submission is in my own capacity as a researcher with an interest in electoral law and not on behalf of the *Smartvote Australia* team (with whom I am not currently employed). Despite this submission being in my personal capacity, some of this submission is informed by my experiences engaging with the Electoral Commission. On 19 March 2021, I received an Investigation Notice from the Electoral Commissioner threatening me with six months jail if I did not produce four years of the University's financial records. In response to this notice, which was *clearly* legally incorrect, I wrote to the Electoral Commissioner, the Attorney-General, and the Special Minister of State (who has portfolio responsibility for the Act) in order to note the problems with the Act that had resulted in the manifestly absurd outcome. The notice was revoked, and Minister Steel has referred the issue to the Justice and Community Safety Directorate as part of their review of the Act. As such, I do not cover that issue in this submission.

In this submission, I raise issues about the defined scope of the Act (section 4), the proposed prohibition on misleading electoral advertising due to commence in July 2021 (new section 297A), and the intersection of the proposed restrictions on roadside usage with the obligation of the Electoral Commission to publish information about candidates (section 110A).

I strongly urge the Committee to recommend that section 4 be amended to avoid obvious constitutional challenge. I urge the Committee to recommend that the ACT Electoral Commissioner either receives an increased adjustment to base in order to recruit a permanent legal officer or, during election periods, seconds a legal officer from the Justice and Community Safety Directorate. And I encourage the Committee to address the narrowing scope of disseminating electoral information during election campaigns.

Scope of the Act

Section 4 of the Act—which defines the 'electoral matter' that is regulated by the Act—is no longer consistent with the implied freedom of political communication and is unlikely to resist a challenge on that basis.

This is not a surprising claim. Section 4 has been largely unchanged since 2001, and yet the leading cases about the implied freedom of political communication (*McCloy v New South Wales* (2015) 256 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328) and leading cases in electoral law (such as *Unions v New South Wales* (2019) 264 CLR 595) have occurred since.

The relevant part of section 4 currently reads:

(1) In this Act, electoral matter is matter, in printed or electronic form, that is intended or likely to affect voting at an election.

(2) Without limiting subsection (1), matter is taken to be intended or likely to affect voting at an election if it contains an express or implicit reference to, or comment on—

  (a) the election; or

  (b) the performance of the Government or Opposition, or a previous Government or Opposition; or

  (c) the performance of an MLA or former MLA; or

  (d) the performance of a political party, candidate or group of candidates in the election; or

  (e) an issue submitted to, or otherwise before, the electors in relation to the election.

This definition turns out to be surprisingly broad if read literally and without reference to the case law. An ANU researcher with no interest at all in the ACT Election could write an academic article about house prices, gambling policy, the energy efficiency of trams, or arts policy and discover, when reading the template e-mail sent by the Electoral Commissioner, that they might have committed an electoral offence by not properly authorising the material. And if the research was disseminated at a conference or event that cost $50,000, then the ANU could be fined by the Electoral Commissioner. Clearly, this material is not supposed to be within the scope of the Act and, yet, it is.

And it is not just research materials that are potentially within scope. Art that is otherwise unrelated to the election except that it provides commentary on an issue that might be before the electors in relation to the election can fall within its scope. A local high school performance of *Merchant of Venice* could be within scope if either justice policy or antisemitism emerge as issues 'otherwise before' electors in relation to the election. Or a performance of Gilbert and Sullivan's *Mikado* could be deemed electoral matter if, as is usual performance practice, the words to 'As Some Day It May Happen' were updated to reference Australian political parties, even though there is no serious attempt to influence a person's vote.

What is perhaps most shocking of all, private communications between individuals could meet the current literal threshold. Subsection (2) of the definition causes a lot of material that is clearly not supposed to be within scope to be defined by the ACT Electoral Commission as 'electoral matter'. As a policy matter, the threshold for being within the scope of the Act needs to be significantly higher and adapted specifically to the mischief of preventing the irresponsibility of anonymity that interferes with election outcomes.

As a legal matter, it is likely that the definition would not satisfy a challenge on the grounds that it breaches the implied freedom of political communication. The *McCloy* test is well-known:

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If yes to (1), is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If yes to (2), is the law reasonably appropriate and adapted to advance the legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

By regulating speech during an election, the Act trivially satisfies (1). And the purpose of the law is to regulate the mischief that arises from irresponsible anonymous speech during an election, and to ensure that influence in elections is open and transparent. This trivially satisfies (2). But covering literally every kind of speech act that makes as little as 'implicit reference' to an issue 'submitted to, or otherwise before, the electors in relation to the election' would struggle to satisfy (3). It is not well-adapted narrowly to advance the legitimate object.

Section 4 should follow the template of section 4AA of the *Electoral Act 1918* (Cth), covering only those communications that have the dominant purpose of attempting to secure some electoral outcome and with a carve-out that expressly excludes:

1. News, current affairs, and genuine editorial content in news media;
2. Academic materials; and
3. Private communications.

This would have the very welcome result that parties who are providing non-partisan materials that make reference to social, political, and economic issues would not be caught within the scope of the Act unless it was clearly designed to influence the election result to achieve a particular electoral outcome.

Ideally, every State and Territory would have very similar definitions of electoral material in their Act. Given the situation of the ACT and the number of actors who routinely engage both Acts, it would be preferable that the ACT used exactly the same definition of electoral matter as the Commonwealth Act.

Misleading electoral advertising

The uncommenced amendments from the *Electoral Amendment Act 2020* include a new section 297A that make it an offence to disseminate or authorise the dissemination of an advertisement containing electoral matter and the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent. The same section also includes new powers for the Electoral Commissioner to prohibit a person from distributing the advertisement again and to publish a retraction in stated terms and in a stated way. Although this provision is modelled very closely upon section 113 of the South Australian *Electoral Act 1985*, the administrative differences between the ACT and South Australia should focus the Committee's attention on whether the ACT Electoral Commission has sufficient resources to administer this provision, especially given the complexities that can arise in its administration (such as the lack of a bright line of applicability discussed in *Hanna v Sibbons* [2010] SASC 291).

I am personally strongly supportive of legislative attempts to regulate misleading and deceptive conduct in election campaigns. The integrity of election outcomes depends upon our ability to facilitate rational and reasonable electoral behaviour, and this integrity is threatened by misleading and deceptive conduct. That said, on any view, the powers conferred upon the ACT Electoral Commission and the SA Electoral Commission are draconian. They permit the Commissioners to censor electoral materials and empower the Commissioners to direct candidates, campaigners, or other electoral participants to publish messages authored by the Commissioner. As a result, the SA Electoral Commission has very rarely used these powers. The cases that I have been able to find of the SA Electoral Commission using the powers were clearly very extraordinary.

The result is that there is a practical barrier to the SA Electoral Commission using these powers (an unwillingness to use the powers in borderline cases) but not a legislative barrier. The powers conferred by the SA and ACT acts are largely unreviewable and unchallengeable. In a strict sense, they are chilling: the rational actor who receives a notice from the SA Electoral Commission is likely to comply, even where the application of the Act is dubious, because the risk of the penalty outweighs the benefit of being legally

correct. This is exactly how the *Smartvote* team operated when we received correspondence from the ACT Electoral Commissioner: even though we disagreed with their interpretation of the Act, it was much easier to behave as if we agreed with their interpretation as the risks of getting it wrong outweighed the benefits of being legally correct.

This problem is highlighted by the *Hanna* case. Mr Hanna was a Member of the South Australian Parliament who became, during the 2010 South Australian election, the target of political advertising that claimed he was 'soft on crime'. Mr Hanna sued, claiming that the advertising misrepresented his position. The Supreme Court of South Australia was confronted by a problem of characterisation: were the political advertisements statements of fact that would attract the provisions of the *Electoral Act*, or were they statements of opinion that would not attract those provisions. There is no clear bright line, and the process of determining how to characterise the material was done through reference to defamation law (described by Justice David Ipp as 'the Galapagos Islands Division of the law of torts').

The powers conferred upon the Electoral Commissioners to regulate misleading political advertising are legally complex, but the ACT Electoral Commission does not appear to have adequate resources to use the powers consistently with community expectations. The SA Electoral Commission appears to have its own lawyers (or, at least, legally trained officers); the ACT Electoral Commission appears to rely on obtaining advice from the Government Solicitor's Office. Increasing the resources available to the ACT Electoral Commission so that they could recruit a legal officer who specialises in this area of public law would greatly improve protection to the community against the ACT Electoral Commission misinterpreting their powers under the Act. If there is an unwillingness to have a permanent adjustment to base to allow for the ongoing training and specialisation of their own legal officer, the Committee should consider recommending that a legal officer with sufficient knowledge and experience in electoral law be seconded from the Justice and Community Safety Directorate during election periods.

Otherwise, the powers conferred under the Act ought to be amended so that there is a clearer pathway to review of the use of powers (likely through the ACT Civil and Administrative Tribunal), or so that the powers are very tightly constrained to 'the worst of the worst' cases reducing the scope for error.

Dissemination of electoral information

There appears to be widespread community support for prohibition of roadside electoral material, and I am strongly in favour of this ban. However, attention needs to be given to the political information ecosystem of the ACT: are people afforded a serious opportunity to know who is proposing to represent them in the Assembly?

With the ban on roadside advertising, there are very few opportunities for candidates to get any level of name recognition with voters. This is a problem especially for independent candidates attempting to seek election, and for voters who are potentially confused by parties or candidates with similar names.

In anticipation of this problem, the Greens moved amendments to the Act to insert section 110A, effectively requiring the Electoral Commission to run a website of electoral advertisements for candidates. The Act provides the Electoral Commission with very little discretion in the exercise of this function.

Section 110A(6), however, states that if the Electoral Commission is 'satisfied on reasonable grounds' that material provided by a candidate for publication 'includes content that is obscene, defamatory or otherwise unlawful' then the Commission 'must not publish that part' of the material. In 2020, this had the effect of changing the meaning of one candidate's statement. Bruce Paine was an independent candidate for Kurrajong who was campaigning on a transparency and accountability platform. His statement to the Electoral Commission appears to have included material that offended section 110A(6), and his statement was edited to the following:

> 'I have the skills and experience to stop [REDACTED], including by hugely increasing rates, then wasting money, and being unduly influenced by the construction sector.'

It is unlikely that Mr Paine was campaigning on a platform to increase rates hugely, then waste money and be unduly influenced by the construction sector, but publishing this appears to have been the effect of how the legislation was applied.

The Electoral Commission appears to be in an awkward position with regard to this function, and the position gets more awkward as the scope for dissemination of electoral information gets narrower. They effectively become a primary way for candidates to advertise their election platform, but they are not well-resourced to fulfil the function in a meaningful or substantive way.

The problem is that it would be preferable that the Electoral Commission not have the role of publishing partisan content on its website, but the increasing restrictions on other forms of information dissemination (such as roadside advertising) means that there needs to be some consideration for what should be done instead. Further, this question needs to be considered in the context of the funding rules contained within the Act. A well-meaning philanthropist who spends $50,000 on translating electoral material to increase informed participation of the ACT's culturally and linguistically diverse communities could easily find themselves in breach of the Act's very, very broad 'third party campaigner' provisions. In 2020, *Smartvote* considered using the digital screens in ACT's shopping centres to get people to engage with the study, but the cost was completely prohibitive.

Between the Act's broad definitions of electoral matter and 'third party campaigner' and the prohibitive costs involved in disseminating information, there is a real risk that the prohibition on roadside electoral material will significantly reduce the public's ability to obtain electoral information. The Committee might consider whether non-partisan projects like *Smartvote* satisfy the policy purpose of section 110A, or whether more options should be developed to support a healthier ecosystem of political information during election periods. These are not reasons to oppose the ban on roadside electoral material; instead, the ban on roadside electoral material is a further pressure point on an existing underlying need to improve the dissemination of political information during election periods.

Concluding remarks

The ACT Electoral Commission is a highly professional and high functioning institution that depends on the trust and support of the wider community. It is a very small organisation that is called upon to perform difficult, complex, and large activities. Nothing I have written in this submission should be interpreted as an unreasonable criticism of the Commission, and I enjoyed very warm and constructive interactions with the Deputy Electoral Commissioner during the *Smartvote* project.

Flaws in the Act make it more difficult for the Commission to perform its function with the very limited resources it has available to it. The scope of the Act defined by section 4 is manifestly too broad, and this breadth increases the ambiguity of whether or not specific material should be within the Commissioner's responsibilities to regulate. Narrowing this will make the Commissioner's function easier, more efficient, and more effective. The trend towards requesting more regulatory functions from the Commissioner (such as policing the truth in electoral advertising and publishing partisan electoral matter) must require more resources for the Commission, and resourcing the Commission with a legal officer will improve its decision making and provide assurance to the community that the powers are being used lawfully, reasonably, and appropriately.

Finally, the well-intentioned need to regulate the forms of electoral advertising during an election period is narrowing the ability of candidates and parties to contest elections in a meaningful way. The restrictions imposed should be accompanied by measures to improve the dissemination of political information.

Sincerely

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