

Wednesday, 19 August 2020

Mrs Giulia Jones MLA
Chair Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020 Canberra ACT 2601

Dear Chair,

I write regarding Scrutiny Report 48 which considered my most recent proposed amendment to the Electoral Amendment Bill 2018. I thank the Standing Committee on Justice and Community Safety for your detailed comments.

Your report expresses concerns about how two of these amendments engage with the Human Rights Act. These are: the limits on political donations, and misleading political advertising. I respond to each of these areas below.

Limits on political donations

It is widely acknowledged that large financial contributions to political parties are likely to have an influence on policies of the parties. A 2008 survey by the Grattan Institute found "56 per cent of respondents said they had 'personally witnessed' public officials making decisions that favoured a business or individual who gave them political donations or support, or at least 'suspected' that was happening."¹

As noted in the Committee's response, reliance on the Constitutionality of the limit is not necessarily a justification for a limit on the personal rights in the HRA. Equality in a democratic country ensures that voters should be allowed to express their support for political parties and independents financially. The question is, what level of support is excessive and should be regulated? Furthermore, does an unregulated amount on political donations actually limit the right to equality, participation on public life and freedom of expression? Where people with less financial means have less of a voice because they cannot possibly give more than someone with more money. In considering this, with no limit to donations, someone less materially wealthy, has their access to political representatives and participation in public life limited. This amendment aims to equalise the voices in our community, as such the restriction of a donation cap of \$10,000 is proportional and reasonable limit on the right to take part in public life.

¹ <https://grattan.edu.au/wp-content/uploads/2018/09/908-Who-s-in-the-room-Access-and-influence-in-Australian-politics.pdf>, p8



Many jurisdictions in Australia require all donations over a threshold to be publicly disclosed. The disclosure threshold was presumably chosen to reflect community views as to amounts of money that might influence a political party or independent. In the ACT amounts over \$1,000 per annum must be disclosed. Federally donations above \$14,300 must now be disclosed. Other jurisdictions have limits on the amounts that can be donated. In Victoria that is \$4,000 over a parliamentary term (4 years). In NSW it is \$6,600 per party or grouping.

The \$10,000 donations cap was chosen as an amount that enables voters to contribute to the democratic process in the ACT without excessive influence on the party. For a party that fields the maximum 25 candidates in the ACT, the campaign expenditure cap is \$1,068,750 so \$10,000 is less than 1% of campaign expenditure so presumably an acceptable amount, despite being larger than NSW or Victorian caps.

It is important to allow some private funding as well as public funding because public funding is only available after an election for parties or independents that get 4% or more of the vote. Thus, a purely publicly funded electoral system would not allow small parties to make any expenditure and thus could not operate. However, whether real or perceived, there is a growing trend of distrust in political institutions and political representatives, and as this limit aims to reduce this distrust it is a proportional and reasonable limit on freedom of expression.

Misleading electoral advertising

In response to my amendment on misleading electoral advertising, the Committee has noted that the term 'advertisement' is not clearly defined, and that my amendments do not distinguish between reportage and commentary. This is an understandable concern, given the reality of the role that websites, social media and emails play in modern political campaigns. The intention of the amendment, however, is to capture both paid advertising, and any authorised campaign material. It is not intended to capture private advocacy, nor reportage and commentary on political campaign material or advertisements. These amendments are borrowed directly from South Australia, where they have been in operation for decades. In that state the Electoral Commission, the courts, political entities all appear to have a solid understanding that this legislation does not refer to private advocacy, debate, or public commentary.

I note that the term 'advertisement' is currently used over 30 times in the Electoral Act, without a statutory definition. In the absence of a legislated definition in ACT legislation, the Macquarie Dictionary is used to determine meaning. The definitions provided for 'advertising' and 'advertisement' in the Macquarie Dictionary both refer to the public nature of advertising. I am hopeful that this definition, and indeed the common understanding of the term, should ameliorate concerns that private advocacy would be inadvertently caught by using the term, which would go too far. I'd like to draw the Committee's attention to section 226 of the Electoral Act, whereby 'advertisement' is used multiple times and clearly incorporates broadcast, published advertising, as well as other forms of advertising such as roadside signs.

Regarding reportage and commentary, subsection 2 of the amendment provides a defence for the overextension of this provision. For example, where a media outlet has been paid to have a political advertisement in their publication, they have not contributed

in deciding the content of the advertisement and beyond the reasonable steps and due diligence that media outlets would normally take in regards to advertising content they publish, they would not be expected to research the truth of the advertisement.

The Scrutiny Committee's report notes that these amendments engage section 22 of the HRA to rights in criminal proceedings, particularly the presumption of innocence. Proposed new section 297A(3) holds that the Electoral Commissioner, if satisfied that an offence under proposed section 297A has occurred, may ask a person not to disseminate the advertisement again or to publish a retraction in stated terms and in a stated way. It must be noted that this is not an order. Only the Supreme Court may make an order under this proposed section, and at this point the usual court appeal processes may be used. In this way the presumption of innocence before the court is no different than for other offences.

As noted by the Committee, this amendment has not extended the powers of the Electoral Commission to issue take-down and retraction notices without the binding decision of a relevant court. I believe this would unreasonably extend the powers of the Commissioner, particularly when considering the concept of 'truth' and this is better dealt with by the Courts. Further, this approach was chosen as has been operational and working effectively in the only other jurisdiction of Australia with truth in political advertising, South Australia. I believe that this is the best course of action as it has been tested through decades of operation and in the courts, and it is extremely unlikely that there will be unforeseen consequences or impacts on human rights if these amendments are passed by the Assembly.

Thank you again for your time and considered comments on these amendments.

Yours sincerely



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ACT Greens Member for Murrumbidgee

ACT Greens Spokesperson for Planning, Transport, City Services, Housing, Arts, Animal Welfare, Community Services, Women, Seniors and Social Inclusion