



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Jeremy Hanson MLA (Chair), Dr Marisa Paterson (Deputy Chair), Ms Jo Clay MLA

Submission Cover Sheet

Inquiry into 2020 ACT Election and the Electoral Act

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Standing Committee on Justice and Community Safety
ACT Legislative Assembly,
GPO Box 1020,
Canberra ACT 2601
LCommitteeJCS@parliament.act.gov.au

25 April 2021

Dear Officer,

RE: Inquiry into 2020 ACT Election and the Electoral Act

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Standing Committee on Justice and Community Safety, responding to term of reference (11) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

Term of reference (11):

1. The ACT Government should proceed with the implementation of the *Electoral Amendment Act 2020* and misinformation in political advertising laws. Furthermore, any future attempts to undermine the laws should be rebuffed.
2. The ACT Government should amend the *Electoral Amendment Act 2020* by increasing the maximum penalty units stipulated in s 297A(1) from 50 to 100. This may increase the deterrence effect of the Act, thereby increasing its practical effectiveness in curbing false and misleading political discourse in campaigns.
3. The ACT Government should amend the *Electoral Amendment Act 2020* by extending liability for the offence in s 297A(1) to vicariously include the political party responsible for the advertisement. This may incentivise political party involvement in reasonably ensuring member compliance with misleading political advertising offences.
4. The ACT Electoral Commissioner should publish a regulatory policy for the exercise of the prevention and take-down order powers in s 297A(3) and (5) prior to the next election period to give their determinations greater legitimacy and political impartiality.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,

A large black rectangular redaction box covering the signature and name of the representative of the ANU LRSJ Research Hub.

Introduction

This submission focuses upon addressing the implications of laws pertaining to false and misleading political advertising in the ACT. This is due to be introduced through section 297A of the *Electoral Amendment Act 2020* (ACT) (**the Act**), coming into force 1 July 2021.

297A Misleading electoral advertising

(1) *A person commits an offence if—*

(a) the person disseminates, or authorises the dissemination of, an advertisement containing electoral matter; and

(b) the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Maximum penalty: 50 penalty units.

Our recommendations support the implementation of laws combating false and misleading political advertising, but particularly recommend amendments to s 297A of **the Act** so as to make the laws more effective in their purpose.

1. Proceeding with Misleading Political Advertising Laws

Misleading and false political advertisements, in particular those authorised by individuals and political parties running for office, undermine the legitimacy of our democracy and erode public confidence in the electoral process. In an age of social media where ‘fake news’ has been a term weaponised by politics and exposure to misinformation is more prevalent than ever before,¹ false political advertising laws are essential.

Attempts to enact false political advertising laws in Australia have been mostly unsuccessful in the past at both a State and Federal level, with only South Australia having such laws. While the ACT already had provisions prohibiting the dissemination of material that misleadingly induces voters to falsely mark their ballot papers,² the amendment to come into force through **the Act** essentially prohibits all political advertising that materially misleads or lies to voters. The new amendments passed with unanimous support in the ACT Legislative Assembly.³ This is

¹ John Brumette, et al, ‘Read All About It: The Politicization of “Fake News” on Twitter’ (2018) 95(2) *Journalism and Mass Communication Quarterly* 497.

² See *Electoral Amendment Act 2020* (ACT) s 298.

³ Jake Evans, ‘ACT passes new political advertising laws to ensure voters are not ‘deceived on the way to the ballot box’, *ABC News* (online, 28 August 2020)

<<https://www.abc.net.au/news/2020-08-28/act-bans-false-political-advertising-new-laws/12604096?nw=0>>.

following research from the Australia Institute which showed that 89 per cent of Canberrans agree that such laws should be passed.⁴

Arguments against such laws primarily revolve around the assertion that they stifle freedom of speech which is integral to a democratic society. It therefore implies that politicians in political campaigns should be able to say and express any ideas as any regular person is able to. To not allow this is deemed to be an assault upon the freedom of political communication.

However, this argument is untenable.

The regulation of messaging surrounding political campaigns should be held to a higher standard than regular speech. Other industries have regulations on messaging. Laws exist to regulate and prohibit the speech and inducements of private sector corporations and individuals in order to protect the consumer. There are limits on what companies may represent and advertise to the consumer when it goes beyond 'mere puffery'.⁵ Regulation of messaging and speech in the public arena is not a perverse and unusual occurrence. It happens with regularity and is in the public interest, especially when espoused by those in positions of power and authority. In political campaigning, citizens should equally be protected from the misrepresentations of those who can unjustly take advantage of them for personal political gain.

A 2019 study of South Australia's false political advertising regime found that 'the provisions in South Australia ... score very well in terms of both operability and perceptions'.⁶ This was with the caveat 'that their impact on actual political discourse is limited.'⁷ As **the Act's** wording and operation largely follows South Australia's legislation, the benefits and flaws will likely be similar.

However, while **the Act** may be initially flawed, its value is still retained in its aspirational and symbolic purpose. The noted study found that false political advertising laws do aid public perceptions of electoral processes, and that is of benefit to the ACT's elections. Merely because it may not initially be effective should not mean that it is scrapped or repealed. Any efforts in the future to remove the laws should be rebuffed with certainty and surety in **the Act's** inherent symbolic value.

However, where the laws can be made more robust and more effective in their purpose of curbing falsehoods and mistruths, these alterations should be made. Recommendations 2, 3 and 4 are a reflection of this. The ACT should persevere with the laws to come into force in July, however amendments must be made so that ACT elections are not merely left with a toothless tiger as their guardian.

⁴ Anna Chang, 'Majority of Canberrans Want Truth in Political Advertising Laws', *The Australia Institute* (online, 9 August 2020)

<<https://australiainstitute.org.au/post/majority-of-canberrans-want-truth-in-political-advertising-laws/>>.

⁵ See *Carlill v Carbolic Smoke Ball Company* [1892] 1 QB 256 (CA).

⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (Report, University College London, March 2019).

⁷ *Ibid.*

Recommendation 1: The ACT Government should proceed with the implementation of the *Electoral Amendment Act 2020* and false political advertising laws. Furthermore, any future attempts to undermine the laws should be rebuffed.

2. Amending s 297A(1) to increase maximum penalty units

One way in which to make **the Act** more effective is to amend s 297A(1) to increase the maximum penalty units for false or misleading political advertising from 50 to 100.

50 penalty units for an individual is equivalent to \$8000, or \$40,500 for a corporation.⁸ 100 penalty units is \$16,000 for an individual or \$81,000 for a corporation.

South Australia's false political advertising laws carry the penalty of \$5000 for individuals and \$25,000 for corporations.⁹ As was noted by University College London, South Australia's laws are not effective at actual curbing of false or misleading advertising. **The Act's** own penalties therefore need to be significantly greater than South Australia's to have an effective deterrent effect. The fairly similar penalty for individuals between the two laws are of concern and raise questions of whether **the Act** has sufficient maximum penalties for effective deterrence.

One of the issues with **the Act**, is that any offences relating to it which occur in the final days before an election or even in the final hours outside the polling stations cannot be rectified by any mechanism in **the Act**. Under section 3, the Electoral Commissioner may request the advertisement not be disseminated again and may request a retraction.¹⁰ In the stated circumstances, the damage to the election cannot be rectified as polling will most likely have already taken place. The damage will have been done. A prime example of this was at the 2016 Federal election with Labour's 'Mediscare' campaign. Purely based on a lie, it was a message that was sent by targeted text on the day of the election.¹¹ If something of this nature occurred in the ACT election, **the Act** could not prevent it except through deterrence. Therefore, it is imperative that the penalties in place in **the Act** are sufficiently high so as to effectively deter exploitation of the final moments of elections.

There has been much research into the inability of increased penalties to provide specific deterrence for criminal activity.¹² However, much of this research revolves around criminal activity where there is a possibility of avoiding being caught. Misleading and false political advertising is of a different variety as there is little that the perpetrator can do to hide their crime besides defending it. It is by virtue of its nature as a public act and therefore evidence is immediately available through the content of the messaging.

⁸ *Legislation Act 2001* (ACT) s 133.

⁹ *Electoral Act 1985* (SA) s 113(2).

¹⁰ *Electoral Amendment Act 2020* (ACT) s 297A(3).

¹¹ Andrea Carson, Aaron J. Martin & Shaun Ratcliff, 'Negative campaigning, issue salience and vote choice: assessing the effects of the Australian Labor party's 2016 "Mediscare" campaign' (2020) 30(1) *Journal of Elections, Public Opinion and Parties* 83.

¹² Derek Pyne, 'Deterrence: Increased enforcement versus harsher penalties' (2012) 117(3) *Economics Letters* 561.

The research also criticises many instances of harsher penalties for deterrence because the perpetrators are not actually aware of the existing law or the penalty.¹³ Again, misleading and false political advertising can be distinguished from this as political candidates are expected to have knowledge of the standards and guidelines expected of them when advertising. This is a result of operating in a very specific field where questions of expected standards will likely arise in most political campaigns by operating within a regulated political broadcast framework. Therefore, the increase of maximum penalty units will have a greater specific deterrence for false and misleading political advertising than other types of crime.

As demonstrated by South Australia, insufficient penalties may contribute towards ineffectiveness of their laws in practice. Doubling the penalty units of **the Act** may increase effectiveness at actual regulation of political discourse during ACT elections.

Recommendation 2: The ACT Government should amend the *Electoral Amendment Act 2020* by increasing the maximum penalty units stipulated in s 297A(1) from 50 to 100. This may increase the deterrence effect of the Act, thereby increasing its practical effectiveness in curbing false and misleading political discourse in campaigns.

3. Amending s 297A(1) to include vicarious liability of political parties

Another area where **the Act** requires reform is the liability attached to political parties responsible for misleading electoral advertising. Under the existing legislation, political parties are liable as corporate ‘persons’ who disseminate or authorise the dissemination of misleading advertising.¹⁴ Registered political parties are considered corporations as unincorporated bodies who can sue and be sued in their own name.¹⁵

What the legislation fails to acknowledge is that misleading advertisements still vicariously benefit the political parties regardless of their direct involvement. Party members can issue misleading advertising without consent of their political party. As such, political parties have no direct involvement in dissemination. In fact, political parties can use the defence in s 297A(2) that they ‘took no part in deciding the content of the advertisement’. This renders political parties immune from liability for the actions of their members. Despite this, misleading advertising vicariously benefits the political party. Vicarious misleading advertising favours the election of the parties’ candidates and damages the credibility and policies of their competition. Thus, despite not having any direct involvement in the dissemination of misleading political advertising, the party will benefit. This may incentivise political parties to adopt wilful ignorance towards s 297A(1) offences of their members. Likewise, parties are perhaps disincentivised from

¹³ Ben Knight, ‘Do harsher punishments deter crime?’, *UNSW Newsroom* (online, 16 July 2020) <<https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime#:~:text=%E2%80%9CThe%20severity%20of%20punishment%2C%20known,some%20extent%20as%20a%20deterrent.%E2%80%9D>>.

¹⁴ See *Legislation Act* (n 7) s 160(1).

¹⁵ *Corporations Act 2001* (Cth) s 57A(1)(c).

preventing their members from offending. Ultimately, reform of these incentives from within parties may establish a long-term culture of informative advertising.

It is important that **the Act** establishes a norm of compliance with informative and not misleading political advertising. By amending **the Act** to include vicarious liability, it could encourage political parties to establish procedures and cultures of informative advertising. Holding them accountable for the actions of their members potentially incentivises parties to ensure their members behave in an appropriate manner.¹⁶ Additionally, the vicarious penalty placed on political parties in the event of a materially misleading advertisement ensures that the benefit a party would derive from offending individuals is removed, and the status quo re-established. Thus, vicarious liability for political parties incentivises compliance procedures from within the party structure, encourages more informative advertising, and offsets the vicarious benefits political parties derive from misleading advertising.

Vicarious liability is not a new concept. It has its foundations in an understanding of group liability: a group should be held responsible for not correctly managing the behaviour of its members.¹⁷ Likewise, the concept of ‘all or none’ is not foreign to political parties through mechanisms of cabinet solidarity and party mentality. In this respect, vicarious liability can be justified in situations where the group is responsible for mismanagement, the group is easier to identify, and to create more effective incentive structures. It has been used widely in tort law as well as in human rights frameworks.¹⁸

It should be noted that vicarious liability does not hold organisations accountable for every action of their members, only those which a court would deem the organisation responsible for managing. Standards of reasonableness become relevant in assessing whether organisations have taken the appropriate steps to mitigate risks.¹⁹ As mentioned above, at present there is no incentive without vicarious liability for political parties to mitigate the risk of their members disseminating misleading political advertising. To impose vicarious liability merely places a duty on parties to ensure their members are compliant with party standards. To what extent this duty exists is guided by principles of reasonableness which in Australia is typically defined in the negative. This places a low, but necessary standard for political parties to bear responsibility for misleading information disseminated by its members. Thus, vicarious liability ensures that parties have the correct incentives to mitigate the risks posed by their individual members.

Recommendation 3: The ACT Government should amend the *Electoral Amendment Act 2020* by extending liability for the offence in s 297A(1) to vicariously include the political party responsible for the advertisement. This may incentivise political party involvement in reasonably ensuring member compliance with misleading political advertising offences.

¹⁶ See generally Giuseppe Dari Mattiacci, ‘The Cost of Delegated Control: Vicarious Liability, Secondary Liability and Mandatory Insurance’ (2004) 23(4) *International Review of Law and Economics* 453.

¹⁷ Daryl J Levinson, ‘Collective Sanctions’ (2003) 56(2) *Stanford Law Review* 345, 348-9.

¹⁸ See eg, *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1, 12-3 (*Leighton*); *Leslie v Graham* [2002] FCA 32, [72]; see also Australian Human Rights Commission, ‘Vicarious Liability’ (Handout, Australian Human Rights Commission, November 2014).

¹⁹ See *Leighton* (n 18) 12-3.

4. The Electoral Commission issuing policy guidelines

A major issue with the enforcement provisions in **the Act** is that decisions of the Electoral Commissioner (the Commissioner) lack the legitimising force which can come from predetermined guidelines.

The penalty provisions often act too late to remove the effect of misleading advertising during an election period. That is why it is equally important to have the secondary enforcement mechanism through the powers of the Commissioner in ss 297A(3) and 297A(5) of **the Act**. In cases of minor offences, s 297A(3) empowers the Commissioner to ask for dissemination to cease or publication of 'a retraction in state terms'.²⁰ Whilst s 297A(5) empowers the Supreme Court on application of the Commissioner to issue similar orders but with a more binding effect. This dual pronged approach de-legitimises decisions of the Commissioner as any resistance results in expensive and often complex court proceedings. Whilst ss297A(3) and (5) should not be removed, the Commissioner must establish clear guidelines both to legitimise their powers without compromising their integrity as a non-partisan body and to simplify the evidentiary process in later court challenges.

The ACT Electoral Commission is a non-partisan body. This is essential to its role as a regulator of electoral periods which, by definition, involve partisan competitions. A major concern with provisions to regulate misleading information in Australia is that they involve very subjective determinations of truth and 'materially misleading'.²¹ In fact, similar legislation enacted under s 329(2) of the *Commonwealth Electoral Act* was repealed in 1983, two years after its adoption as the Australian Electoral Commission refused to enforce it.²² This has led the Commissioner's office to describe their role under **the Act** as being 'unworkable' due to difficulties in assessing factual accuracy of advertising.²³ These concerns are reasonable in principle as any controversial decisions of the Commission risk undermining a deserved reputation as a non-partisan and independent government body. However, since any practical enforcement of **the Act** is likely to occur through the decisions of the Electoral Commissioner, it is essential that they are able to make orders without affecting their legitimacy. For example, under the South Australian *Electoral Act*, on which **the Act** is based, during the 2014 and 2018 elections alone the South Australian Electoral Office issued 17 orders to prevent dissemination of misleading advertising and not a single penalty sanction.²⁴ Notably, the South Australian Commissioner expressed concerns about enforcement on their independence in 2014.²⁵ Despite this, the South Australian Commissioner was capable of issuing those 17 orders without significant

²⁰ *Electoral Amendment Act* (n 8) ss 297A(3), (5).

²¹ *Ibid*, s 297A(1).

²² *Commonwealth Electoral Act 1918* (Cth) s 329(2) as repealed by *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 114.

²³ Katie Burgess, 'Truth in Political Advertising Laws "Unworkable", ACT Electoral Commission Says' *The Canberra Times* (online, 25 July 2017)

<<https://www.canberratimes.com.au/story/6030153/truth-in-political-advertising-laws-unworkable-act-electoral-com-mission-says/#gsc.tab=0>>.

²⁴ See Evans (no 2).

²⁵ *Ibid*.

controversy. Thus, robust enforcement through the Electoral Commissioner is necessary for **the Act** to have any force or effect.

The ACT Electoral Commissioner can establish legitimacy in their decisions using a similar notion of precedent and procedure that legitimises the decisions of courts. This is not to blend the role of the Commissioner with that of a Justice, but to acknowledge that both bodies are independent with good justification and are aided in this regard by clear and uncontroversial guidelines upon which to make their decisions. The New Zealand Advertising Standards Authority adopted a policy that all advertising must clearly distinguish between factual information and mere opinion.²⁶ Standards such as this are clear and uncontroversial. Additionally, this policy also eases the challenges by clearly acknowledging the material the Commissioner will and will not engage with. Misinformation can blend fact with opinion. To place a clear requirement that opinion must be clearly distinguished as such, or that factual information must have sources provided so as to separate them from opinion, are just some examples of how the Commissioner may adopt such guidelines. Notably, clear policy still provides some discretion, but legitimises the discretion according to pre-established criteria.

Some suggestions for clear policy guidelines for the Commissioner to establish include:

- Electoral advertising must clearly distinguish between fact and opinion.
- Electoral advertising purporting to declare a fact must provide a source of evidence.
- Electoral advertising must not appropriate independent government bodies (i.e. should not adopt Electoral Commission colours, medicare cards, or other styles pertaining to the bureaucratic arm of government).
- Electoral advertising must clearly distinguish itself as advertising for the purposes of an election.
- Information in malicious advertising (i.e. attack ads) will be subject to greater scrutiny.
- The Commissioner will form their belief of what is 'inaccurate and misleading to a material extent' under s 297A(1)(b) based on expectations of what the (ordinary/reasonable) elector would understand from the advertisement.

It is necessary for the ACT Electoral Commissioner to exercise their powers to regulate misinformation in political advertising to give any practical effect to **the Act**. Concern of political bias from the impartial body can be mitigated by establishing uncontroversial and less subjective criteria to guide the exercise of the power prior to its use.

Recommendation 4: The ACT Electoral Commissioner should publish regulatory policy for the exercise of the prevention and take down order powers in s 297A(3) and (5) prior to the next election period to give their determinations greater legitimacy and political impartiality.

²⁶ See Renwick and Palese (n 5) 30-3.

5. Conclusion

In summary, whilst we endorse the adoption of misinformation regulation for political advertising in the ACT, the regulatory framework must be made more robust and practical for it to be legitimately enforceable. Truthful political information is a key attribute in maintaining a healthy and functioning democratic system. The manner in which **the Act** seeks to protect the public from offences of political advertising does not go far enough to mitigate the harm misinformation causes to the electoral system. As such, we implore that the 2020 ACT Election and Electoral Act Committee recommend to the ACT government amendments to the *Electoral Act* in order to; maintain the integrity of the misinformation provisions, increase the penalty for false and misleading advertising, introduce vicarious liability for political parties who do not take reasonable steps to redress the actions of their members, and suggest to the ACT Electoral Commissioner to create a pre-emptive policy framework for regulating misleading advertising.

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B | Legislation

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C | Cases

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