

Submission to the Standing Committee on Electoral Affairs Electoral Amendment Bill 2024

I write in response to the Committees's invitation to provide a submission relevant to its examination of the Electoral Amendment Bill 2024 (the Bill)

Section 196(1) of the Electoral Act 2004 (the Electoral Act) presently provides as follows:

A person must not between the issue of the writ for an election and the close of the 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.

The effect of the Bill, if passed, will be to narrow the scope of s 196(1) of the Electoral Act such that it will no longer apply to prohibit election advertising containing candidates name, photograph or likeness without the candidate's consent save in respect of printing, publishing, distribution or keeping on display a "how to vote" cards having such content.

The Bill received broad support in the House of Assembly. Only one speaker expressed reservations during that debate on its second reading.

Those supporting the Bill's passage (with no attempt to be comprehensive) drew attention, inter-alia, to:

- (a) the possible invalidity in whole or in part of the existing measure for inconsistency with the freedom of political communication impliedly guaranteed by the constitution;
- (b) the unique status of the prohibition in Tasmania; and,
- (c) the chilling impact the existing measure imposes on modern communication and robust political speech.

However, greater concern was expressed during the Bill's debate in the Legislative Council. Those concerns focussed on both of the impact of fake websites and concern that negative campaigning directed against named individuals could deter people putting their hands up for public office and if it was necessary to subject themselves to such a risk.

The policy of the legislation: Electoral Act Review

The debate in both Houses assumed that the rationale for the passage of s196(1) in 1921 had been principally, if not exclusively, to address concerns about misleading or fake how to vote cards in the context of House of Assembly elections under Tasmania's Hare-Clark electoral system.

That understanding was expressly referred to in the debate. It's source was the historical analysis provided in the final report of the *Electoral Act Review* (the Review):

The Review acknowledges that the Tasmanian Act currently contains other provisions that apply to HTV cards. Under section 191, HTV cards are subject to the authorisation requirements. Section 177 prohibits canvassing or soliciting for votes within 100 metres of a polling place, which would include the distribution of HTV cards. Section 197 prohibits the printing, publishing and distributing of any printed electoral matter that is intended, likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote.

However, as was noted in the Interim Report, it is thought that one of the original reasons for the introduction of section 196 was to address concerns about misleading or fake HTV cards in the context of the Hare-Clark system.

Given this, this Review considers that there is merit in retaining section 196 in respect of HTV cards and, in light of changes in technology, any material that seeks to direct a voter as to how they should vote, including that distributed through social media or telephone calls, as it provides a further deterrent to fake or misleading HTV material - an issue which has been of concern to candidates in the past.

The Review's analysis was sourced on limited evidence. It is probably wrong.

Policy of s 196(1)

An essential attribute of the Hare-Clark system is that it permits (and requires for success) a candidate who has been endorsed by their party to enter into a contest not only against their formal rivals in other parties but also against each other. That reality is embedded in the structure of the Hare Clark system.

The Tasmanian Hare Clark system ensures that political parties have quite limited control over which of their several endorsed candidates in any particular electorate will be elected.

That is because the Tasmanian Electoral Act was amended after an unsuccessful attempt by the Labor Party to persuade its supporters to follow a formal party ticket. The Robson rotation system as intersects with s 196(1) makes futile any attempt by a party to issue an effective how to vote ticket to electors.

In consequence, while inter-party campaigning determines how many seats each party will win, intra-party campaigning and the preference flows between them and other candidates determines which of a party's candidates in a particular electorate will hold those seats.

A very long time ago, Eric Reece, then Premier of Tasmania, told me that the prohibition against publication of candidate's names was designed to stop endorsed candidates of the same party engaging in public disparagement of each other, and, more broadly, to ensure there was some level of civility in the politics of Tasmania including limits on personal attacks on individual candidates during elections. Eric Reece is long deceased and I have no means of evaluating the correctness of that explanation but I offer what I was told some 50 years ago as an historic insight into how it was then understood.

In any event s 196(1) continues to limit public ad-hominem personal abuse of and negative campaigning against named rivals during the period between the issue of writs and the close of polls.

The same prohibition equally protects candidates seeking election to that chamber in a similar manner.

That additional rationale for the policy of s196(1) was not treated as significant by the Review. Nor was it referred to in debate on the Bill in the House of Assembly.

One speaker in the Legislative Council specifically referred to the reasons for s196(1)'s enactment. They were, the member noted, unknown and lost in the mists of time.

The rival contentions

Those supporting the Bill reason that with an exception to be retained for how to vote cards, s196(1) is outdated and inconsistent with the principle of holding politicians and candidates to account.

The Bill, it is said, simply removes an anachronistic, too wide, and unjustifiable, prohibition on articulating public reasons in advertising why electors should not vote for a named or pictured candidate unless their consent has been obtained. That limitation on free speech is offensive to democratic principles.

However, at least arguably, there is still a countervailing public interest in requiring candidates seeking election to the Tasmanian Parliament, (and any third parties seeking to influence those elections) to run their campaigns without being able to use negative campaign advertising targeting one or more other named and pictured candidates.

The case for s196(1) articulated by Eric Reece perhaps even has increased salience having regard the ease of use, and impact of, modern electronic social media advertising in the absence of any effective take down rules to control its misuse.

Negative campaigning using advertising against named or pictured individual candidates in the heat of an election in a small state such as Tasmania where candidates are often deeply connected to their local communities may exacerbate the decline in public respect for its political processes.

Nonetheless, and notwithstanding that restricting this form of advertising may be seen to have some benefits, it must be accepted that the prohibition contained in s 196(1) imposes a direct constraint on political speech in Tasmania that exists in no other Australian state or territory.

The constraints it imposes cannot be dismissed as trivial.

Another candidate cannot be named or their image used in advertising during an election without their consent. No candidate can be realistically expected to give their consent unless they expect to benefit. In practice that reality means s196(1) stops negative advertising directed against any particular candidate or candidates. While it can be brutally effective, negative campaigning attacking rivals is often regarded as the ugly side of politics and is hated by much of the public. Nonetheless, other electoral systems have accepted that negative advertising directed at persuading electors why a particular candidate or candidates is or are unworthy of support is an entirely legitimate part of their democratic political contests.

The issue before the Joint Committee therefore involves a choice that people of good-will may well come to different conclusions about. It involves a decision to be made by the Parliament.

However, in Australia there is a constitutional overlay.

I therefore turn to the issue of constitutional validity.

Constitutional principles

The High Court has held that freedom of political communication is implied by the text and structure of the Australian Constitution.

With no claim for originality it is reasonably well settled that three questions arise whenever it is asserted that a law infringes the implied freedom:

1. Does the law effectively burden the freedom of political speech in its terms, operation or its practical effect?
2. If so, are the purpose of the law and the means it has adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government ?
3. If the answer to the second question is 'yes', is the law reasonably appropriate and adapted to advance that legitimate object? That involves a court applying a proportionality test to determine whether the law is justified as suitable, necessary and adequate in its balance.

I have drawn on that broadly settled jurisprudence without engaging with the nuances of its development in the case law in order to assist the Joint Committee in its deliberations.

Question 1

It is self-evident s196(1) imposes a burden on a sub-set of political speech.

If its constitutional validity is challenged it is inevitable that a court would answer the first question noted above: “yes”.

However questions 2 and 3 are more contestable.

Question 2

Question 2 requires a court to identify the purpose of a challenged law and the means it has adopted to effect that purpose when examined within the context of Australia’s constitutionally prescribed system of representative government.

The High Court has repeatedly held that the purpose of a statutory provision primarily is to be identified by its text read in its statutory context.

The identification of the purpose of a statutory provision by a court will often be additionally illuminated by what was said in parliamentary debates and the prior history of the legislation.

However, Tasmania did not have Hansard in 1921.

It is possible that there may be some secondary records in newspaper reports or other contemporary writing but I am not aware that any exist. If the issue of the section’s validity is ever litigated a comprehensive search would need to be undertaken.

But assuming no such materials exist and in the absence of a record of the parliamentary debates it is likely a court would simply conclude that the purpose of s196(1) is to be discerned from the outcome its text provides for when read in the context of all of the provisions of the Electoral Act.

That its purpose would be concluded to be to prohibit a specific subset of political speech—that names or identifies candidates in electoral advertising and other campaign literature without their consent in the period between the issue of the writs until the close of the polls.

The mischief s196(1) specifically addresses is the printing, publishing or distribution of an ‘advertisement’ or a “‘how to vote” card, handbill, pamphlet, poster or notice’ that name or picture a candidate without their consent during the period of an election. Read in the context of the other provisions of the Electoral Act such as the Robson rotation system that make impractical other certain specific forms of campaigning in elections for the House of Assembly, it is plausible that a court might further infer that the section’s purpose is to implement the objects that former that Premier Eric Reece understood it to have.

In *Monis v R* (2013) 249 CLR 92 (Monis) the High Court split 3-3 as to whether the protection of public civility was a purpose that could justify a constraint on political speech. Monis concerned whether a law prohibiting the use of the postal service to send grossly offensive communications violated the implied freedom. In the result the impugned law was upheld. However, the questions in the present matter arise in an entirely different context. In the present context greater civility during campaigning is likely to be understood as a desired but not stand alone purpose of s196(1).

Importantly, notwithstanding the not trivial constraints it imposes, s196(1) does not operate to inhibit the media being informed of, or reporting about, a named candidate’s conduct or character during an election.

There are three indicia in the Electoral Act that make it clear that the term “advertisement” cannot be read as extending to prohibit even the most robust of media reporting.

First, the ordinary meaning of the expression “any advertisement” is not apt to describe media reporting. Second, in so far as s195 of the Electoral Act expressly requires all advertisements to be identified as such, it confines that obligation to material which is, or is to be, paid for; or that for which any reward or compensation or promise of reward or compensation is, or is to be, made. Third, s4(8)(a) excludes from the definition of ‘electoral matter’ for the purposes of the Electoral Act the reporting of news, the presenting of current affairs or any genuine editorial content in news media. While s196(1) does not use that particular defined term, its definition for the other purposes of the Electoral Act provides additional contextual support for the view that the operations of news media are not the subject of s196(1).

Equally s 196(1) does not inhibit the ordinary communication of a citizen’s political views to others—including that which can be said at rallies or meetings. Speech acts of their nature do not come within the prohibition on publishing handbills, posters, pamphlets or notices naming a candidate without their consent.

Neither does s196(1) prohibit a citizen raising any matter of concern about a candidate, in writing or otherwise, with the media, law enforcement, or electoral officials.

Given that Tasmanian elections have now been contested for over a hundred years since the provision was enacted without it ever having been plausibly contended that have not been free and fair, a court might well conclude that whilst s196 self-evidently does impose a burden on political speech the laws of Tasmania permit adequate public debate of the merits or otherwise of candidates for the House of Assembly and Legislative Council as to not be inconsistent with Australia’s constitutionally prescribed system of representative government.

While it cannot be free from doubt, in my opinion a court is likely to conclude that the prohibition provided for in s196(1) is not as such incompatible with the maintenance of Tasmania's distinctive, but entirely legitimate, system of representative government.

Question 3

It is the third question that is likely to be determinative.

Question 3 requires a court to apply a proportionality test to decide whether s196 is justified as suitable, necessary and adequate in its balance.

That is tripartite a question of law— one which ultimately involves a value judgment by a court albeit one informed by the law's context and history.

As to **suitability**, a court is concerned whether there is a rational connection between the provision and the legitimate end as identified in the statute's purpose. That is likely to be unproblematic with respect to s196(1). There is an obvious rational link between the two.

As to **necessity**, a court tests whether there is any 'obvious and compelling alternative' that could effect the provision's purpose but which would have a less restrictive effect on freedom of political communication. No obvious and compelling alternative appears capable of being identified— assuming the purpose of s196(1) is found by a court to be as discussed above.

It is the final leg of the tripartite test—**adequacy in its balance**— that is likely to determine whether the law is upheld or not.

Any challenge to the validity of s196(1) would be open to be removed into the High Court of Australia for hearing and decision. I anticipate that the Tasmanian Attorney General would ask for that to happen if only to resolve the uncertainty which otherwise might attend the decision of a lower court.

The specific circumstance giving rise to any constitutional litigation, and how the parties to it articulate their respective contending submissions for and against validity, almost certainly would influence how that question is answered.

That is because the final step of this tripartite question requires a court to balance the purpose served by s 196(1) against the extent of the restriction it imposes on the freedom of political communication.

Necessarily that requires the judges of that court to make a value judgment as whether s196 is justified as adequate in its balance.

What degree of weight, if any, a Justice of the High Court might place on the value of preserving the coherence of Tasmania's unique Hare Clark system as includes both the Robson rotation ballot and s 196(1)'s restrictions on the publication of how to vote tickets and the naming of individual candidates without their consent, in forming that value judgment cannot be known and any answer purely speculative.

In such circumstances, particularly in the absence of the facts of an actual challenge and without further research as to the legislative history of s 196(1) being undertaken, all that usefully can be said is that those who have expressed doubt as to the provision's constitutional validity must be accepted to have a plausible basis for that contention.

However it is not self-evident, having regard to the above discussion, that a finding of invalidity would be the result of a challenge. It would not be inconsistent with fidelity to the law if the Parliament retained the provision while acknowledging the right of any affected person to seek to challenge it.

Concluding observations

At the level of generality it may be useful to observe that ordinarily the narrower the practical impact of a law is on chilling political speech the more likely the law is to be held to meet the proportionality test.

For that reason if the Tasmanian parliament is minded to retain the general prohibition s196(1) imposes, attention might usefully be given to two aspects of its operation that a court might conclude extend beyond that which is adequate in its balance.

The first involves s196(1)'s potential application to an issue of the kind raised in debate in the Legislative Council by the Member for Hobart. Its impact on political speech would be lessened if section 196(1) provided for a defence to the prohibition against publishing a candidate's name without their consent if, prior to the calling of an election, that person or a group of citizens had an existing history of making public criticisms of the conduct of someone who later becomes a candidate. Curtailing pre-existing political speech simply because a person later becomes a candidate might go towards tipping the balance adversely to validity.

Second, it is unsurprising that any provision dating from a century ago might need attention being given to modern means of communication. It may be prudent at least to specifically exclude from the reach of s196(1) the reporting of news, the presenting of current affairs and any genuine editorial content, in electronic news media and to clarify what forms of electronic communications the section is intended to apply to.

The Electoral Amendment Bill 2024

For completeness I observe that the same structure of legal analysis applies to the residual form of s 196(1) if the Bill is enacted.

The Bill if enacted may be equally vulnerable to allegations of potential constitutional invalidity.

It could survive constitutional challenge only if it is plausible that a court might accept that it is suitable, necessary and adequate in its balance.

In elections for both the House of Assembly and the Legislative Council preferences often determine whether a candidate succeeds or not. The Bill if enacted would prevent anyone recommending a voting order to electors naming other candidates even if it is done with the intention of maximising their own or another's prospect of success.

Severed from the broader considerations of public and private interest (such as constraining negative campaigning) that can be plausibly contended to apply to s 196(1) in its current form, arguably it might be just as difficult to defend a residual prohibition against campaigning for

preference votes in a recommended order as being reasonably appropriate and adapted and adequate in its balance.

Hon Duncan Kerr AO SC
14 APRIL 2025