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Subject: Submission by Bret Walker AO SC
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Hon Meg Webb MLC
Chair Joint Standing Committee on Electoral Matters

Submission by Bret Walker AO SC on *Electoral Amendment Bill 2024* (No 24 of 2004)

Thank you for the invitation to provide a submission to the Joint Standing Committee. My submission and my name may be published, as far as I am concerned. I will not republish nor release these submissions elsewhere.

In my opinion, the current provisions of section 196 of the *Electoral Act 2004* are plainly invalid by reason of their infringement of the freedom of political communication implied in the Commonwealth *Constitution*. It is by no means clear to me that any part of the current provisions could be saved by severance.

The forms of publication, in the period between the issue of the writ for an election and the close of poll for that election, by way of advertisement, how-to-vote card, handbill, pamphlet, poster or notice are very comprehensive in the variety of ways by which a name, photograph or other likeness may appear by way of such publication. In particular, advertisement, handbill, pamphlet and poster are words apt to describe virtually all the ways in which politically partisan matters might be published in an election period, about a candidate.

In short, these provisions purport to provide a veto to a candidate, during that period, over the use of their name, a photograph or other likeness in any such form of publication. This is, on its face, a grossly overreaching regulation of communication highly likely to be political in nature.

Its overreaching character appears in a number of respects. First, and remarkably, it appears there has not survived any historical material to explain why these matters should not be published, during this period in relation to an election, unless the candidate in question consented. I am afraid I cannot deduce any sensible explanation for the current provision, even historically in a period well before the High Court discerned the implied freedom, regardless of the unique Tasmanian electoral system.

Take the case of a photograph or likeness: the law purports to prohibit it being published unless the candidate consents, meaning unless the candidate likes the idea of his or her image in the form proposed for publication. I cannot conceive of any legitimate object of that prohibition, nor can I imagine how privileging a candidate in this regard could possibly be a proportionate way of achieving any legitimate end at all.

When one considers that this law does not extend its reach to forbid the publication of news photographs, or courtroom sketches, the lack of any coherent justification for this law in light of the implied freedom is palpable.

To take a current plausible scenario: a person wishes to show the electorate a recent picture

of a candidate in company with a recognizable figure; that figure may lend prestige by his or her proximity to the candidate or oppositely produce embarrassment or shame. The person wishing to publish the picture might be, thus, a supporter or opponent of the candidate's election. What legitimate end could be served by allowing publication with the enthusiastic consent by the candidate in the first case, and ban it in the second case if the candidate predictably refused consent? This example does not involve any element of misleading information one way or the other.

Put another way, the current provisions will only incidentally and occasionally have the effect of preventing dishonest or otherwise misleading being published. A provision that throws the baby out with the bath water is a classic case of a constitutionally invalid disproportionate legislative response to a mischief such as misleading publications in the context of an election campaign.

The present provisions equally could have only coincidental and tangential effect on the publication of phony how-to-vote cards. Worse so far as these provisions are concerned (as opposed to provisions regulating the publication of misleading how-to-vote cards or the like), a candidate could consent to his or her name appearing in some advantageous position in a supposed how-to-vote card, while refusing consent to a how-to-vote card placing him or her in a disadvantageous position, however genuine that latter card may have been as an expression of view by a lawfully disclosed person or group opposed to that candidate's election.

Notions of privacy have no place whatever in relation to the name and likeness of a candidate for public office.

A statutorily imposed ban on names or likenesses except in flattering or otherwise favourable forms consented to by the candidate in question may not have been the intention of the originators of these provisions, but it is an entailed outcome of their enforcement. This is absurd in the context of the implied freedom of political communication.

It follows that the proposed amendment confined to how-to-vote cards is itself, in my view, problematic. If the justification of some such regulation of political communication in this election period is to prevent or punish dishonest or misleading conduct, the device of providing candidate with a veto is both indirect and inadequate - while at the same time being vastly excessive to meet that mischief.

My understanding from Hansard is that there has been no concrete example of conduct, historical or contemporary, which Parliament has regarded as conduct that should be prevented in order to secure elections of integrity that count the votes of an appropriately informed body of voters. Bluntly, candidates' vetoes are no way to delineate political information, opinion and argument that Parliament would regard as appropriate.

I wish the Honourable Members of the Joint Standing Committee well in their considerations.

1 May 2025