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THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS MET IN COMMITTEE ROOM 1, PARLIAMENT HOUSE, HOBART ON TUESDAY, 25 MARCH 2025

INQUIRY INTO THE ELECTORAL AMENDMENT BILL 2024

Dr KEVIN BONHAM

The Committee met at 9.00 a.m.

CHAIR (Ms Webb) - Thank you. We're here this morning for the Joint Standing Committee on Electoral Matters Inquiry into the Electoral Amendment Bill 2024 public hearings. I welcome Mr Kevin Bonham as a witness. Kevin, we have committee members here today: Kristie Johnston MP; Vica Bayley MP; myself, Meg Webb MLC; Michael Ferguson MP; and Mike Gaffney MLC. We may be joined by other members in due course, and Ella Haddad has just joined us as well.

To begin with, I know you're familiar with this process, but I will go through the formalities. Before you begin giving your evidence, I would like to ask whether you have received and read the guide sent to you by the Committee Secretary?

Dr BONHAM - I have.

CHAIR - Thank you. I need to reiterate some important aspects of that document for you. The hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned any court or place out of Parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings.

This is a public hearing, members of the public and journalists may be present and this means your evidence may be reported. It is important that, should you wish all or part of your evidence to be heard in private, you must make this request and give an explanation prior to giving the relevant evidence. Do you understand?

Dr BONHAM - Yes.

CHAIR - Thank you. What we will do is get you to make the statutory declaration before we begin. I note that Bec Thomas MLC has joined us online in the committee as well.

Dr KEVIN JAMES BONHAM WAS CALLED, MADE THE STATUTORY DECLARATION, AND WAS EXAMINED.

CHAIR - Thank you, and I apologise, I was saying 'Mr' and I should have said 'Dr' Bonham. Would you like to make an opening statement? We have your submission, we also note that you have provided evidence to us for another inquiry which, where relevant, will be incorporated into this inquiry when it relates to this topic. Would you like to make an overarching statement to begin with before we move to questions?

Dr BONHAM - Yes. I welcome this inquiry because I think that having this committee is what it's for. That said, in preparing a submission, I found that I was mostly saying things

that I have said before. Reading the other submissions, I noticed was also true of all the other witnesses. A lot of this has been talked through before. It is useful to have the opportunity to talk about it without binding it to the context of one specific election.

The main thing that I wanted to cover in my submission that I had not covered in detail before was the issue of how-to-vote cards and the reason why you would keep the restriction on naming candidates in how-to-vote cards without their permission. The reason for this is that Tasmania's Hare-Clark system has competition between candidates from the same party. This is an unusual aspect that's not present elsewhere in Australia except for the ACT and, in rare cases, in Senate contests, some upper House contests and so on. Mainly it doesn't apply to how-to-vote cards elsewhere, which is usually for cases where a party is running only a single candidate.

There was a case, when Brett Whiteley was first elected, where he issued how-to-vote cards that named other candidates without their permission. This created a lot of problems, there was a finding of guilt, there was speculation about whether he could even take his seat in the Parliament. I wanted to mention that because there were some people expressing confusion, saying, 'Why would you keep the restriction on how-to-vote cards?' That's why - it's to preserve the free and fair competition between candidates from a party without someone being able to have a how-to-vote card that looks like, 'If you are voting for party x, you should vote with the candidates in this order'. If there was such a card out, it could well be that it was not authorised by a party, but was a candidate freelancing, as was the case with Whiteley. That's why you would keep that restriction.

CHAIR - Thank you. I'll pick up on that with a quick question. Presumably, then, retaining that provision in 196 in relation to how-to-vote cards isn't relevant for upper House elections because they're single member elections. At times, there are long lists of candidates running and candidates may wish to put out how-to-vote cards. Would you think and accept that there's no need to have that constraint for our upper House elections?

Dr BONHAM - Yes, it's only for the lower House, basically. If somebody wanted to put out a how-to-vote card for an upper House election, the same situation doesn't arise there, but nobody does that.

CHAIR - We haven't been allowed to, to date.

Dr BONHAM - There's also the prevention on handing out how-to-vote cards surrounding polling booths. I think someone could put out a how-to-vote card if they were allowed to outside of that, but Tasmanian voters are just so used to voting without these things that I think that the following rate of it would be very low indeed.

CHAIR - It's interesting, isn't it? I can speak from personal experience and say that preferences are often very meaningful when it comes to determining upper House results. Actually, we haven't ever been in a situation where we've been able to have how-to-vote cards available for upper House elections. If there's no Hare-Clark reason, in that sense because it's single members, not to have them, there doesn't seem to be a rationale to retain a restriction in relation to upper House elections.

Dr BONHAM - Yes. It's a lower House thing. I'll say that there are a lot of myths about how-to-vote cards. I will say that what people should be aware of is that in federal elections,

most voters do not follow how-to-vote cards, contrary to myth. Most voters who do follow how-to-vote cards are major party voters. Most preferences that follow how-to-vote cards are never distributed, because they're mostly for major party voters in seats where the major parties mostly make the top two. In some seats, they have a large impact from where a major party does get eliminated, like the Liberals getting eliminated in Victorian election contests between Labor and the Greens.

I think that in Tasmania, even if candidates for the Legislative Council were allowed to issue how-to-vote cards, you would find that the rate of voters following them was extremely low. Tasmania has very low rates of voters following Senate how-to-vote cards even compared with the very low rates in other states that were even lower.

CHAIR - There's something heartening about that.

Dr BONHAM - I think that if you allow them, people would just ignore them anyway.

Mr BAYLEY - Thanks, Chair. Kevin, thanks for your submission and thanks for your service and analysis at every election. Good luck and may your predictions and analysis be sound at this federal election.

We've heard evidence from other witnesses around an element of protection that they see in section 196, and that if you're going to do away with it, we need to balance that out with some really strong truth in political advertising laws. You're unequivocal in your recommendations that the Parliament should pass this Bill as it stands, removing section 196, consider down the track some elements of truth in political advertising, but do not condition action on section 196. Can I invite you to unpack that a little bit for us?

Dr BONHAM - Yes. I have a number of concerns about truth in political advertising that I've raised in my submission, including around the ability of Tasmanian to administer it, and including the possible impact on perceptions of fairness of the Electoral Commission.

People treat this section 196 as being a truth in advertising style protection, but it doesn't actually distinguish between whether the statement is true or false, except for the extent that if it's true, it may be more likely that the person named in it may give permission for it to occur. You can be restricted from making a true statement by section 196. This is commonly an issue with people who want to put out comment about voting records and things like that. You can't put out a statement about voting records of candidates in a Legislative Council election, so it makes it harder for people to campaign if they want to run a campaign where they want to criticise some of the candidates based on their voting records or their policy positions. It's very hard to do that.

Mr BAYLEY - I guess it does give some level of protection if the advertising is misleading or untruthful because, of course, the candidate that's named can then take action and request action from the Electoral Commission. That doesn't weigh heavily in your sort of analysis as to what the Parliament should do here?

Dr BONHAM - No. I think the problems with this legislation, as it stands, are too severe because it stops people from saying things that are true or that are legitimate opinions. I think that the harm caused by that prevention outweighs the benefits of stopping people from saying false things in an environment where people can say false things, but if someone says a false

thing, they can be challenged on it. They can be criticised for saying a false thing. Whereas, if you're stopped from saying a true thing, that's it, you just can't say it. If somebody says a false thing, there is an opportunity for them to be criticised and voters can judge them for having said something that is false.

Mr BAYLEY - Is that weighed up with your analysis about the sort of influence that may have on the outcome of the poll?

Dr BONHAM - I don't know that I've talked about the - I am concerned that you can get a situation here where someone is stopped from saying something that they should be allowed to say. I'm more concerned about that because - and I'm particularly concerned about this law because it's been implemented in cases where I think it shouldn't, particularly the Juice Media thing. I think that was a mistake by the Electoral Commission under pressure. As I've said in my submission, I would very much like to see the advice that that was based on because I think they may have been given mistaken legal advice. It's very concerning to me where you have a situation where some people try to say things that seems that they should be allowed to say under the law, at least under the federal Constitution, and they're stopped by this confusing law. I think that that has a greater impact on the fairness of elections than if someone is allowed to say a false thing in a situation where they can then be criticised by others for saying that false thing.

I've also mentioned that it is possible to imagine circumstances in which somebody would say something false and, because of this law, a candidate wouldn't be able to correct the record. They might want to use a video to show someone saying something that happened at a meeting or something like that, and the candidate wants to use a video to show that this is false, but they can't use that video because that video features a likeness of another candidate. There's a potential for this to interfere with the correction of false claims as well. I'm not aware of a case where that's come up, but it could happen.

Ms O'CONNOR - Thanks for your excellent submission and all your work for democracy. What you're essentially describing there is a chilling effect on free political discourse during that period of the campaign between when the writs are issued and the end of the election. It can be argued that section 196 has a chilling effect, can't it?

Dr BONHAM - Yes. One example, I think of a previous Nelson election where there was a lobby group that wanted to put out sort of statements about the voting records of candidates on particular issues or concerns to them - same-sex marriage or something like that - and because of this law - you can put out candidates and you can name some of the candidates, but you'd be sort of naming candidate A, candidate B, candidate C, and then so-and-so will become 'incumbent member' or 'liberal candidate' or some other description like that. You can't actually name the person who you're making a statement about because this law won't let you. I don't think that that style of voting record criticism is very effective, but people should be allowed to say, 'This person with this name is running for election and I think they have this policy and I think that you should or shouldn't vote for them based on this.'

Ms O'CONNOR - It can be effective in a small community though, can't it? If there's a newsletter going out where there's been a candidate forum before an election. Within that community, there's a sharing of knowledge about each candidate's position. What I actually wanted to ask you about, because I know you engage with the Tasmanian Electoral Commission on a semi-regular basis, do you empathise with the TEC a little bit on section 196?

Because they're taking calls from people from political parties who are unhappy with some representation that they've seen during a campaign, then they're in this bind, having to interpret and apply the Act. Often what they'll do - out of an abundance of caution, isn't it - is ring up the person and ask them to take it down.

Dr BONHAM - Yes, that's a problem where you get cases where the TEC might think, 'We're not sure that 196 hasn't been breached' and then they're asking someone to remove the material, which carries the implication that you are in breach. I would prefer in those cases if they simply said to the person, 'Look, we have had a concern raised that you may be in breach of section 196. We don't take a position on the matter because we're not sure, but we recommend you get your own advice.' It's a problem if you have the Electoral Commission asking people to take things down because they might be in breach, not saying, 'You should take this down because you are in breach, in our view'.

Ms O'CONNOR - Isn't that partly, though - the TEC ends up in that position because there's interpretive ambiguity about how section 196 should be applied -

Dr BONHAM - Yes.

Ms O'CONNOR - The TEC is almost acting out of an abundance of caution in saying to people, 'Could you please take this down', even though they may not be in breach of section 196 and they certainly wouldn't be in breach of the implied freedom of political communication under the Constitution.

Dr BONHAM - Yes, it's an unenviable position for the TEC. I find it strange that we had this situation where the TEC put out a statement about how they were going to interpret section 196 that seemed to be very sensible. They were saying that they were going to take the view that a lot of social media was more like a public meeting and they were going to be cautious about this. Then the Juice Media video, which seems to be exactly the sort of thing that was being talked about there, somehow ends up being the subject of a takedown request. We reached a bizarre situation where something that is obviously a mock advertisement somehow gets deemed to be possibly an advertisement under some reasoning that I cannot make any sense of. This is a severe problem that we have this law that nobody seems to understand how to apply to the modern world because nobody understands what the reason for it in the first place was with certainty, pre-Hansard I believe.

Mr FERGUSON - I have a different question, but before I get to that, I just want to pick you up on that, if I may, Dr Bonham. I'm fascinated by your observation about the Juice Media mock ad, because, actually, I think the creation of that mock ad has helped to focus the minds of politicians, political parties, and advocacy groups around the need to reform 196. I actually think it was an ad, I believe it was electoral material because, even if it had a mocking style, as a Liberal candidate I took it as a hostile ad against my party's interests, which in my opinion should have been allowed and is reasonable and fair play. Except that it did breach 196 because it featured a likeness of the Premier, but doesn't that help make the case that we need to reform 196 because that's exactly the sort of media, whether it's humorous, mocking, or serious, it's still electoral material and it ought to be allowed. If it gets a laugh along the way, maybe that lightens the campaign.

Dr BONHAM - It was certainly electoral material, but I don't think it was an advertisement because an advertisement is usually something that is paid for by one actor to

PUBLIC

appear in another actor's media, like somebody buys an advertisement in the paper. Now, this was material that Juice Media issued unilaterally. I don't believe they were paying anyone - maybe they were paying YouTube, I don't believe they were, I think they were just putting it out on their channel. I don't think that it's different to -

Mr FERGUSON - It was also beamed up on a building.

Dr BONHAM - Was it?

Ms HADDAD - Was it?

Ms O'CONNOR - Excellent.

Mr FERGUSON - This would have cost money.

Dr BONHAM - Yes, yes.

Mr FERGUSON - Fair play, I think. The point I'm trying to make, even though it was against my party, is that that's the sort of material that should be allowed in a campaign.

Dr BONHAM - Yes.

Mr FERGUSON - And it was electoral material, we agree on that at least.

Dr BONHAM - Yes.

Mr FERGUSON - Thanks for your observations on that. I really appreciate it. I just want to take you to the part of your submission, which you've also commented on in your evidence about the within party competition. I'm playing a devil's advocate role here because the position of my party is that we still want to protect against the use of name and image for a 'how-to-vote' card during the campaign period.

You clearly support that as well. You refer to the importance of within party competition, but is that within party competition really what the Hare-Clark system is intended to provide? I noticed that with a one-step Google search I was able to find a literal how-to-vote card with one to seven with people's names in an order of one party that participated in the last election. They've clearly chosen to do that as a way of maximising the chance, first of all, of getting a seat up and perhaps getting more than one seat up - I'm referring to the Greens - and that was a successful strategy. They focused their supporters to a particular voting method of one to seven with their preferred candidates.

I'm just interested in your views on that because the Greens - first of all, would you agree that that was a successful strategy by the Greens and helped them get two seats in Clark?

Ms O'CONNOR - We've always ranked our ticket though.

Mr FERGUSON - That may be the case -

CHAIR - It's a fair question. Let's have the answer.

Dr BONHAM - Actually, I think it's very debatable whether it was a successful strategy. They did get two seats in Clark, but there is an advantage in trying to split your vote evenly across your ticket, which they didn't do in Franklin. In Franklin, having their vote too dominated by the top candidate, who was their leader, was always going to happen, but that didn't help them get two seats, which they ended up not getting.

The Greens are different in that they are a party that is normally only competing for one seat. We did have a case where they got two, in this case. I particularly intended that comment in the context of the major parties, that the major parties usually have multiple strong candidates competing for multiple seats and where it's often not clear who's going to get them. I mainly intended that in the context of that.

If a party's candidates are all happy with being ranked in a how-to-vote card order, they can. There's nothing to stop the major party's candidates in a seat from saying, 'Hey, we want our voters to go out and rank us in this order one to seven', but they don't do that, partly because that gets in the way of competition between major party candidates, which people value, and partly because it's actually a stupid strategy.

Mr FERGUSON - My final question on this theme is - to switch gears a little bit - can I invite you to distinguish between mentioning/publishing a how-to-vote card. You might be an interest group and you wish to say, 'Well, look, if you're going to vote we would encourage you to vote for these people in this order. They might actually run across the card from different parties because they're all candidates that are more Ford than Holden, for example. We want you to encourage this vote. I want to distinguish that from standing at polling booths and handing out - and I could say harassing - voters at a polling station, which is what distinguishes state elections from federal elections. Our state elections are a very serene affair. People quietly line up, have a chat with their people that are in front and behind them and go in and quietly vote -

Ms O'CONNOR - True.

Ms CHAIR - Enjoy their sausage.

Mr FERGUSON - and enjoy their sausage or their slice of cake, compared to elections for federal, which are running the gauntlet and people getting over-enthusiastic. I want to just draw that distinction. The question is why shouldn't a lobby group or an interest group be able to encourage voters to vote a particular way, whether it was for a party in an order or across the ticket in an order? I just again say my party's position is not to allow it, but I am playing devil's advocate with the question. Why shouldn't they be able to do that?

Dr BONHAM - As I mentioned, it's to do with - the purpose of the provision is to ensure competition within parties. If it's clearly something that's a non-party source, say, if it's something like the Australian Christian Lobby, and it's saying, 'Our ranking of the Liberal candidates is 1-2-3-4-5-6-7 blah blah blah', I don't think that would be a problem.

Mr FERGUSON - That does run against your evidence in your submission.

Dr BONHAM - Yes, but that's a very marginal and uncommon case.

Mr FERGUSON - I don't wish to be argumentative, because I appreciate what you're bringing to the table, but I'll just point out the parties can already do it. They could make it part of their candidates agreements, which presumably is what the Greens do. I just appreciate your answers to the questions. It's good discussion. Thank you.

Dr BONHAM - Yes, the major parties don't do that. If the candidates agree with it, then it's fine.

CHAIR - I'm going to move to Ms Thomas online.

Ms THOMAS - Thank you. Dr Bonham, in your recommendations in your submission you say the Parliament should pass the Bill irrespective of whether any other changes in regulation of electoral speech are agreed to. Then you go on to say the Parliament should consider also, and perhaps together, passing new laws restricting some new narrowly defined forms of false or misleading electoral material. I'm just interested in your thoughts on - because a lot of the discussion we've been having in the hearings and the submissions and indeed in the debate in the Parliament was around: one, naming candidates and using images without their permission; and two, some concerns around misleading and deceptive information, and the impact that has on candidates and electors who are falsely led to believe something that may be not true.

I'm wondering if there's possibly a solution that would mean candidates could still be named and their images could still be used without permission, but would address the issue of misleading and deceptive electoral matter. Maybe amendment to section 197A, which currently reads:

197. A person must not communicate, or permit or authorise the communication of, any electoral matter that -
- (a) is intended, is likely, or has the capacity, to mislead or deceive an elector in or in relation to recording of his or her vote.

If 'in relation to or the recording of his or her vote' was removed from that, it would be a provision that would mean a person must not communicate electoral matter that misleads or deceives an elector - full stop. Do you think that would be a reasonable amendment to make, to address the issue of prohibiting misleading and deceptive information whilst also enabling people to name and use images of candidates without their permission?

Dr BONHAM - That would effectively become a full-scale truth-in-electoral advertising provision in that case. That would be covered by the concerns that I've raised about full-scale truth in electoral advertising both in my submission and in the previous inquiry.

The existing provisions there regarding misleading an elector in relation to the casting of the vote concern the voting process. That will be things like telling them the vote will be formal when it's not formal, telling them the election is on a day when it's not on that day, telling them that a candidate is endorsed by a party when they are, in fact, not endorsed by that party. That sort of thing. If you make it cover misleading and deceptive material generally, then that becomes a full-scale truth in electoral advertising provision. The Electoral Commission has to decide what electoral material is true or false in the face of constant complaints.

I have concerns that I've raised about Tasmania's ability to implement full-scale truth in electoral advertising and I have concerns about the potential for statements that are actually reasonable to get knocked out by courts in cases like this. I am a little concerned about the separation of powers in the case of truth in electoral advertising, because judges become arbiters of political truth.

Ms THOMAS - You accept, then, that it is okay for misleading and deceptive information to somewhat inform election outcomes?

Dr BONHAM - I accept that if you remove the current provisions that - I mean, there's still plenty of misleading information and misleading claims that can still be made. The current situation is not stopping people from saying misleading things in elections. In my previous round, I identified some of them that were actually said during the last election campaign that were significant, so it's not actually stopping it.

What I've been saying all along here is that some misleading claims being able to be made is the price that's paid for free and fair debate, and people can be judged if they make misleading claims.

Ms THOMAS - Finally, on the matter of the ability to administer proposed truth in advertising laws, what do you think of an independent panel being established to make those decisions, rather than courts or the TEC?

Dr BONHAM - Ultimately, the decisions on what is legal have to be made by a court. The court has to confirm that something is legal under the law. I don't think you can have an independent panel going around fining people. If there was to be a truth in advertising model, I would prefer that an independent body be administering it rather than the TEC, just because of the impact on the TEC's reputation if the TEC has to implement it. That said, I'm concerned about Tasmania's ability to support such a body, particularly given the problems that we've had with the Integrity Commission, for instance, in terms of both resourcing and questions of competence - whether we would have a body able to competently do that job in this state.

CHAIR - Thank you. I'm going to take us slightly past our finished time because Ms Haddad has a question.

Ms HADDAD - I know we're running short of time, but thank you, Kevin, for the conversation today and all of the submissions you've made to various inquiries. My question was similar to Bec's. I know we are running short of time so I'll distil it down to this. The committee has heard from people who believe that 196 protects against false and misleading information being distributed during an election campaign. I don't share that view. I just wondered if you would like to elaborate a little bit on your thoughts about what 196 can and does currently provide in terms of protections.

I'll give one very quick example of a really impractical application of it - I've clarified something I referred to yesterday - it was a 2018 election where the Labor Party was ordered to remove information from their Facebook page that had been put up onto the Facebook page prior to the writs being issued. It wasn't advertising material or how-to-vote cards, it was just policy debate. For example, the Government's going to do something that the Labor Party disagrees with, or make a cut to a department that we don't agree with, or put forward something that the Labor Party opposes. It was genuine policy debate going on by way of social media

that had to be removed because it referred to candidate names, although it had been posted prior to the issue of the writs. Once the writs were issued, Labor Party was ordered to take that down. It was an administrative task for someone in party office to go through and remove all these posts.

Ms O'CONNOR - I am surprised you did.

Ms HADDAD - I've confirmed with our former State Secretary that that did actually happen. I just wondered if you would elaborate a little bit on your thoughts about the people who believe that 196 provides protection from misleading and deceptive information being distributed. That was longer than I intended.

Dr BONHAM - It does stop some deceptive and misleading material from being published. The problem is that it's a catch-all that doesn't distinguish between whether the information is deceptive and misleading or whether it isn't. The test is only that a candidate -

Ms HADDAD - Mentions the name, yes.

Dr BONHAM - Or permits their name to be used, and the candidate can object to true things being said about them, just as they can object to false things being said about them. It's the fact that they can object to true things being said about them that's the chilling - alter reasonable opinions that aren't clearly false or misleading. That's the problem with it.

There was something else I did want to mention briefly, which is that the issue of 'deepfakes' has come up a number of times in this debate. I'd like to mention that Western Australia just had an election and, just like the Queensland 2024 election, there was a lot of speculation that there was going to be nasty deepfake-style campaigning - and there wasn't.

Ms O'CONNOR - The Alan Turing Institute has done some really interesting research on this on the US and UK elections, the impact of deepfakes and said so far, not of significant impact at all.

Dr BONHAM - It's not a panic stations thing. In terms of AI, there are far bigger problems with AI than deepfakes in terms of the impact on elections. This is getting into a separate matter. People are looking up things about elections on AI sites that are false - AI sites are providing false information and people believe that AI is like Google. This is a big problem. The deepfake thing seems to have been overhyped. I'd also say that, with 196, I'm more concerned about the restriction on naming candidates without their permission than I am about the image situation. If the naming part was fixed, I would consider that to be most of the solution. Most uses of images of candidates without their permission, like negative campaigning style stuff, that doesn't really contribute a lot to debate. There are cases that I can imagine - I mentioned one earlier where it might be useful to be able to show an image, but mostly it's that people can't name candidates and that we don't know what material that applies to. It's a big problem.

CHAIR - Thank you. We've gone past the time and we appreciate your indulgence on that. Thank you, members. I'm going to advise you, as I said at the commencement of your evidence, what you've said to us today is protected by parliamentary privilege. Once you leave the table, you need to be aware that that privilege does not attach to comments you may make

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to anyone, including the media, even if you are just repeating what you've said to us. Do you understand?

Dr BONHAM - Yes, thank you.

CHAIR - Thank you, Dr Bonham, for your time.

The witness withdrew.

The Committee suspended at 9.35 a.m.

TASMANIAN CONSTITUTION SOCIETY

The Committee resumed at 9.37 a.m.

CHAIR - Welcome, Mr Spark, to the Joint Standing Committee on Electoral Matters inquiry into the Electoral Amendment Bill 2024. We appreciate the submission that the Constitutional Society has made and that you've come today to speak with us more about that.

We've got the full committee: Bec Thomas MLC is online; we have Kristie Johnston MP; Ella Haddad MP; Cassy O'Connor MLC; Vica Bayley MP; Michael Ferguson MP; Mike Gaffney MLC; and I'm Meg Webb, MLC. We've also got Scott supporting us and Secretariat and Gabby on Hansard. Welcome. I'll do the formalities at the start to check with you that you've received and read the guide sent to you by the committee secretary.

Mr SPARK - Yes.

CHAIR - I'm going to reiterate some important aspects. The hearing is covered by parliamentary privilege allowing individuals to speak with freedom without fear of being sued or questioned in any court or place out of Parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings.

This is a public hearing. Members of the public and journalists may be present and this means your evidence may be reported. It's important that should you wish all or part of your evidence to be heard in private, you must make this request and give an explanation prior to giving the relevant evidence. Do you understand?

Mr SPARK - Yes.

CHAIR - Thank you. We'll get you to make your statutory declaration and then if you'd like to make an opening statement or speak to your submission before we move to questions, that would be great.

Mr NEIL SPARK, PRESIDENT, TASMANIAN CONSTITUTION SOCIETY, WAS CALLED, MADE THE STATUTORY DECLARATION, AND WAS EXAMINED.

Mr SPARK - I don't propose to give you the background for the Tasmanian Constitution Society. I think most of you are aware of that. I know Mr Gaffney and Mr Ferguson haven't been at other hearings that I've been at but I think just in the interests of efficiency and time, I probably don't need to go into that.

Let's get straight to section 196 which is why we're here. The Constitution Society supports a change to the law because we think that a measure of any law's effectiveness is its practicality and enforceability. We think if 196 was taken seriously, the TEC would have a division or unit dedicated to possible abuse. It would be staffed by people who were to be keeping an eye out for possible breaches.

We also think that there's the potential for it to be open to abuse as the section stands. If someone complains, the TEC investigates, but the complainant is likely, we think, to be a political actor whose motivations are vexatious. The Electoral Commission has concerns about

the publication of inaccurate information if the clause was changed are actually covered by other regulations.

It has been argued that retaining section 196 could give voters greater confidence and faith in our democracy. We're all for that. However, Tasmania doesn't have truth in advertising laws. We think anyone can say anything about a candidate, true or not, whether section 196 is there or not.

We think that there is a need for electoral reform. We think that South Australia is an exemplary model because it includes publicly-funded election campaigns with the same spending caps for both Houses of Parliament, which we don't have. South Australia also has truth in advertising laws, which we don't have. Changing section 196 won't make a great deal of difference to the conduct of our politics. That concludes my remarks, Madam Chair.

CHAIR - Thank you, Mr Spark. One of the things that I was interested in is your advocacy for the truth in political advertising laws, and the references to South Australia in your submission. You've just mentioned now some of the concerns that are raised around introducing such laws relate to the capacity of an electoral commission, especially in a small jurisdiction, to be able to give effect to those laws and police them appropriately, I suppose, to put it bluntly. The other is that it might undermine the credibility, the impartiality or the sense of being apolitical that that electoral commission has. Have you turned your mind to that or do you have a view on that?

Mr SPARK - The concerns that you raise are certainly possible, but if a division of the Electoral Commission or a team or whatever you'd like to call it was set up, there would have to be a commitment to do that and staff it in a way that would enable it to be effective. I'm sure that those staff members would be, like all public servants, professional, impartial and do an effective job.

Mr BAYLEY - Thanks, Mr Spark. There's a strong view, amongst other witnesses and submissions, that section 196 cuts across the Australian Constitution, the implied right of freedom of political communication as a constitution society. Have you turned your mind to whether it complies with the Constitution or not, or have you sought any advice in relation to this section in the context of the Australian Constitution?

Mr SPARK - We're getting into a legal area where we don't have that expertise.

Mr BAYLEY - It's never been tested, of course.

Mr SPARK - I'm aware that there are concerns about that, that issue has been raised. It hasn't been tested and I suppose that would be the only way to resolve it. I'm inclined to think that it probably doesn't, but it would be interesting to know with certainty either way. The only way to do that would be to test it.

Mr BAYLEY - There's benefits in getting rid of it irrespective of that, as per your submission?

Mr SPARK - Yes, it seems illogical to have a clause in an Act that isn't going to make any difference whether it's there or not, or, we think, a great deal of difference.

Ms O'CONNOR - It could make a difference though, couldn't it? The clause, as it is, to the free expression of political opinion during the period of an election campaign, which is the evidence that we heard from Dr Kevin Bonham - the chilling effect of that provision now.

Mr SPARK - Yes. I'll correct myself there, that yes, it would make a difference if it stays. That's why we think it should probably go.

Ms O'CONNOR - Within your submission, Neil - and thank you for that - you do put forward the argument for truth in political advertising. The Australia Institute has taken a similar position. Dr Bonham has a different position. The Bill before us simply amends section 196, that's what we're dealing with at the moment. To summarise your submission, would it be fair to say the Tasmanian Constitution Society, on balance, would like to see section 196 amended for the reasons that you outlined, and while you want to see truth in political advertising happen, it doesn't need to be connected to this Bill?

Mr SPARK - Yes. I would agree that that's an accurate summary of our position. I raised the truth in political advertising - I know that that's not within the purview of this committee, but concern has been raised that if this section was changed in the way suggested, it could open the floodgates to misinformation, disinformation and lies.

Ms O'CONNOR - That's all here now anyway.

Mr SPARK - Exactly, and getting worse. I'm not sure that keeping this section worded the way it is now is going to make any difference to people lying and spreading disinformation and being vexatious actors.

CHAIR - I'll jump in there just to correct - in fact, truth in political advertising matters are in the purview of this committee because the electoral matters committee could consider that issue for sure. We can consider it potentially as it comes up in this inquiry, but it's also a matter we could consider separately because it is across the areas that we are looking at in our terms of reference for this committee broadly.

Ms HADDAD - Thanks Mr Spark, just while we're on the topic of political truth and political advertising, the committee has heard evidence about it and it's been debated in the Chamber and in other committees as well. I note that your organisation is in favour. I wondered if you had any observations you might like to share about who might be the arbiter of such a scheme if it were introduced. The TEC or, as Ms Thomas suggested in our last hearing, an independent panel might be established or there might be some alternative in terms of who would actually receive allegations of breaches of truth in political advertising laws and who might be the arbiter of those complaints.

Mr SPARK - I think, logically, the Tasmanian Electoral Commission would be the appropriate organisation to deal with that. Obviously, the Electoral Commission is overloaded with work now, so for that to work and be effective the Electoral Commission would need to be funded appropriately. I think often what happens with these things is that a process or a division is set up but it's not properly funded, so it's not able to fulfil its intention.

Ms HADDAD - I thought it was interesting, the observation you make that action can really only be taken at the moment if somebody makes a complaint. You've expressed that very clearly in your written submission around vexatious actors, that kind of thing. The Labor Party

PUBLIC

has been in support of introducing some kind of political advertising laws. I think the challenging balance will be making sure that any such scheme doesn't have the counterintuitive effect that I think section 196 does have, which is to shut down debate on policy issues.

Mr SPARK - Yes. That's certainly a danger and a danger that we're cognisant of and something that with any sort of legislation would have to tread around carefully. Obviously, the intent is not to shut down political debate. At the same time, the public need to be able to come to a decision about how they're going to vote based on information that's fair, true, and honest.

CHAIR - I think we might have come to the end of our line of questions for you, Mr Spark. Thank you so much for your time with us today. Are there any closing comments you want to make or things that we didn't cover that you would like to put on the record here before we wrap up?

Mr SPARK - No, I don't have anything to add. Thank you for the invitation and your time.

CHAIR - I have to advise you before you leave, just to remind you that as I said at the commencement of your evidence, what you've said to us here today is protected by parliamentary privilege. Once you leave the table, you need to be aware that privilege is not attached to comments that you may make to anyone, including the media, even if you are just repeating what you've said to us. Do you understand?

Mr SPARK - I do understand.

CHAIR - Thank you so much for your time. We appreciate it.

The witness withdrew.

The Committee suspended at 9.50 a.m.

LIBERAL PARTY OF TASMANIA

The Committee resumed at 9.59 a.m.

CHAIR - Mr McQuestin, welcome to the Joint Standing Committee on Electoral Matters Inquiry into the Electoral Amendment Bill 2024. Thank you for being here on behalf of the Liberal Party and for the submission made.

We have the committee in attendance in full. Online, we have Bec Thomas MLC. We have Kristie Johnston MP; Ella Haddad MP; Cassy O'Connor MLC; Vica Bayley MP; Michael Ferguson MP; Mike Gaffney MLC; and me, Meg Webb, MLC. We have the support from Scott on Secretariat and Gabby on Hansard. We appreciate your time today. I'll do the formalities before we start. Before giving your evidence, I'd like to ask whether you've received and read the guide sent to you by the committee Secretary.

Mr McQUESTIN - Yes, I have.

CHAIR - Thank you. I need to reiterate some important aspects of that document here. This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or place out of Parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings.

This is a public hearing. Members of the public and journalists may be present and this means your evidence may be reported. It's important that should you wish for all or part of your evidence to be heard in private, you must make this request and give an explanation prior to giving the relevant evidence. Do you understand this?

Mr McQUESTIN - I do.

CHAIR - We'll get you to take your statutory declaration and then move to an opening statement if you would wish to make one before we have questions from the members.

Mr CHARLES DAVID McQUESTIN, STATE DIRECTOR, LIBERAL PARTY OF AUSTRALIA (TASMANIAN DIVISION), WAS CALLED, MADE THE STATUTORY DECLARATION, AND WAS EXAMINED.

CHAIR - Would you like to make an opening statement of some sort?

Mr McQUESTIN - I don't think so, Chair. Obviously, you've all received our submission. I'm happy to rely on that.

Ms O'CONNOR - Thank you for your submission, Mr McQuestin. Perhaps you could summarise what your position is on behalf of the Liberal Party on the impact of section 196 on free and open political discourse during an election campaign?

Mr McQUESTIN - It's an important part of our electoral process, the ability to challenge incumbent members of a Parliament and hold them to account for their actions and to challenge actions that they may have taken. I believe that section 196 does impinge on that.

I'm no lawyer, though several submissions to the committee have asserted that section 196 is likely to be unconstitutional given it may breach the rights of freedom of political communication under the Australian Constitution. This section of the Act, in my view, or in the party's view as well, has not kept pace with the community or with technology. It was clearly conceived in a time where broadcast or social media were not available.

It's inconsistent with the *Commonwealth Electoral Act* as well as every other state Act and therefore leads to complication there. I fear that we will continue to see a complaints arms race come from this section of the Act. It's ambiguous and we've seen some inconsistent determinations, and there's no criticism of the Tasmanian Electoral Commission, but we have seen certain pieces of communication considered in different ways.

It's resource-heavy on candidates. It uses a lot of resources for the TEC, I'm sure, and it certainly does for political parties. I would ask members of the committee one further thing, if you were presented with an Act that contained this section, knowing its potential to be unconstitutional, would you support this section being included in an Act that you were considering? I feel, looking at the nods around the table, that the answer may well be that you would not support that.

Ms O'CONNOR - Thank you for your answer. We haven't yet seen legal advice, for example, that the Tasmanian Electoral Commission has relied on and they've corresponded with us in the past to say they've sought advice from the Solicitor-General and perhaps we could seek that advice, but there clearly is a constitutional question. Have you ever seen any advice on the constitutionality at all of section 196? Has the Liberal Party taken a -

Mr McQUESTIN - We've not sought such advice and I have not seen anything.

Ms O'CONNOR - But you would agree - there's plenty of High Court precedent that affirms the implied right to freedom of political communication that section 196, by its very nature, impinges on that implied right because it prevents community organisations and other NGOs [Non-governmental organisations], anyone, from during an election campaign portraying a candidate and putting their position, for example, on a particular policy or issue.

Mr McQUESTIN - That would be my feeling, but I don't feel I'm qualified to make any further assertion and that would be my starting point.

Ms O'CONNOR - But just to flesh out a little bit the impact from the Liberal Party's point of view on open political discourse, remembering that this provision only applies from when the writs are issued to when they're called in. It's such a short period, but during that period, section 196, do you believe impacts on open political discourse during the campaign?

Mr McQUESTIN - Yes, I believe it does.

CHAIR - I'm going to go to Ms Thomas online.

Ms THOMAS - Thank you, Mr McQuestin, for your submission on behalf of the Liberal Party of Australia, Tasmania Division. Your submission says that 'in our view, section 196 is nothing more than a protection racket for incumbent members of Parliament. I just wonder what the party's thoughts are on the importance of having some mechanism to protect electors from false or misleading or deceptive material information. Do you think there ought to be any

legal provisions to protect electors from misleading information, or do you think it's okay to have information in the public arena that misleads electors, effectively tricks them into believing something to be true, to win votes?

Mr McQUESTIN - I believe that the Tasmanian electors are a very intelligent group of people and that they will very quickly understand what is truthful information and what is not, and it is in no-one's political interest to be caught out putting out information that's not truthful and it is a self-policing environment.

CHAIR - Do you have a follow-up on that, Ms Thomas?

Ms THOMAS - My follow-up would be in relation to section 197 of the Act, which has had some amendments in recent times that are specifically around parties and ensuring, well prohibiting I guess, misrepresentation of party alignment or affiliation. Does the party have a view on potentially amending section 197, so that people are able to use a name or image of a candidate without their permission, but not in a way that is misleading or deceptive?

Mr McQUESTIN - I have to concede to having studied section 196 for this hearing. I've not really looked any more broadly than section 196, so I'm not in a position to comment further.

Mr BAYLEY - I feel compelled to ask a question I wasn't going to ask based on that last answer on behalf of some colleagues of ours in the Chamber who presented evidence yesterday highly critical of the Liberal Party and a tactic at the last election to create a fake website purporting to be a Jacqui Lambie Network website, and what they believe is deeply misleading and dishonest behaviour in the midst of an election campaign. Given your last answer around your belief that all information should be transparent and honest and accurate, would you, as the new director of the state division, endorse that kind of tactic in an election campaign context?

Mr McQUESTIN - I wasn't here during the last campaign.

Mr BAYLEY - I appreciate that.

Mr McQUESTIN - I'm not familiar with the particular example you give. All electoral material must carry an authorisation and someone has to be responsible for it; otherwise they have breached the Act. As far as I can comment, you need to make a judgment based on anything that you're going to put your name to?

Mr BAYLEY - Would you see yourself as director signing off on an advertising strategy that is authorised by the Liberal Party but purports to be from another party?

Mr McQUESTIN - It's not authorised by the political party, of course. It's authorised by the responsible person. So, it sits with the director or whoever the responsible person is.

Mr BAYLEY - That would be you in the current context.

Mr McQUESTIN - In the current context it would be me, but, as I said earlier, the Tasmanian voter is an intelligent, well-informed person and I would be unlikely to go down

the road of any tactics that would see us on the wrong side of that. Whilst I am not in a position to make a definitive comment, I think I refer you to an earlier answer.

CHAIR - To follow on from that, is it your view that it's a fair expectation that if a website utilising the name of another party presented visually as being from another party, but with a small authorisation somewhere on it, that it is being authorised by the director of the Liberal Party, that it's a fair expectation that the average voter who might encounter that in a web search is expected to ascertain that that's a misleading website, that it isn't in fact who it purports to be in the headline that it's actually a Liberal Party site.

Mr McQUESTIN - Well, the authorisation makes it quite clear whose it is.

CHAIR - That's often a very small matter and the intent has clearly been to misrepresent the other party by presenting material on that website.

Mr McQUESTIN - I can't speak to what the intent was, but obviously an authorisation has to be placed on all material that you are responsible for. If you neglect to do that, then you have breached the Act.

CHAIR - It's very much a 'letter of the law' sort of approach, isn't it? Not so much ethically based, but legally based. 'We've put an authorisation, very small at the bottom somewhere, even though we've branded everything else to look like another party that's not us' in order to try to influence voters' thoughts about that other party.

Mr McQUESTIN - Well, there is a requirement for authorisation and size requirements often as well. Not being familiar with the particular example that you give, it's important that all communication complies with the Act.

CHAIR - It's a very well-known public example. It was reported on in the media. It's been discussed a lot. You've come in to this position of responsibility. I think we can assume you're at least passingly familiar with it. If you weren't, we would be astonished, I think, to learn that you weren't. So, even from the description we've provided today, do you regard that sort of behaviour as ethical behaviour in an election context?

Mr McQUESTIN - To address your comments, I was interstate running a larger organisation at the time that it occurred. I am not familiar with it. As I reiterate, we take our responsibilities to comply with the Act seriously and we'll continue to do that.

Mr BAYLEY - Can I ask a follow-up? We've heard evidence from other witnesses that any dealing with section 196 in terms of amending it as proposed needs to be married with truth in political advertising laws. We've heard this conversation and I ask again, as the responsible entity for the Liberal Party now, would you see yourself signing off on and authorising an ad that purports to come from another party or another candidate?

We're going to be asked to pass this legislation without those truths in political advertising provisions, I understand. We won't necessarily rest on your assurance here today, Mr McQuestin, I'm just interested, as the responsible person, could we expect you to sign off on an ad that is in the colours of, and purports to be from, a different candidate or party?

Mr McQUESTIN - Mr Bayley, I'm not in a position to make a judgment on that at this point. Obviously, political environments change but, as I say, we will continue to make good on our obligations under the Act.

Ms HADDAD - Thanks, Mr McQuestin for giving us your time today. Just to comment on the issue around that Jacqui Lambie website, section 196 didn't prevent that website from going out there, no matter any of our personal views about it.

I just wanted to ask if you could provide any examples, if you have any, so 196, as you've described, well - it prevents the use of someone's name, whether it's truthful or otherwise, or image, whether it's truthful or otherwise. In my view, it does have an effect on people being able to have free-flowing political debate including, as we've had other examples, community groups putting out report cards or statements on individual party or candidates' views on policy issues. Of course, it only applies within the issuing and return of the writs. So it's really quite a limited time period that it provides any protection. In the meantime, it also, in my view, shuts down the ability to have policy debates during that time. I just wondered if you had any examples from an administrative point of view from your organisation of counterintuitive or impractical applications of 196 that your organisation may have had to deal with in your time as director?

Mr McQUESTIN - To start with, when you endorse candidates, you have to ask them and then check, of course, that every post that they might have put up on their Facebook page that might include the image or name of an MP from another party is removed. In fact, you need to make sure that you have written agreement from all your candidates that their colleagues can name them in their posts as well.

That might seem like a simple thing to do, but some people who come from public life prior to being elected, might have other - not just a simple Facebook presence, for example, so there's a number of layers in that. They may have had a social media account for a workplace that they were responsible for also. So, the first thing is a necessary and quite substantial burden to make sure that that's dealt with. I'd give you a reasonably current example that 7 Tasmania News, if they carry a political advertisement during their news, that's fine, but when they then go and publish their news bulletin on YouTube as they do each day, that advertisement is a breach, potentially.

Ms HADDAD - Comes within the scope of 196, inside the writs.

Ms O'CONNOR - It's an illogical anomaly in the application of that clause.

Mr McQUESTIN - I believe that's right. I'm not sure whether the obligation falls on them as the publisher of that advertisement or the person who paid for the advertisement, who probably didn't expect it to be reproduced in that way. There're two examples, I suppose.

CHAIR - Just to clarify, that was a specific 196 problem, was it? In terms of the 7News and publishing it on YouTube.

Mr McQUESTIN - Well, it would potentially be so.

CHAIR - But you're saying that exists now as an issue. Has it been pulled up as a section 196 -

Mr McQUESTIN - It's not one that has actually occurred to date, but I'm aware that the practice of the reproduction of 7 Tasmania News - I would imagine if I looked I'd find that WIN News would do something quite similar - could well present that problem.

CHAIR - Just making sure that there's a connection between that and section 196. We're talking about that.

Mr McQUESTIN - Certainly. I'm talking about 196 because an advertisement may well contain an image or likeness or name of a person.

Ms HADDAD - The example you've given is a really -

CHAIR - There might be a person who gave permission for it to be created.

Ms HADDAD - Yes, that's right. It is a practical example for providing it because you're right. TV advertising doesn't come within the scope of 196, is my understanding. It comes under the Commonwealth broadcasting Act. You're right. It's a not double standard, but it's a disconnect between where an advertisement might actually be viewed.

With your example of Facebook pages and checking that candidates - you're quite right, people come to run for office after a history in local government or in public life in some other way. Have they had to remove information that simply talks about a policy issue, because I know the Labor Party has had to do that and I've explained that to the committee already. I won't bore you with the details. Inside the writs they've been required to remove information that was up on their Facebook page prior to the writs being issued that, I would say, is actually a discussion of policy rather than fitting within the prohibited items in 196. Is that the kind of content that you have to check that your candidates have removed?

Mr McQUESTIN - We have to check everything that they have posted that would, as we've said, contain the name, likeness, or image of anyone who hasn't provided us with written permission.

Ms HADDAD - Going back to the beginning of their Facebook page, not just inside the writs.

Mr McQUESTIN - That's right, because it remains published. The section of the Act refers to the act of publishing and it remains published until it's taken down.

Ms HADDAD - That's really helpful. Thank you.

CHAIR - I'm going to Ms Thomas online.

Ms THOMAS - Thank you. Mr McQuestin, I'm just interested in hearing a little bit more on the Liberal Party's views, regardless of what section of the Act it is, if this legislation is passed and it is no longer prohibited to use a candidate's name or image without their permission.

Does the Liberal Party have a view on the idea of misleading or deceptive information and the publication of that? Regardless of how effective section 196 has been, that has been

one, I guess, protection as you'd call it, not just for incumbents, for any candidates, but also, some may say, for the public in a measure to somewhat prevent, maybe, some people, but not others, from publishing misleading or deceptive information. If that provision is removed, there will be, as this Act proposes, nothing, effective or not, stopping that in electoral law.

Does the party have a view on that more broadly, on the publication of misleading information? How does that sit with Liberal Party values, I guess, in terms of publishing misleading or deceptive information? I appreciate your commentary around respecting the intelligence of Tasmanian voters. That's a very nice view to take. We do know that a lot of people are disengaged from politics regardless of how intelligent they are. We do know we have very low literacy levels in Tasmania, so it is important, what some may say, that electors are protected from being tricked into believing false information. I wondered how that sits with Liberal Party values.

Mr McQUESTIN - As I said earlier, I've focused my submission and my comments on section 196 and I don't believe that these changes to section 196 will have an effect on the situations you have described. There are already workarounds that are put into place under section 196 - you can use the person's title. You can refer to them in different ways. I've seen images; I well recall a billboard that had an image of Paul Lennon on it, which, then, the image was removed and the silhouette merely remained.

Ms O'CONNOR - He looked better for it. Sorry.

CHAIR - We will move on from that.

Mr McQUESTIN - I don't believe that changes to section 196 will have an adverse impact on those matters at all.

Ms THOMAS - I guess it didn't really directly answer my question about the Liberal Party values when it comes to misleading and deceptive information, but if that's what you want to offer in response to that question, then I accept that as your answer.

Mr BAYLEY - Thank you, Mr McQuestin. You spend a bit of time in your submission talking about incumbency and, as was quoted before, you use the words:

Section 196 is nothing more than a protection racket for incumbent members of Parliament.

There was an interesting exchange between Mr Ferguson and Dr Bonham earlier today, about incumbency and the way that major parties - the Labor and Liberal parties - arrange their tickets versus the Greens and potentially others. I was wondering whether you could talk more about this issue and how section 196 affects incumbency or at least advantages incumbency in your mind?

Mr McQUESTIN - Obviously, being able to draw voters' attention to the voting record, for example of an incumbent member is a legitimate form of political communication, I would argue. Section 196 makes that very difficult to effectively do, especially given that whilst there are workarounds and you can use titles and the like, a less engaged voter may not necessarily make that connection. Obviously, we have election posters and people's headshots are often contained within those. As part of being able to fully make your argument about, for example,

PUBLIC

a voting record of an incumbent member, being able to name that person is an important part of that.

Mr BAYLEY - Part of the conversation was sort of bedded in the competitive nature of the ticket within the one party - within, particularly, the Labor and the Liberal parties. Now with seven-seat electorates, seven members from each party will contest, usually. It's a competitive ticket. You see that as an advantage in terms of the political process?

Mr McQUESTIN - Sorry, I don't fully understand.

Mr BAYLEY - I guess, the conversation went along the lines of, it was using the Greens as an example, where we identify a lead candidate or a lead candidate or two and then fill the ticket versus the Labor and Liberal parties not delivering a how-to-vote card. Of course, the how-to-vote card is very much isolated out in the context of section 196. I was inviting you to give some commentary around the importance of competition within party tickets.

Mr McQUESTIN - Obviously, having a high calibre group of candidates who can be identified is a very important part of the electoral process. I don't think section 196, given that we provide - I would expect that all parties would provide permission for their likeness to be used across the communications from the party. Certainly, I think that is already probably covered or, at least, in practice able to be done. I would argue that being able to fully challenge your opponent is a probably more important component thereof.

Mr BAYLEY - Thank you.

Ms O'CONNOR - Thank you, Chair. Mr McQuestin, a lot of the discussion that we are having and the tension here is between a measure of some protection for a candidate during the period of the writs and free and open political discourse during a campaign. There's a weighing exercise here that, as you know, we're going through. Would you agree, while section 196 as it currently stands provides some measure of protection against misleading and deceptive representation of a candidate - some - that it can also prevent voters from hearing the truth and the facts. It's the weighing of what is in the greater public good here. I'm wondering if you wanted to reflect on that a little bit.

Mr McQUESTIN - My view, noting the workarounds in inverted commas, is that it actually has a greater impact on free speech than it would have on any protections.

Ms O'CONNOR - Thank you.

CHAIR - Following on, I don't know that there's anybody at all that we have encountered or at this table who is making an argument that section 196 is perfect and should be retained entirely as is, but there is concern. It was expressed during debate in the Chambers as well on this Bill, about what might be lost that is there, at least in some measure; an interest in, if not retaining section 196, having something else contemplated that would fulfil at least some function around ensuring that false or misleading claims about candidates can be protected against.

I accept what you have said about respecting the Tasmanian community as intelligent voters and that is all very well. However, we do, for example, in consumer law, put laws in place to protect the Tasmanian consumers, from false claims and misleading or un-factual

information being provided in a consumer context. We could take your rationale and say well we don't need those laws because we can trust Tasmanian consumers to be intelligent enough to know what's being claimed is false or not, and to direct their consumer behaviour in an appropriate direction based on what they have discerned to be the truth. We don't do that. We put laws in place to protect them. Why wouldn't we be thinking about ways to appropriately put similar protections in place for Tasmanian voters as we do when they're regarded as Tasmanian consumers?

Mr McQUESTIN - Firstly, I return to my earlier statement that I believe the Tasmanian voter is smart enough to identify mistruths when they might exist. In accepting that I think that the Tasmanian voters are smart enough to do so, I would point out that any other option might involve, what, someone else making a judgment on whether something is untrue? Is that what's proposed?

CHAIR - I think the idea is that people are interested to explore how we might put that sort of protection in place in the way that we do, as I described to you, when we regard Tasmanians as consumers and try to protect them in their consumer behaviour from being told mistruths or being misled by claims that are made by people trying to sell them something, for example. Why wouldn't we regard the need to do something similar in the political environment as being equal to that? We're not treating them as intelligent enough to make their own judgments about any lies or misleading things put before them in a consumer context, but we are in a political context.

Mr McQUESTIN - I think that's a very different example and one that involves financial loss and other things. I don't really see the connection.

CHAIR - Right. You don't see that if we're trusting them to be intelligent enough to know when political lies are told to them, they are not intelligent enough to know when commercial lies are told to them?

Mr McQUESTIN - I am not making that statement. I am merely saying that I believe the Tasmanian voter is smart enough to realise when they're being told something that is truthful or not. When a political party steps over the line, quite often they are brought to account by media and other members of public life. It is, to that extent, self-policing.

CHAIR - You don't see any inconsistency there? Interesting. Further questions from the committee? I think we have come to the end of our session. Thank you very much, Mr McQuestin for your time today and for the submission from the Liberal Party. As I advised you at the commencement of your evidence, what you have said to us here today is protected by parliamentary privilege. Once you leave the table, you need to be aware that privilege does not attach to the comments you may make to anyone, including the media, even if you are just repeating what you have said to us here today. Do you understand this?

Mr McQUESTIN - I do.

CHAIR - Thank you very much.

The witness withdrew.

The Committee suspended at 10.30 a.m.

PUBLIC

Dr ROBIN BANKS

The Committee resumed at 10.31 a.m.

CHAIR - Thank you, Dr Banks, for coming in to talk to us today, the Joint Standing Committee on Electoral Matters with our inquiry into the Electoral Amendment Bill 2024. We appreciate the submission that you've made. I know we've discussed this in the context of our other inquiry already, so it's good to have a further opportunity today to consider your submission and to engage further with you about it.

The committee is here in full. We have the honourable Bec Thomas MLC online; Kristie Johnston MP; Ella Haddad MP; Cassy O'Connor MLC; Vica Bayley MP; Michael Ferguson MP; Mike Gaffney MLC; and me, Meg Webb MLC - the full crew. We have Scott assisting us as Secretariat and Gabby on Hansard here today assisting us.

I'll do the formalities before we begin - checking that you have received and read the guide sent to you by the committee Secretary.

Dr BANKS - I have.

CHAIR - I'll reiterate some important aspects of that document on the record here. This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or place outside of Parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings.

This is a public hearing. Members of the public and journalists may be present and this means your evidence may be reported. It's important that should you wish all or part of your evidence to be heard in private, you must make this request and give an explanation prior to giving the relevant evidence. Do you understand this?

Dr BANKS - I do.

CHAIR - What we'll have you do is make your statutory declaration and then if there's some opening remarks you would like to make to begin things, you're welcome to do so.

Dr ROBIN LYNETTE BANKS WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

Dr BANKS - As you indicated, Madam Chair, I have previously given some evidence to this committee on a different inquiry in relation to my concerns about the repeal of section 196. I reiterate those concerns and note that I think that the best way forward is to reform rather than repeal in its entirety. I think it does important work that's not otherwise done in Tasmanian electoral law. While it's not as nuanced and targeted as perhaps it could be, it is better than the gap that would be left if it were repealed. From my point of view, I encourage this committee to recommend that there be work done on how to deal with the problem about misleading and deceptive conduct, not in commerce or trade or any of those other places, but in political campaigning.

Ms O'CONNOR - Thank you, Dr Banks, for your submission and for coming in to give evidence. In your submission when you talk about the importance of section 196, you state that it provides some protection against misleading conduct in election campaigns, and it has the effect of preventing a personal campaign from falsely attributing statements or positions to a particular candidate or using their image in attack ads.

Don't you also agree though it has the effect, and we've heard evidence of this, of inhibiting free political discourse during that period when the writs are issued and they are returned because it is unlawful under section 196 to state, for example, if you're a community organisation, you want to put out in your Facebook page a scorecard of candidates' positions, it's currently unlawful. Don't you think that the effect of section 196 is that it chills political discourse during campaigns?

Dr BANKS - Firstly, I would say it is not unlawful for a community group to do that. What they have to do is seek permission before they report on the survey results. Every community campaign I've been involved in, we have surveyed candidates and said, 'We propose to let people know through whatever mechanism we have available to us, the results of this survey. Do you consent to that?' We've never had pushback on that.

I don't believe it stifles it entirely. I think it requires people to take care, and I'm not sure that's a bad thing in the political context. We're talking about elections for who runs the state, who sits in our Parliament, who represents us as members in the parliamentary process. I think everybody in that process should take care, should be cautious about not misstating positions that people have taken. It's not an infringement on free speech in the way that free speech is protected under international law, because free speech has limits on it. Those limits are about responsibility in a democratic society.

Ms O'CONNOR - Okay. Say, during an election campaign, a community organisation asks all the candidates for their permission, and one candidate, who has a particularly obnoxious position on a particular policy issue that's relevant to that community, refuses to give their permission. Don't you see how that denies voters their right to know what particular candidates stand for during a campaign so they make an informed choice when they go to the ballot box?

Dr BANKS - I believe there are ways to deal with that, which is to say, these are the responses we got, we didn't get responses from all the candidates, you may want to look at their campaign material to understand their position on things.

Ms O'CONNOR - I think it's a bit difficult. As a member of a former community group that collided with this issue during the Ralphs Bay campaign, it is quite difficult, and can have a chilling effect on organisations. I want to point you to some High Court precedents. In *Nationwide News v Wills* in 1992, Justice Brennan said:

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential.

A number of submissions have raised the constitutionality of section 196. We, the Greens, have serious concerns about the constitutionality of it. We've collided with this provision before.

What are your views on how section 196 can impinge on that freedom of public discussion of political and economic matters?

Dr BANKS - The High Court has considered political and governmental speech a number of times, which is the only free speech that we have under Australian law, and they haven't said it's unfettered; they haven't said 'go for broke'. That's because (a) it wouldn't be consistent with the international freedom under Article 19 of the International Covenant on Civil and Political Rights. It also wouldn't be good for democracy, and they recognise that democracy needs to be looked after - that it needs not to come up against directly, deliberately misleading statements and conduct. The High Court is not an absolute fan of all free speech. It has clearly shown that time and time again.

Ms O'CONNOR - No, I didn't say that.

Dr BANKS - I know you didn't say that, but I think it's important to understand that it has, time and time again, said well, yes, this might infringe freedom of speech, but it's a legitimate infringement they have done.

Ms O'CONNOR - Or the restriction is appropriate is the other -

Dr BANKS - They occasionally say the restriction is appropriate, absolutely. The question that I have: this provision has never been considered by the High Court, or any other superior court in this country. That is important to understand. Instead of actually testing it, which would be one way to go forward -

Ms O'CONNOR - We would've liked to.

Dr BANKS - Yes, well, another way would be to look at what would be the least infringing and most effective mechanism for managing speech in political campaign. That's what I believe is the appropriate way forward. I'd love to see what the High Court would do with it, but I suspect they wouldn't actually say that it was an unjustified limitation.

Ms O'CONNOR - Well, we can't yet know. Just one thing, though. We're not talking in this amendment Bill about the full repeal of section 196. What we're talking about is confining its application to the publishing of how-to-vote cards.

Dr BANKS - Which, to me, seems absurd because that's the one time where you would expect to see a list of the candidates. You've got a how-to-vote card that says, 'These are the candidates in this electorate. We want you to put a "1" next to my name.' It seems, to me, absurd to suggest -

Ms O'CONNOR - I think it's a Hare-Clark - the original purpose of 196 was to accommodate for Hare-Clark.

Dr BANKS - A how-to-vote card does list candidates. That's sort of what it does. The ballot paper lists candidates; that clearly isn't in breach. Putting a person's name on a how-to-vote card seems to me the most innocuous time that you would publish another candidate's name.

Ms O'CONNOR - Unless it was a fake how-to-vote card.

Dr BANKS - What's a fake how-to-vote card?

Ms O'CONNOR - Well, unless there was some material that had been distributed that was designed to mislead.

Dr BANKS - Okay, and that needs to be addressed.

Ms O'CONNOR - That's right, but section 196 is not necessarily the place for that.

CHAIR - That might be captured by the now-amended 197, so I think we do have a protection in place for that.

Dr BANKS - Yes. It seems to me that to limit section 196 to just how-to-vote cards, it doesn't do any of the work that it could do and can do, and does work that is probably not as important. Although, as you say, somebody might issue a false how-to-vote card saying 'This is the Greens how-to-vote card - we think you should vote the following way'. That would be a problem, yes.

Ms HADDAD - Thanks, Dr Banks, I just wondered if you had any views about, well, first of all, 196. In some people's views, it provides some protection around the misuse of image and name - misuse in terms of misleading. However, it also prevents the use of someone's name or image in any way, truthful or otherwise.

Dr BANKS - Without their permission.

Ms HADDAD - Yes. Truthful or otherwise. I've seen it have an effect on what I would see as genuine policy debate. My question for you is whether you have any views around the fact that it only applies within the writs period - from the issue of the writs to the return of the writs. That's it, really, whether you have any views about that time period.

Dr BANKS - That's a really interesting question, and one that certainly, when it was asked of me before, it made me turn my mind to it. I'm not sure that it's entirely appropriate to limit it in that way, but I would say that that's the time where people are most attentive to political discourse, and that's the time where misleading activities in political discourse are most likely to hit the mark.

I heard the question that was asked of the previous witness about regulation of advertising for consumer goods, consumer protections. In completing my doctorate, I did a lot of work looking at the role of bias in prejudice and discrimination, but also understanding all the ways in which people who seek to market things, whether it be political positions or otherwise, play on the way our brains operate, to save us time in our day-to-day lives. One of the really obvious ones in this context is confirmation bias. If somebody has a slight tendency to think that so-and-so is a bit dodgy, and they see something that is false but it reinforces that, they will absolutely latch onto it. That's what our brains do. Our unconscious biases, our various heuristics, the way we process information, allow us to live in a very complex world, but they are very, very easily triggered.

People who study behavioural economics and practise behavioural economics, including in politics, are very, very good at playing on those foibles, or brain twitches, that we all have.

It's not about whether or not the electorate is stupid or bright; it's about how busy we all are and how much information we have coming at us at a time. We have to process things incredibly quickly now.

Ms HADDAD - That's the pertinent period.

Dr BANKS - Yes. During that period, and you know, there's an argument, I suspect, that the writs are often called quite late in what is an unofficial election campaign, so there's a question about that, but I believe that most of the rest of the time, a lot of people blank out everything else. I don't - I'm a bit of a nerd, but it is a really important time in the electoral cycle.

Ms HADDAD - Thank you. I'll just ask one more question before I pass the call on to someone else. One of the practical applications that we've seen of 196 in the past, in the context of political parties, is that they've had to remove information that was published prior to the issue of the writs if it potentially offends 196, including things that really are policy debate. I don't think it's been tested in the same way for community organisations, but it could be.

For example, Equal Marriage Australia might have some historic posts saying, 'Candidate A, B, C supports or doesn't support marriage equality.' If there was a complaint made under 196 that was upheld by the Commission, technically they'd have to go back and remove those posts because they list candidates' names and their position on marriage equality. Alternatively, as you said, they could go and seek permission, but I would argue maybe that some past candidates wouldn't give that permission. That's my worry about 196 is that not only could it shut down that kind of assessment of candidates within the issuing of the writs, it could shut down information that was previously published that's genuine discussion of policy.

Dr BANKS - That's a legitimate concern, absolutely. Hence my view that I think work needs to be done to get it right, to understand all of the possible permutations and combinations of how this might inadvertently prevent something that is a public good, and how it might inadvertently or deliberately prevent something that needs to be prevented. Work needs to be done. I don't think the work to date has achieved that. We have things like the Tasmanian Law Reform Institute and if they were given a brief on misleading and deceptive conduct in politics or in campaigning, they might do some interesting work in that space, for example.

Mr BAYLEY - Thank you Dr Banks. We've heard competing evidence from some witnesses on section 196 and truth in political advertising law reforms: Dr Bonham this morning saying 196 should be gotten rid of irrespective of action on truth in political advertising, although he does support some limited provisions there; the Australian Institute basically saying it must be married with truth in political advertising. You're the strongest supporter of section 196 that we've encountered in this committee and you recommend strengthening it. Acknowledging your desire for truth in political advertising provisions, if we got those provisions, if we got the perfect provisions in truth in political advertising, is it still your view that 196 should be retained?

Dr BANKS - No, absolutely not.

Mr BAYLEY - You would do away with 196.

Dr BANKS - Once the work is being done more effectively by a tailored provision, there's no reason in my view to retain section 196.

Mr BAYLEY - So 196 just provides some sort of temporary guardrails -

Dr BANKS - It's a backstop.

Mr BAYLEY - and a little bit of backstop, in your mind, in the absence of those provisions. Irrespective of its impact or otherwise on the ability for community groups and others to robustly and transparently engage in election context by naming political candidates.

Dr BANKS - Absolutely. We need a better provision. In the absence of the better provision, retain, then remove when we have the better provision. I will say again, and I made this point in my submission, one of my concerns about all of this is that the Electoral Commission doesn't use its powers particularly effectively, so there are repeat players who know that they're falling foul of 196 and -

Ms O'CONNOR - How would they know though?

Dr BANKS - Because they're political parties and they've been caught before.

Ms O'CONNOR - Examples though?

Dr BANKS - There are examples in my submission about five entities being identified by the Electoral Commission and no action taken and simply asked to take down the content which has already done the work of influencing people. That's the problem. If the TEC doesn't use the powers that are given to it for good reason, then things are allowed to happen that can influence public debate. Then it's like, 'Oh, oops, didn't realise we weren't allowed to do that.' It's like, 'I'm sorry, you're the - name the large party - you did this in the last election, you got called to account for it, and you took the advertising and all the material down. You've done it again. Really, you forgot?' That is problematic.

When a community group does it and does it inadvertently, I completely understand why the TEC contacts them, and says, 'Are you aware of this? Da-da-da.' It's very different for the major players in a political election campaign to say, 'Oh, oops, yes, we'll take it down,' knowing it's done the work. That to me is a real failing of our system, our statutory system that gives power to do something more. It would have had they done something more; we might have got a ruling on whether or not there was an infringement of free speech. We haven't because I suspect the Crown has said, 'We don't want to go there.'

Ms O'CONNOR - Isn't one of the issues here that there's ambiguity over the interpretation of section 196, which you see. We saw in the example when they asked us to take a Facebook video down. Through the course of the TEC's approaches to section 196 when these complaints come in, you can see interpretive ambiguity and confusion and doesn't that tell us that the clause is ambiguous and ineffectual?

Dr BANKS - Certainly ambiguous, and there are various things that people do with legislative ambiguity. They let it sit and they test it in the courts, not ideal, or they fix the ambiguity.

Ms O'CONNOR - I think that's what we're trying to do with the amendment Bill.

Dr BANKS - I think the amendment Bill is doing a whole lot more than dealing with any ambiguity. I think it is saying we actually don't think it matters if people issue materials that are potentially misleading, naming a candidate as saying something they haven't said or being in support of something they're not in support of.

Ms O'CONNOR - What they are saying is it matters that there's free and political discourse during a campaign.

Dr BANKS - Yes.

CHAIR - Ms O'Connor, we'll just let the flow of an answer go through without interrupting.

Dr BANKS - Absolutely, it matters. It also matters that we understand the nuance of the internationally recognised freedom, which is not 'go for broke, say whatever you like' - it is absolutely not that. International human rights law, article 19 of the International Covenant on Civil and Political Rights says that freedom of speech can be limited for legitimate purposes in relation to, for example, democracy, and democracy isn't helped by falsehoods.

Ms O'CONNOR - It isn't helped by hiding the truth about candidates either, though.

Dr BANKS - No, it's not, but it's not assisted by falsehoods.

CHAIR - Which is presumably why you are pointing us to reform rather than repeal.

Dr BANKS - Absolutely.

CHAIR - I'm interested in your submission, where you speak in your section about strengthening section 196 and propose that, potentially, there is even a way to focus it more to political players, essentially, political parties, candidates, and related entities, rather than broadly the whole community. Is that something that you would see as sort of a minor adjustment on the way to something more substantial in terms of reform, or do you think that fixes things sufficiently?

Dr BANKS - I think it should be on the table as part of a proper review of what would improve it because I can't remember what the right terms are for related entities, but you need to make sure that you aren't allowing somebody over here who is in fact very much connected to a particular candidate to do that work under the cloak of 'we are a community organisation' or whatever. I do think it needs to be done well. I'm not suggesting this is what you should do to fix it; it should just be part of the conversation, it seems to me, because there is the problem of its impact on political players, candidates, and making sure you get that right, and the impact it has on the broader community's discourse, you know, because, presumably, we're not talking about somebody at the pub having a political argument. They are not - well, they are publishing if you were talking defamation law - but they are probably not publishing in the sense that this is intended to capture.

All of that should be part of a really thorough review of what the harm is that we seek to prevent and what is the good that we seek to achieve through freedom of political

communication. Those two things have to both be on the table, I think, to do a really thorough review of what should be in the *Electoral Act*.

Another concern I have about the TEC's operations is there's nothing that I could find that says to the world at large or reminds community organisations that, if they want to put out electoral surveys, for example, they need to follow a really simple protocol. Because - I learnt that - I can't remember how I learned that, but very shortly after I came back to Tasmania somebody had asked me, 'Can we do a survey?' And I said yes, but you might want to just check with TEC about what that does. They came back and said, 'It turns out we have to do X, Y and Z,' and, it's like, 'Okay, we can do that,' but that material is not publicly known except when things like Juice Media get into trouble and everybody goes, 'What happened there?' That's a bad outcome. That's not an appropriate way to deal with something that does have a potential effect on speech in political context.

CHAIR - Presumably, because we have this currently in our Act, a series of educational materials, fact sheets, or the like, could be available online. That would assist community organisations or others to - and would also potentially guard against this sense of a varying interpretation over time and parties potentially encountering a different interpretation in this election then what they had felt was applied last election.

Certainly, I am in a similar position to you, coming from a background where I was involved in community settings where we would look to do scorecards about positions. We understood the constraints on that and weren't ever tripped up by it, and quite comfortably didn't include people who didn't give permission, noting that, that information could be sought elsewhere.

That was more of a statement, I apologise, than a question. I have forgotten now what my question was.

Mr BAYLEY - I would like to add to that. In that scenario I completely acknowledge you can seek permission, and if you're in a policy space that is not highly contested and everyone's on the same page, there is no problem here. In a highly contested policy space, you end up with permission from those who support the group that is surveying them. You, presumably, quite often end up with a rejection. That in itself kind of skews and limits and constrains the capacity not only for that community group to do its job as it sees it, but it also pushes them into the space where they are doing promotion of candidates that support them as opposed to policy discussion and comparison. I think that is a really dangerous place to be. It's dangerous for charities, particularly if they have DGR [Deductible gift recipients] status, to be pushing one side of the agenda as opposed to what - speaking from experience - they like to do; we like to do, which is provide a straight-bat comparison of policy positions on a contested issue. There is no doubt in my mind that section 196 constrains that capacity.

Dr BANKS - It's an interesting take to suggest that presenting that information that was provided to you with consent to the community and saying, 'We did this survey, these are the questions we asked. We asked all of the candidates. These are the answers we got'.

Mr BAYLEY - We can only do it for half of them, and those who support what we think.

Dr BANKS - They're the half that are willing to -

PUBLIC

Ms O'CONNOR - We can only say nice things about the candidates. That's the effect of section 196.

Dr BANKS - No it's not. You can only say what the candidates approve you repeating in their name. That is not the same as only saying nice things. Sometimes people will be very proud of their positions on things that are antithetical -

Ms O'CONNOR - If they find them favourable to them.

Dr BANKS - No, not even that. They may think it's a vote winner.

Ms O'CONNOR - That's what I meant. That's what I meant.

Mr FERGUSON - Reverse flattery.

Dr BANKS - Reverse flattery, whatever it is. Yes, I think that there will be times when people are very happy to say, well - and let's use forestry as an example - 'Absolutely, I support native forest logging'. Somebody might think that that's a vote winner in their electorate, and they'll be very happy to consent to that information being included in the survey results.

Mr BAYLEY - I can tell you from experience, it doesn't happen very often.

Dr BANKS - No, no, I can imagine it doesn't happen very often, but maybe the candidates aren't as smart as they could be because it may be in some places a vote winner to have a position that is different to the one that the community group might be seen to be pursuing.

Mr FERGUSON - Free advertising.

Mr BAYLEY - Except, just to counter that, obviously community groups are limited. They manage very carefully how and where they publish, and obviously therefore are seen by a wide but limited audience. I think there is a counter to that notion of benefit.

Dr BANKS - One example in which I have been involved in the not-too-distant past was positions of political parties or candidates on a human rights Act for Tasmania. We got responses from pretty much every candidate and the Liberal Party provided a party response which was fine, so we were able to report that. As I recall, the Labor Party candidates tended to give a personal response that was consistent with the party platform, the Greens similarly, and individual candidates put their positions. I don't recall anybody saying, 'I don't want you to repeat that'. A human rights Act is not - we still don't have one - but that was a way in which we were able to represent accurately the position of everybody. Some people might have thought, 'If I say no, that'll look pretty bad, so I do not want them to report it'. We didn't have that problem. Everybody was happy to stand on their position.

Ms O'CONNOR - Might be better for the fish farm community though.

Mr BAYLEY - Someone, for example, an independent candidate, if they said 'No', they wouldn't be able to be identified as saying no. In some ways that point is -

Dr BANKS - But they would if they consent to it, which was my point. They all consented to it. Not everybody said, 'Yeah, yeah, this is great'. There were people who said, 'It's [inaudible] but I'm not sure it's the right time'. There were more nuanced responses.

Yes, it might be different in a fish farming community. Absolutely. At the end of the day, there would be people in a fishing community who support it utterly and those who oppose it utterly. It may be in the interests of candidates to have their position really clearly on the record in that context. They probably already are on the record, so consenting to it being repeated in a survey is probably not going to be a reason that they'd say no.

Ms O'CONNOR - It's hard to wrap your head around having to have a candidate's consent to tell the truth about their position on something during a campaign.

Dr BANKS - Except if somebody subsequently said something that wasn't what the candidate had said. You've got some comeback on that.

Ms O'CONNOR - You do under civil law as well.

CHAIR - It's too late, then.

Dr BANKS - The election's well and truly over by then.

Ms THOMAS - My question - I'll try and put it succinctly because we're talking a lot about using a candidate's name and image, which is what's currently prohibited, and I know you're for broader reform for truth in political advertising laws.

What do you think about the idea of reforming or amending section 197 of the Act, which currently reads a person must not print, publish or distribute 'any electoral matter that is intended to, is likely, or has the capacity to mislead or deceive an elector ... in the recording of his or her vote.' If 'in the recording of his or her vote' was removed, would that satisfy the issue around misleading and deceptive information being shared, while still allowing names to be used without permission?

Dr BANKS - It goes some way, but the difference - and I think I draw this distinction out in my submission - is it's much harder to prove something was intended to or had the effect of misleading, much more difficult. The test in law - you couldn't do it during the campaign. You couldn't get it pulled down during the campaign. This allows for the Electoral Commission to say 'You need to remove this', and that happens, which has the effect of limiting - not completely eliminating - its impact during the campaign period.

Ms THOMAS - The wording is 'has the capacity to'.

Dr BANKS - Yes, 'has the capacity to'. You still have to prove that. Would a reasonable person be misled by this? Reasonable person tests are sort of notoriously hard. It's not a bad thing to include in reforms, but again, I would say, I think there's a broader conversation to be had about: what's the work that needs to be done? What are the risks of doing that work badly? How do we prevent inadequate responses to this and manage it so that things can happen in real time during election campaigns to prevent misleading conduct from taking place? How do we send the message to both candidates and the community that we're serious about truth in electoral campaigning?

PUBLIC

I think section 197 might go some way. Rather than ad hoc reforms, I think it really does deserve a thorough review of what 197 currently does, what it could do, what are the limits on how effective that might be in the timeliness of an election campaign? What can we do during election campaigns that will have the impact that is needed? All those questions are important to consider.

CHAIR - I'm mindful we've gone past the time we had allotted. We'll draw the hearing to a close. I'm just going to reiterate, as I advised you at the commencement of your evidence, Dr Banks, what you've said to us here today is protected by parliamentary privilege. Once you leave the table, you need to be aware that privilege is not attached to comments you may make to anyone, including the media, even if you're just repeating what you've said to us. Do you understand?

Dr BANKS - I do, thank you.

CHAIR - Thank you very much and we appreciate your time.

The witness withdrew.

The Committee adjourned at 11.04 a.m.