Electoral Act Review

Interim Report | December 2018

Tasmanian Government

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Minister's Foreword

In May 2018, the Premier announced a Review into Tasmania's *Electoral Act 2004* and associated election laws.

I am pleased to release this Interim Report, which recommends a first immediate tranche of amendments to the *Electoral Act 2004* (Recommendation 1). This Interim Report also sets out 19 specific issues for public consultation to inform potential changes to be recommended in the Final Report due to be released in mid-2019.

Recommendation 1 and the Consultation Issues listed in this Interim Report are informed by research into electoral reform, the practices of other Australian jurisdictions and feedback from the first round of consultation on the Terms of Reference for the Review. The Consultation Issues do not reflect the Government's final position, rather are matters for additional consultation and consideration.

Public submissions on the Interim Report are invited until 18 February 2019. The submissions received in response to this Interim Report will inform the Final Report.

Alongside the Interim Report, the Government has released a consultation draft of the *Electoral Amendment Bill 2019*, to address Recommendation 1 of this Interim Report. The proposed changes include removing the ban on newspaper commentary on polling day, changes to postal delivery timing and several administrative changes recommended by the Tasmanian Electoral Commission.

The majority of the submissions to the Terms of Reference supported these amendments. Public submissions on the draft Bill are invited until 4 February 2019.

The Government is committed to ensuring that we have a robust, democratic and fair electoral system. I encourage every Tasmanian, political party, and organisation to have their say on the proposals under consideration.

The Hon Elise Archer MP
Attorney-General
Minister for Justice

Review Process

This Interim Report represents the second stage of consultation being undertaken as part of the Tasmanian Government's Electoral Act Review (the Review).

The public and stakeholders were initially invited to provide submissions in relation to the Terms of Reference for the Review during the period 9 June 2018 to 20 July 2018. The submissions received from the initial consultation have informed the development of this Interim Report.

Consultation on this Interim Report will be open until 18 February 2019 to allow all interested parties to consider and make comment in relation to the Consultation Issues. All submissions will then be considered as part of the Review's progress towards a Final Report.

A Final Report will be provided to the Government in mid-2019. The Government will consult further on any proposed legislative reforms to address the recommendations arising from the Review following the release of the Final Report.

The Interim Report identifies 19 Consultation Issues developed with reference to current best practice and feedback from the initial consultation.

All written submissions on the Interim Report must be received by 18 February 2019.

The Government has also released a draft consultation version of the *Electoral Amendment Bill 2019* to accompany this Report. This Bill proposes a number of technical amendments that have been identified as a priority for reform through consultation on the Terms of Reference for the Review. More complex amendments to modernise the Act are canvassed in Section One of this Interim Report.

A copy of the draft Bill can be found at: https://www.justice.tas.gov.au/community-consultation.

All written submissions on the draft Bill must be received by 4 February 2019.

Submissions on the Interim Report and the draft Bill can be made online, by email or by post.

Email your submission to haveyoursay@justice.tas.gov.au.

Mail your submission to:

DEPARTMENT OF JUSTICE
OFFICE OF THE SECRETARY
GPO BOX 825
HOBART TAS 7001

This consultation process is subject to the Government's 'Publication of Submissions Received by Tasmanian Government Departments in Response to Consultation on Major Policy Issues' policy, which can be accessed through the Department of Premier and Cabinet's website.

Executive Summary

On 3 May 2018, the Premier, the Hon. Will Hodgman, announced that a review would be undertaken of Tasmania's *Electoral Act 2004* and associated election laws to be jointly conducted by the Department of Justice and the Department of Premier and Cabinet (the Review).

The Review is guided by two principles: protecting freedom of speech, with note to Constitutional implications; and minimal cost to the taxpayer.

The Terms of Reference for the Review are:

1. Modernising the current Tasmanian Electoral Act, with specific examinations of sections including section 191(1)(b), 196(1) and 198(1)(b);
2. Whether state-based disclosure rules should be introduced, and, if so, what they should include; and
3. The level of regulation of third parties, including Unions, during election campaigns.

The Government indicated that an Interim Report would be released within six months of the commencement of the Review with a Final Report to be provided to the Government within 12 months.

The Review commenced on 9 June 2018 with a call for public submissions on the Terms of Reference.

Consultation

The public was invited to provide submissions in relation to the Terms of Reference for the Review during the period of 9 June 2018 to 20 July 2018.

This process yielded a range of submissions that will continue to be reviewed.

The submissions that are subject to publication in accordance with the Tasmanian Government Public Submissions Policy[1] will be published with the Final Report.

1 The Public Submissions Policy can be accessed online at http://www.dpac.tas.gov.au/divisions/office_of_the_secretary/public_submissions_policy.

Interim Report

This Interim Report has been informed by the initial public consultation process together with research in relation to the electoral laws applying in other Australian jurisdictions and relevant international comparisons.

Considerable review and reform of electoral laws has occurred within Australia in recent years and this research, coupled with several significant legal cases have been invaluable in preparing this Interim Report. It is recognised, however, that each jurisdiction has its own particular circumstances to reflect in its legislation and governance. Consequently, Recommendation 1 and the Consultation Issues identified in this Interim Report reflect the Tasmanian context.

> The Review is guided by two principles: protecting freedom of speech, with note to Constitutional implications; and minimal cost to the taxpayer.

Section One of this Interim Report considers how the *Electoral Act 2004* could be modernised to better reflect contemporary Tasmanian society, including technological change. Importantly, Section One recommends a first tranche Bill to deal with a number of minor and technical amendments. These amendments include changes to reflect longer Australia Post delivery times, several administrative changes recommended by the Tasmanian Electoral Commission (TEC), and the removal of the 'ban' on newspaper reporting and commentary on Election Day.

The last of these amendments, the removal of the 'ban' on newspaper reporting and commentary on Election Day under section 198(1)(b)(ii) of the Act, was specifically identified in the Terms of Reference and its removal was supported by the vast majority of submissions.

Section Two of this Interim Report considers the issue of disclosure of political donations and electoral expenditure in Tasmania. Specifically, this section of the Interim Report looks at disclosure of donations received by political parties, members of Parliament and candidates for election to Parliament. It also considers disclosure of electoral expenditure by candidates and political parties during the election period.

Section Two outlines the current approach to electoral disclosure in other Australian jurisdictions and poses specific Consultation Issues relating to the elements of disclosure that could be considered for application in a Tasmanian context.

Section Two also considers the issue of public funding for electoral campaigns, along with implementation, enforcement and compliance in relation to electoral law in the State. Tasmania is one of only two Australian jurisdictions not to provide public funding for elections in the lower house of Parliament, with the other being the Northern Territory. While the Interim Report does not recommend public funding at this stage, it points out that if restrictions on fundraising, such as caps or prohibitions on certain types of donations or a low threshold for disclosure of political donations are to be introduced, the issue of public funding may need to be considered.

Section Three of the Interim Report considers options for regulating third parties. For the purpose of this Interim Report, third parties are defined as third party political campaigners, associated entities and donors. Third party campaigners are individuals or organisations that may seek to influence an election while not actually being a candidate or a political party. This would include groups such as unions, peak groups or organisations representing particular interests or fundraising bodies. Tasmania is currently the only jurisdiction that does not have disclosure requirements in place for such groups.

Section Three poses several Consultation Issues to better define options for the introduction of a system to regulate third parties, to determine whether such a system should be introduced. The section also considers the registration of third party campaigners and the introduction of donor and associated entity disclosure requirements that mirror any donation disclosure requirements which may be recommended for parties and candidates. It suggests that reporting and disclosure requirements, if introduced, could inform any later consideration of whether caps on third party expenditure should be introduced at a later time.

The Report

This Interim Report proposes one recommendation and 19 issues for further consultation in the context of potential reform of Tasmania's electoral laws. Importantly, the matters raised for further consultation do not represent the Government's position, rather the opportunity for wide-ranging consultation and consideration.

Current Tasmanian Context

Tasmania's current electoral system is predominantly governed by two pieces of legislation: the *Electoral Act 2004* (Tas) (the Tasmanian Act) and the *Commonwealth Electoral Act 1918* (Cth) (the Commonwealth Act). Local government elections and other matters are covered by the *Local Government Act 1993* (Tas) and are not considered as part of the Terms of Reference for this Review.[2]

Tasmanian Electoral Act and related legislation

Tasmania is the only Australian jurisdiction that does not have state-based legislation regulating the disclosure of gifts and donations to political parties, politicians or election candidates and the only jurisdiction not to regulate 'third parties' in elections. Tasmania is also one of only two jurisdictions in Australia that does not publicly fund elections.

The Tasmanian Act deals with electoral rolls, the general conduct of elections and the state system for registering political parties. The Tasmanian Electoral Commission (TEC) is established by the Tasmanian Act[3], consisting of the Tasmanian Electoral Commissioner and two other members.[4]

Part 6 of the Tasmanian Act regulates and caps election expenditure for candidates at the Legislative Council elections. It does not, however, regulate spending caps for the House of Assembly candidates.

Beyond capping expenditure for Legislative Council candidates during defined periods, the Tasmanian Act does not deal with the receipt of gifts or donations by any member of the Tasmanian Parliament nor by political parties.

2 The Department of Premier and Cabinet (DPAC) is conducting a separate, comprehensive review of the *Local Government Act* 1993 – announced by the Minister for Local Government, the Hon Peter Gutwein MP on 26 June 2018.

3 *Electoral Act 2004* (Tas), s6.

4 *Electoral Act 2004* (Tas), s7.

Parliamentary (Disclosure of Interests) Act 1996

The *Parliamentary (Disclosure of Interests) Act 1996* (Tas) (the PDOI Act) establishes a register of Members' interests, and those of their spouse. All members of the Tasmanian Parliament are required to provide information to the Clerk of the relevant House at the time of taking their seat and then annually while they remain a member.

The PDOI Act applies to Members of Parliament from the time of their oath of allegiance until they leave office. It requires disclosure of a wider range of interests than are generally covered by electoral disclosure requirements in other jurisdictions, and includes identifying real estate ownership, involvement with companies and organisations, income and the receipt of gifts.

The PDOI Act is administered by Parliament. Failure to comply with the requirements of the PDOI Act or the provision of false or misleading information on a return is potentially deemed contempt of Parliament. In addition to any punishment given for such a contempt, the relevant House may admonish the member, impose a fine of no more than $10,000 and/or suspend the Member for a period. There is no requirement for regular auditing or a review process for the register, rather the publication of the register acts to enable public scrutiny.

Similar registers operate in the Commonwealth Parliament and other states and territories. Although there is some overlap in the information gathered through such registers and that gathered as part of electoral disclosure and reporting, the two are not incompatible.

Tasmanian Legislative Council Inquiry (2016)

The Legislative Council Government Administration Committee 'B' held an inquiry into the Tasmanian Act which commenced in 2014 with the Final Report being published in 2016. The Committee noted in its Final Report that Tasmania is the only jurisdiction in Australia that does not have campaign donation requirements for House of Assembly or Local Government candidates, with restrictions applying only to expenditure by Legislative Council candidates.[5]

In relation to campaign donations the Inquiry found that:

- Currently, campaign donations are not required to be disclosed in Tasmania.
- There may be instances where in-kind donations occur and are not reported.
- There is a lack of clarity as to whether in-kind donations should be included as expenditure.
- There are currently no bans on candidate campaign donations from specific sources.

Mandatory disclosure of candidate campaign donations would provide transparency as to the source of political donations. The Inquiry also found that Tasmania was one of only two Australian jurisdictions that does not provide public funding for candidates and parties and recommended that the Government investigate this issue.

At the time of this Interim Report being prepared, the only jurisdiction other than Tasmania to not provide public funding for elections in the lower house of Parliament, is the Northern Territory.

Commonwealth legislation

The Commonwealth Act governs disclosure of donations and gifts to federally registered political parties in Tasmania. This applies to State politicians who are members of the three major parties all of which are registered federally.

The Commonwealth Act provisions do not apply to independent Members of Parliament, such as the independent Members of the Legislative Council. Nor, hypothetically, would these provisions apply to a Tasmanian MP who is a member of a party that is not federally registered.

5 Legislative Council Government Administration Committee "B", *Final Report on Tasmanian Electoral Commission*, 2016, p 20-21.

The Commonwealth Act creates an annual reporting regime for political parties including the annual reporting of total revenue as well as the identification of any or all donations of $13,800[6] or more. Reporting is on a financial year basis and is made public on the first working day of February the following financial year. The Commonwealth Act also requires donors to a candidate in a Federal election, and to a political party at any point, to disclose certain donations to the Australian Electoral Commission (AEC). Unlike disclosure requirements for parties or candidates, donors whose gifts total over the declarable amount of $13,800 must disclose all donations for the period.

Law Reform

In the last decade, most jurisdictions in Australia have introduced disclosure requirements for political parties, candidates and third parties, as well as several other measures, to increase the transparency and integrity of elections in their respective jurisdictions.

The *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), which amends the federal disclosure regime and increases regulation of third parties, has recently passed Federal Parliament. One of the catalysts for the amendments was the Senate Select Committee into the Political Influence of Donations. The Committee considered the influence of political donations on public policy, how to improve the integrity of decision making and other related topics. The Committee's final report makes 14 recommendations, all of which are in the interest of increasing the stringency of measures at the federal level.

Table 1 below provides a comparison of election funding and disclosure settings across Australian jurisdictions. Table 2 provides a comparative overview of public funding for elections across Australian jurisdictions.[7]

One of the most common regulatory measures across jurisdictions is the requirement that donations above a certain threshold are disclosed. The design of disclosure systems varies across jurisdictions. Jurisdictions with disclosure regimes in place require disclosure either annually or bi-annually. South Australia, Queensland, Western Australia, the Australian Capital Territory and the Northern Territory require more frequent reporting during election periods. Queensland's disclosure system is the closest to 'real time' reporting, with disclosure required within seven days of receipt.

Most jurisdictions also provide public funding to successful candidates, which is a common measure that has been considered to increase fairness during elections. All jurisdictions, except for Tasmania and the Northern Territory, have a public funding regime in place.

New South Wales, Victoria and Queensland each have bans in place on donations from foreign donors and certain interest groups. On such bans, however, it should be noted that they have been the subject of High Court challenges. Also, the Commonwealth's amendments include bans on foreign donations.

While political expenditure and caps on donations for political parties, candidates and third parties have been highly debated in Australia, only a handful of jurisdictions have such regulation in place. New South Wales, South Australia, the Australian Capital Territory and most recently Victoria have varied caps in place.

6 This threshold is indexed annually.

7 These tables were produced by Dr Damon Muller and are available on the Australian Parliamentary Library website. Dr Muller approved their reproduction in this report.

TABLE 1: ELECTION FUNDING AND DISCLOSURE SETTINGS

	Federal	NSW	Vic.	SA(a)	Qld	Tas.(b)	WA	ACT	NT
Gift disclosure threshold	$13,800	$1,000	$1,000	$5,191	$1,000	×	$2,500	$1,000	$1,500
Loan disclosure threshold	$13,800	$1,000	$1,000	$5,191	$1,000	×	-	$1,000	$1,500
Threshold indexed	✓	×	-✓	✓	×	-	✓	×	×
Donation cap (to party)	×	$6,300	$4,000	×	×	×	×	×	×
Donation cap period	-	Yearly	4 years	-	-	-	-	-	-
Donor returns required	✓	✓	✓	✓	✓	×	×	×	✓
Expenditure cap (max for party)	×	~$11m	×	~$4m	×	×	×	$1m	×
Expenditure cap indexed	-	✓	-	✓	-	-	-	✓	-
Per seat expenditure cap	×	$61,500	×	$100k	×	×	×	×	×
Expenditure caps for third parties	×	$500k	×	×	×	×	×	$40,000	×
Expenditure caps for associated entities	×	×(c)	×	×	×	×	×	$40,000	×
Third party campaigner returns	✓	✓	✓	✓	✓	×	✓	✓	×
Anonymous donations threshold	$1,000	$1,000	$1,000	$200	$1,000	×	$2,300	$1,000	$1,000
Banned donor industries	×	✓(d)	×	×	✓(e)	×	×	×	×
Foreign donation restrictions	✓	✓	✓	×	✓	×	×	×	×
Expenditure reporting	×	✓	✓	✓	✓	×	✓	✓	✓
Campaign account	×	✓	✓	✓	×	×	×	×	×
Per vote public funding	$2.74	$3/$4(f)	$6.00	$3.19	$3.14	×	$1.91	$8.24	×
Public funding vote threshold	4%	4%	4%	4%	6%	-	4%	4%	-
Public funding capped to expenditure	✓	✓	✓	✓	✓	-	✓	×	-
Administrative funding (max)	×	~$3.4m	~1.8	$60 000	$3m(g)	×	×	~$533k(h)	×
Other public funding sources	×	✓	✓	×	×	×	×	×	×
Election donation reporting	×	21 days	21 days	Weekly	✓	×	✓(i)	Weekly	✓
Other reporting cycle	Annual	Half yearly	Annual	Half-yearly	Half-yearly(j)	×	Annual	Annual	Annual

Notes:

As applicable to political parties. Rules for candidates or upper-house non-party groups may vary. Indexed amounts as per November 2018 or most recent amounts as published by the relevant electoral commission. The "Federal" column indicates recent provisions that have been legislated and will take effect before the next Federal election.

(a) For parties that have opted into the SA public funding scheme.

(b) Tasmanian House of Assembly elections only. Different rules apply for Legislative Council elections.

(c) Expenditure of associated entities is aggregated with the party for which they are an associated entity for the purposes of this cap.

(d) Property developers, gambling, tobacco, liquor industries or persons closely associated.

(e) Property developers.

(f) $4 per vote in the Legislative Assembly and $3 per vote in the Legislative Council.

(g) Divided between eligible parties.

(h) An amount of $21,322.64 per candidate.

(i) Gifts over the disclosure threshold at any time must be reported within seven days.

(j) Expenditure only.

TABLE 2: COMPARATIVE OVERVIEW OF PUBLIC FUNDING FOR ELECTIONS

	Federal	NSW	Vic.	SA(a)	Qld	Tas.(b)	WA	ACT	NT
Legislation	*Commonwealth Electoral Act 1918*	*Electoral Funding Act 2018*	*Electoral Act 2002*	*Electoral Act 1985*	*Electoral Act 1992*	*Electoral Act 2004*	*Electoral Act 1907*	*Electoral Act 1992*	*Northern Territory Electoral Act*
Public funding of election campaigns	Indexed amount per first preference vote. Threshold of 4% of primary votes needed. First $10,000 of public funding paid automatically, with claim of expenditure required for any additional funding.	Indexed amount per first preference vote up to actual election expenditure incurred. Threshold of 4% of primary votes needed.	Indexed amount per first preference vote up to actual election expenditure incurred. Threshold of 4% of primary votes needed.	Opt-in public funding on a per vote basis. Candidates must receive at least 4% of the primary vote to be eligible for public funding. Those who opt-in to receive public funding are subject to an indexed expenditure cap.	Indexed amount of public funding per first preference vote up to the claimed electoral expenditure. Threshold of 6% of primary votes needed.	No public funding.	Indexed amount per first preference vote up to actual election expenditure incurred. Threshold of 4% of primary votes needed.	Indexed amount per first preference vote paid automatically to candidate. There is no claims process. Threshold of 4% of primary votes needed.	No public funding of election campaigns.
Public funding of parties' or candidates' activity	No public funding for administration or other organisational or policy development purposes.	Administration Fund based on the number of elected members, from $87,500 (indexed annually) for one to $187,500 for three plus $30,000 for each of up to 22 additional members. Parties not eligible for Administration Funding may be eligible for New Parties Funding of the greater of $0.63 per vote or $12,000.	Administrative funding paid annually at $200,000 for the first party member, $70,000 for third to forty-fifth member. Cannot be used for electoral expenditure.	Political parties who have a Member of Parliament are eligible for up to $7,000 or $12,000 (indexed) half yearly, administrative funding, depending on the number of MPs, which cannot be used for political expenditure.	A policy development funding pool of $3,000,000 is available. A registered party's entitlement is calculated from their formal fist preference votes of candidates who received more than 6% of the first preference vote.	No public funding for administration or other organisational or policy development purposes.	No public funding for administration or other organisational or policy development purposes.	Parties represented by an MLA and non-party MLAs are entitled to administrative funding of $21,322.64 (from 2015, indexed each year) per calendar year for each MLA, paid quarterly.	No public funding for administration or other organisational or policy development purposes.

	Federal	NSW	Vic.	SA(a)	Qld	Tas.(b)	WA	ACT	NT
Disclosure of donations	Details of donations over $13,800 (indexed) must be disclosed by parties and their associated entities and donors annually, and by candidates in their election returns. Donations over $1,000 from foreign donors are banned.	Parties and candidates disclose donations of $1,000 or more. Donations to a political party are capped at $6,300 and $2,800 for a candidate (annually indexed). Only individuals on the electoral roll or organisations with an Australian Business Number can donate. Disclosures within 21 days in the pre-election period otherwise six monthly.	Donations of $1,000 or more (indexed) at any time must be disclosed within 21 days by donors and recipients. Donation cap of $4,000 from any one donor to any one recipient during a parliamentary term. Donations from foreign donors, or anonymous donations under $1,000 are banned.	Donations, gifts and loans over $5,000 (indexed) must be disclosed by political parties, candidates, associated entities and third party campaigners. Donors must declare gifts over $5,000.	Donations or loans of $1,000 or more must be declared within days and total donations, loans and electoral expenditure must be declared within 15 weeks of polling day. Third parties who incur electoral expenditure over $1,000 must declare donations over $1,000 within seven days. Foreign donations are banned.	No state-legislated provisions for disclosure.	All political parties and associated entities are required to disclose the value of all gifts and other income received. Gifts above $2,300 must be detailed along with the details of donors. Anonymous donations above $2,300 prohibited.	MLAs, associated entities submit annual returns. Must disclose details of donations of $1,000 or more. Parties, non-party candidates, associated entities and third party campaigners submit election returns listing expenditure incurred during the election period.	Parties must submit annual returns showing total amounts received and detailing gifts of $1,500 or more. Donors of $1,500 or more must submit returns. Candidates must disclose details of gifts of $200 or more.
Disclosure of electoral expenditure	Parties and their associated entities must lodge annual returns listing their total receipts, total payments and total debts. Candidates and unendorsed Senate groups must disclose electoral expenditure during the election period.	All electoral expenditure must be disclosed annually by parties, candidates and third party campaigners. Electoral expenditure is capped for parties, associated entities (aggregated with party's expenditure) and third parties during the election period.	Parties and candidates submit audited statement of total expenditure within 21 weeks of election day.	Parties or candidates that have incurred more than $5,000 (indexed) of political expenditure during a campaign period must lodge a political expenditure return.	Electoral expenditure returns must be submitted by parties, candidates and third parties, regardless of whether the spending is during the election period. Evidence of expenditure must be retained.	No state-legislated expenditure regulations for Assembly, but parties may not incur expenditure for Legislative Council elections. Council candidates must submit election returns and have an expenditure limit.	Political parties, associated entities, candidates and groups who incur expenditure for political purposes are required to disclose all gifts received and expenditure incurred for election purposes ($17,000 in 2019, increases by $500 each year).	Registered parties must submit election returns detailing electoral expenditure during the election period. Expenditure is capped at $40,000 per candidate.	Registered political parties must disclosure total amounts paid each year. Candidates must detail all election expenditure by category. Publishers and broadcasters must lodge returns detailing electoral advertisements totalling more than $1,000.

[1] Associated entities are organisations that are controlled by, operated for, or have voting rights or are financial members of a political party.

[2] Other receipts are any amounts received other than donations, including income from sales of goods or services, interest on bank accounts, and public funding.

[3] Throughout this Interim Report the term 'candidate' is used to mean a non-party or independent candidate, and 'group' is used to mean a group of non-party candidates who have chosen to be listed together, particularly on an upper house ballot paper.

Section 1: Modernising the Tasmanian Electoral Act

Term of Reference 1: Modernising the current Tasmanian Electoral Act, with specific examination of sections including 191(1)(b), 196(1) and 198(1)(b).

First Tranche 'Technical' Amendments

Early in the Review process, it became apparent that there are a number of technical and administrative amendments that are reasonably straightforward and well supported. These proposed amendments are generally non-contentious and informed by the public and stakeholder consultation on the Terms of Reference for the Review.

It is recommended that these amendments be introduced as a first tranche of reforms to commence prior to the Legislative Council elections to be held in May 2019. To this end, a draft Bill setting out these amendments has been prepared and released for public consultation with this Interim Report.

The majority of these matters were raised by the TEC and relate to administrative matters including difficulties caused by recent changes to postal delivery times. The first tranche of amendments also removes the ban on newspaper reporting and commentary on Election Day.

Postal delivery timeframes

In its submission to the consultation on the Terms of Reference for the Review, the TEC states:

> *The rapid shift into the digital age has led to a change in the use and demand for Australia Post's mail services, to which Australia Post has adapted and evolved. In 2016, Australia Post introduced a two-speed mail service, offering regular and priority mail services. Australia Post estimates regular deliveries across Tasmania take between 3 – 6 business days and priority mail services take between 1 – 4 business days, subject to destinations. However, at the 2018 House of Assembly and Legislative Council elections, there were incidents where the TEC experienced longer timeframes than these estimates in the delivery of postal vote applications and postal votes, giving rise to a challenge in meeting the time frames set out in Part 5 Division 9 of the Act.*

The use of the priority mail service also has an impact on the costing for an election. As at 19 March 2018 the cost to post a small letter with Australia Post's regular mail service was $1.00 per letter and $1.50 per small letter with the priority service. When this price difference is considered in terms of 29,675 postal votes issued and 26,329 postal votes returned across the 2018 State and Legislative Council elections, the use of priority mail for the postal vote processes clearly creates a substantial financial impact to the taxpayer. Australia Post has announced a further cost increase commencing on 1 October 2018.[8]

It is accepted that delays experienced in postal delivery times cause difficulties in meeting timeframes under the Tasmanian Act. The Review recommends that the following provisions in the Tasmanian Act be amended, with the amendments included in the first tranche Bill, to make allowances for these delays.

TABLE 3: POSTAL DELIVERY PROPOSED AMENDMENTS

Provision	Current requirement	Proposed amendment
Section 126 Application for postal vote	Postal vote application required to be lodged before: – 6pm on the second day before polling day (if within Australia); and – 6pm on the fourth day before polling day (if outside Australia).	Amend to move the deadline for receipt of all postal vote applications to 4pm on the eighth day before polling day.
Section 129 Issue of replacement postal votes	Replacement postal vote material can be issued where an election official is satisfied that the original material has not been received or has been spoiled. The provision currently has no timeframe for applying for replacement postal vote material.	Amend section 129(1) to include the "requested before 4pm on the eighth day before polling day" timeframe as per the proposed amendment to section 126 (Postal vote applications).
Section 228 How and when to nominate to contest recount	Nomination to be lodged, posted or sent by facsimile so as to be received by Commissioner before noon on the tenth day after which the notice of vacancy was published (s228(2)(d)).	Amend to extend the 10 day period to 14 days.
Part 5 Division 14 Compulsory voting	The Tasmanian Act sets out a process to be followed by the Electoral Commissioner where an elector appears to have failed to vote in an election, consisting of up to three mailed notifications with specified timeframes for response. If a response is not received within the set timeframes, the Commissioner is to send the next notice as soon as practicable.	Amend to provide the Electoral Commissioner with an additional period to issue follow up notices for failure to vote.
Section 70(1) Polling Day	House of Assembly election/Legislative Council by-election to be a Saturday which is not less than 15 days nor more than 30 days after nomination day.	Amend to extend the minimum period between nomination day and polling day from 15 days to 22 days.

8 Tasmanian Electoral Commission Submission for the Review of the Electoral Act, p 2.

Administrative matters

In addition, the TEC also proposed the following administrative changes to the Tasmanian Act as part of its submission on the Terms of Reference for the Review:

- An amendment to allow postal vote information to be made available for viewing at the TEC office rather than the office of the returning officer.
- Amendments to various provisions in the Tasmanian Act to replace references to 'facsimile' with 'electronic means'.
- Amendments to various provisions in Part 5 of the Tasmanian Act to allow the returning officer to delegate in writing a number of administrative duties to electoral officers.
- An amendment to allow confirmation of out of session resolutions of the Commission to occur by electronic means rather than by the physical signing of a document.

The Review has concluded that these suggestions appear to be reasonable and straightforward and it is recommended that the Tasmanian Act be amended accordingly, with the amendments to be included in the first tranche Bill.

Newspaper reporting and commentary (section 198(1)(b)(ii))

Term of Reference 1 makes specific reference to section 198(1)(b) of the Tasmanian Act. Section 198(1)(b) provides:

> *198. Campaigning on polling day*
>
> *(1) A person must not, on the polling day fixed for an election, or on a day to which the polling for an election has been adjourned –*
>
> *(b) publish or cause to be published in a newspaper –*
>
> *(i) an advertisement for or on behalf of, or relating in any way to, a candidate or party; or*
>
> *(ii) a matter or comment relating to a candidate or a question arising from, or an issue of, the election campaign.*
>
> *Penalty: Fine not exceeding 100 penalty units or imprisonment for a term of 3 months, or both.*

The first part of this provision, that is, the section 198(1)(b)(i) prohibition on newspaper advertisements, is dealt with later in this section.

The second part – section 198(1)(b)(ii), prohibits a person from publishing or causing to be published in a newspaper a matter or comment relating to a candidate or a question arising from, or an issue of, the election campaign.

This 'ban' on newspaper reporting and commentary on Election Day has been the subject of public criticism for some time, leading to the specific inclusion of this provision in the Review's Terms of Reference.

A number of submissions received during the initial consultation on the Terms of Reference for the Review commented on section 198(1)(b)(ii). The general consensus was that the provision is outdated and unfair in that it penalises newspapers rather than other forms of media such as online and social media content. Further, that it is inconsistent with other Australian jurisdictions and prevents the reporting of important information on Election Day.

One submission raised concerns about removing section 198(1)(b)(ii) due to the effect of editorial and opinion pieces and suggested that voters should have a period free from media commentary in which to make their own decisions.

No other Australian jurisdictions prohibit newspaper commentary and reporting on Election Day. The concern that voters should have clear space or time in which to make their own decisions seems to be of less relevance today where information and commentary is available and more readily accessed on online and social media platforms and where there is a significant rate of 'early voting'.[9]

9 Tasmanian Electoral Commission Parliamentary Elections Report 2011-2014 (page 21) indicates that at the 2014 House of Assembly elections there were 22,830 pre-poll votes, 24,086 postal votes and 4,197 mobile votes.

The Review therefore recommends that the ban on newspaper reporting and commentary be removed by the repeal of section 198(1)(b)(ii), with this amendment to be included in the first tranche Bill.

Recommendation 1: That a first tranche of amendments to the *Electoral Act 2004* be introduced in Parliament in early 2019, including:

- Repeal of section 198(1)(b)(ii), i.e. the removal of the ban on newspaper commentary on Election Day.
- Amendments to various timeframes in the Act to take account of longer or delayed postal delivery times, including:
  - Section 126 (Application for postal vote) – move the deadline for receipt of all postal vote applications to 4pm on the eighth day before polling day.
  - Section 129 (Issue of replacement postal votes) – include a timeframe for applying for replacement voting material consistent with the proposed amendment to section 126, i.e. before 4pm on the eighth day before polling day.
  - Section 228 (How and when to nominate to contest recount) – extend the 10 day period for receipt of nominations to 14 days.
  - Part 5 Division 14 (Compulsory voting) – provide the Electoral Commissioner with an additional period of time to issue follow up notices for failure to vote.
  - Section 70(1) (Polling Day) – extend the minimum period between nomination day and polling day from 15 days to 22 days.
- An amendment to section 127 to allow postal vote information to be made available for viewing at the Tasmanian Electoral Commission Office.
- Amendments to various provisions in the Act to replace references to 'facsimile' with 'electronic means'.
- Amendments to various provisions within Part 5 of the Act to enable the returning officer to delegate, in writing, a number of administrative duties to electoral officers.
- An amendment to Schedule 2 Clause 6 of the Act to allow confirmation of out of session resolutions of the Tasmanian Electoral Commission to occur by electronic means rather than by the physical signing of a document.

These recommended amendments are contained in a draft consultation Bill – Electoral Amendment Bill 2019 which has been released for public consultation together with this Interim Report.

Remaining Provisions Referenced in Terms of Reference 1 – Sections 191(1)(b), 196(1) and 198(1)(b)

Section 191(1)(b) Campaign material to be authorised

Section 191 of the Tasmanian Act provides as follows:

> *(1) Subject to sections 192 , 193 and 194 , a person must not, between the issue of the writ for an election and the close of poll at that election –*
>
> > *(a) print, publish, keep on display or distribute, or permit or authorise another person to print, publish, keep on display or distribute, any printed electoral matter without the name and address of the responsible person being printed, in legible characters, at the end of the electoral matter; or*
> >
> > *(b) publish, or permit or authorise another person to publish, any electoral matter on the internet without the name and address of the responsible person appearing at the end of the electoral matter.*
>
> *Penalty: Fine not exceeding 100 penalty units or imprisonment for a term not exceeding 3 months, or both.*
>
> *(2) Printed electoral matter is published or kept on display by a person if the publication or display is published or kept on display with that person's consent.*

These requirements (often referred to as 'authorisation laws') are intended to ensure that electoral materials are appropriately authorised, with a nominated person who remains accountable for those materials.

Feedback received through the initial consultation on the Terms of Reference for the Review supported retaining this provision. However, the majority of submissions that referred to section 191(1)(b) suggested that it should be revised to clarify its application to material on social media and other digital communication platforms.

The TEC noted that:

> *the difficulties in regulating the authorisation of online electoral matter is an area of growing concern for all electoral authorities.*[10]

All other states and territories require authorisation of election/campaign materials such as advertisements, handbills, pamphlets, notices and posters. Some jurisdictions specifically make provision for authorisation of internet and/or social media content. For example:

- The New South Wales *Electoral Act 2017* provides that paid advertisements containing electoral matter published on the internet must contain the name and address of the individual who authorised the advertisement.[11] There is an exception for matter published on the internet that forms part of the general commentary on a website.[12]
- The Western Australian *Electoral Act 1907* requires the relevant authorisation details on an electoral advertisement published on the internet if the electoral advertisement is paid for and is intended to affect voting in an election.[13] Similar to New South Wales, there is an exception for matter that forms part of a general commentary on an internet website.[14]
- In the Australian Capital Territory, the *Electoral Act 1992* prohibits the dissemination of electoral matter that does not include the relevant authorisation information. There is an exception if the electoral matter is disseminated on or through social media and forms part of the expression of the individual's personal political views and the individual is not paid to express those views.[15] Social media is defined as internet or mobile broadcasting-based technology or applications through which individuals can create and share content generated by the individual, eg internet forums, blogs, wikis, text messaging etc.[16]

10 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 7.
11 *Electoral Act 2017* (NSW), s188.
12 *Electoral Act 2017* (NSW), s188(2).
13 *Electoral Act 1907* (WA), s187B(1).
14 *Electoral Act 1907*(WA), s187B(2).
15 *Electoral Act 1992* (ACT), s293A(1).
16 *Electoral Act 1992* (ACT), s293A(2).

The Commonwealth recently amended its legislative provisions around authorisation of 'voter communication' materials. The extensive authorisation provisions are set out in Part XXA of the Commonwealth Act.

Having regard to the submissions on this issue, and the position in other Australian jurisdictions, consideration should be given to retaining section 191(1)(b) but amending it to clarify the application of the authorisation requirements to online, social media and digital communication content.

The issue for more detailed consideration by the Review is what form that regulation should take. More detailed recommendations will be made in the Final Report following consideration of feedback received on this issue through consultation.

Consultation Issue 1: Whether consideration should be given to amending the Act to clarify the application of authorisation requirements for candidates in elections to online, social media and digital communication content, having regard to the models applied in other Australian jurisdictions.

Section 196(1) Candidate names not to be used without authority

Section 196(1) of the Tasmanian Act provides:

> *(1) A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.*
>
> *Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 12 months, or both.*
>
> *(2) Subsection (1) does not apply to any matter printed, published or distributed by the Commission or the Commissioner in the course of promoting public awareness of elections and parliamentary matters.*

There was general consensus in the submissions that subsection 196(1) is problematic for various reasons including that:

- There is uncertainty about whether the provision applies to material published online prior to the election period but accessible during that period.
- The provision does not appear to be consistent with freedom of speech – a guiding principle of this Review.
- The provision is not consistent with requirements in other Australian jurisdictions.
- The provision is outdated and inconsistent with the principle of holding politicians and candidates to account.

While all submissions that referred to section 196(1) concurred that it is problematic, there were differing views on how to address that provision. Some stakeholders recommended repealing section 196, while others considered that the complete removal of section 196 could leave a gap in the regulation of 'how to vote' cards (HTV cards).

It has been suggested that one of the original reasons for section 196 was to address concerns about misleading or fake HTV cards, particularly in the context of the Hare-Clark system where candidates are competing not only against candidates from other parties but also with candidates from their own party.

There are differing approaches to the regulation of HTV cards in other Australian jurisdictions. Some states, such as New South Wales and Victoria, require HTV cards to be registered or lodged with the relevant Electoral Commission. Other jurisdictions appear to regulate HTV cards through their general provisions and requirements relating to campaign materials, i.e. that they be authorised and do not contain any misleading or deceptive information.

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

Notwithstanding that HTV cards are subject to these other provisions, it may be appropriate to retain section 196 in respect of HTV cards as it provides a further deterrent to fake or misleading HTV cards which have been of concern to candidates in the past.

There does not appear to be any reason to retain the section 196 prohibition more generally, other than for HTV cards. As noted above, there was general consensus during consultation on the Terms of Reference for this current Review that the provision is problematic and it was also noted that these restrictions do not apply in other Australian jurisdictions.

The Review therefore proposes that section 196, if retained, should be amended to apply only to HTV cards.

Consultation Issue 2: Whether consideration should be given to amending section 196(1) of the Act which requires written consent to print, publish or distribute any advertisement, 'how to vote' card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate in an election so that it only applies to 'how to vote' cards.

Section 198(1)(b)(i) Campaigning on polling day

Section 198(1)(b)(i) provides that a person must not, on the polling day fixed for an election, or on a day to which the polling for an election has been adjourned, publish or cause to be published in a newspaper, an advertisement for or on behalf of, or relating in any way to, a candidate or party.

There was no significant feedback on this provision in the submissions on the Terms of Reference for the Review. However, as with the feedback on section 191, it was noted that there have been major changes in the way that information is provided and received with the rise of the internet and social media platforms. Again, there were suggestions in the submissions ranging from the repeal of section 198(1)(b)(i) to retaining the provision but amending it to clarify that it applies to online and social media content.

No other Australian jurisdiction appears to prevent print advertising in newspapers or online on polling day. There are provisions in other jurisdictions that restrict canvassing for votes within a certain distance of polling booths on polling day. This is also the case under section 177 of the Tasmanian Act which prohibits a person from canvassing or soliciting for votes within 100 metres of a polling place that is open for polling.

The Commonwealth *Broadcasting Services Act 1992* imposes a blackout on the broadcasting of election advertisements from the Wednesday before polling day until the close of poll on polling day for both federal and state elections.[17] The blackout applies to licensees of commercial television broadcasting, commercial radio broadcasting, community broadcasting, subscription television broadcasting and providers of broadcasting services under class licences. The *Election and Political Matter Guidelines* published on the Australian Communications and Media Authority website, indicate that the blackout does not apply to online services and print media.

Suggestions made during consultation were to:

- Retain the prohibition on advertising on polling day, but amend it to target advertising on all platforms;
- Use the Commonwealth *Broadcasting Services Act 1992* as a model for limiting political material in the lead up to an election (i.e. expand the blackout under that Act); or
- Repeal section 198(1)(b)(i).

Consultation Issue 3: Whether consideration should be given to repealing section 198(1)(b)(i) to remove the ban on newspaper advertising on polling day, consistent with other Australian jurisdictions.

17 *Broadcasting Services Act 1992* (Cth), Schedule 2 Clause 3A.

Other Matters Raised in Relation to Modernising the Tasmanian Act

A number of other issues were raised during consultation, each of which are dealt with separately below:

- Definition of 'electoral matter'.
- Partial return of the writ.
- Use of newspapers in electoral processes.
- Party registration processes.
- Express and interstate pre-poll classified as ordinary ballot papers.
- Instructions on ballot papers.
- Informal voting.
- Regulation of election signs.
- Electoral bribery and electoral treating.
- Composition of the Redistribution Committee and Redistribution Tribunal.

Definition of electoral matter

The term 'electoral matter', as used in the provisions of the Tasmanian Act[18], relates to authorisation of campaign material, advertising and misleading and deceptive materials.

The TEC suggests that consideration be given to amending the definition, on the basis that:

> *The current definition is extremely broad, as it captures matter which refers to a current or previous government, opposition or member of the Commonwealth or another state and territory. There is potential for confusion and difficulties with compliance and enforcement, particularly when election periods in other jurisdictions overlap with a Tasmanian election and in the modern realm of digital advertising where advertisements are published online.*[19]

The term 'electoral matter' is variously defined in the Electoral Acts in most other Australian jurisdictions. Victoria defines 'electoral matter' in almost the same terms as Tasmania.[20] The Australian Capital Territory[21] and Northern Territory[22] also have similar definitions, except they do not include references or comments on the governments, oppositions, members or former members of Parliaments in other states and territories or the Commonwealth.

The legislation in Victoria, the Australian Capital Territory and the Northern Territory also does not refer to matter containing a photo, drawing or printed matter depicting a candidate or intended candidate. Definitions in Queensland[23] and South Australia[24] do not set out a list of matters deemed to be electoral matter.

Consultation Issue 4: Whether consideration should be given to amending the definition of 'electoral matter' in the Act to narrow the definition and/or remove the deeming provision given the broad range of matters that may be captured by the current definition.

18 'Electoral matter' is defined in section 4 *Electoral Act 2004* (Tas).

19 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 11.

20 *Electoral Act 2002* (Vic), s4.

21 *Electoral Act 1992* (ACT), s4.

22 *Electoral Act* (NT), s7.

23 *Electoral Act 1992* (Qld), s2.

24 *Electoral Act 1985* (SA), s4.

Partial return of the writ

In its submission on the Terms of Reference for the Review, the TEC made reference to an incident at the 2014 State election where 163 Denison postal ballot papers were accidentally destroyed. It noted that while the winning margin for the fifth candidate was greater than 163, a closer result would have left the fifth seat in unresolvable doubt.

Section 147 of the Tasmanian Act provides for the situation where ballot papers are lost or destroyed.

The TEC's submission notes that under the current terms of the Tasmanian Act, the House of Assembly may not in certain circumstances be able to proceed to business until the Supreme Court has determined an application under section 205 and any consequential orders have been fulfilled.

The TEC suggests:

> *The Review may wish to consider amending the Act to put beyond doubt that a returning officer, as directed by the TEC, may return a writ certifying the election of a part of the number of members required to be elected for a division: in the thankfully averted Denison scenario, four of the five members. Whereas this might not avoid the need for those members subsequently to face a by-election, it would enable them to take their places in the Assembly and assume ministerial or parliamentary office, and for the Assembly itself to proceed to business.*[25]

This proposal does not appear to have been enacted in any of the other Australian jurisdictions. However, with the exception of the Australian Capital Territory, no other state or territory apart from Tasmania has a system where multiple members are elected from the same division.

The TEC advised that if the writ for one House of Assembly division were not returned this would result in Parliament not being able to establish a quorum which would effectively keep the Government in caretaker mode until a full new election could be completed for that division.

It is clear that a difficulty such as that encountered in the 2014 election could have serious ramifications for candidates and the State in terms of costs, delays and uncertainty.

Consultation Issue 5: Whether consideration should be given to amending the Act to allow a returning officer, as directed by the Tasmanian Electoral Commission, to return a writ certifying the election of a part of the number of members required to be elected for a division to address the issues that could potentially arise in delaying the formation of a Government under the current Act where ballot papers are lost or destroyed.

25 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 9.

Use of newspapers in electoral processes

The TEC noted in its submission on the Terms of Reference for the Review that there are certain circumstances in which the Tasmanian Act prescribes the use of newspaper notifications or advertisements, including:

- Announcement of candidates.
- Registration of political parties.
- Declarations of elections with and without poll.
- Acceptance of election writs.

The TEC submitted:

> *The cost for the placement and production of newspaper advertisements in the Tasmanian daily newspapers for 2017 and 2018 Tasmanian elections and party registration notifications was over $170,000. With the well-documented worldwide decline of readership in printed daily newspapers, the Review of the Act could look to prepare for a future where printed daily newspapers are no longer available, or it is not cost-effective to publish in a newspaper.*
>
> *To future-proof the Act, sections referring to "published in a daily newspaper" could be extended to "published in a daily newspaper or published by a means determined by the Commission."* [26]

The legislation in other Australian states and territories varies in the way in which these types of matters are to be published or notified.

For example, under the Victorian *Electoral Act 2002*, the Commission is to 'publicly advertise' various matters including the result of an election (s121(4)), receipt of a writ and the final nomination day and election day named in the writ (s64).

In the Australian Capital Territory (under the *Electoral Act 1992* (ACT)), the Commissioner is to give 'public notice' of an application to register a political party (s91(4)). Public notice means notice on an Australian Capital Territory government website or in a daily newspaper circulating in the Territory.

In Tasmania, however, while it is acknowledged there are significant costs involved in placing newspaper advertisements, given the nature of the demographic, particularly the ageing population, there are a number of people who have limited or no internet access and still rely on newspapers for information. For these reasons, any further consideration regarding possible change should be cautious not to limit the potential audience for such notices.

Consultation Issue 6: Whether consideration should be given to the means of publishing certain matters, such as the announcement of candidates, registration of political parties and declarations of elections, by the Tasmanian Electoral Commission.

26 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 9-10.

Party registration process

The TEC's submission to the Terms of Reference for the Review made a number of suggestions for amendments to Part 4 of the Tasmanian Act relating to party registration processes as follows:[27]

- That the length of the ballot paper name as set out in s44(1)(c)(iii) be changed from six words to a character limit.
- That the statutory declaration required under s44(3) be made within the 12 month period of the lodging of the application.
- That there are privacy concerns which may need to be addressed in relation to s52(6)(b) which allows a member of the public to request a copy of all or part of the party register.
- That the Tasmanian Act require that, under the process to apply to register a party, a copy of the party's constitution be submitted as part of the application to verify the existence of the party.

Six word limitation on party name (Section 44(1)(c)(iii))

In its submission to the Terms of Reference for the Review, the TEC proposed that the word limit of six words imposed in relation to the name of a party should be changed to a character limit.

It is noted that all other Australian jurisdictions apply the six word limit to party names.[28]

It is understood that the TEC's reason for requesting the change to a character limit is for administrative and practical purposes related to the printing of the party name on a ballot paper. The TEC advises that there are currently ten parties registered in Tasmania. This makes it increasingly difficult to produce a reasonably sized ballot paper with a font size that is legible. Restricting party names by reference to a character limit rather than a maximum number of words may make this more manageable for the TEC to administer.

12 Month period to lodge Statutory Declaration (Section 44(1)(f))

Section 44(1)(f) of the Tasmanian Act requires an application for the registration of a party to set out the names and addresses of at least 100 members of the party who are to be the registered members. Under section 44(1)(g), these statutory declarations must accompany the application for registration.

There is currently no requirement around how recent the statutory declarations of the party members must be at the time of making the application to register a party. The TEC has expressed concern that if a long time has elapsed between when the statutory declarations were made and the time of making the application for party registration, it is possible that some of the proposed members will have moved interstate, passed away or no longer be members of the party, and therefore no longer be eligible to support the registration.

There are varying requirements in relation to statutory declarations and registration of a party in other jurisdictions. In South Australia, an application for registration by a party that is not a parliamentary party must be accompanied by declarations of membership completed and signed by the members on whom the party relies for the purposes of qualifying as an eligible political party.[29] Some other jurisdictions require an application for registration to be accompanied by a statutory declaration made by the secretary of the party stating that a particular number of members are electors and members in accordance with the rules of the party.[30]

The Review will give further consideration to the requirements under section 44(3) including whether any amendments may be necessary. A recommendation will be made (if required) in the Final Report.

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27 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 12.

28 *Electoral Act 1992* (ACT), s93(2); *Electoral Act 2017* (NSW), s64(4); *Electoral Act* (NT), s158(2); *Electoral Act 1992* (Qld), s75(3); *Electoral Act 1985* (SA), s42(2)(a); *Electoral Act 1907* (WA), s62J(3); *Electoral Act 2002* (Vic), s47(a).

29 *Electoral Act 1985* (SA), s39(2)(f).

30 *Electoral Act 2002* (Vic), s45(2)(e), *Electoral Act* (NT), s152(4)(a).

Privacy concerns in relation to Section 52(6)(b)

The submission from the TEC on the Terms of Reference for the Review states that it is content with the current requirement in section 52(6) to make the party register available for public inspection. However, the TEC submits that there are privacy concerns in relation to section 52(6)(b) whereby a member of the public can request a copy of all or part of the party register.

It seems excessive and unnecessary that any person can obtain a copy of the entire party register containing personal details of all of the members of the registered parties. No other Australian jurisdiction requires a copy of the party register to be provided to a person on request. In all other states, territories and the Commonwealth, the register is to be made available for public inspection.[31]

Given that the Tasmanian Act already provides for the register to be made available for public inspection, the fact that no other jurisdiction requires a copy of the register to be provided on request and the privacy concerns expressed by the TEC, the Review proposes that paragraph (b) of section 52(6) should be repealed from the Tasmanian Act.

Requirement to submit a copy of the party's constitution

It is noted that every other jurisdiction, including the Commonwealth, requires an application for registration to be accompanied by a copy of the party's constitution.[32] It would therefore seem appropriate to consider including this requirement in the Tasmanian Act.

Consultation Issue 7: Whether consideration should be given to changes to Part 4 of the Act in relation to the registration of political parties to provide greater transparency in this process. The following possible changes have been identified by the Review for consideration:

- Repeal section 52(6)(b) of the Act so the Tasmanian Electoral Commission is not required to provide a copy of the party register on request, but continue to provide that a copy is to be made available for public viewing, consistent with other Australian jurisdictions.
- Amend section 44(1) of the Act to require an application for registration of a party to be accompanied by a copy of the party's constitution.
- Consider whether any changes to the requirements under section 44(3) of the Act in relation to statutory declarations by members of a registering party may be required.

31 *Commonwealth Electoral Act 1918, s139; Electoral Act 1992 (ACT), s88(3); Electoral Act 2017 (NSW), s70(1); Electoral Act 2002 (Vic), s59; Electoral Act 1907 (WA), s62M(1); Electoral Act 1985 (SA), s38(2); Electoral Act 1992 (Qld), s79(1); Electoral Act (NT), s168.*

32 *Commonwealth Electoral Act 1918* (Cth), s126(2)(f); *Electoral Act 1992* (ACT), s89(1)(e); *Electoral Act 2017* (NSW), s59(2)(g); *Electoral Act 2002* (Vic), s45(2)(d); *Electoral Act 1907* (WA), s62E(4)(e); *Electoral Act 1985* (SA), s39(2)(e); *Electoral Act 1992* (Qld), s71(4)(f); *Electoral Act* (NT), s152(2)(e)(ii).

Express and interstate pre-poll ballots classified as ordinary ballot papers

The TEC submission to the Terms of Reference for the Review suggests that the Tasmanian Act should be amended to allow express and interstate pre-poll ballots to be classified as postal ballot papers. Under the Tasmanian Act, these votes are to be counted with the postal votes.[33] The TEC has advised that express and interstate pre-poll votes are easily identified as different from other postal votes when being counted which may compromise the secrecy of the ballot for those electors.

Having regard to the concerns raised by the TEC, particularly in relation to the secrecy of the ballot, the Review proposes that consideration be given to amending the Tasmanian Act to classify express and interstate pre-poll ballots as postal ballot papers.

Consultation Issue 8: Whether consideration should be given to amending the Act to classify express and interstate pre-poll ballots (for example, votes cast in Antarctica) as postal ballot papers to allow them to be treated in the same way under the Act, including to ensure the relatively small number of votes received in this way are less easily identifiable.

Instructions on ballot papers

During the consultation process on the Terms of Reference for the Review, concerns were raised in a number of submissions that the requirements in section 100 of the Tasmanian Act regarding the instructions to be put on ballot papers are confusing and may have resulted in informal votes during elections.

It was suggested that section 100 is internally inconsistent with paragraph (a) indicating that the elector has to number all of the boxes and then paragraph (b) suggesting that the elector has to number a different amount of boxes and that the Tasmanian Act should be amended to remove this inconsistency.

One suggestion made in the submissions to this Review was that section 100 could be removed altogether, given that section 102 covers all the matters dealt with in section 100 except for the instruction in section 100(a) indicating that electors are to vote for all candidates in the order of choice. An alternative proposal was to amend section 100 to require a ballot paper to include instructions that are consistent with the requirements set out in section 102 for the marking of ballot papers, to remove the apparent inconsistency between these two provisions.

Section 102 clearly sets out the requirements for marking a ballot paper. It seems appropriate that any instructions provided on ballot papers be consistent with those requirements. It is therefore recommended that further consideration be given to amending section 100 to require a ballot paper to include instructions consistent with the section 102 requirements.

Consultation Issue 9: Whether section 100 of the Act should be amended to require a ballot paper to include instructions which are consistent with the requirements set out in section 102 for the marking of ballot papers, to remove the apparent inconsistency in the Act between these two provisions.

33 *Electoral Act 2004* (Tas), s134. Also see s131 and s132.

Informal voting

During consultation on the Terms of Reference for the Review, it was suggested that the formality requirements for House of Assembly elections in the Tasmanian Act could be improved to take into account innocent errors and allow a vote to be counted where the voter's intention is clear.

The current provision, section 103 of the Tasmanian Act, allows for a ballot paper to be treated as formal if there is an omission or a duplication in the numbering but only where this has occurred above the minimum number of preferences. The provision also allows an otherwise informal ballot paper to be counted at the discretion of the returning officer.

However any ballot paper that omits or duplicates a number within the minimum number of preferences (eg between one and five for House of Assembly elections) will be informal and not counted towards an election result.

This issue was also raised in the Legislative Council Inquiry in relation to Local Government ballot papers. The same concerns were mentioned as in the current Review, namely, that a voter could omit or repeat a number, rendering their vote invalid.[34]

It was submitted during consultation on the current Review that the formality requirements for voting in House of Assembly elections could be modernised to allow votes that contain unintentional duplications or omissions between the numbers two and five to be counted. The provisions in the Australian Capital Territory *Electoral Act 1992* were raised for consideration, noting the Australian Capital Territory also has a Hare-Clark electoral system like Tasmania.

Consultation Issue 10: Whether further consideration should be given to possible changes that would allow otherwise 'informal' votes to be treated as formal votes.

Regulation of election signs

The regulation of election signage by local government was raised during the consultation on the Terms of Reference for the Review.

Matters such as the placement and size of signs are currently regulated by local government planning authorities under Interim Planning Schemes (which will be replaced by Local Provisions Schedules when the Statewide Planning Scheme is in effect), the *Local Government (General) Regulations 2015* and relevant Local Government by-laws.

It is noted that the State Planning Provisions which are not yet in effect, but will be uniformly applied across the State over the next few years, include standardised specific requirements in relation to signs including election signs.

Consistent with the Tasmanian approach, election signage, as with other forms of signage, is regulated by local planning authorities in most other Australian jurisdictions.

At this stage, the Review considers that it is not clear that there should be any change to the regulation of election signs in Tasmania, given that all other signs are regulated under Local Government Planning Schemes and by-laws.

34 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 13.

Electoral bribery and electoral treating

Section 187 of the Tasmanian Act provides that it is an offence to directly or indirectly promise, offer, give, ask for or receive any property or benefit with the intention of influencing a person's election conduct.

Section 187(5) of the Tasmanian Act states that electoral bribery does not include a declaration of public policy or promise of public action.

The Director of Public Prosecutions (DPP) raised an issue as part of the consultation on the Terms of Reference for the Review that section 187 is not clear as bribery is extremely broadly defined and, on the face of it, there does not appear to be an element of fault, such as dishonesty. The DPP noted that other jurisdictions have bribery offences in similar terms to section 187:

> *Section 187 is a provision that has been used in numerous Electoral Acts in Australia. Public promises of funding have been a standard electoral practice throughout the country. Yet there has been little or no prosecution under these provisions. Thus, it would appear the provisions are not designed to cover ordinary public election promises of public policy or action.*[35]

The DPP suggests that:

> *In my view, in order to prove the offence, one should have to prove the offer of the benefit was not public or, alternatively, if it was public it was not for the purpose of public policy or action and only for the purpose of influencing electoral conduct. Further, there would have to be something improper in respect of it. If one is to look at the normal common law definition of bribery there must be some dishonest conduct or purpose: see R v Glynn (1994) 71 A Crim R 537. Clearly, the section should not cover normal political public activity. If a fault provision was enacted this would make it clear.*[36]

The DPP notes that the common law definition of bribery requires a dishonest conduct or purpose, citing the case of *R v Glynn* (1994) 71 A Crim R 537. In that case, Allen J stated:

> *As stated by Russell (Russell on Crimes (9th Ed) Vol 1):*
>
> "*Bribery is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity*".[37]

The DPP submits that there are similar problems in relation to section 188 which prohibits a person from supplying food, drink or entertainment or offering, promising or giving a gift, donation or prize with the intention of influencing a person's election conduct at an election. The DPP has suggested that section 188 also requires amendment to include a fault provision.

Given concerns raised about the potential difficulties in the scope and enforcement of sections 187 and 188 of the Tasmanian Act, it is recommended that consideration be given to amending the Tasmanian Act (for example, by including appropriate fault provisions) to ensure that sections 187 and 188 are enforceable.

The Review will also give consideration to any changes that may be required to the current offence, enforcement and compliance provisions of the Tasmanian Act as well as the creation of any new offence, enforcement and compliance provisions in relation to disclosure, third party regulation and any other new provisions that may result from this Review.

Consultation Issue 11: Whether consideration should be given to any changes that may be required to the current offence, enforcement and compliance provisions of the Act as well as the creation of any new offence, enforcement and compliance provisions in relation to disclosure, third party regulation and any other new provisions that may result from this Review. Specific issues to be considered in relation to the current Act include whether further consideration should be given to amending the Act to ensure the offences of electoral bribery (section 187) and electoral treating (section 188) are clearly enforceable, including whether the definition of bribery in the Act should be narrowed and whether it is appropriate to introduce a fault element to the offence.

35 Office of the DPP submission dated 26 July 2018, p 4.

36 Office of the DPP submission dated 26 July 2018, p 4-5.

37 R v Glynn 71 A Crim R 537 at p 542.

Associated Election Laws

Legislative Council Electoral Boundaries Act 1995 – Redistribution Committee and Redistribution Tribunal

Concerns were raised in some submissions on the Terms of Reference for the Review about the structure of the Redistribution Committee and the Redistribution Tribunal under the *Legislative Council Electoral Boundaries Act 1995* (Tas).

The *Legislative Council Electoral Boundaries Act 1995* (Tas) provides for the periodic review of electoral boundaries for Legislative Council divisions to ensure electors retain equal representation in line with the 'one vote one value' principle.

The redistribution is undertaken by the Redistribution Committee, which consists of the Electoral Commissioner, the Surveyor General and a representative of the Australian Statistician[38] and the Redistribution Tribunal, which consists of the members of the Redistribution Committee along with the Chairperson of the Electoral Commission and the remaining member of the Electoral Commission (who is not the Commissioner or Chair).[39]

Under that Act, the Redistribution Committee makes an initial proposal for a redistribution of Legislative Council boundaries. Section 13 (2) and (3) of that Act provide the priorities and matters to be taken into account in making an initial proposal. Under section 13(2), the Redistribution Committee must take into account that:

- The first priority is to ensure, as far as practicable, that, if the State were redistributed in accordance with the initial redistribution proposal, the number of electors enrolled in each Council division would not, 5 years after the redistribution, be less than 90 per cent or more than 110 per cent of the average Council division enrolment.[40]
- The second priority is the community of interest within each Council division.[41]

Submissions that raised this issue were critical of this structure on the basis that the Tribunal consists of the same members that make up the Committee, i.e. the body 'reviewing' the proposal is largely made up of the people who made the initial proposal.

It seems that the redistribution or electoral boundary review process under the *Legislative Council Electoral Boundaries Act 1995* (Tas), is not dissimilar to the process used in other Australian jurisdictions. However, the Review will give further consideration to whether the composition of the Redistribution Tribunal should be changed. This will be informed by a more detailed examination of the processes in Tasmania and other Australian jurisdictions.

Consultation Issue 12: Should changes be made to the composition of the Redistribution Tribunal established under the *Legislative Council Electoral Boundaries Act 1995* to address the overlap of membership between the Redistribution Committee and the Redistribution Tribunal?

38 *Legislative Council Electoral Boundaries Act 1995* (Tas), s5.

39 *Legislative Council Electoral Boundaries Act 1995* (Tas), s6.

40 Under s9(3) of the *Legislative Council Electoral Boundaries Act 1995* (Tas), the average Council division enrolment is the nearest whole number ascertained by dividing the number of electors enrolled in the State by the number of Council divisions.

41 *Legislative Council Electoral Boundaries Act 1995* (Tas), s13(2).

Section 2: Disclosure and Electoral Expenditure

Term of Reference 2: Whether state-based disclosure rules should be introduced, and, if so, what they should include?

The disclosure of political donations and electoral expenditure have become a well-accepted part of electoral legislation across the country.

Apart from Tasmania, all other Australian jurisdictions have a state or territory based disclosure regime for candidates and political parties in addition to the Commonwealth requirements.[42]

The Commonwealth disclosure requirements under the Commonwealth Act apply to political parties that are federally registered with the Australian Electoral Commission (AEC). The disclosure regime under that Act provides that all political donations over a threshold of $13,800 must be disclosed by political parties registered under the Commonwealth Act, with reporting required on an annual basis.

The term 'disclosure' is used varyingly in Australian electoral legislation to refer to different types of reporting namely:

(a) Disclosure by members of parliament, candidates in elections or political parties of donations received.

(b) Disclosure of electoral expenditure by either a candidate or a political party.

(c) Disclosure of political donations by the donor.

(d) Disclosure by a third party campaigner of political donations received.

This section of the Interim Report considers options (a) and (b) above, together with the key elements that would need to be considered in designing any proposed state-based disclosure system for Tasmania and related matters.

Disclosure requirements for donors and third parties under options (c) and (d) above are addressed in Section Three of this Interim Report.

42 Refer to Table 3 for details of disclosure regimes in other Australian jurisdictions.

The Review will consider a range of issues to inform the design of any proposed disclosure regime for Tasmania, should one be introduced, including:

- The scope of political donations to be included under the regime (definition of 'gift' for the purposes of disclosure).
- Thresholds and timeframes for disclosure.
- Disclosure of electoral expenditure.
- Caps on donations.
- Anonymous donations.
- Implementation.
- Enforcement and compliance.

The Review will also consider the relationship between public funding and disclosure regimes that have been introduced in other jurisdictions and the matter of whether caps on electoral expenditure should be considered.

Definition of Gifts (Political Donations)

Determining what is to be treated as a political donation for the purposes of disclosure is an important aspect to consider in the design of any disclosure regime.

A gift or donation, in a political or electoral sense, may be as simple as the gifting of cash. However, other Australian jurisdictions, including the Commonwealth, recognise that the concept of a gift or donation can be broader and more complex.[43]

Although the term 'donation' is commonly used to describe the giving of some benefit, in a legislative context the term 'gift' is usually used. For the purpose of this Interim Report, the terms 'gift' and 'donation' are used interchangeably.

Similar definitions of 'gift' and 'disposition of property' appear in the electoral legislation in other Australian jurisdictions in relation to disclosure of political donations. Key aspects of the definition include any disposition of property without any or with inadequate consideration, including the provision of a service (other than volunteer labour) and annual subscriptions.

The key types of 'gift' covered by this generally accepted definition as well as the common exclusions from the definition include consideration of in-kind contributions, tickets, auctions and sponsorships, subscriptions, levies and dues for political parties, volunteer labour, professional services and other matters.

While the definitions are broadly consistent across Australian jurisdictions there are some minor differences in some jurisdictions that are worth noting, particularly in relation to subscriptions, levies and dues for political parties, prescribed dispositions and professional services provided by party officers or elected members.

43 Note section 287 of the *Commonwealth Electoral Act 2018* (Cth) which provides that "gift means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include:

(a) a payment under Division 3 *[this refers to a payment under the Commonwealth public funding regime]*; or

(b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of a political party by a person in respect of the person's membership of the party, branch or division."

Timing and Thresholds for Disclosure of Political Donations

Timeframes for Reporting

Jurisdictions have varied reporting timeframes, as shown in Table 4.

As already noted, Queensland now requires disclosure of donations over $1,000 within seven days all year round and claims to be the first jurisdiction to require 'real time' reporting. Victoria's recent reforms require reporting within 21 days.

New South Wales is also transitioning to new disclosure requirements. Previously its legislation required an annual disclosure of donations. Under upcoming reforms, in the six months prior to an election all reportable donations need to be disclosed within 21 days. Outside this period, donations will need to be reported every six months. All electoral expenditure must be disclosed annually.

The timeframe for disclosure under the Commonwealth Act is up to 18 months after the receipt of the donation.

Thresholds for Disclosure and Aggregation of Gifts and Donations

If a disclosure regime is introduced in Tasmania, the Government will need to consider what quantum or value of gift would trigger a requirement to disclose.

As noted above, the Commonwealth Act has a current disclosure threshold of $13,800. All Australian jurisdictions which have disclosure regimes in place, have a disclosure threshold of $5,000 or lower.[44]

In addition to the higher threshold, the Commonwealth Act only requires disclosure if the single donation exceeds the threshold. All other Australian jurisdictions with disclosure regimes in place provide that the donation threshold is calculated on an aggregate of all gifts from one donor during the reporting period.

TABLE 4: DISCLOSURE REQUIREMENTS FOR RECIPIENTS – AUSTRALIAN JURISDICTIONS

	Federal	NSW	Vic	Qld	SA	WA	ACT	NT
Disclosure threshold for gifts	Over $13,800	Over $1,000	Over $1,000	Over $1,000	Over $5,000	Over $2,500*	$1,000	$1,500
Reporting period	Annual	Annual	Within 21 days	Within 7 days	Depends when made	Annual	Depends when made	Depends when made

Processes for Disclosure

The questions of what is to be disclosed and when it is to be disclosed are fundamental to the design of any disclosure scheme.

There are three main types of disclosure by political parties or candidates that apply in the various Australian jurisdictions:

a) Electoral period disclosure – i.e. disclosure of receipts and/or expenditure during a defined election period.

b) Annual reporting – a regular reporting cycle involving the reporting of all revenue and/or expenditure during that period.

c) Disclosure of specific events – the requirement that certain spending or receipts are disclosed, for example the receipt of a donation over a certain size or from a certain type of donor.

Most jurisdictions in Australia have disclosure regimes involving a combination of two of these.

44 See Table 4 for details of disclosure thresholds in Australian jurisdictions.

Under the Commonwealth Act, candidates and unendorsed Senate Groups are required to submit reports relating to election periods. The Commonwealth Act also establishes an annual reporting system for registered political parties.

In February 2017, Queensland introduced reforms that require disclosure within seven days of any gift or loan over $1,000. Gifts over $100,000 constitute a 'special reporting event' and need to be disclosed within seven days using a specific reporting form. All reporting is now undertaken through an online reporting portal.

In addition, within 15 weeks of polling day, candidates are required to submit an online return outlining:

- The total amount of gifts including fundraising contributions and gifts in kind received by or for the candidate.
- The number of entities or persons who gave gifts including fundraising contributions and gifts in kind received by or on behalf of the candidate.
- The total amount of loans, and the number of entities who made loans.
- Electoral expenditure incurred by the candidate, or with their written authority.

Victoria is in the process of transitioning to a new disclosure and regulatory regime that will involve a combination of annual reporting of all donations, expenditure and debt as well as online reporting of all political donations within 21 days of receipt.

The Review will consider an appropriate approach to gathering information on the donations received and electoral expenditure of candidates and parties, should a disclosure regime be adopted in Tasmania.

Disclosure of Electoral Expenditure

All jurisdictions now require disclosure of electoral expenditure by candidates and/or political parties in some form, although the detail and extent to which disclosure is required varies considerably.

New South Wales has the most extensive requirements regarding disclosure of electoral expenditure. Arguably this is because there are also caps on expenditure during the defined election period in place.

As of 1 July 2018, all political parties, elected members, candidates and groups, third party campaigners and associated entities in New South Wales must disclose all electoral expenditure incurred annually. All electoral expenditure incurred must be disclosed within 12 weeks after the end of the annual period, by 22 September.

Similarly, the Australian Capital Territory has caps on electoral expenditure with detailed electoral expenditure returns required to reflect compliance and to detail the nature of the expense.

In Western Australia electoral expenditure returns must detail all relevant expenditure in a range of categories with expenditure outside the 'electoral period' relating to advertising for use during that electoral period must still be included in the return.

The Northern Territory also requires reporting of expenditure broken down into a range of categories.

While Victoria has recently introduced an annual reporting system in relation to expenditure, with political expenditure now required to be paid from a dedicated account, the new provisions include a narrow definition of 'political expenditure', thereby reducing the amount of expenditure that needs to be reported.

South Australia requires two cycles of expenditure reporting; one during an electoral period (when expenditure is capped) and one for outside the electoral period. The capped electoral period return must be submitted within 60 days after polling day.

The Commonwealth Act requires parties to lodge annual reports containing total receipts, total payments and total debts. The Commonwealth Act also requires disclosure of election expenditure during a Federal election period. This requires candidates, unendorsed Senate Groups and Senate Groups endorsed by more than one registered party to disclose donations and election expenditure incurred during the election period. Election returns are made public 24 weeks after polling day.

Under the Commonwealth Act, 'expenditure' that needs to be reported on during the period from the issue of the writ to the close of polling includes:

- Broadcasting electoral advertisements (including production costs).
- Publishing electoral advertisements (including production costs).
- Displaying electoral advertisements at a place of entertainment, such as a cinema (including production costs).
- Production of campaign material requiring authorisation (eg how-to-vote cards, posters and pamphlets).
- Direct mailing (including printing and postage).
- Opinion polling and electoral research.[45]

Candidates endorsed by a federally registered political party may submit a 'nil' return if their campaign expenditure is transacted through the political party. The party will then report the expenditure as part of its annual return. If the candidate receives and/or spends funding specific to their campaign, they will need to lodge a return containing these details.

As noted earlier, the Tasmanian Act requires disclosure of electoral expenditure by candidates for Legislative Council elections for the period of 1 January of the year of the election until the close of the poll. There are no requirements for disclosure of expenditure by Legislative Council members outside this period, and no requirements for disclosure of House of Assembly members or candidates during any period.

It should be noted that a simple legislative provision requiring reporting of electoral expenditure from a fixed date is possible for Legislative Council candidates due to the predictable timing of Legislative Council elections. This would not be the case for House of Assembly candidates as Tasmania does not have a fixed polling date.

Anonymous Donations

The Commonwealth Act currently prohibits the receipt, by either a candidate or a political party, of an anonymous donation above the disclosure threshold.

Under the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* that recently passed the Federal Parliament, anonymous donations over $250 will be prohibited, as will smaller donations from the same source that total over $250 in the one reporting period.

Once implemented, this will significantly reduce the ability to donate anonymously. It should be noted that the Commonwealth Act does not aim to reduce the disclosure threshold but rather places a legal requirement on the recipient to keep adequate private records of the source of the funds.

New South Wales, Western Australia, the Australian Capital Territory, Queensland and now Victoria have all prohibited anonymous donations in excess of their respective disclosure thresholds. South Australia and the Northern Territory have gone further, requiring identifying information for donations from a threshold lower than the disclosure threshold. In other words, the party or candidate will have to obtain adequate information on the donor even if they are not required to disclose this information as part of the reporting regime.

It is generally recognised that requiring identification for very small amounts (for example, $20) would be impractical and would pose a significant administrative burden for candidates and parties. Under such a scenario traditional fundraising efforts such as raffles and cake stalls would be virtually impossible to run legally. For this reason, a disclosure threshold for anonymous donations is usually set so that these types of 'gifts' are not required to be disclosed.

A clear requirement for information to be gathered and disclosed for any gift of significant value would be important to any disclosure regime.

45 *Commonwealth Electoral Act 1918 (Cth),* s308.

Implementation Approaches

If introduced, a disclosure regime and regulation of third parties in Tasmania would require significant implementation arrangements including the roll out of new reporting and monitoring systems. It would also require mechanisms to ensure compliance and support.

Although it is premature to recommend specific systems reforms without a final recommendation in relation to a disclosure regime, it is valuable at the outset to make comment in relation to the operating requirements for different disclosure regimes in Australia and how that might impact a disclosure system for Tasmania.

The Development of an Online System

An effective online system for making disclosures, as well as for any registration of third parties, lodging of returns and related matters would need to be either developed or at least tailored for Tasmanian requirements. The exact cost of this system would depend on a range of factors including the specific legal requirements of any regulatory regime.

In its submission in relation to the Terms of Reference for the Review, the Institute for the Study of Social Change expressed the view that 'disclosure systems only work when the information disclosed is easily accessible and understandable.' [46]

Similarly, the 2014 Report by the New South Wales *Independent Commission Against Corruption on electoral funding, expenditure and disclosure issues* stated that an effective disclosure system '…should be timely, comprehensive, accessible and searchable and intelligible.' [47]

Ease of use for candidates, parties and third parties should also be a consideration. If a system needs to be used on a frequent *ad hoc* basis, as would be the case with a 'real time' disclosure system, it makes sense to ensure it is as simple and secure as possible to facilitate accurate and timely reporting. It should also be an effective tool for the purposes of compliance and enforcement.

Queensland has the most established system of online reporting in the nation. It has been in place for a number of years, with an online portal operating for the last two years.

The Australian Capital Territory has a less interactive system whereby reports are submitted via an electronic spreadsheet. Information can then be viewed on the ACT Electoral Commission website in table format.

The acquisition and/or development and implementation of an appropriate online system for any disclosure and regulatory regime is critical and the Review will consider the range of options available in other jurisdictions.

Enforcement and Compliance Considerations

The 2016 Final Report of the Legislative Council Inquiry observed that disclosure of donations would have an impact on TEC resources as the body responsible for monitoring and compliance. While this Interim Report does not consider the resourcing requirements for implementing state-based disclosure laws it is anticipated that there would be significant resource implications for implementation of such a change from a recurrent staffing and capital system cost perspective.

Compliance issues, such as any proposed new penalties, limitation periods and any investigative powers of the regulatory authority would need more detailed consideration in the drafting of any legislation following the Final Report of the Review.

Consultation Issue 13: If state-based disclosure rules are to be introduced in Tasmania, that consideration should be given to whether the Act should define 'gift' or donation for the purposes of disclosure, options for the thresholds and timeframes for reporting and any implementation issues, including compliance and enforcement.

46 Institute for the Study of Social Change, *Submission to the Review* p 3 at 1.2.

47 New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency* (December 2014) p 30-1.

Public Funding and Disclosure

Linkages have been drawn between the decision to publicly fund electoral expenditure and the introduction of disclosure regimes for political donations and other matters such as caps on donations. Public funding of elections is provided in all Australian jurisdictions with disclosure regimes in place, apart from the Northern Territory. A smaller number of jurisdictions have caps on donations in place.

There are two general types of public electoral funding currently made available in the various Australian jurisdictions:

- 'Election funding', defined by Muller as 'post-election payments of an amount based on the number of votes received, possibly capped to the amount of expenditure incurred at the election'.
- 'Administrative funding' or 'policy development funding' is 'money paid to political parties or candidates outside the election period to support parties' routine operation'.[48]

In all jurisdictions with public funding there is a threshold percentage of first preference votes that must be received by a candidate prior to being eligible for public funding. This is 4 per cent in all jurisdictions apart from Queensland, where it is 6 per cent.

The Commonwealth and the Australian Capital Territory calculate and pay entitlements based solely on the votes received by the candidate. The remaining jurisdictions with public funding now cap public electoral funding to actual expenditure.

The cost of a public funding regime to the State, if introduced, would depend on the amount provided per vote. However, the general costs in other states can provide some guidance.

The current Commonwealth rate of public funding is $2.68 per vote.[49] According to the AEC, Tasmania has 380,122 enrolled voters.[50] Based on a similar formula, the House of Assembly election would cost approximately $1.02 million in public funding. The Legislative Council, if paid at the same rate, would cost $1.02 million over the six year voting cycle.

The Commonwealth rate of $2.68 is fairly average across the jurisdictions. Western Australia has the lowest rate of public funding at $1.68 and the Australian Capital Territory, the highest, at $8.00 per first preference vote.

Public funding can be seen to act as a form of compensation in situations where other funding sources have been limited through caps or prohibited donors or potentially where a reduction in political donations as a result of disclosure regimes and thresholds may be anticipated. The recent reforms in Victoria saw the introduction of caps on donations of $4,000 and bans of foreign donations and will see an increase in the rates of public funding from 2022.[51]

Public funding can also provide an effective means of ensuring compliance. In New South Wales public funding can be reduced or withheld in the event of an offence or contravention of the electoral regime.[52]

Public funding has been introduced alongside disclosure regimes in other jurisdictions. Indeed, the AEC states in its election funding guide:

> *The two arms of the funding and disclosure scheme were introduced together in 1984 as complementary initiatives to address concerns over the potential influence of private money in the electoral process.*[53]

Should a disclosure regime be introduced in Tasmania, consideration should be given to the need for public funding of electoral expenditure, consistent with the majority of other Australian jurisdictions.

Consultation Issue 14: If a state-based disclosure regime is introduced in Tasmania, consideration should be given to the need for public funding of electoral expenditure, consistent with most other Australian jurisdictions.

48 Muller, Damon 'Election Funding and disclosure in Australian states and territories: a quick guide', p 5.

49 This is indexed each March.

50 2017 figure.

51 Under the reforms, from 2022 public funding will increase from a flat rate of $1.75 per first preference vote in either House to $6 per first preference vote in the lower house and $3 in the Upper House.

52 *Electoral Funding Act 2018* (NSW), s96.

53 AEC, *Election Funding Guide*, p 4.

Caps on Electoral Expenditure

There are some potential challenges and risks involved with setting caps on electoral expenditure. Caps set at a low level favour incumbents as new candidates are limited in their ability to raise their profile. Such caps also advantage candidates who already have a personal public profile while making it difficult for lesser known candidates to raise their own profile as part of their campaign.

The Institute for the Study of Social Change indicated it had considered AEC data provided by Tasmanian political parties, as part of their reporting under the Commonwealth Act, and argued that even without a cap, electoral spending as reported was not significantly higher than that of other smaller states and territories.

Caps on electoral expenditure are currently in place in some form in New South Wales, South Australia and Western Australia. However, these jurisdictions all have in place some form of public funding for electoral campaigns.

There are other practical implications that would need further consideration if caps were to be recommended. These include:

- Tasmania does not have a fixed electoral cycle in the House of Assembly. Therefore it is difficult to identify an election period during which to cap expenditure. In New South Wales, for instance, general elections are held on the fourth Saturday in March and the electoral period commences on 1 October of the previous year. The timing of House of Assembly elections is only known from the date that it is called by the incumbent Government.
- Consideration would need to be given as to the status of associated entities (associated entities are discussed further in Section Three of the Interim Report).
- The definition of 'electoral expenditure' can have a significant impact on certain candidates or parties. For example, if travel expenses are counted as part of electoral expenditure and are therefore capped, this would disproportionately affect candidates in large, regional or remote electorates.[54] Up until its recent reforms, New South Wales capped electoral communications expenditure only. The recent Grattan Institute report also recommended a cap on electoral advertising only.[55]

In its submission in relation to the Terms of Reference for the Review, the Institute for the Study of Social Change argues that "…the focus for reform should be on the disclosure of donations and spending rather than on imposing spending caps on political parties and candidates contesting Legislative Assembly elections."[56]

The issue of capping of electoral expenditure by third parties is discussed in more detail in Section Three of this Interim Report.

Consultation Issue 15: Whether caps on electoral expenditure for candidates for the House of Assembly should be considered at a later stage in light of additional research and data including evidence that may be gathered through any new state-based disclosure regime, if introduced.

54 *Inquiry into Options for the Reform of Political Funding and Donations in the Northern Territory* – June 2018, p 21.

55 Wood and Griffiths, Grattan Institute, *Who's in the Room? Access and influence in Australian politics*, Sept 2018.

56 Institute for the Study of Social Change, *Submission to the Review*, July 2018, Part 2.

Section 3:
Regulation of Third Parties

Term of Reference 3: The level of regulation of third parties, including Unions, during election campaigns.

This Term of Reference responds to growing calls to regulate the involvement of third parties and other actors in elections.

Examples of third party campaigners include unions, lobby groups, not-for-profit and corporate bodies. Disclosure requirements for third parties are in place in all Australian jurisdictions except Tasmania.

The only current regulation of third party activity in Tasmanian elections are the Commonwealth Act provisions requiring disclosure by donors to branches of nationally registered political parties, and the Tasmanian Act prohibition on third parties incurring expenditure on behalf of candidates for Legislative Council elections.[57]

There is currently no regulation of the activity, donations and expenditure of third parties, such as unions, representative bodies, lobby groups and corporate bodies, for House of Assembly elections under Tasmanian law. Third party electoral campaign activity is regulated in all other Australian states and territories.

This section outlines options for the regulation of third party electoral activity in Tasmania. There have been significant developments among Australian jurisdictions in recent years to modernise electoral funding and disclosure regimes to improve transparency and fairness. Tasmania can look to these reforms for models that will help ensure continued public confidence in Tasmania's electoral system.

Definition of Third Parties

For the purpose of this Review, the term third party has been interpreted to include:

- Third party campaigners.
- Associated entities: entities that are controlled by or operating for the benefit of a political party, including those with or without formal linkages.
- Donors: individuals, organisations or companies who donate money to a political party, or candidate in an election.

57 *Electoral Act 2004* (Tas), s159.

Third Party Campaigners

Third party campaigners are individuals or organisations who influence elections through political expenditure.[58] These individuals or organisations are not contesting any election themselves but seek to influence the election campaign and/or specific policy issues.[59]

Under Commonwealth legislation, organisations such as GetUp!, Greenpeace, Universities Australia, United Voice, World Vision Australia, the Mineral Council of Australia, the Business Council of Australia, Industry Super Australia, and trade unions have been subject to electoral regulation as third party campaigners in various jurisdictions.

Third party engagement in political campaigns may differ from political party engagement because actors are trying to 'win' on issues, rather than winning elections.[60] This may mean that third parties maintain issue-based campaigns for longer periods, compared to political parties who tend to campaign leading up to and during elections. However, some third parties also run election-focused campaigns and may advocate for a preferred political party and/or set of candidates.

Third parties derive income from a variety of sources, including membership fees, investments and services. They may receive political donations, but do not rely as heavily as do political parties, on donations to fund their political campaigns.

Third parties are important in civil society, contributing to public debate and advising on policy and government matters. However, these actors can lack the public accountability of more traditional entities, such as registered political parties.[61] The increased engagement of third parties in elections has been met with calls for greater transparency and accountability requirements to regulate their involvement. At the same time, it should be remembered that the role of many third party campaigners, such as charities, is not primarily or solely political, and any attempt to regulate their electoral activity should not limit their non-political activity.

Any regulation of third parties and other actors must balance the competing interests of the freedom of individuals and groups to express political preferences and engage in free speech on issues of public interest, against ensuring that such actors do not disrupt democratic processes by exerting undue influence in elections.

Associated Entities

Associated entities are bodies that are controlled by or operating for the benefit of a political party; hold voting rights in a political party; or hold a financial interest in the political party. Examples of associated entities could include companies holding assets for a political party, investment or trust funds, fundraising organisations, groups and clubs, trade unions and corporate members.

Donors

For the purpose of this Interim Report, a 'donor' is a person or body that makes political donations. The AEC defines a political donor as "a person, organisation or other body other than a political party, an associated entity or a candidate in a Federal election who is under an obligation to furnish a disclosure return because they made a donation."[62]

Most Australian jurisdictions require donors to disclose donations made over a certain threshold. The Commonwealth Act requires disclosure of donations that total over $13,800[63] during the reporting period. The Commonwealth threshold is higher than other regulating jurisdictions where thresholds for donor disclosure are between $1,000 and $5,000.[64]

In Tasmania, donors who donate to a federally registered political party are required to comply with the Commonwealth provisions.

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58 Tham, Prof Joo-Cheong, Submission into the Inquiry of the Joint Standing Committee on Electoral Matters in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 9 Cth) p 14.

59 Schott, Tink ,Watkins - Definition used page 105 *Political Donations – Final Report Vol 1 – Panel of Experts* (2014) NSW.

60 Tham, J-C, Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto Submission 25 - Attachment 1, p 78.

61 *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* Explanatory Notes.

62 Definition provided in the glossary of the AEC Financial Disclosure Guide for Election Donors.

63 As previously noted, this figure is indexed annually.

64 Regulating jurisdictions include New South Wales, Victoria, South Australia, Queensland and the Northern Territory.

The Review considers that if a state-based disclosure regime is introduced for political donations that are received by political parties and candidates in Tasmania, corresponding regulation of disclosure of donations for third parties should also be introduced.

Reform of Third Party Regulation in Australia

Recent reports including the 2018 Select Committee into the Political Influence of Donations[65] and the Grattan Institute report on access and influence in Australian politics have identified the considerable potential for third parties to influence electoral outcomes.[66] Other Australian jurisdictions have undertaken significant reform in the regulation of third parties' political activity as part of their broader electoral reforms. This section provides a snapshot of third party regulation in other Australian jurisdictions with a focus on recent reforms and reform proposals currently under consideration by Australian Parliaments.

Commonwealth

Under the Commonwealth Act, third party campaigners that incur electoral expenditure over the threshold amount (currently $13,800) are required to lodge an annual third party return of political expenditure and to disclose donations received, and used for political expenditure, that exceed the threshold amount.

Donors are required to disclose donations over the threshold amount, including indirect donations such as funding political advertising for a party or candidate.

There is no requirement in the Commonwealth Act for third parties to register before they can incur political expenditure unless they are classified as a political campaigner, as noted below. There are no expenditure caps for associated entities, or prohibited donors.

The Commonwealth *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (recently passed by Commonwealth Parliament and due to commence prior to the next Federal election) will make a range of changes relating to third parties including:

- Creation of a transparency register that will include the annual returns of political parties, associated entities, third parties and political campaigners.
- Associated entities will be required to register with the Australian Electoral Commission.
- Creation of a new category of third party that spends more than $100,000 in a financial year, or $500,000 across three years, to be identified as 'political campaigners'. Political campaigners would be required to register and would have disclosure obligations in-line with political parties.
- Political parties and political campaigners must not receive donations from foreign donors for the amount or value of $1,000 or more. A foreign donor must not make gifts to a political party or political campaigner for $100 or more if the purpose is for the gift to be used for electoral expenditure or for creating or communicating electoral matter.
- Third parties must not receive donations from foreign donors for the amount or value equal to the disclosure threshold, which are then used for the purpose of incurring electoral expenditure or for creating or communicating electoral matter.

65 2018 Senate Committee into the Political Influence of Donations – Chapter 3: Political Donations: A Corrupting Influence?

66 Wood and Griffiths 2018, *Who's in the room? Access and influence in Australian politics*, Grattan Institute p 3.

New South Wales

The New South Wales *Electoral Funding Act 2018* came into effect on 1 July 2018 introducing changes for regulation of third parties. Prior to the introduction of this legislation, New South Wales already had strong regulation of third parties.

The new legislation has halved the amount that unions and other third parties can spend on election campaigns, with third party expenditure caps being set at $500,000 (previously set at $1.3 million, the same level as for political parties). For political parties, the cap is now set at $122,900 per electoral district where a candidate is endorsed (candidates could be fielded in up to 93 electorates). Any spending by associated entities is counted against the cap for the relevant party. It should be noted that Unions NSW has commenced a constitutional challenge to these changes in the High Court.[67]

Bans on political donations from property developers, the gambling, tobacco and liquor industries and anonymous and foreign donors, have been retained in the new legislation.

New South Wales legislation did not previously refer to associated entities and unions were considered as third parties. The *Electoral Funding Act 2018* (NSW) now includes a category of associated entities, but given that this applies to "…an entity that operates solely for the benefit of one or more registered parties or elected members" it is likely that most political campaigners, including unions would still be considered third parties for the purposes of the legislation.

The new legislation no longer refers to electoral communication expenditure, but to the broader concept of electoral expenditure. All expenditure incurred for the purpose of influencing the voting at an election will be subject to the caps.

Expenditure by third-parties need only be disclosed during election periods, but donations received for the purpose of incurring that expenditure are required to be disclosed whenever they are received. Donations to all political parties and third parties, are capped at $6,300 and $2,800 respectively. A donor can donate to no more than three third parties in a financial year. Third parties are required to register with the New South Wales Electoral Commission.

Victoria

Until recently, Victoria did not regulate third party campaigners, apart from restricting donations from licensed gambling organisations. In July 2018, however, amendments to the Victorian *Electoral Act 2002,* came into effect banning foreign donations, regulating third parties and increasing disclosure requirements.

The *Electoral Act 2002* (Vic) refers to both associated entities and third party campaigners. In Victoria, most unions would be considered associated entities on the basis that an associated entity includes an entity that is a financial member of, or that has voting rights in, a registered political party. In addition to annual disclosure requirements, as required of third parties, associated entities are also required to disclose a series of prescribed financial statements.

To be considered a 'third party campaigner' the entity must have received political donations or incurred political expenditure, which exceeds a total of $4,000 in a financial year. The term 'political expenditure' has been defined narrowly to ensure that only entities that are intending to directly influence an election are regulated and to ensure that individuals and community groups maintain their right to engage in public discussion on policy matters that are important to them.[68] Third parties are required to keep a campaign account.

It is unlawful for a donor to make a donation to a party, associated entity or third party of over $4,000 during an election period or to make political donations to more than six third party campaigners during the election period. Both donor and recipient must disclose all political donations of over $1,000 to the Victorian Electoral Commission within 21 days. Foreign donations are banned.

67 *Unions NSW & Ors v. State of New South Wales* (S204/2018).

68 Hansard - Second Reading Speech, Electoral Amendment Act 24 May 2018.

Queensland

In 2017, Queensland made a number of changes to the *Electoral Act 1992* reducing the thresholds for disclosing donations and timeframes for reporting. Third parties who spend more than $1,000 for a political purpose (which is defined broadly and includes publicly expressing views on an issue in an election) during the disclosure period for an election must provide a return to the Electoral Commission reporting all gifts that have been used as electoral expenditure.[69] They must also disclose all gifts over $1,000 that they have made to candidates or political parties.[70]

A 2018 amendment to the *Electoral Act 1992* (Qld) bans donations from property developers. The ban follows a recommendation by the Queensland Crime and Corruption Commission that property developer donations be banned at Council level. The ban is currently also the subject of a High Court challenge.[71] Foreign donations and anonymous donations over $200 are banned.

Western Australia

Western Australia's *Electoral Act 1907* does not define third parties. The Act refers to 'other persons', which may include third parties. Other persons that spend $500 or more for a political purpose, are required to disclose gifts received above $2,500 to be used for a political purpose and relevant expenditure including donations made to political parties.[72] Expenditure for a political purpose includes publication of material used to promote or oppose a candidate or political party or to influence voting in an election. Disclosure is only required by one entity, so if the donor has disclosed the donation then the recipient need not.

In a report on the 2017 Western Australian State Election by the Community Development and Justice Standing Committee[73], the Committee noted that the well-resourced campaign by the Chamber of Minerals and Energy of Western Australia during the election had raised concerns about the extent to which third parties can influence election outcomes.

The report recommended that the *Electoral Act 1907* (WA) be reviewed and amended as a matter of urgency and that particular consideration should be given to limiting expenditure by third party campaigners. The Western Australian Government supported the recommendation to review the Act, but this work has yet to commence.

South Australia

In 2015, South Australia established a funding and disclosure scheme in its *Electoral Act 1985*. This introduced provisions for public funding to be made available for election campaigns, established a public disclosure regime for candidates, political parties, their associated entities and third parties who engage in campaigning during an election and introduced caps on political expenditure. The caps do not apply to third parties.

A third party is defined as an entity who intends to, or does in fact, incur more than $10,000 in political expenditure either during the current or preceding election. A third party must maintain a campaign account if they receive a gift to be used for political expenditure and then must ensure that all political expenditure is made from that account.

Third parties must:

- Record gifts of $200 or more and loans of $1,000 or more.
- Lodge half-yearly returns and additional returns during election years.
- Lodge a return if their annual political expenditure is more than $10,000.

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69 *Electoral Act 2002* (Qld), s263.

70 *Electoral Act 2002* (Qld), s264.

71 *Spence v the State of Queensland*.

72 See s.175Q and 175SD of the *Electoral Act 1907* (WA).

73 Community Development and Justice Standing Committee "2017 WA State Election Maintaining confidence in our electoral process", Report No. 2 February 2018.

- Declare gifts or loans over $5,000 in amount or value to a candidate or member of a group during a disclosure period.
- Lodge a return within 60 days of polling day if the third party's total amount of political expenditure during the capped expenditure period exceeded $5,000.

Northern Territory

The Northern Territory *Electoral Act* provides that if a third party spends at least $1,000 on political expenditure they are required to disclose relevant donations of $1,000 or more.

Electoral reforms related to the regulation of political donations and election expenditure are being considered through the *Inquiry into Options for the Reform of Political Funding and Donations in the Northern Territory.*[74] The Terms of Reference called for investigation into thresholds for the disclosure of donations, caps on electoral expenditure and donations, bans or caps on donations from specific sources, and public funding of political parties and candidates. The Final Report recommended caps on electoral expenditure for candidates and parties, but made no recommendations in relation to third parties.

Australian Capital Territory

To be regulated under the Australian Capital Territory *Electoral Act 1992*, a third party campaigner must have incurred $1,000 or more in electoral expenditure in the disclosure period for an election. Third party campaigners must submit election returns within 60 days after polling day, listing expenditure, the total of all gifts received and the details of all gifts of $1,000 or more. Third parties are subject to the same spending caps ($40,000) that apply to candidates and associated entities.

Current Tasmanian situation

The regulation of the electoral activity of third parties in Tasmania is limited. Donors to Tasmanian branches of parties that are federally registered are subject to the provisions of the Commonwealth Act. Donations must be disclosed if they total over $13,800 during a reporting period.

The only Tasmanian legislation relating to third party electoral activity relates to Legislative Council elections. Section 159 of the Tasmanian Act prohibits groups or individuals from incurring expenditure on behalf of Legislative Council candidates but does not preclude candidates from receiving donations toward their campaign.

Options for Third Party Regulation

This section identifies options to regulate third parties in Tasmania including reference to best practice approaches and canvasses the benefits and risks associated with each option.

Disclosure and Registration

Based on research and submissions to the Review, there appears to be broad support for Tasmania to adopt some form of disclosure and registration regime for third party campaigners and donors. Several submissions noted that it is in the public interest to render transparent the influence third party campaigners and donors have on elections.

Disclosure by Third Party Campaigners

Disclosure requirements for third parties are in place in all Australian jurisdictions except Tasmania. These requirements may relate to disclosure of electoral expenditure and/or to political donations.

74 Refer to Inquiry into Options for the Reform of Political Funding and Donations in the Northern Territory, Final Report (Commissioner John Mansfield), June 2018 and Inquiry into Options for the Reform of Political Funding and Donations in the Northern Territory, Discussion Paper, October 2017.

One concern raised is that the administrative requirements of a disclosure regime for third parties may be burdensome, particularly for smaller organisations, and that this could adversely affect legitimate civic participation. Jurisdictions with third party disclosure regimes have approached these issues in two ways: by using a narrow definition of activity that is to be regulated; and by use of threshold expenditure and donation amounts before an organisation is required to disclose.

Victoria has restricted the activity to be regulated to being "for the dominant purpose of directing how a person should vote at an election, by promoting or opposing a candidate or party."[75] This means organisations can conduct issue-based campaigning without having to comply with disclosure laws. A narrower definition, however, may allow a well-funded third party issue-based campaign to strongly influence an election without being subject to disclosure laws. For this reason it is suggested that the best way to limit the administrative impact on smaller Tasmanian organisations could be to introduce a more generous expenditure threshold of, for example, $5,000 before disclosure requirements are activated.

The Tasmanian Act does not regulate political donors, however the Commonwealth Act requires donors who make donations to federally registered political parties totalling more than $13,800 during the financial year to disclose the gift within 20 weeks of the end of the financial year.[76]

TABLE 5: THRESHOLDS FOR DISCLOSURE BY THIRD PARTY CAMPAIGNERS – AUSTRALIAN JURISDICTIONS

Disclosure of:	Federal	NSW	Vic	Qld	SA	WA	ACT	NT
Electoral expenditure	$13,800	$2,000	$4,000	*	$5,000	$500	$1,000	*
Donations provided for electoral expenditure	$13,800	$1,000	$1,000	$1,000	$5,000	$2,500	*	$1,500 to a party
Donations received for electoral expenditure	$13,800	$1,000	$1,000	$1,000	$5,000	$2,500	$1,000	$1,000

*No disclosure required

Once determined that a third party is subject to disclosure requirements, there are options for the type of disclosure required. This may include reporting of political expenditure and related income (including donations) for the period of an election or on an annual basis. An electoral commission may require the use of campaign accounts to make the tracking of income and expenditure easier.

Australian jurisdictions implement two main forms of reporting for participants in the electoral process: electoral period returns and annual returns.

If decided upon, the Tasmanian Government would need to weigh potential benefits against the costs of creating and administering the chosen approach in a small jurisdiction.

Regulation of Associated Entities

All Australian jurisdictions, with the exception of Tasmania, recognise 'associated entities' in electoral legislation, and regulate their participation in political campaigns. This recognises that associated entities can, in effect, be receiving and spending funds for the political benefit of the political party to which they are associated.

Associated entities, for electoral regulation purposes, are generally subject to transparency and disclosure requirements similar to those required by political parties. Most jurisdictions require associated entities to disclose detailed financial information such as total receipts, gifts (including in-kind), total payments, total debts and contributions to capital that benefit a political party. Associated entities are generally required to disclose political donations and electoral expenditure. This information may be required to be disclosed in aggregate with political parties (usually where caps are imposed).

75 *Electoral Act 2002* (Vic), s206.

76 *Commonwealth Electoral Act 1918* (Cth), s305B(1).

Unions may be subject to the requirements of either associated entities or third parties, depending on whether they are affiliated with a political party or operate independently.

The Review considers that any regulation of third parties should recognise the specific role of associated entities in the electoral system.

Registration of Third Parties

New South Wales is currently the only jurisdiction in Australia that requires registration of third party campaigners, however recently passed amendments will introduce registration for third parties at a Commonwealth level.[77] In New South Wales, third party campaigners must register prior to making electoral expenditure during an electoral period. Registration makes it easier for the Electoral Commission to regulate third parties and a public register provides greater transparency as voters can see which organisations are participating in campaigning during the election.[78] The New South Wales provisions only apply to campaigners that will incur more than $2,000 in electoral expenditure during an electoral period.

In the absence of a registration requirement, third party campaigners could be made visible to the public through a disclosure regime. However, no Australian jurisdiction requires disclosure of electoral expenditure prior to polling day, but, a number of jurisdictions require disclosure of donations within seven to 21 days (Queensland, New South Wales and Victoria).

Donor Disclosure

Political donors are regulated in most Australian jurisdictions by requiring them to disclose details of donations to the relevant electoral commission.

TABLE 6: DISCLOSURE REQUIREMENTS FOR DONORS – AUSTRALIAN JURISDICTIONS

	Federal	NSW	Vic	Qld	SA	WA	ACT	NT
Disclosure threshold for gifts	Over $13,800	Over $1,000	Over $1,000	Over $1,000	Over $5,000	Over $2,500*	Disclosure only required by gift recipients	Annual Returns - $,1500 Electoral Returns -Over $200 to candidates and $1,000 to parties
Reporting period	Annual	Annual	Within 21 days	Within 7 days	Depends when made	Within 15 weeks of polling day		Depends when made

*A return under this section is only required if both the gift and its donor have not been disclosed through an alternate mechanism

It may be appropriate that a threshold set for disclosure by donors should be consistent with any threshold for disclosure of political donations to candidates and parties. However, donor disclosure may not be required where there is a system for disclosure or receipt of donations by parties, candidates and third party campaigners.

The Australian Capital Territory does not require donor disclosure and Western Australia only requires donor disclosure where details of the donation have not already been disclosed in some other way.

77 *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

78 J-C, Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto Submission 25 - Attachment 1, 2012, p 83.

Caps on Third Party Expenditure and Donations

Two Australian jurisdictions, New South Wales and the Australian Capital Territory, place caps on third party electoral expenditure and political donations. In addition, New South Wales, along with Victoria, also caps the amount a single donor can donate to a single recipient.

Caps on Third Party Expenditure

Capping the electoral expenditure of third parties may only be appropriate where the expenditure of political parties and candidates is also capped. The introduction of caps on expenditure by third party campaigners in the absence of caps for candidates and political parties could be criticised as stifling political discourse and may also likely face legal challenge for its potential to infringe the implied constitutional freedom of political communication. Similarly, if caps were placed on political parties but not third party campaigners, there may be a risk of political funding being funnelled through third party organisations.

The two Australian jurisdictions that impose electoral expenditure caps on third parties, New South Wales and the Australian Capital Territory, also have caps for parties and candidates.

The Australian Capital Territory cap is the same amount ($40,000) for candidates, associated entities and third parties. Parties may spend up to five times this amount depending on how many candidates they have. New South Wales, as previously noted, has recently reduced the cap for third parties to $500,000, whereas the cap for parties is $122,000 per candidate (up to a maximum of 93 candidates).

Electoral spending by associated entities is aggregated with party spending for the purposes of determining whether a cap has been reached. The Northern Territory Inquiry has recommended $40,000 caps on electoral expenditure by parties, but has not considered caps on third party spending.

Consultation Issue 16: If a state-based disclosure regime is introduced for political donations received by political parties and candidates in Tasmania, whether corresponding regulation of disclosure of donations for third parties should also be introduced.

Consultation Issue 17: If additional regulation for third parties is introduced in Tasmania, consideration should be given to the following matters:

- Whether the Act should adopt a broad definition of electoral activity for the purposes of disclosure requirements.
- Whether political campaigners should be defined in the Act and required to disclose all political expenditure over a specified amount.
- That political campaigners should be required to disclose all political donations received over a designated threshold within a specified period, which should be consistent with the threshold and period set for the disclosure of political donations received by political parties and candidates.
- That 'associated entities' (entities that are controlled by or operate for the benefit of a registered political party) should be regulated and whether their disclosure obligations should be the same as those for political parties and candidates.
- Whether third party campaigners should be required to register with the Tasmanian Electoral Commission prior to making any electoral expenditure.
- Whether political donors should be required to disclose all donations over a designated threshold to the regulator within a specified period, which should be consistent with the threshold and period set for the disclosure of political donations received by political parties and candidates.

TABLE 7: CAPS ON THIRD PARTY EXPENDITURE AND DONATIONS – AUSTRALIAN JURISDICTIONS

	Federal	NSW	Vic	Qld	SA	WA	ACT	NT
Caps on electoral expenditure	Nil	$500,000	Nil	Nil	Nil	Nil	$40,000	Nil
Caps on donations for electoral expenditure	Nil	Over $6,300 to a political party Over $2,700 to a third party	Over $4,000 Max. 6 donations to third parties	Nil	Nil	Nil	Nil	Nil

Caps on Donations

New South Wales and Victoria cap donations from and to third parties. New South Wales caps donations to third parties and associated entities at $2,700 and caps donations to political parties at $6,300. Donors may not donate to more than three third parties.

In Victoria, the most recent changes to the *Electoral Act 2002*, ban donations over $4,000 to parties, associated entities or third parties. It is unlawful for a donor to make political donations to more than six third party campaigners during the election period.[79] Donations from property licensed gambling operators continue to be limited to $50,000.

The Northern Territory Inquiry has recommended $5,000-$10,000 caps on donations to registered political parties and candidates.

Restrictions on donations need to be considered in the light of general funding arrangements for elections. Caps may be more acceptable to political parties and candidates where there is public funding of electoral activity. Replacement funding for parties was provided as part of the recent Victorian reforms in recognition of the restrictions on fundraising.

It is premature for Tasmania to proceed with caps in the absence of further information. Instead, the desirability of caps should be revisited once there has been time to assess the information provided if a state based disclosure regime is introduced.

Consultation Issue 18: Whether the need for caps on political donations by third parties should be considered at a later stage in light of additional research and data including evidence that may be gathered through any new state-based disclosure regime and regulation of third parties, if introduced.

79 *Electoral Act 2002* (Vic), s217F. It is noted that these changes will not come into effect until after the 2018 Victorian State election.

Prohibited Donations

Table 8 provides a comparative analysis of Australian jurisdictions that have introduced provisions to prohibit donations from certain parties and/or ban foreign donations.

New South Wales, Victoria and Queensland have provisions in place to prohibit certain donors[80] or industries from making political donations to parties or candidates and to prohibit foreign donations.

The Commonwealth Act has recently been amended to include a ban on foreign donations to parties and candidates at Federal elections, however unlike New South Wales, Victoria and Queensland, the Commonwealth has not introduced any specific restrictions to prohibit donations from certain industries or bodies within Australia.

New South Wales and Queensland introduced a prohibition on donations from certain parties in response to independent findings of corruption associated with electoral activity. Bans or caps on donations are also under consideration in the Northern Territory as part of its Inquiry.

TABLE 8: PROHIBITED DONORS – AUSTRALIAN JURISDICTIONS

	Federal	NSW	Vic	Qld	SA	WA	ACT	NT
Prohibited donors (certain industries)	×	✓	✓	✓	×	×	×	×
Foreign donations banned	✓	✓	✓	✓	×	×	×	×

The use of prohibited donations as a measure of third party regulation has been met with legal challenge, mostly in New South Wales.

Two cases, outlined in the Case Notes below have decided legal questions about whether bans on donations from any person, organisation, corporation or person other than a person enrolled on the electoral roll satisfied the two-limb test set out in *Lange*.[81] That test has since been modified,[82] however the constitutional implication still depends on whether there is a burden on the implied freedom of political communication and, if so, whether the law pursues a legitimate purpose in a manner that is compatible with and reasonably appropriate and adapted to the system of representative and responsible government.

80 NSW has banned donations from property developers, tobacco businesses, liquor and gambling businesses or their close associates. Victoria recently repealed its ban on donations over $50 000 from gambling bodies and now just prohibits foreign donations. Queensland prohibits donations from property developers and property developer industry bodies.

81 *Lange v Australian Broadcasting Corporation* (1997) 109 CLR 520 was a High Court case that decided that the defence of qualified privilege in defamation law was subject to the freedom of political communication implied by certain provisions of the Constitution (Cth).

82 First in *Coleman v Power* (2004) 220 CLR 1; secondly, in *McCloy v New South Wales* (2015) 257 CLR 178, and thirdly in *Brown v Tasmania* (2017) 91 ALJR 1089, [104].

CASE NOTES: HIGH COURT CHALLENGES ON NEW SOUTH WALES LEGISLATION

New South Wales' ban on donations has been subject to two recent legal challenges:

Unions NSW v New South Wales[83] considered whether the restrictions on non-voters including unions making political donations and expenditure impermissibly burdened the implied freedom of political communication. The High Court considered that the purpose of protecting the electoral and governmental system from corruption was legitimate, but that the legislation was not rationally connected to that purpose. Following this ruling, the NSW legislation was amended to include the following objective: "to help prevent corruption and undue influence in the government of the State or in local government".

McCloy v New South Wales[84] decided that a ban on donations from property developers did not impermissibly burden the implied freedom of political communication. In this case, the High Court ruled that the restriction was constitutional because it was reasonably appropriate and adapted to serve a legitimate end to reduce the risk or perception of undue influence and corruption.

These recent legal challenges are important precedents that provide guidance in relation to third party regulation. Both cases illustrate the principle that in order to restrict the implied freedom of political communication the law must serve a legitimate end (i.e. seek to prevent corruption and undue influence, or otherwise preserve or enhance the integrity of the system of representative and responsible government). However, case law on prohibited donations by third parties continues to evolve.

In 2018, two new cases related to electoral reform have commenced. Unions NSW has made another application to the High Court against NSW's recent electoral reform.[85]

In Queensland, a High Court challenge is on foot in relation to the proposed ban on political donations by property developers.[86] The proposed ban to apply to both state and local elections goes further than the findings of the Crime and Corruption Commission, which focused solely on local elections. The proposed legislation has been referred to Committee.

In the absence of any regulation of third parties in Tasmania, the extent of third party influence is unknown. Further, Tasmanian elections have not been the subject of any independent findings of corruption or undue influence to warrant restricting certain donors.

Given the uncertainty about the extent of third party activity, it is too early to make a judgement on whether any bans on donations may be required in Tasmania in future, and it is not clear whether any such bans would be likely to survive a test of constitutionality.

Consultation Issue 19: That a prohibition on donations from certain parties not be considered in Tasmania at this stage.

83 *Unions NSW v. New South Wales*; (2013) 252 CLR 530.

84 *McCloy v. New South Wales*; (2015) 257 CLR 178.

85 Gregory, K (2018) 'NSW Government's new electoral laws face High Court challenge', ABC Radio, 11 August 2018.

86 *Spence v the State of Queensland*.

List of Recommendations

Recommendation 1: That a first tranche of amendments to the *Electoral Act 2004* be introduced in Parliament in early 2019, including:

- Repeal of section 198(1)(b)(ii), i.e. the removal of the ban on newspaper commentary on Election Day.
- Amendments to various timeframes in the Act to take account of longer or delayed postal delivery times, including:
  - Section 126 (Application for postal vote) – move the deadline for receipt of all postal vote applications to 4pm on the eighth day before polling day.
  - Section 129 (Issue of replacement postal votes) – include a timeframe for applying for replacement voting material consistent with the proposed amendment to section 126, i.e. before 4pm on the eighth day before polling day.
  - Section 228 (How and when to nominate to contest recount) – extend the 10 day period for receipt of nominations to 14 days.
  - Part 5 Division 14 (Compulsory voting) – provide the Electoral Commissioner an additional period of time to issue follow up notices for failure to vote.
  - Section 70(1) (Polling Day) – extend the minimum period between nomination day and polling day from 15 days to 22 days.
- An amendment to section 127 to allow postal vote information to be made available for viewing at the Tasmanian Electoral Commission Office.
- Amendments to various provisions in the Act to replace references to 'facsimile' with 'electronic means'.
- Amendments to various provisions within Part 5 of the Act to enable the returning officer to delegate, in writing, a number of administrative duties to electoral officers.
- An amendment to Schedule 2 Clause 6 of the Act to allow confirmation of out of session resolutions of the Tasmanian Electoral Commission to occur by electronic means rather than by the physical signing of a document.

These recommended amendments are contained in a draft consultation Bill – Electoral Amendment Bill 2019 which has been released for public consultation together with this Interim Report.

List of Consultation Issues

Consultation Issue 1: Whether consideration should be given to amending the Act to clarify the application of authorisation requirements for candidates in elections to online, social media and digital communication content, having regard to the models applied in other Australian jurisdictions.

Consultation Issue 2: Whether consideration should be given to amending section 196(1) of the Act which requires written consent to print, publish or distribute any advertisement, 'how to vote' card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate in an election so that it only applies to 'how to vote' cards.

Consultation Issue 3: Whether consideration should be given to repealing section 198(1)(b)(i) to remove the ban on newspaper advertising on polling day, consistent with other Australian jurisdictions.

Consultation Issue 4: Whether consideration should be given to amending the definition of 'electoral matter' in the Act to narrow the definition and/or remove the deeming provision given the broad range of matters that may be captured by the current definition.

Consultation Issue 5: Whether consideration should be given to amending the Act to allow a returning officer, as directed by the Tasmanian Electoral Commission, to return a writ certifying the election of a part of the number of members required to be elected for a division to address the issues that could potentially arise in delaying the formation of a Government under the current Act where ballot papers are lost or destroyed.

Consultation Issue 6: Whether consideration should be given to the means of publishing certain matters, such as the announcement of candidates, registration of political parties and declarations of elections, by the Tasmanian Electoral Commission.

Consultation Issue 7: Whether consideration should be given to changes to Part 4 of the Act in relation to the registration of political parties to provide greater transparency in this process. The following possible changes have been identified by the Review for consideration:

- Repeal section 52(6)(b) of the Act so the Tasmanian Electoral Commission is not required to provide a copy of the party register on request, but continue to provide that a copy is to be made available for public viewing, consistent with other Australian jurisdictions.
- Amend section 44(1) of the Act to require an application for registration of a party to be accompanied by a copy of the party's constitution.
- Consider whether any changes to the requirements under section 44(3) of the Act in relation to statutory declarations by members of a registering party may be required.

Consultation Issue 8: Whether consideration should be given to amending the Act to classify express and interstate pre-poll ballots (for example, votes cast in Antarctica) as postal ballot papers to allow them to be treated in the same way under the Act, including to ensure the relatively small number of votes received in this way are less easily identifiable.

Consultation Issue 9: Whether section 100 of the Act should be amended to require a ballot paper to include instructions which are consistent with the requirements set out in section 102 for the marking of ballot papers, to remove the apparent inconsistency in the Act between these two provisions.

Consultation Issue 10: Whether further consideration should be given to possible changes that would allow otherwise 'informal' votes to be treated as formal votes.

Consultation Issue 11: Whether consideration should be given to any changes that may be required to the current offence, enforcement and compliance provisions of the Act as well as the creation of any new offence, enforcement and compliance provisions in relation to disclosure, third party regulation and any other new provisions that may result from this Review. Specific issues to be considered in relation to the current Act include whether further consideration should be given to amending the Act to ensure the offences of electoral bribery (section 187) and electoral treating (section 188) are clearly enforceable, including whether the definition of bribery in the Act should be narrowed and whether it is appropriate to introduce a fault element to the offence.

Consultation Issue 12: Should changes be made to the composition of the Redistribution Tribunal established under the *Legislative Council Electoral Boundaries Act 1995* to address the overlap of membership between the Redistribution Committee and the Redistribution Tribunal?

Consultation Issue 13: If state-based disclosure rules are to be introduced in Tasmania, that consideration should be given to the following matters: whether the Act should define 'gift' or donation for the purposes of disclosure, options for the thresholds and timeframes for reporting; and any implementation issues, including compliance and enforcement.

Consultation Issue 14: If a state-based disclosure regime is introduced in Tasmania, consideration should be given to the need for public funding of electoral expenditure, consistent with most other Australian jurisdictions.

Consultation Issue 15: Whether caps on electoral expenditure for candidates for the House of Assembly should be considered at a later stage in light of additional research and data including evidence that may be gathered through any new state-based disclosure regime, if introduced**.**

Consultation Issue 16: If a state-based disclosure regime is introduced for political donations received by political parties and candidates in Tasmania, whether corresponding regulation of disclosure of donations for third parties should also be introduced.

Consultation Issue 17: If additional regulation for third parties is introduced in Tasmania, consideration should be given to the following matters:

- Whether the Act should adopt a broad definition of electoral activity for the purposes of disclosure requirements.
- Whether political campaigners should be defined in the Act and required to disclose all political expenditure over a specified amount.
- That political campaigners should be required to disclose all political donations received over a designated threshold within a specified period, which should be consistent with the threshold and period set for the disclosure of political donations received by political parties and candidates.
- That 'associated entities' (entities that are controlled by or operate for the benefit of a registered political party) should be regulated and whether their disclosure obligations should be the same as those for political parties and candidates.
- Whether third party campaigners should be required to register with the Tasmanian Electoral Commission prior to making any electoral expenditure.
- Whether political donors should be required to disclose all donations over a designated threshold to the regulator within a specified period, which should be consistent with the threshold and period set for the disclosure of political donations received by political parties and candidates.

Consultation Issue 18: Whether the need for caps on political donations by third parties should be considered at a later stage in light of additional research and data including evidence that may be gathered through any new state-based disclosure regime and regulation of third parties, if introduced.

Consultation Issue 19: That a prohibition on donations from certain parties not be considered in Tasmania at this stage.


Tasmanian
Government