# Electoral Act Review

Final Report | February 2021

Tasmanian Government

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# Minister's Foreword

I am pleased to release the Final Report of the Review of the *Electoral Act 2004* ('the Review') and associated election laws.

The Final Report has been developed at a time when a great deal of change was occurring in electoral law across Australia, as well as a number of key decisions being handed down by the High Court in relation to electoral law during this time. These changes and legal decisions have been considered as part of the Review and I thank the Steering Committee for their work.

The Review has already yielded one tranche of reforms with amendments to the *Electoral Amendment Act 2019* commencing in April and July of 2019.

The Review has also benefited from two rounds of public consultation; the first on the terms of reference of the Review, and the second in relation to the Interim Report. I thank all those individuals and organisations who made submissions. These submissions were carefully considered by the Review and have informed the Final Report.

The Final Report makes 11 recommendations, with some recommendations containing a number of sub-recommendations. The recommendations broadly fall into four areas:

- recommendations of a technical nature that will ensure our electoral system is effective and contemporary;
- recommendations relating to a new disclosure regime for candidates and political parties;
- recommendations relating to the regulation of third party campaigners, donors and associated entities; and
- a recommendation in relation to the public funding of election campaigns.

The Tasmanian Government remains committed to ensuring that Tasmania has a robust, democratic and fair electoral system, and I look forward to further reform in this area.

**The Hon Elise Archer MP**
Attorney-General
Minister for Justice

# Executive Summary

## The Review Process

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 has been 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 Terms of Reference were released for public consultation from 12 June to 20 July 2018.

A total of 33 submissions were made in relation to the Terms of Reference.

The Interim Report was informed by the submissions on the Terms of Reference, recent case law and the experience of other Australian jurisdictions including legislative models in place in those jurisdictions.

The Interim Report provided a summary of this information and preliminary analysis and posed 20 consultation issues to guide consultation. The Interim Report was released for public consultation on 20 December 2018, which closed on 15 April 2019.

In addition, a draft Bill containing a number of minor and technical amendments proposed for introduction as the first tranche of reforms resulting from the Review was released for consultation at this time.

Some 69 submissions were received on the Interim Report, while 4 submissions were received on the draft Bill itself.

The draft Bill included a number of changes that were proposed to be introduced in time to apply during the Legislative Council elections of May 2019, including changes to timeframes for postal delivery and other administrative matters. That Bill also removed the restrictions on advertising and commentary in newspapers on polling day, in response to submissions made on the Terms of Reference for the Review. The amendments were passed by both Houses of Parliament and have since commenced.

## The Final Report

The Final Report is divided into four sections which largely align with the three Terms of Reference for the Review and include an additional section relating to implementation issues for the proposed reforms.

The Final Report makes 11 recommendations. Several of these recommendations contain a number of sub-sections. This detail is included to ensure readers can form an accurate picture of the reforms proposed.

Section 1 considers a range of technical amendments to the *Electoral Act 2004* (the Tasmanian Act) to ensure the legislation is contemporary and to implement a range of practical and operational recommendations of the regulator, the Tasmanian Electoral Commission (TEC).

Section 2 considers the creation of a state-based disclosure regime comparable to contemporary models in other Australian jurisdictions, subject to further modelling and analysis that is recommended to be undertaken to inform the final detail of the model. It is proposed that this new regulatory system for candidates, members and parties would not involve capping of either expenditure[1] or donations at this stage.

Section 3 considers the regulation of third party campaigners, associated entities and political donors, including donors to political parties and candidates and donors to third party campaigners.

It recommends that third party campaigners should be required to register with the TEC and report political expenditure and donations received during a defined election period. It also recommends that donors to political parties, candidates and Members of Parliament should be required to disclose donations above a set threshold, informed by contemporary and best practice in other jurisdiction.

Section 4 makes a number of recommendations in relation to implementation of the proposed reforms. It recommends that further modelling and analysis be undertaken to inform the final detail of the model arising from several of the recommendations in Sections 2 and 3 of the Final Report and to determine the resource and budgetary impacts of the proposed reforms as well as the information technology and other systems required to support implementation.

Section 4 includes an analysis of possible models for public funding of elections in Tasmania, with reference to the funding models in place in other Australian jurisdictions and submissions received on the Interim Report.

1 Other than the cap on electoral expenditure already in place for candidates in Legislative Council elections.

# Glossary

**ACT** – Australian Capital Territory

**AEC** – Australian Electoral Commission

**COAG** – Council of Australian Governments

**DPP** – Director of Public Prosecutions

**HTV** – how to vote

**ICAC** – Independent Commission Against Corruption

**NSW** – New South Wales

**NT** – Northern Territory

**SA** – South Australia

**TEC** – Tasmanian Electoral Commission

**The Tasmanian Act** – *Electoral Act 2004*

**The Commonwealth Act** – *Commonwealth Electoral Act 1918*

**TLRI** – Tasmania Law Reform Institute

**WA** – Western Australia

# List of Recommendations

## Section 1

***Recommendation 1:*** *That, subject to further modelling and analysis to inform the final detail of the model, a number of technical and operational amendments be made to modernise and improve the operation of the Electoral Act 2004 (Tas) (the Tasmanian Act) as follows:*

*(a) That the Tasmanian Act be amended to clarify the application of authorisation requirements to online, social media and digital communication content consistent with the Commonwealth legislative requirements and with appropriate exceptions and defences similar to other Australian jurisdictions.*

*(b) That section 196(1) of the Tasmanian 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 likeness of a candidate or intending candidate, be amended so that it only applies to 'how-to-vote' material including, for example, how-to-vote cards, social media and contact via telephone.*

*(c) That, if section 196(1) is amended to apply only to how-to-vote material, that section 197 be amended, or a new section drafted, to provide for additional offences including, but not limited to, an offence to print, publish or distribute electoral matter that:*

*(i) contains incorrect or misleading information about whether a person is or is not a candidate or a member of/ endorsed by a registered party;*

*(ii) uses the name or derivative of a name of a party in a way intended to or likely to mislead any elector;*

*(iii) could result in an elector casting an informal vote;*

*(iv) contains a statement (express or implied) to the effect that voting is not compulsory; and*

*(v) contains a statement intended or likely to mislead an elector that the material is an official communication from the Electoral Commission or Electoral Commissioner.*

*(d) That section 197 be amended to clarify that:*

*(i) "publish" includes publish by radio, television, internet or phone;*

*(ii) "electronic communications" include social media as well as "the internet";*

*(iii) offences are not limited to an "election period"; and*

*(iv) the provision applies to all campaign material (noting the current wording "in or in relation to the recording of his or her vote".*

*(e) That the definition of 'electoral matter' be amended to apply a 'dominant purpose' test consistent with the definition in section 4AA of the Commonwealth Electoral Act 1918.*

*(f) That the Tasmanian Act be amended to allow a returning officer, as directed by the TEC, to return a writ certifying the election of a part of the number of members required to be elected for a division.*

*(g) That the requirement for certain matters to be notified or advertised in newspapers be retained, noting that additional notification by other means, such as on the TEC's website, may also occur.*

*(h) That the following amendments be made to Part 4 of the Tasmanian Act:*

*(i) section 52(6)(b) requiring the TEC to provide a copy of the party register on request be repealed;*

*(ii) section 44(1) be amended to require an application for registration of a party to be accompanied by a copy of the party's constitution with consideration to be given to whether any additional provisions are required, for example in relation to amendments subsequently made to the constitution; and*

*(iii) section 44 be amended to provide that the statutory declarations required under section 44(1)(g) must have been made no more than 12 months prior to the date of lodging the application.*

*(i) That the Tasmanian Act be amended to provide that the ballot papers issued for all votes counted with the postal votes under section 134 be classified as postal ballot papers to ensure that the relatively small number of votes received in this way are less easily identifiable.*

*(j) That section 100 of the Tasmanian Act be amended to require a ballot paper to include instructions which are consistent with the requirements in section 102 for marking of ballot papers.*

*(k) That the current formality rules under sections 102 and 103 of the Tasmanian Act be retained. Further, that the TEC actively pursue avenues to reduce unintentional informal voting by electors with literacy or vision problems.*

*(l) That the Tasmanian Act be amended to clarify that where polling is adjourned at a polling place, for example, where a polling place is closed due to safety reasons such as storm damage or bushfire, only electors who are enrolled to vote in the division in which the polling place is situated are entitled to vote in the adjourned polling.*

*(m) That the Tasmanian Act be amended to allow for postal vote information to be delivered in person to the elector, including by issuing the postal vote information to a third party such as a family member.*

*(n) That, in relation to compliance and enforcement:*

*(i) sections 187 (electoral bribery) and 188 (electoral treating) of the Tasmanian Act be amended, by including appropriate fault provisions, to ensure that the offences under those sections are enforceable;*

*(ii) the Tasmanian Act be amended to provide the TEC with investigative powers to allow it to meet its current responsibilities under the Tasmanian Act, particularly in relation to its functions under section 9(1)(f) of the Act;*

*(iii) electoral offences under section 186 of the Tasmanian Act be made mirror offences, whereby there would be an indictable crime and summary offence for the same conduct, and allow for offences to be charged on complaint or indictment depending on the circumstances of the case. Alternatively amend section 186 to provide for relevant offences to be electable with the agreement of the prosecution; and*

*(iv) other reforms to the Tasmanian Act be considered in the context of identifying whether any new enforcement, compliance and offence provisions are required to support reforms under this Term of Reference.*

***Recommendation 2:*** *That the current composition of the Redistribution Committee and Redistribution Tribunal under the Legislative Council Boundaries Act 1995 be retained, but that the name of the Tribunal be changed to more accurately describe the role of that body in the redistribution process.*

# Section 2

***Recommendation 3:*** *That, subject to further modelling and analysis to inform the final detail of the model, a disclosure system be introduced for political donations that are received by political parties and candidates, with the following elements and informed by models in other jurisdictions:*

*(a) The Tasmanian Act include a definition of "gift" that is generally consistent with the definition in the Commonwealth Electoral Act 1918.*

*(b) That a threshold be set for disclosure of donations received, informed by approaches in other jurisdictions.*

*(c) There be a requirement that all donations over the specified disclosure threshold be disclosed to the regulator within a specified time period. This time period could either be a single rolling period of no more than 28 days or alternatively, a less frequent reporting period outside the election period with more frequent reporting during the election period.*

*(d) Multiple donations received from a single donor during a reporting period be aggregated when determining whether the disclosure threshold has been exceeded.*

*(e) All candidates and political parties for House of Assembly elections be required to submit a return identifying all electoral expenditure, donations and debt during an identified period and that the return be required to be submitted via the designated electronic system within a set period after polling day.*

*(f) All disclosure and reporting obligations be managed through an online disclosure system which allows:*

*(i) easy and secure input of meaningful information by candidates, parties and third parties;*

*(ii) the public to access and interrogate all appropriate data; and*

*(iii) effective monitoring, auditing, investigation and enforcement.*

*(g) It be an offence to receive a donation over the threshold for disclosure without recording the requisite identifying information.*

*(h) It be an offence for a donor to provide false identifying information when making a political donation.*

***Recommendation 4:*** *That the need for caps on electoral expenditure for candidates for the House of Assembly be considered at a later stage in light of additional research and data on electoral expenditure including evidence gathered through a new disclosure regime.*

# Section 3

***Recommendation 5:*** *That, subject to any further modelling and analysis required to inform the final detail of the model, 'associated entities' (entities that are controlled by or operate for the benefit of a registered political party) be registered and that their disclosure obligations be the same as those for political parties.*

***Recommendation 6:*** *That, subject to further modelling and analysis to inform the final detail of the model, a disclosure regime be introduced for third party campaigners for electoral expenditure, donations and loans received during the election period. It should include the following elements:*

*(a) That third party campaigners that spend over a defined threshold on electoral expenditure during the election period will be subject to regulation.*

*(b) That regulation is limited to campaigning for the 'dominant purpose' of influencing voting at an election.*

*(c) That a reporting period be I set for disclosure of electoral expenditure, donations and loans received, in line with the period identified in Recommendation 3 (e).*

*(d) That third party campaigners be required to register with the Tasmanian Electoral Commission prior to incurring expenditure over the defined threshold during an election period.*

*(e) That, during an election period, a registered third party campaigner be required to disclose the receipt of a donation over the designated threshold to the TEC within the specified time period (in line with Recommendation 3(e)). That third party campaigners be required to submit a return identifying all electoral expenditure, total political donations during the election period, and details of donors of donations exceeding the identified threshold. This return must be submitted within a set period of polling day.*

*(f) That multiple donations received from a single donor during the electoral period be aggregated when determining whether the disclosure threshold has been exceeded.*

*(g) That it be an offence for a third party campaigner to receive a political donation over the threshold for disclosure without recording the requisite identifying information.*

***Recommendation 7:*** *That political donors be required to disclose details of donations to political parties, candidates, associated entities and third party campaigners to mirror the disclosure requirements for the receiver of the donations.*

***Recommendation 8:*** *That levels of third party political expenditure and donations to as well as from third parties be monitored following introduction of the proposed disclosure regime to inform consideration at a later stage of whether a cap on donations by or to third parties and/or electoral expenditure by third parties may be appropriate.*

***Recommendation 9:*** *That, noting the principle of freedom of speech, a prohibition on donations from specified industries and/or entities including foreign donations be considered and that developments in this area in other Australian jurisdictions continue to be monitored, including any future High Court decisions.*

# Section 4

***Recommendation 10:*** *That modelling and further analysis be undertaken in relation to resourcing and implementation, including to inform the best option regarding:*

*a) The specific timeframe/s for disclosure of donations (ie whether this should be the same timeframe year round or with a shorter timeframe during the election period, with reference to Recommendation 3).*

*b) The timeframe for submitting electoral expenditure reports to the TEC.*

*c) The amount of expenditure to trigger the classification of an organisation as a third party campaigner.*

*d) Enforcement and compliance resource requirements for the new disclosure regime for candidates, political parties, third party campaigners and donors.*

*e) Resource requirements to implement the proposed reforms, including information technology requirements and staffing for the TEC to oversee the new disclosure system and regulation of third party campaigners, including compliance and enforcement of the new requirements.*

*f) Whether a staged approach to implementing the reforms may be appropriate.*

***Recommendation 11:*** *That potential options for public funding and the issue of whether or not there should be public funding be considered as part of further analysis being undertaken prior to implementation of the proposed reforms, including the likely costs of the following identified options:*

*(a) Short term transitional funding to support candidates, parties and third party campaigners to implement the new disclosure regime and reporting requirements.*

*(b) Ongoing administrative funding to comply with the new requirements.*

*(c) Public funding for electoral expenditure generally, including models in other jurisdictions based on a percentage of the vote received by candidates and/or parties.*

*(d) In regard to (b) and (c) above, consideration should be given to the impacts of long-term public funding of elections on the fiscal strategy for Tasmania.*

# Introduction

## The Tasmanian context

As outlined in the Interim Report, the electoral system in Tasmania is currently governed by the Tasmanian *Electoral Act 2004* (the Tasmanian Act) and the *Commonwealth Electoral Act 1918* (the Commonwealth Act). The Tasmanian Act is now 15 years old, with few changes made to the Act in that time.

The Review has provided the opportunity to consider a range of technical and administrative amendments to the Tasmanian Act, in addition to considering potential significant reforms as identified in the Terms of Reference for the Review.

The TEC has provided valuable submissions to the Review, highlighting areas that would benefit from amendment due to experience here in Tasmania or in other jurisdictions. A small number of changes were not contentious and formed the basis of the *Electoral Amendment Bill 2019* (also referred to as the First Tranche Bill). This Bill passed Parliament and commenced on 15 April 2019.

The Final Report considers further technical changes to the Tasmanian Act, including changes to the sections highlighted in the Terms of Reference for the Review.

Tasmania is the only Australian state 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.

The Tasmanian Act deals with electoral rolls, the general conduct of elections and the state system for registering political parties. The TEC is established by the Tasmanian Act[2], consisting of the Tasmanian Electoral Commissioner and two other members[3].

Part 6 of the Tasmanian Act regulates and caps electoral spending for candidates at Legislative Council elections. It does not, however, regulate spending caps for the House of Assembly. 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 Section 6, *Electoral Act 2004* (Tas).

3 Section 7, *Electoral Act 2004* (Tas).

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.

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 $14,000 or more[4]. Reporting is on a financial year basis and is made public on the first working day of February the following financial year, which may be over a year after a donation has been received.[5]

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 $14,000 must disclose all donations for the period.

## Recent reforms and events

The Review has taken place during a period of significant change in electoral law around Australia. Even since the release of the Interim Report of the Review, there have been a number of significant judgments, reforms and events, including the following.

The High Court has handed down the decision in *Spence*[6] as well as the decisions of *Banerji* and also *Clubb v Preston*[7].

The Northern Territory (NT) has recently passed significant electoral reform[8] and Queensland has tabled a Bill providing for further reform to electoral regulation prior to the 2020 election in that state.[9]

The 2019 Federal election saw considerable discussion about issues such as regulation of electoral advertising on social media and misleading signage. This was in addition to the election being the first following a Commonwealth ban on foreign donations over $1,000.

The current NSW Independent Commission Against Corruption (ICAC) inquiry into political donations in that state[10] has further fuelled discussion surrounding transparency in political donations and the challenges in policing various regulatory measures.

All this activity and attention serves to highlight the complexity of effectively regulating the electoral process.

The Review has had the benefit of analysing the various reforms and events across the nation in determining options that best suit the Tasmanian context.

4 This threshold is indexed annually.

5 The Commonwealth Act establishes a reporting regime for electoral expenditure and donations for candidates in Federal elections. It also provides for the public funding of federal politicians who receive over 4% of the vote, based on the number of formal first preference votes received.

6 This was the reason for the extension of the consultation period for the Interim Report.

7 These two decisions did not look at electoral reform specifically but were considering the scope of the implied constitutional freedom of political expression.

8 http://legislation.nt.gov.au/en/LegislationPortal/Bills/~/link.aspx?_id=4F825096AFAD4C28953BCFB83EB2DEC2&_z=z

9 http://statements.qld.gov.au/Statement/2019/10/29/sweeping-electoral-reforms-to-make-elections-fairer-and-more-transparent

10 Full title of the investigation is "Political donations – allegations concerning ALP NSW branch officials, Chinese Friends of Labor and others (Operation Aero)".

Another issue which is of concern to all Australian jurisdictions and electoral commissions relates to cyber security. In its submission on the Terms of Reference, the TEC suggested that the Tasmanian Act be modernised to "meet the evolving needs of cyber security" by adding a provision in relation to the failure of an election as a result of a significant breach to the system.

This issue has not been specifically addressed in this Review as it is understood that it is currently under consideration at a national level in accordance with the Council of Australian Governments' (COAG) decision that 'Electoral Commissions, security and government agencies will work together to ensure than Australia's electoral systems are resilient to cyber threats'.[11]

## The consultation process

The Review has been informed by the submissions made to the Terms of Reference and the Interim Report.

There were 33 submissions to the Terms of Reference and 69 submissions to the Interim Report.[12] Submissions that are eligible for publication will be made publicly available in accordance with the Government's *Public Submissions Policy*.[13] The 4 submissions received on the draft Bill that implemented the first tranche of reforms arising from the Review earlier in 2019 have already been published on the Department of Justice website in accordance with this policy.

The Review has benefited from the broad range of stakeholders that have taken the time to make a contribution to the Review, including submissions from all three major parties in the state, as well as from the Institute for the Study of Social Change, the Tasmania Law Reform Institute, the TEC and Unions Tasmania.

11 Meeting of the Council of Australian Governments Adelaide December 2018 Communiqué, p 4.

12 Several submissions dealt with both the Bill and the Interim Report within the one submission.

13 http://www.dpac.tas.gov.au/divisions/office_of_the_secretary/public_submissions_policy.

# 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).

## Introduction

This section will focus on the provisions of the *Electoral Act 2004* specifically raised in Term of Reference 1, namely sections 191(1)(b) and 196(1) - s198(1)(b) having already been dealt with in the first tranche of amendments - as well as other matters raised during consultation on the Terms of Reference and in response to the Interim Report.

## First tranche amendments – *Electoral Amendment Act 2019*

As noted in the Interim Report, it was identified early in the review process that there were a number of technical and administrative matters that were reasonably straightforward and unlikely to be contentious. The majority of these matters had been raised by the TEC, with most relating to difficulties caused by recent changes in postal delivery times.

It was recommended in the Interim Report that those matters be addressed through a first tranche of amendments to commence prior to the Legislative Council elections in May 2019. Accordingly, the Government released a draft Bill at the same time as the Interim Report was released for consultation.

The *Electoral Amendment Act 2019* was passed by Parliament in April 2019. It made the following amendments to the Principal Act:

- Repeal of section 198(1)(b) removing the ban on newspaper advertising, reporting and commentary on polling day.
- The deadline for the receipt of all postal vote applications was brought forward to 4pm on the eighth day before polling day to provide sufficient time to for a postal ballot paper to be sent to and received by the voter and then returned in time.
- A new timeframe, consistent with the amended timeframe for postal votes, was added in relation to replacement postal vote information.

- The period to lodge, post or send a nomination to contest a recount was extended from 10 days to 14 days.
- The minimum period between nomination day and polling day was extended from 15 days to 22 days.
- The time allowed for postal responses to a notice of failure to vote was clarified.
- Postal vote information to be made available for public viewing at the TEC office instead of at the office of the returning officer.
- Returning officers were given the power to delegate a number of administrative duties to election officials.
- Various provisions were modernised to allow information and documents to be transmitted by electronic means such as email rather than by facsimile.
- TEC meeting procedures were updated to allow the Commission to determine an electronic method by which a proposed resolution can be distributed to and voted on out of session by members.

With the exception of sections 7 and 9, all other provisions of the *Electoral Amendment Act 2019* commenced on 18 April 2019. Sections 7 and 9 relating to postal vote applications commenced on 1 July 2019.

The reason for the later commencement date for these sections was that the writs for the Legislative Council elections on 4 May 2019 were issued prior to the *Electoral Amendment Act 2019* being passed by Parliament. The Tasmanian Electoral Commissioner advised that the implementation of amended forms and processes part-way through an election would cause confusion and be likely to disenfranchise some electors.

# Provisions referenced in Term of Reference 1

Term of Reference 1 makes specific reference to the following three provisions in the Tasmanian Act:

- Section 191(1)(b) relating to the authorisation of campaign material that is published on the internet.
- Section 196(1) which prohibits the printing, publication and distribution of advertisements, how to vote cards, handbills, pamphlets, posters or notices which contain the name, photograph or likeness of a candidate or intending candidate without the consent of that candidate.
- Section 198(1)(b) prohibiting newspaper advertising, reporting and commentary on the polling day fixed for an election.

As indicated above, section 198(1)(b) was repealed in the first tranche of amendments which commenced on 18 April 2019.

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

Section 191 of the Tasmanian Act provides:

*(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, 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 provisions are commonly known as authorisation laws or requirements. Authorisation requirements have long been a feature of the electoral system in Australia, appearing in the earliest Commonwealth electoral laws in 1902.[14] Requiring authorisation allows identification of the person or organisation responsible for electoral matter and helps ensure accountability for campaigning in the electoral system.

### Consultation on the Terms of Reference:

In consultation on the Terms of Reference, the submissions received supported the retention of section 191(1)(b) recognising the importance of authorisation. However, the majority of submissions that provided feedback in relation to this provision suggested that section 191(1)(b) should be revised to take account of social media and other new platforms for communication.

Some of the comments made included:

- *The rise of social media has undermined both the purpose and enforceability of the law. Authorisation laws must be retained to ensure that anonymous advertising (and the ensuing risk of misinformation, defamation and slander) is kept to a minimum. However in the age of social media, blanket authorisation requirements are no longer feasible. This section of the Act should be reviewed to focus on prohibiting unauthorised coordinated campaigns with allowance made for general political discussion among members of the ordinary voting public. Section 191(1)(b) should be amended to take into account the role of social media in contemporary society.*[15]
- *In an age where Facebook pages can be set up for a cause or campaign without clearly identifying the organisation or individual behind them, we contend that it is reasonable that those who are authoring those campaigns are identified……We need to balance the rights of individuals to lawfully express their views and we will need to carefully consider what digital content is captured by the requirements to authorise. It may not, for example, be reasonable or practicable to expect authorisation for social media posts that are simply photos taken at functions or campaign events or where individual citizens are making personal comment.*[16]

### Interim Report:

This issue was discussed further in the Interim Report, outlining the concerns raised during consultation on the Terms of Reference and providing an outline of the provisions in the Commonwealth legislation and in some other states and territories.

The Interim Report raised the following issue for consideration and feedback:

> ***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.*

Of the 69 submissions received in response to the Interim Report, nine submissions made comments in relation to Consultation Issue 1.

While there was strong consensus amongst the submissions that section 191(1)(b) should be amended to clarify its application to online and social media content, there was variation in the approaches suggested.

For example, the Jacqui Lambie Network suggested that the authorisation requirements should be in line with the federal requirements[17] while the Institute for the Study of Social Change submitted that consideration be given to the various models applied in Australia to determine the most effective option for Tasmania.[18]

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14 Joint Standing Committee on Electoral Matters "The 2016 Federal Election Interim Report on the authorisation of voter communication", p 2.

15 Institute for the Study of Social Change "Submission to the review of the Tasmanian Electoral Act" July 2018, p 8.

16 Unions Tasmania "Electoral Act Review Submission to the Tasmanian Government" 20 July 2018, p 3.

17 Jacqui Lambie Network "Electoral Act Interim Report Review Response to the Interim Report", p 2.

18 Institute for the Study of Social Change "Submission to the review of the Tasmanian Electoral Act" 18 February 2019, p 4.

The Tasmania Law Reform Institute (TLRI) provided detailed feedback in relation to this issue recommending that an inclusive definition of electoral matter be inserted into the Tasmanian Act given the rise of electoral advertising through bulk messaging services, citing section 321D(1) of the *Commonwealth Electoral Act 1918* (Cth) and section 293A(2) of the *Electoral Act 1992* (ACT).

The TLRI suggested:

> *While the Institute supports the ongoing requirement for authorisation of electoral matter, it is important not to unduly regulate public conversations regarding political matters. We generally support the current definition of "electoral matter" (sic)? recommend a clear exemption be inserted for general online commentary, such as that provided in s.293A of the Electoral Act 1992 (ACT) or s.321D(4)(d) of the Commonwealth Electoral Act 1918.*
>
> *These exemptions are limited to personal expressions of political views and exclude any paid commentary or advertising.*[19]

The TLRI also suggested that a person who inadvertently breaches authorisation requirements be given an opportunity to remedy the breach.

Section 190(1)(c) of the *Electoral Act 2017* (NSW) provides a defence that "the person was not aware that the act or omission concerned was a breach of the provision when it occurred and took all reasonable steps to remedy the breach when the person became aware that it was or may have been such a brief".

The Tasmanian Labor Party and the of the Liberal Party of Australia (Tasmanian Division) both submitted that the authorisation requirements need to be clarified but did not make specific recommendations or suggestions for change.

### Other Australian jurisdictions:

All other Australian jurisdictions require authorisation of election campaign materials such as advertisements. Table 2 summarises the position in the other jurisdictions. Some jurisdictions, such as New South Wales (NSW), Western Australia (WA), the Australian Capital Territory (ACT) and Commonwealth, specifically make provisions for the authorisation of internet and/or social media content.

South Australia (SA) has specific requirements relating to 'robocalls', with section 115A of the *Electoral Act 1985* (SA) prohibiting a person from making, causing or permitting the making of a telephone call consisting of a pre-recorded electoral advertisement unless, immediately after the advertisement, various statements are made, including the name and address of the person who makes or authorises the call.

The NT *Electoral Act 2004* imposes requirements on 'push-polling', stating that a person must, before conducting any push-polling, state clearly the name and address of the person authorising the push-polling. Push-polling is defined as any activity conducted as part of a telephone call made, or meeting held, during an election period that is or appears to be a survey or is intended to influence an elector in deciding his or her vote.

The Commonwealth made amendments to its authorisation provisions in 2018 to, amongst other things, consolidate the authorisation requirements in the new Part XXA of the Commonwealth Act and extend authorisation requirements to social media, voice calls (including robocalls) and text messages (including bulk text messaging).[20]

19 Tasmania Law Reform Institute "Electoral Act Review", 17 April 2019, p 6.

20 *Electoral and Other Legislation Amendment Act 2017* (Cth).

The AEC has provided guidance on the new authorisation requirements[21] noting that:

- The requirements apply to electoral communication made at any time – not just to communication undertaken during an election period.
- The requirements apply to communication that:
  - is intended or likely to affect voting in a federal election or referendum, or
  - contains an express or implicit comment on the election or referendum, a political party or candidates, or an issue that is before electors in connection with an election or referendum.
- The authorisation requirements are extended to modern communication channels and methods including online platforms, bulk text messages and robocalls.
- The authorisation particulars for electoral communication will depend upon the type of communication and the entity or person who authorises the communication:
  - Where the person who authorised the communication is an individual – the name of the person and the town or city in which the person lives;
  - Where the communication is authorised by a disclosure entity (ie a registered political party, an associated entity, current members of Parliament, candidates and other bodies/persons who have to lodge returns under the Commonwealth Act) – the name of the entity, the relevant town or city of the entity and the name of the natural person within the disclosure entity responsible for giving effect to the authorisation;
  - Where the communication is authorised by an entity that is not a disclosure entity or a natural person (eg, a company that is not an associated entity) – the name of the entity and the town or city of the entity.
- For text messages that contain electoral matter, the authorisation particulars must be notified at the end of the message or if they are too long to be included in the message in a website accessed by a URL included in the message.
- For social media content (eg, Facebook, Twitter, Instagram etc), it depends what the communication is and the purpose it is made for. Social media content containing electoral matter, will not require an authorisation if it is communicated for personal purposes or only to personal friends. However if the content consists of a paid for advertisement approved by or communicated on behalf of a person, it will require authorisation. Authorisation particulars must be notified at the end of the communication or if the particulars are too long to be included in the word limit of the communication in a website accessible by a URL included in the communication or a photo included in the communication. It may be sufficient for the authorisation particulars to be in the bio on a Facebook or Twitter account.
- For phone calls, including bulk voice calls, the authorising particulars must be disclosed at the beginning of the call.
- For email communications, the authorisation particulars must be set out in the email – a link to a website is not sufficient. Particulars can be set out in the signature block.

### Definition of 'electoral matter':

The authorisation requirements in section 191 of the Tasmanian Act apply to 'electoral matter'. The Review has also considered the definition of 'electoral matter' and whether it requires amendment, later in the Final Report.

21 Australian Electoral Commission website "Electoral Backgrounder: Electoral communications and authorisation requirements" (www.aec.gov.au/About_AEC/Publications/Backgrounders/authorisation.htm).

TABLE 2: Inter-jurisdictional comparison of authorisation requirements

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Commonwealth Electoral Act 1918* | *Electoral Act 2017* | *Electoral Act 2002* | *Electoral Act 1992* | *Electoral Act 1985* | *Electoral Act 1907* | *Electoral Act 1992* | *Electoral Act 2004* | *Electoral Act 2004* |
| **What is required to be authorised** | Paid for electoral advertisements, promotional items such as stickers, fridge magnets, leaflets, flyers, pamphlets, notices, posters and how-to-vote cards, communication of electoral matter that is intended to affect voting in a federal election by or on behalf of a disclosure entity (ie political party, political campaigner, third party, associated entity, current members of Parliament, candidates etc).<br>Electoral matter is matter that is communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a Federal election. | Electoral material (s186). Electoral material is defined as anything, including how to vote cards, posters and advertisements, containing electoral matter. | Electoral advertisement, handbill, pamphlet or notice (s83(1)). | Advertisement, handbill, pamphlet or notice containing election matter (s181(1)). | Electoral advertisement in printed form or through electronic publication on the internet (s112).<br>Name and address of person who takes responsibility for the publication of material is also required in relation to material consisting of or containing commentary in written form or by television or radio (exceptions for publication of lead articles and letters in journals, news or current affairs programs (s116). | Electoral advertisement, handbill, pamphlet, electoral notice (s187(1)). | Electoral matter (s292).<br>Electoral matter is defined as matter in printed or electronic form that is intended or likely to affect voting in an election – including references to or comments on the election, performance of current or previous Government or Opposition, performance of candidates or political parties, etc (s4). | Campaign material (s270)<br>Campaign material includes electoral advertisements, printed documents such as handbills, pamphlets or how-to-vote cards, messages containing electoral matter sent by telephone or broadcast by electronic means, published material containing electoral matter (s268A). | Electoral matter – printed electoral matter and matter published on the internet. (s191).<br>Electoral matter is defined as matter which is intended to, is likely to or has the capacity to affect voting in an election (s4). |
| **Authorisation requirement** | Depends on the type of communication. Generally name and relevant town or city/ address of entity, name of natural person responsible for giving effect to the authorisation, the name and address of the printer who printed the communication. | Name and address of the individual on whose instructions the material was printed, published or distributed. If the material has been printed, the name of the printer and the address at which it was printed (s186). | Name and address of the person who authorised and if published otherwise than in newspaper, the name and place of business of the printer or publisher (s83(1)). | Name and address (other than a post office box) of person who authorised the advertisement, handbill, pamphlet or notice (s181(2)). | Following details to be at end of advertisement - Name (being the name by which the person is usually known) and address of the author of the advertisement or the person who authorised its publication.<br>If authorised for a registered political party of a candidate of a registered party, the party's name.<br>If authorised for a relevant third party, the third party's name.<br>Name and place of business of printer (if not in newspaper). | Name and address of the person authorising the electoral advertisement, handbill or pamphlet.<br>Name and place of business of the printer (s187(1)). | Name of person who authorised the matter or its author and statement to the effect that the named person authorised or is the author of, the matter; and<br>if the matter is published for a registered party, candidate or a person who has indicated that he or she intends to be a candidate for election – a statement to the effect that the matter is published for the party, candidate or person. (s292). | Name and address of person authorising the publication or distribution and the name and address of the printer (if the material is a printed document. This must be on both sides of the material if it is intended to be viewed from 2 sides. | Name and address of responsible person in legible characters at the end of the electoral matter(s191).<br>*Details of printer were no longer required when the Electoral Act 2004 was drafted, on the basis that a large amount of material was being printed in-house and to be consistent with local government.* |

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Commonwealth Electoral Act 1918* | *Electoral Act 2017* | *Electoral Act 2002* | *Electoral Act 1992* | *Electoral Act 1985* | *Electoral Act 1907* | *Electoral Act 1992* | *Electoral Act 2004* | *Electoral Act 2004* |
| **Internet, online and social media** | Text messages that contain electoral matter require authorisation particulars either at the end of the text message or in a website that can be accessed by a URL included in the message.<br>Social media content requires authorisation if it includes electoral matter that is communicated by or on behalf of a disclosure entity such as a candidate or political party or in a paid advertisement on social media. Authorisation particulars to be notified at the end of the communication or in a website accessible by URL included in the communication or in a photo included in the communication.<br>A social media page that is established by or on behalf of a disclosure entity must be authorised – it is sufficient to include the authorisation particulars in the bio or about section of the social media page.<br>Social media content will not require authorisation if it is communication for personal purposes, for instance, to personal friends only.<br>Bulk phone calls communicating electoral matter must disclose authorisation particulars at the beginning of the call.<br>Emails to contain authorisation particulars – sufficient for particulars to appear in the signature block.<br>For websites, authorisation particulars should appear somewhere on each page that contains electoral matter. | Paid advertisements containing electoral matter which are published on the internet to include name and address of individual who authorised the advertisement. (s188). | Person who make copies of electoral advertisement, handbill, pamphlet or notice that is published on the internet is taken to be printer. | In s181, publish is specifically defined as including publish on the internet even if the internet site is located outside of Queensland. | Electoral advertisements published on the internet to contain name and address of person who authorised, political party or third party (s112).<br>Automated calls consisting of pre-recorded electoral advertisement must have name and address of person making or authorising making of call, name or political party or third party (s115). | Name and address of authorising person must appear at the end of electoral advertisement on the internet if the electoral advertisement is paid for and intended to affect voting in an election (187B(1)).<br>Note – the authorisation requirements do not apply if the matter published on the internet forms part of a general commentary on an internet website (s187B(2)). | Authorisation requirements in s292 do not apply to the dissemination of electoral matter by an individual if disseminated on or through social media, forms part of the expression of the individual's person political views and the individual is not paid to express those views (s293).<br>Social media is defined as meaning internet-based or mobile broadcasting-based technology or applications through which individuals can create and share content generated by the individual. | Authorisation requirements apply to push polling. Before conducting any push-polling, a person must state clearly the name and address of the person authorising the push-polling (s271(1)).<br>Push-polling means any activity conducted as part of a telephone call made, or a meeting held, during the election period that is or appears to be a survey and is intended to influence an elector in deciding his or her vote. (s271(3)). | Authorisation requirements apply to electoral matter published on internet (s191(1)(b)). |

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Defence** | | Person not guilty of breach if it is established that the breach was not of a material nature or was not intended or not likely to mislead an elector in the casting of his/her vote or the person was not aware that the act or omission was a breach and took all reasonable steps to remedy the breach when he or she became aware of the breach. | | | | | | | |

**Recommendation:**

The Review considered the following options in relation to this issue:

- Making no change to the current provision.
- Making some amendments to the authorisation requirements as suggested by the TLRI:
  - That the heading of the provision be changed from "Campaign material to be authorised" to "Electoral material to be authorised".
  - That an inclusive definition be inserted to cover communications conveyed through platforms such as bulk messaging services – TLRI specifically pointed to section 321D(1) of the Commonwealth Act and section 293A of the *Electoral Act 1992* (ACT).
  - That a clear exemption be inserted for general online commentary – limited to the personal expressions of political views (excluding any paid commentary or advertising).
  - That there be a defence where a person who inadvertently breaches authorisation requirements takes all reasonable steps to remedy the breach.
- Adopting the Commonwealth provisions.

The Review considers that section 191(1) requires amendment. Since the current version of section 191 was enacted, there has been a significant change in the electoral campaigning environment with the rise of online and social media platforms.

While section 191 does make reference to electoral matter published on the internet, it is not clear how the authorisation requirements apply in relation to certain forms of communication or content, such as social media posts, robocalls etc.

Almost all submissions that provided feedback on this issue have suggested that the authorisation requirements should be clarified in relation to their application to online and social media content. Other Australian jurisdictions provide more clarity around these issues, including providing clear exceptions for personal comments made on social media platforms.

There would seem to be obvious advantages in adopting a model along the lines of the Commonwealth provisions, noting that these requirements are up to date, having been implemented last year, and are clearly designed to cover a wide range of contemporary forms of communication, including text messages and robocalls.

The Review therefore recommends that the Tasmanian Act be amended to clarify the application of authorisation requirements to online, social media and digital communication content consistent with the Commonwealth legislative requirements. The Review further recommends that consideration be given to including appropriate exceptions and defences as applied in other Australian jurisdictions and recommended by the TLRI.

**Recommendation 1(a):** That the Tasmanian Act be amended to clarify the application of authorisation requirements to online, social media and digital communication content consistent with the Commonwealth legislative requirements and with appropriate exceptions and defences similar to other Australian jurisdictions.

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

Section 196 of the Tasmanian Act provides:

> ***196 Candidate names not to be used without authority***
>
> *(1) A person must not be 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.*

Section 196(1) was specifically included in the Terms of Reference for the Review as it has been raised in the past as being problematic.

During the Inquiry into the Tasmanian Electoral Commission undertaken by the Legislative Council Government Administrative Committee "B" in 2014-2016 (the Legislative Council Inquiry), concerns were raised that there are inconsistencies in the application of section 196 and that it hinders proper discourse and scrutiny of candidates.[22]

Notwithstanding these concerns, the Legislative Council Inquiry found that it had not received sufficient evidence to support any changes to section 196 to allow the publication of names, photographs or likenesses of candidates without their consent.[23] It recommended that the TEC should be more proactive in enforcing issues of non-compliance with section 196.[24]

**Consultation on the Terms of Reference:**

There was general consensus during consultation on the Terms of Reference that section 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 provisions 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 agreed that there are difficulties with section 196(1), there were differing views on how to address these issues. Some submissions recommended the repeal of section 196, whilst others suggested that the complete removal of the provision would leave a gap in the regulation of how-to-vote cards (HTV cards).

**Interim Report:**

Taking account of the submissions on the Terms of Reference and the position in other Australian jurisdictions, the Interim Report posed the following consultation issue for consideration:

> ***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 in an election so that it only applies to 'how-to-vote' cards.*

A number of submissions received in response to the Interim Report provided feedback on this issue. There were a range of views with some submissions, including from the Liberal Party of Australia (Tasmanian Division), the Tasmanian Labor Party and Dr Kevin Bonham indicating support for amending section 196(1), and other submissions, including from the Jacqui Lambie Network, suggesting that there should be no change to section 196 at all.

The Liberal Party of Australia (Tasmanian Division) and Dr Kevin Bonham supported changing section 196(1) to apply only to HTV cards.

22 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 7.

23 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 9.

24 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 9.

Whilst the Institute for the Study of Social Change agreed that section 196(1) should be updated, it suggested that formal campaign material should only be published (including on-line) with the consent of a candidate.[25]

The TLRI expressed concerns that section 196 could unduly restrict the dissemination and receipt of information, opinions and arguments concerning government and political matters, contrary to the High Court decision in *Lange v Australian Broadcasting Corporation*.[26] The TLRI indicated that it supports the removal of section 196 submitting that:

> *Any restrictions on political communication must be proportionate and necessary to address legitimate concerns. Candidates may be concerned by the potential publication of inaccurate material, including false How to Vote cards. However, the Institute considers that requirements for authorisation of electoral material and prohibition on the publication of misleading and deceptive material are sufficient to protect against false statements being made about candidates or How to Vote cards.*[27]

**Other Australian jurisdictions:**

As noted in the Interim Report, while there are no equivalent provisions to section 196 in the other Australian jurisdictions, there are legislative provisions regulating HTV cards. These vary between jurisdictions. Some States, such as NSW 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, that is, that they be authorised and do not contain any misleading or deceptive information.

**Misleading or deceptive information:**

Some submissions on this issue have suggested that consideration be given to strengthening the provisions around misleading and deceptive conduct. During consultation on the Terms of Reference, the Director of Public Prosecutions (DPP) suggested that "perhaps the emphasis ought to be on the prohibition of untrue, incorrect or misleading material, as opposed to requiring the written consent of the candidate", and pointed to relevant provisions in the NSW Electoral Act.

In its submission in response to the Interim Report, the TLRI suggested that section 197 could be strengthened to address concerns regarding misleading personal information along the lines of Queensland legislation.[28] Along similar lines, Dr Kevin Bonham submitted that an option for dealing with this issue is to repeal section 196(1) entirely but add a new offence that prohibits releasing any form of advertising material that is misleading as to the authorship or source of the material.[29]

**Recommendation:**

The Review acknowledges that the Tasmanian Act currently contains other provisions that appear to apply to HTV cards. Under section 191, 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.

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

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25 Institute for the Study of Social Change "Submission to the review of the Tasmanian Electoral Act" 18 February 2019, p 4.

26 Tasmania Law Reform Institute, "Electoral Act Review", p 6.

27 Tasmania Law Reform Institute, "Electoral Act Review", p 6.

28 Tasmania Law Reform Institute, "Electoral Act Review", p 6.

29 Dr Kevin Bonham "Submission to the Department of Justice, Tasmanian Government: Electoral Act Review Interim Report", p 2.

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

There does not appear to be any reason to retain the section 196 prohibition more generally, given general consensus that it is problematic and noting that it does not apply in other Australian jurisdictions. As was indicated above, some submissions suggested that consideration be given to strengthening provisions around misleading and deceptive materials. This is discussed in detail on the next page.

**Recommendation 1(b):** That section 196(1) of the Tasmanian 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 likeness of a candidate or intending candidate, be amended so that it only applies to 'how-to-vote' material including, for example, how-to vote cards, social media, and contact via telephone.

# Other matters raised in relation to modernising the Tasmanian Act

### Misleading or deceptive information:

Section 197 prohibits the printing, publishing or distribution of electoral matter that is intended to, or likely to or has the capacity to mislead or deceive an elector in relation to the recording of his or her vote.

*197. Misleading and deceptive electoral matter*

*A person must not:*

*print, publish or distribute, or permit or authorise the printing, publishing or distribution of, any printed electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or*

*publish on the internet, or permit or authorise the publishing on the internet of, any electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or*

*broadcast on radio or television, or permit or authorise the broadcasting on radio or television of, any electoral matter that is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote.*

*Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.*

This section applies to the more mechanical aspects of obtaining and marking a ballot paper and depositing it in a ballot box and not to the formation of a judgment as to who to vote for. That is, the truth or otherwise of campaign material is not covered by this section.

### Consultation on the Terms of Reference

During consultation of the Terms of Reference, some submissions suggested that consideration be given to the provisions relating to misleading and deceptive electoral matter as part of the consideration of section 196.

### Interim Report

Consultation Issue 2 of the Interim Report specifically related to section 196(1). Similar sentiments in relation to misleading and deceptive electoral matter were again expressed in submissions in response to the Interim Report.

Some submissions to the Interim Report suggested amendments to section 197 if section 196 is removed from the Tasmanian Act or limited in capacity. As noted above, the application of section 197 is limited to matter that has the capacity to mislead or deceive an elector in the casting of his or her vote. It does not apply more broadly to other campaign material.

The DPP, in a submission of 26 July 2018 on the Terms of Reference for the Review, cited sections 180 of the NSW *Electoral Act 2017* as an alternative approach to section 196 of the Tasmanian *Electoral Act 2004*. It is noted that the DPP does not specifically suggest amending section 197 in the Tasmanian Act.

Section 180 of the NSW *Electoral Act 2017* provides that electoral material contravenes the Act if the material:

- contains voting directions intended or likely to mislead or improperly interfere with an elector in or in relation to the casting of his or her vote; or
- contains information that is incorrect or misleading about whether a person is or is not a candidate, member of a registered party or nominated by a party; or
- uses the name or acronym of the name of a party in a way that is intended or likely to mislead any elector; or
- contains voting instructions that are contrary to the Act or directions in the ballot papers (with some examples); or
- could result in an elector casting an informal vote; or
- contains a statement (express or implied) to the effect that voting is not compulsory; or
- the material contains a statement or is likely to mislead an elector that the material is an official communication from the Electoral Commissioner or the Electoral Commission.

This last dot point is of particular note following an incident at the 2019 Federal Election. A sign was placed on a Melbourne polling place which mimicked the purple design of AEC electoral materials.[30] The AEC had no powers under the *Commonwealth Electoral Act 1918* to take action in relation to this sign on the basis that it was misleading. Similarly in Tasmania the TEC is powerless to act to cease distribution of such material unless the material breaches another section of the Tasmanian Act such as lack of authorisation.

Under section 9(c) of the Tasmanian Act, the TEC has the function to promote public awareness of elections and voting. Adopting the NSW position in relation to prohibiting electoral material containing misleading voting instructions or encouraging informal voting would assist the TEC in this function, by helping to ensure electors get clear and correct information on voting.

The TLRI has suggested that section 197 of the Tasmanian Electoral Act "could be strengthened" by adding a provision similar to that in section 163(2) of the *Queensland Electoral Act 1992* (now covered by the present section 185 as the Act was renumbered in 2017):

> *A person must not for the purpose of affecting the election of a candidate, knowingly publish a false statement of fact regarding the personal character or conduct of a candidate.*

Some of the submissions to the Review have expressed concerns about an increase in negative campaigning should section 196 be removed.

This concern has also been raised interstate in the broader issue of truth in political advertising.

Negative election campaigning has been steadily increasing across all Australian elections over the past 20 years, not just in Tasmania which is the only jurisdiction to have a provision prohibiting the use of the name, photograph or likeness of a candidate without consent.

Marian Sawer, Emeritus Professor at the Australian National University, and author of several books on electoral administration, elections and democratic theory and practice, has suggested that a limit on campaign expenditure would be one of the best ways to cope with negative advertising.[31]

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30 This issue has been raised in some of the 61 submissions to the current Joint Standing Committee on Electoral Matters (JSCEM), which occurs after each Federal Election.

31 "Designed to deceive", The Guardian, 27 May 2019, retrieved from https://www.theguardian.com/australia-news/2019/may/27/designed-to-deceive-how-do-we-ensure-truth-in-political-advertising as at 18 October 2019.

### Recommendation

The Review considers that the NSW provisions suggested by the DPP would be a beneficial addition to the Tasmanian Act.

However, the Review is cautious about the Queensland provision at this time. Such a provision arguably goes further than mere "strengthening" section 197. It is entering the territory of truth in political communication clauses, which is a complex issue and was not raised in the Interim Report and goes well beyond Consultation Issue 2. As such the Review considers this matter to be beyond the Terms of Reference.

The Review considers that provisions similar to those in NSW could be placed in a new standalone section, or as part of a streamlined section 197 (in which subsections (a), (b) and (c) are combined into one subsection), with "publish" defined to include publish by radio, television, internet or phone.

**Recommendation 1(c):** That if section 196(1) is amended to apply only to how-to-vote material, that section 197 be amended, or a new section drafted, to provide for additional offences including, but not limited to, an offence to print, publish or distribute electoral matter that:

(i) contains incorrect or misleading information about whether a person is or is not a candidate or a member of/endorsed by a registered party;

(ii) uses the name or derivative of a name of a party in a way intended to or likely to mislead any elector;

(iii) could result in an elector casting an informal vote;

(iv) contains a statement (express or implied) to the effect that voting is not compulsory;

(v) contains a statement intended or likely to mislead an elector that the material is an official communication from the Electoral Commission or Electoral Commissioner.

**Recommendation 1(d):** That section 197 be amended to clarify that:

(i) "publish" includes publish by radio, television, internet or phone;

(ii) "electronic communications" include social media as well as "the internet";

(iii) offences are not limited to an "election period"; and

(iv) the provision applies to all campaign material (noting the current wording "in or in relation to the recording of his or her vote").

## Definition of electoral matter

The term 'electoral matter' is a key term for the purposes of authorisation requirements and campaigning offences under Part 7 Division 5 of the Tasmanian Act.

Electoral matter is defined in section 4 of Tasmanian Act as follows:

> ***4. Electoral matter***
>
> *(1) For the purposes of this Act:*
>
> *Electoral matter means matter which is intended to, or is likely to or has the capacity to affect voting in an election.*
>
> *(2) Without limiting subsection (1), matter is taken to be intended or likely to affect voting in an election if it:*
>
> *(a) contains an express or implicit reference to, or comment on:*
>
> *(i) the election; or*
>
> *(ii) the Government, the Opposition, a previous Government or a previous Opposition; or*
>
> *(iii) the Government, the Opposition, a previous Government or a previous Opposition, of the Commonwealth or a State or Territory; or*
>
> *(iv) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory; or*
>
> *(v) a party, a branch or division of a party or a candidate or intending candidate or group of candidates or intending candidates in the election; or*
>
> *(vi) an issue submitted to, or otherwise before, the electors in connection with the election; or*
>
> *(b) contains:*
>
> *(i) a photograph of a candidate or intending candidate in an election; or*
>
> *(ii) a drawing or printed matter which purports to depict a candidate or intending candidate in an election or which purports to be a likeness or representation of any such candidate or intending candidate.*

### Consultation on the Terms of Reference:

During consultation on the Terms of Reference for the Review, the TEC raised concerns about the current definition of 'electoral matter' and suggested that consideration be given to amending it 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.*[32]

The TEC suggested that one approach for amending the definition of electoral matter could be to delete the deeming provision in section 4(2) so that electoral matter would mean "matter which is intended to or likely to or has the capacity to affect voting in an election". It suggested that an alternative would be to adopt a similar provision to the provisions contained in ACT and Commonwealth legislation. It is noted that since the TEC's submission, the Commonwealth definition has been substantially amended.

32 Tasmanian Electoral Commission, "Submission for the Review of the *Electoral Act 2004*", p 11.

### Interim Report:

This issue was discussed in the Interim Report, setting out the concerns by the TEC and providing a very broad overview of the position in other Australian jurisdictions. The Interim Report raised the following issue for consideration and feedback:

> ***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.*

Eight submissions received in response to the Interim Report made comments in relation to this Consultation Issue. There was a mixed response amongst these submissions.

Some submissions, including from the Liberal Party of Australia (Tasmanian Division) and the Institute for the Study of Social Change, supported amending the definition of electoral matter to narrow it.

The Liberal Party of Australia (Tasmanian Division) noted:

> *There are a number of instances that have occurred in recent years where national elections overlap with Legislative Council elections as well as general state elections. In these situations, material clearly not intended to influence a Tasmanian election has the potential [to] be considered to be electoral matter.*
>
> *A near annual complication also arises on the Saturday of Agfest. Under the current definition of electoral matter, the business of Members of Parliament engaging with their constituents is made more difficult as it is arguable, they are unable to distribute any information about themselves even though they are not up for election.*[33]

The TLRI indicated support for a broad definition focussed on whether the purpose of the matter is to influence voting behaviour in the particular election. It suggested that the 'deeming provision' in section 4(2) be revised to include only matters referring to the relevant election, candidates and parties nominating for that election, or any issues of policy or public interest in relation to that election.

Some other submissions did not support or expressed uncertainty about the need for change. The Tasmanian Labor Party indicated that it did not support narrowing the definition of electoral matter or removing the 'deeming provision' in section 4(2), but did not provide any reasons for this position.[34] The Tasmanian Greens did not comment on this issue in its submission.

### Other Australian jurisdictions:

The term 'electoral matter' appears in the electoral legislation in all other Australian jurisdictions. In some of the other jurisdictions, 'electoral matter' is used in the context of election funding and disclosure provisions as well as in relation to authorisation requirements and campaign offence provisions. The definitions vary from jurisdiction to jurisdiction. The relevant provisions are set out in Table 3, below.

Victoria defines 'electoral matter' in almost the same terms as Tasmania, except that it does not include matter that "has the capacity to affect voting in an election" – only matter that is intended or likely to affect voting. As in the Tasmanian legislation, the Victorian deeming provision includes previous Governments, Oppositions and members of Parliament, and Governments, Oppositions and members of Parliament of the Commonwealth and other states and territories.

33 Liberal Party of Australia (Tasmanian Division), "Submission to the interim report into the review of the Tasmanian *Electoral Act 2004*", p 2.

34 Tasmanian Labor Party, "Response to interim report by the Tasmanian Branch of the Australian Labor Party", p 1.

The ACT and the NT also have deeming type provisions but they differ from the Tasmanian definition in two key respects:

- firstly, the definitions in the ACT and NT (which are in identical terms to one another) do not include matter that has the capacity to affect voting in an election – they only refer to matter that is intended or likely to affect voting in an election; and
- secondly, the deeming provisions in both the ACT and NT do not refer to current or previous Governments, Oppositions or parties in other States or Territories or the Commonwealth, only to current and previous Governments, Oppositions, parties and members etc within their own jurisdictions.

Other jurisdictions, such as NSW, Queensland, SA and WA do not have deeming provisions at all. For example, the Queensland *Electoral Act 1992*, defines 'election matter' as anything able to, or intended to influence an elector in relation to voting at an election or affect the result of an election. 'Electoral matter' is defined as a matter relating to elections.

In the SA *Electoral Act* 1985, 'electoral matter' means matter calculated to affect the result of an election (s4). The WA definition is similar stating that 'electoral matter' means any matter that is intended, calculated or likely to affect voting in an election (s175 *Electoral Act 1907* (WA)).

The NSW *Electoral Act 2017* defines 'electoral matter' as:

(a) any matter that is intended or calculated or likely to affect or is capable of affecting the result of any election held or to be held or that is intended or calculated or likely to influence or is capable of influencing an elector in relation to the casting of his or her vote at any election; or

(b) the name of a candidate at any election, the name of the party of any such candidate, the name or address of the headquarters or campaign office of any such candidate or party, the photograph of any such candidate, and any drawing or printed matter that purports to depict any such candidate or to be a likeness or representation of any such candidate.

Table 3 Definition of Electoral Matter – Australian jurisdictions

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Commonwealth Electoral Act 1918* | *Electoral Act 2017* | *Electoral Act 2002* | *Electoral Act 1992* | *Electoral Act 1985* | *Electoral Act 1907* | *Electoral Act 1992* | *Electoral Act 2004* | *Electoral Act 2004* |
| **Definition of 'electoral matter'** | Electoral matter means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a federal election) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:<br>(a) a political entity, to the extent that the matter relates to a federal election; or<br>(b) a member of the House or Representatives or a Senator (s4AA). | Electoral matter means:<br>(a) any matter that is intended or calculated or likely to affect or is capable of affecting the result of any election held or to be held or that is intended or calculated or likely to influence or is capable of influencing an elector in relation to the casting of his or her vote at any election, or<br>(b) the name of a candidate at any election, the name of the party of any such candidate, the name or address of the headquarters or campaign office of any such candidate or party, the photograph of any such candidate, and any drawing or printed matter that purports to depict any such candidate or to be a likeness or representation of any such candidate (s4). | Electoral matter means matter which is intended or likely to affect voting in an election (s4). | Election matter means anything able to or intended to:<br>(a) influence an elector in relation to voting at an election; or<br>(b) affect the result of an election.<br>Electoral matter means a matter relating to elections.<br>Election means an election of a member or members of the Legislative Assembly (s2). | Electoral matter means matter calculated to affect the result of an election (s4). | Electoral matter means matter that is intended, calculated or likely to affect voting in an election(s175). | Electoral matter is matter in printed or electronic form that is intended or likely to affect voting in an election(s4). | Electoral matter is matter, in printed or electronic form, that is intended or likely to affect voting at an election (s7). | Electoral matter means matter which is intended to, is likely to or has the capacity to affect voting in an election (s4). |

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Commonwealth Electoral Act 1918* | *Electoral Act 2017* | *Electoral Act 2002* | *Electoral Act 1992* | *Electoral Act 1985* | *Electoral Act 1907* | *Electoral Act 1992* | *Electoral Act 2004* | *Electoral Act 2004* |
| **Additional deeming or qualifying provision** | Following matters to be taken into account in determining the dominant purpose of the communication:<br>(a) whether the communication would be to the public or a section of the public;<br>(b) whether the communication would be by political entity or campaigner;<br>(c) whether the matter contains and express or implicit comment on a political entity, a member of the House or Representatives of a Senator;<br>(d) whether the communication is or would be received by electors near a polling place;<br>(e) how soon a federal election is to be held after the creation or communication of the matter;<br>(f) whether the communication is or would be unsolicited (s4AA(4)). | | Matter is to be taken to be intended or likely to affect voting in an election if it contains express or implicit reference to, or comment on:<br>(a) the election; or<br>(b) the Government, the Opposition, a previous Government or a previous Opposition of the State; or<br>(c) the Government, Opposition, a previous Government or Opposition of the Commonwealth or any other State or Territory; or<br>(d) a member or former member of the Parliament or the Parliament of the Commonwealth, any other State or Territory; or<br>(e) a political party, a branch or division of a political party or a candidate in the election; or<br>(f) an issue submitted to, or otherwise before, the electors in connection with the election (s4(2)). | | | | Matter is taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to or comment on:<br>(a) the election; or<br>(b) the performance of the Government or Opposition, or a previous Government or Opposition; or<br>(c) the performance of an MLA or former MLA; or<br>(d) the performance of a political party, candidate or group of candidates in the election; or<br>(e) an issue submitted to, or otherwise before, the electors in relation to the election (s4(2)). | Matter is taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to or comment on:<br>(a) the election; or<br>(ab) a candidate for the election; or<br>(b) the performance of the Government or Opposition or a previous Government or Opposition; or<br>(c) the performance of an MLA or former MLA; or<br>(d) the performance of a political party in the election; or<br>(e) an issue submitted to, or otherwise before, the electors in relation to the election (s7(2)). | Matter is to be taken to be intended or likely to affect voting in an election if it-<br>(a) contains an express of implicit reference to, or comment on:<br>(i) the election; or<br>(ii) the Government, the Opposition, a previous Government or a previous Opposition; or<br>(iii) the Government or Opposition, or a previous Government or Opposition, of the Commonwealth or a State or Territory; or<br>(iv) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory; or<br>(v) a party, a branch or division of a party or a candidate or intending candidate or group of candidates or intending candidates in the election; or<br>(vi) an issue submitted to, or otherwise before, the electors in connection with the election; or<br>(b) contains:<br>(i) a photograph of a candidate or intending candidate in an election; or<br>(ii) a drawing or printed matter which purports to depict a candidate or intending candidate in an election or which purports to be a likeness of representation of any such candidate or intending candidate(s4(2)). |

| | Commonwealth | NSW | VIC | QLD | SA | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Commonwealth Electoral Act 1918* | *Electoral Act 2017* | *Electoral Act 2002* | *Electoral Act 1992* | *Electoral Act 1985* | *Electoral Act 1907* | *Electoral Act 1992* | *Electoral Act 2004* | *Electoral Act 2004* |
| **Exceptions** | Matter is not electoral matter if the communication:<br>(a) forms part of reporting of news, presenting of current affairs or genuine editorial content in news media;<br>(b) is by a person for a dominant purpose that is satirical, academic, educative or artistic;<br>(c) is a private communication;<br>(d) is by or to a person in their capacity as a Commonwealth public official;<br>(e) is a private communication to a political entity in relation to public policy or public administration;<br>(f) occurs in the House of Representatives, Senate or parliamentary committee (s4AA(5)). | | | | | | A publication of the Assembly (including a committee of the Assembly) is not electoral matter (s4(3)). | | |

### Commonwealth definition of 'electoral matter':

The Commonwealth legislation contains the most recent definition of 'electoral matter'.

The definition of 'electoral matter' in the Commonwealth Act was recently amended by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* which commenced on 1 January 2019.

The *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill* amended the funding and disclosure provisions in the Commonwealth Act and introduced new measures aimed at improving transparency and accountability in relation to political donations.

The Bill introduced a new definition of 'electoral matter'. Prior to the amendments, 'electoral matter' was defined in section 4(1) as matter which is intended or likely to affect voting in an election. Section 4(9) then went on to specify the matters that are taken to be intended or likely to affect voting in an election. This definition was similar to the current Tasmanian definition, but with the removal of references to previous or interstate governments or opposition parties.

This definition has now been replaced with a new definition (in section 4AA of the Commonwealth Act) which provides that 'electoral matter' means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a federal election) of a member of the House of Representatives or of Senators for a state or territory by promoting or opposing:

(a) a political entity (ie a registered political party, including a State branch of the party, candidate or Senate Group), to the extent that the matter relates to a federal election; or

(b) a member of the House of Representatives or a Senator.

The explanatory materials that accompanied the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill* indicate that the reference to the dominant purpose of influencing the way electors vote in an election is intended to capture content that seeks to influence voters' formation or political judgment in relation to the act of voting, and includes matter seeking to influence the order in which a voter indicates their preferences on their ballot paper; and a voter's choice of whether to cast a formal ballot paper.

It could also cover things like a misleading suggestion about how people can validly vote (eg material instructing voters to cross out a candidate's name on the ballot paper).[35]

The explanatory materials state that a communication is not 'electoral matter' if its dominant purpose is not to influence the way electors vote. That is, if the dominant purpose of the communication is to educate or raise awareness of or encourage debate on a public policy issue – it is not 'electoral matter'.[36]

Section 4AA(4) sets out a list of matters (non-exhaustive) that must be considered in determining whether matter is 'electoral matter'. These matters include:

(a) the accessibility of communicated matter – where matter is communicated publicly, whether universally to the public or a section of the public, it is more likely to be electoral matter.

(b) the source of the communicated matter – where matter is communicated publicly by a political entity or political campaigner, it is more likely to be electoral matter.

(c) the content of the communication – where matter contains an express or implicit comment on one of the categories mentioned in subsection (1), it is more likely to be electoral matter.

35 *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth), Revised Explanatory Memorandum, p 19.

36 *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth), Revised Explanatory Memorandum, pp 19-20.

(d) the intended audience of the communication – where the intended audience of a communication is electors, it is more likely to be electoral matter. In determining the intended audience of a communication, s4AA(4)(d) and (e) clarify that the temporal and spatial proximity of the communication's audience to citizens acting in their capacity as electors is relevant. For example, where a communication targets adults entering a polling place on polling day, it is more likely to be electoral matter.

(e) the audience's consent – where a recipient or intended recipient of a communication has not requested or otherwise invited the communication, ie, it is unsolicited, it is more likely to be electoral matter.

There are a number of exceptions to electoral matter set out in section 4AA(5) as follows:

(a) news and editorial content in news media;

(b) communications for satirical, academic, educative or artistic purposes;

(c) private communications to known persons;

(d) communications by or to Commonwealth public officials;

(e) public policy and administration communication to political entities;

(f) participation in parliamentary processes.

The new definition was in effect prior to the Federal election in May 2019. In response to a query about its experience with the new definition at the recent election, the AEC indicated that the new dominant purpose test was clearer than the former definition of electoral matter – particularly for third parties.

### Electoral matter and disclosure:

Currently, the term 'electoral matter' is only used in the Tasmanian Act in relation to authorisation requirements and campaigning offences. However, it is noted that in other Australian jurisdictions, the term 'electoral matter' is also used in relation to disclosure requirements.

For example, in the ACT parties, elected members, candidates and associated entities are required to disclose electoral expenditure.[37] Third party campaigners are also required to disclose electoral expenditure and gifts received for the purposes of incurring electoral expenditure in a capped state or local government expenditure period.[38] The definition of 'electoral expenditure' includes production, broadcasting, publishing or distribution of 'electoral matter'[39].

As noted above, the new Commonwealth definition of 'electoral matter' is relevant in determining funding and disclosure obligations under Part XX of the Commonwealth Act.

Sections 2 and 3 of this report make recommendations for the introduction of a disclosure regime, including that a dominant purpose test be applied in determining the requirement for disclosure of expenditure by third parties.[40]

37 *Electoral Act 1992* (ACT), s 224.

38 *Electoral Act 1992* (ACT), ss 220, 224.

39 *Electoral Act 1992* (ACT), s 198.

40 The dominant purpose test is discussed in section 3 under the sub-heading "Disclosure by Third Party Campaigners".

**Recommendation:**

In considering this issue, the following options were canvassed:

- Retain the current definition of 'electoral matter'.
- Remove section 4(2).
- Adopt a similar definition to the definitions in the ACT and NT.
- Amend the definition along the lines of the new Commonwealth definition.

As discussed earlier in this section, some of the submissions received in response to this issue in the Interim Report, notably, the submission from the Tasmanian Labor Party, questioned the need for change in this area of the Act.

However, other submissions raised concerns that the current definition is very broad, including matter that contains an express or implicit reference to or comment on current or previous Governments or Oppositions of this State or of the Commonwealth, or other states and territories. It is noted that the definitions in most other Australian jurisdictions do not include comments or references to the Governments or Oppositions in other states and territories.

One option for amendment that was suggested by the TEC was to remove subsection (2) of section 4. This would result in 'electoral matter' being defined as "matter which is intended to or likely to or has the capacity to affect voting in an election". This would make the definition similar to those in NSW, Queensland, SA and WA in the sense of not containing any "deeming" provision.

The TEC suggested an alternative approach of adopting a similar provision to that contained in the Commonwealth or ACT Electoral Acts. At the time of the TEC's submission, the Commonwealth Act contained a definition of electoral matter that was similar to the ACT definition.

It is noted that the ACT and NT define 'electoral matter' in the same terms as matter in printed or electronic form that is intended or likely to affect voting at an election.[41] Both have deeming provisions similar to the Tasmanian and Victorian provisions but without the references to Governments and Oppositions in the Commonwealth and other states and territories.

Adopting a definition along these lines would be not too dissimilar to the current Tasmanian definition but would remove the references to Governments and Oppositions in the Commonwealth and other states and territories. This would somewhat narrow the scope of the definition and resolve some of the problems perceived to be caused by including references to Governments and Oppositions in other jurisdictions.

As indicated above, the Commonwealth has recently moved away from this type of definition with its new definition of 'electoral matter' applying a 'dominant purpose' test. To adopt a definition along the lines of the Commonwealth provisions would be a reasonably significant change from the current definition and a shift away from other states and territories.

The Review notes that the Commonwealth definition is the most recent definition in Australian legislation and was drafted as part of a package of amendments to overhaul disclosure requirements and third party regulation provisions. In addition, there are advantages in providing consistency with Commonwealth definitions and requirements for political parties and third party campaigners operating in both arenas.

Having regard to the legislative provisions in other Australian jurisdictions, submissions received during consultation, and the concerns raised by the TEC in regards to the potential for confusion and difficulties with compliance and enforcement, the Review finds that the definition of electoral matter should be amended to narrow its scope and provide greater certainty.

41 *Electoral Act 1992* (ACT), s 4; *Electoral Act 2004* (NT), s 7.

In view of the fact that the definition in the Commonwealth Act is the most recently drafted definition in Australian legislation and, in the experience reported by the AEC, appears to have provided greater certainty to political parties and third party campaigners, the Review considers that it makes sense to adopt a definition of electoral matter along these lines.

This would have the benefit of providing consistency for political parties and campaigners who operate in both the federal and state electoral arenas and is also in line with recommendations made in Section 3 of this report in relation to the disclosure of third party expenditure.

**Recommendation 1(e):** That the definition of 'electoral matter' be amended to apply a 'dominant purpose' test consistent with the definition in section 4AA of the *Commonwealth Electoral Act 1918*.

### Partial return of the writ:

Section 147 of the Tasmanian Act deals with the situation where ballot papers are lost or destroyed by:

- allowing the returning officer to declare the result of the election if the returning officer and Commissioner are satisfied that the lost or destroyed votes could not have affected the result of the election; or
- requiring the returning officer to report the matter to the Commission if the returning officer is satisfied that the lost or destroyed votes could have affected the result of the election.

If the matter is reported to the Commission, the Commission is to review the decision of the returning officer and instruct the returning officer to declare the result of the election or make an application to the Supreme Court under section 205 of the Tasmanian Act.

### Consultation on the Terms of Reference:

In its submission on the Terms of Reference, the TEC made reference to an incident at the 2014 State election where 163 Denison postal ballots were accidentally destroyed. In that instance the winning margin for the fifth candidate was greater than 163 votes. However, had the result been closer, the loss or destruction of those ballot papers would have left the fifth seat in unresolvable doubt.

In this scenario, the House of Assembly would not have been able to proceed to business until the Supreme Court determined an application under section 205 of the Tasmanian Act and any consequential orders were fulfilled.

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

The TEC suggested that:

> *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: 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.*[42]

42 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 4.

### Interim Report:

The Interim Report gave a very brief summary of this issue and raised the following consultation issue for consideration and feedback:

> ***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.*

Only six submissions received in response to the Interim Report made any reference to or comment on Consultation Issue 5. The submissions supported amending the Tasmanian Act to allow a returning officer to return a writ certifying the election of a part of the number of members required to be elected for a division.

The submissions generally recognised and accepted the concerns raised by the TEC in relation to the current laws and the potential for disruption and cost to the State in a scenario similar to that encountered in 2014.

### Other Australian jurisdictions:

There do not appear to be any provisions of this nature in the other Australian jurisdictions. However, it is worth noting that with the exception of the ACT, no other state or territory has a system where multiple members are elected from the same division.

### Recommendation:

Clearly a situation such as that encountered in the 2014 State election, could have serious ramifications, not only for candidates but for the State if the lost or destroyed votes could affect the outcome of the vote and the matter has to be referred to the Supreme Court.

Under the current law, this would prevent the House of Assembly from proceeding to business until the matter is determined by the Supreme Court as the returning officer cannot declare the result of the election. In accordance with the suggestion made by the TEC, it is recommended that the Tasmanian Act be amended to address these potential difficulties by allowing for a partial return of the writ.

**Recommendation 1(f):** That the Tasmanian Act be amended to allow a returning officer, as directed by the TEC, to return a writ certifying the election of a part of the number of members required to be elected for a division.

### Use of newspapers:

The Tasmanian Act prescribes the use of newspaper notifications or advertisements in a number of circumstances, including:

- announcement of candidates;
- registration of political parties;
- declarations of elections with and without poll; and
- acceptance of election writs.

### Consultation on the Terms of Reference for the Review:

An issue raised by the TEC during consultation on the Terms of Reference was whether, given the cost of newspaper advertisements and declining readership, there should be a move to "future-proof" the Tasmanian Act by providing for notification or advertisement by other means. The TEC made the following comments:

> *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 daily printed 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".*[43]

### Interim Report:

The Interim Report noted the TEC's comments on this matter and posed the following consultation issue:

> ***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 declaration of elections, by the Tasmanian Electoral Commission.*

A small number of submissions on the Interim Report made reference to this Consultation Issue. There were mixed views on this issues. For example, whilst Dr Kevin Bonham indicated support for the TEC's comments stating that:

> *Opportunities for the TEC to save money without compromising its function should be sought so as to better resource it for its core purposes.*[44]

Other submissions, including the submissions from the Liberal Party of Australia (Tasmanian Division) and the Jacqui Lambie Network, did not support removing the requirement to publish announcements in newspapers noting that not all people have access to the internet.

### Other Australian jurisdictions:

As was noted in the Interim Report, the legislation in the other states and territories varies in the way in which these types of matters are to be published, notified or announced.

Under the Victorian *Electoral Act 2002*, the Commission is to 'publicly advertise' various matters including the result of an election[45], receipt of a writ and the final nomination day and election day named in the writ.[46] In other jurisdictions such as Queensland and NSW, the form of notification or publication varies depending on the type of matter.

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43 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", pp 9-10.

44 Dr Kevin Bonham "Submission to the Department of Justice, Tasmanian Government: Electoral Act Review Interim Report", p 2.

45 *Electoral Act 2002* (Vic), s 121(4).

46 *Electoral Act 2002* (Vic), s 64.

In Queensland, the Commission is to arrange for a copy of the writ for an election to be published in the gazette and advertise the days specified in the writ in such other ways as the commission considers appropriate.[47] In relation to an application to register a political party, notice is to be published in the gazette and a newspaper circulating generally in the State.[48]

In NSW, the Commissioner must publicly advertise the date and contents of a writ for an election in such manner as the Commissioner thinks fit[49], however, in relation to an application for registration of a political party, the Commissioner must cause a notice to be published in one or more newspapers circulating in NSW and on the Commission's website.[50]

Legislation in the ACT requires the Commissioner to give 'public notice' of an application to register a political party.[51] Public notice means notice on an ACT government website or in a daily newspaper circulating in the Territory.[52]

### Recommendation:

The Review acknowledges that there are significant costs involved in publishing notices and advertisements in newspapers, particularly in the lead up to State elections and that, on a worldwide basis, there is a general decline in the readership of newspapers.

However, having regard to the submissions made on the Interim Report, the legislative provisions in other jurisdictions, and Tasmanian demographics, particularly the ageing population, the Review considers that there is merit in retaining the requirement for notification in newspapers.

There are a significant number of people in Tasmania who have either limited or no internet access and still rely on newspapers for information. In addition, as noted in the Interim Report, a matter that is only notified on the TEC website will only be seen by people who specifically visit the website, whereas a notice in a newspaper is more likely to be seen by a greater number of people during the course of perusing the newspaper.

In reaching this conclusion, the Review notes that there is nothing preventing matters from being published by other means, such as on the TEC website, in addition to in the newspapers.

**Recommendation 1(g):** That the requirement for certain matters to be notified or advertised in newspapers be retained, noting that additional notification by other means, such as on the TEC's website may also occur.

47 *Electoral Act 1992* (Qld), s 85.
48 *Electoral Act 1992* (Qld), s 72.
49 *Electoral Act 2017* (NSW), s 173(2).
50 *Electoral Act 2017* (NSW), s 60.
51 *Electoral Act 1992* (ACT), s 91(4).
52 *Legislation Act 2001* (ACT), Dictionary.

## Party Registration Process:

Part 4 of the Tasmanian Act sets out the processes and provisions relating to party registration. In its submission on the Terms of Reference, the TEC made a number of suggestions for amendments to provisions in Part 4. These suggestions were:

- section 44(1)(c)(iii) – that the limitation on the length of a party's ballot paper name be changed from a 6 word limit to a character limit;
- section 44(3) – that the statutory declarations from party members be required to have been made within the 12 month period prior to the lodging of the party registration application;
- section 52(6)(b) – that the requirement to provide a copy of all or part of the party register on request be considered having regard to privacy concerns;
- section 44(1) – that a new requirement be inserted requiring an application for registration to be accompanied by a copy of the party's constitution.

## Interim Report:

The Interim Report posed the following consultation issue for consideration and feedback:

> ***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 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.*

Of the submissions received in response to the Interim Report, there were only a small number that made any comment on this issue. The response was mixed with some submissions indicating support for making the suggested changes to the Tasmanian Act for reasons such as improved transparency whilst other submissions expressed doubt or uncertainty about the need for change. Each of the issues raised by the TEC is discussed below along with any specific feedback received during consultation.

### *Six word limitation on party name (section 44(1)(c)(iii)):*

Under section 44(1) of the Tasmanian Act, one of the requirements for an application to register a party is that it set out the ballot paper name which is the form of the party name to appear on ballot papers.[53] Section 44(1)(c)(iii) provides that the ballot paper name is not to consist of more than 6 words.

The TEC suggested that this word limit be changed to a character limit. Whilst there was no detail in the TEC's submission as to the reason for proposing this change or the number of characters proposed, follow up discussions with the TEC confirmed that the change was suggested for administrative and practical purposes relating to the printing of party names on the ballot paper.

The TEC advised that with a large number of parties registered (ten at the time of the Interim Report), it becomes increasingly difficult to produce a reasonably sized ballot paper in a font which is legible. This may be more manageable if the party ballot paper names are restricted by a character limit rather than the current 6 word limit.

53 *Electoral Act 2004* (Tas), s 44(1)(c).

It was noted in the Interim Report that all other Australian jurisdictions apply the six word limit to party names.[54] This includes the Commonwealth.[55] The Interim Report did not propose any change to the current requirements.

In feedback received on the Interim Report, there was only one submission that directly made reference to this issue and that submission suggested that it may be advantageous to apply a character limit rather than a limit on the maximum number of words.[56]

Whilst the Review acknowledges that there may be administrative challenges in the formatting and design of ballot papers where party names are lengthy, it does not recommend any change to the current provision at the time. The current requirements are consistent with all other Australian jurisdictions including the Commonwealth. Consistency across jurisdictions is beneficial for parties that may be registering in more than one jurisdiction.

***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 registered members. Under section 44(g), the application is to be accompanied by statutory declarations made by each of these members verifying that they are members and support the application for registration.[57]

There is currently no requirement around how recent those statutory declarations must be. The TEC submission raised for consideration a proposal that the statutory declarations required under section 44 be made within the 12 months period of the lodging of the application to register the party.

As part of processing registration applications, the TEC currently checks the details of each of the members (minimum of 100) against the details on the electoral roll (as members must be an elector under the Tasmanian Act).

The experience of staff at the TEC who process party registration application is that the longer the time that has elapsed between when the statutory declarations were made and the time of lodging the application for registration, the more of the statutory declarations will be out of date, for example, members may have moved interstate, passed away or no longer be members of the party and therefore not able to support the registration. Any issues with enrolment must then be referred back to the member or registered officer of the party, requiring more time and resources by the TEC in processing an application.

There were only four submissions that directly commented on this issue during consultation on the Interim Report, and all had varying views. The Uniting Church, Synod of Victoria and Tasmania submitted that:

> *….statutory declarations are a worthwhile measure to ensure the people in question are genuine members of the new political party and to curb the risk of misuse of identities to establish a political party. The 12 month time limit is a reasonable requirement to ensure the people in question are likely to be party members at the time of lodgement for registration.*[58]

One of the other submissions suggested that there should be a requirement for the statutory declarations to have been made in the three months prior to the application being lodged[59], whilst another submission suggested that the onus be shifted to the party with the requirement for statutory declarations by members replaced with a statutory declaration made by an officer of the party and provisions for external audit.[60]

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54 "Electoral Act Review Interim Report", December 2018, p 25.

55 *Commonwealth Electoral Act 1918* (Cth), s 129(1)(a).

56 M Taylor, R Scott and A Maddox, "Submission to the Review of Tasmanian *Electoral Act 2004*", p 2.

57 *Electoral Act 2004* (Tas), s 44(3).

58 Synod of Victoria and Tasmania, Uniting Church in Australia "Submission on Electoral Act Review Interim Report", p 5.

59 M Taylor, R Scott and A Maddox, "Submission to the Review of Tasmanian *Electoral Act 2004*", p 2.

60 G Lindsay, "Electoral Act Review – Interim Report – Comments", p 4.

The Review considers that the requirement for an application to be accompanied by statutory declarations made by members should remain. The TEC, as the organisation responsible for receiving applications for registration of parties, has not asked for this to change.

The Review supports the TEC's suggestion that the statutory declarations from members must have been made within the 12 month period prior to the date of lodging the application for registration. This will reduce the risk that the membership information relied upon by the TEC is out of date and assist in ensuring that the party meets the threshold for the required number of members.

***Party Register – privacy concerns (section 52(6)(b)):***

Section 52(6) of the Tasmanian Act requires the TEC to ensure that the party register is available for public inspection and to make a copy of all or part of the register available on request. The TEC has raised concerns about the second limb of this requirement – that is, to provide a copy of all or part of the register[61], on the basis that there are privacy issues. The TEC suggested that section 52(6)(b) be removed.

The party register includes the names and addresses of registered officers and members of the party.[62] It seems unnecessary and excessive that any person should be able to obtain a copy of the party register containing the personal details of all members of all 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 required to be made available for public inspection.[63]

As with other issues relating to registration of political parties, the feedback on this issue received during consultation was mixed with some submissions, including from the Liberal Party of Australia (Tasmanian Division)[64] and the Jacqui Lambie Network[65], advocating no change and others, including from the Uniting Church Synod of Victoria and Tasmania[66], supporting the TEC's suggestion that this provision be removed on the basis that it compromises privacy.

One submission noted that the Interim Report did not indicate how many requests there have been for copies of the party register or where copies of the register will be made available for viewing.[67]

With respect to the number of requests, it is noted that there is no legislative requirement on the TEC to keep records of requests either for copies or to view the party register. However, anecdotal evidence is that in the last 20 years, there has only been one request for a copy of the party register some years ago and there have been occasional instances of people attending the TEC office to view the party register. The party register is made available for viewing at the TEC office in line with section 52(6)(a).

Having regard to the position in the other Australian jurisdictions, privacy concerns and the fact that the Tasmanian Act already provides for the party register to be made available for public inspection, the Review is of the view that it is not necessary for copies of the register to be provided on request. The Review therefore recommends that section 52(6)(b) be repealed.

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61 *Electoral Act 2004* (Tas), s 52(6)(b).

62 *Electoral Act 2004* (Tas), s 52(2).

63 Commonwealth Electoral Act 1918 (Cth), s 139; *Electoral Act 1992* (ACT), s 88(3); *Electoral Act 2017* (NSW), s 70(1); *Electoral Act 2002* (Vic), s 59; *Electoral Act 1907* (WA), s 62M(1); *Electoral Act 1985* (SA), s 38(2); *Electoral Act 1992* (Qld), s 79(1); *Electoral Act 2004* (NT), s 168.

64 Liberal Party of Australia (Tasmanian Division), "Submission to the Interim Report into the review of the Tasmanian *Electoral Act 2004*", p 2.

65 Jacqui Lambie Network "Response to Interim Report", p 2.

66 Synod of Victoria and Tasmania, Uniting Church in Australia "Submission on Electoral Act Review Interim Report", p 5.

67 G Lindsay, "Electoral Act Review – Interim Report – Comments", p 4.

***Requirement to submit a copy of the party's constitution:***

In its submission on the Terms of Reference, the TEC suggested that the Tasmanian Act should be amended to require an application for party registration to be accompanied by a copy of the party's constitution. It is noted that all other Australian jurisdictions including the Commonwealth, have this requirement.[68]

A small number of submissions made reference to this issue. Whilst there was some support for adding this requirement to the application process, there were also some doubts expressed about this suggestion for change.[69] One submission suggested that if this requirement is to be included, the Tasmanian Act should also include the matters to be included in a constitution, whether the quality and content of the constitution will influence the party's registration and whether the party will be required to inform the TEC of any changes to its constitution.[70]

The Review considers that a prospective party's constitution provides an additional means of verifying the existence of the party and assisting in the assessment of an application for registration. This is supported by the fact that this document is required to accompany applications for registration in all other Australian jurisdictions.

Although there is no formal requirement to supply the constitution with the application under current Tasmanian Act provisions, there have been occasions in the past where the TEC has requested a copy of a prospective party's constitution when assessing an application.[71]

The Review therefore recommends that section 44(1) of the Tasmanian Act be amended to require an application for registration of a party to be accompanied by a copy of the party's constitution with consideration to be given to whether any additional provisions are required, for example, in relation to amendments subsequently made to the constitution.

**Recommendation 1(h):** That the following amendments be made to Part 4 of the Tasmanian Act:

(1) Section 52(6)(b) requiring the TEC to provide a copy of the party register on request be repealed;

(2) Section 44(1) be amended to require an application for registration of a party to be accompanied by a copy of the party's constitution with consideration to be given to whether any additional provisions are required, for example in relation to amendments subsequently made to the constitution;

(3) Section 44 be amended to provide that the statutory declarations required under section 44(1)(g) must have been made no more than 12 months prior to the date of lodging the application.

68 *Commonwealth Electoral Act 1918* (Cth), s 126(2)(f); *Electoral Act 1992* (ACT), s 89(1)(e); *Electoral Act 2017* (NSW), s 59(2)(g); *Electoral Act 2002* (Vic), s 45(2)(d); *Electoral Act 1907* (WA), s 62E(4)(e); *Electoral Act 1985* (SA), s 39(2)(e); *Electoral Act 1992* (Qld), s 71(4)(f); *Electoral Act 2004* (NT), s 152(2)(e)(ii).

69 Liberal Party of Australia (Tasmanian Division), "Submission to the Interim Report into the review of the Tasmanian *Electoral Act 2004*", p 2.

70 G Lindsay, "Electoral Act Review – Interim Report – Comments", pp 4-5.

71 Section 48(2) of the *Electoral Act 2004* (Tas) provides that in considering an application, the Commission may take into account any other information.

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

Under sections 131 and 132 of the Tasmanian Act, the TEC can approve procedures enabling electors to vote at an election whilst outside of Tasmania, including in Antarctica.

Currently, the TEC allows electors who are interstate to record a vote at a pre-polling place arranged by the Commissioner and provided by another electoral authority – these are pre-poll ballots. If an elector is going to be interstate or in an isolated area of Tasmania on polling day and is unable to vote at a pre-poll centre or an interstate electoral office or via postal vote, it is possible to vote by express vote which is a way to vote using email or fax[72].

Sections 134 and 143 provide for pre-poll and express votes to be counted with the postal votes.

### Consultation on the Terms of Reference:

During consultation on the Terms of Reference, the TEC advised that express votes and interstate pre-poll ballot papers are easily identified as different from other postal votes when being counted which may compromise the secrecy of the ballot for those electors.

The TEC suggested that the ballot papers issued for all votes to be counted with the postal votes under section 134 should be classified as postal ballot papers so that they can be printed with the word "postal" on them.[73] This would make the ballots less easily identifiable when being counted.

### Interim Report:

The Interim Report posed the following consultation issue for consideration and feedback.

> ***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.*

This issue did not generate much feedback with only six of the submissions received on the Interim Report making any reference to this consultation issue. There was general support for the amendment suggested by the TEC.

### Recommendation:

Having regard to the concerns raised by the TEC, particularly in relation to the secrecy of the ballot, and the general support amongst the submissions that provided feedback on this issue, the Review concurs with the approach suggested by the TEC.

The Review therefore recommends that the Tasmanian Act be amended to ensure that all ballot papers which are to be counted with the postal votes under section 134, be classified as postal votes so that the relatively small number of votes receive by express vote and pre-poll ballot are less easily identifiable.

**Recommendation 1(i):** That the Tasmanian Act be amended to provide that the ballot papers issued for all votes to be counted with the postal votes under section 134 be classified as postal ballot papers to ensure that the relatively small number of votes received in this way are less easily identifiable.

72 At the time of writing, express voting in all jurisdictions has been suspended pending investigations by electoral commissions into cyber-security.

73 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 13.

## Instructions on ballot papers:

Section 100 of the Tasmanian Act sets out the requirements for the instructions to be included on ballot papers. It provides:

> ***100. Instructions on ballot papers***
>
> *Instructions on the ballot paper are to indicate that:*
>
> *(a) the elector is to number the boxes from 1 to a number (being the number of candidates) in order of choice; and*
>
> *(b) the elector's vote will not count unless the elector numbers:*
>
> *(i) in the case of an Assembly ballot paper, at least five boxes; and*
>
> *(ii) in the case of a Council ballot paper, at least the number of boxes required under section 102(2)(a).*

Section 102 provides for the way in which electors are to mark ballot papers. are to be marked, stating that in respect of an election in the House of Assembly, an elector:

(a) must mark the ballot paper by placing, without omission or duplication, the numbers 1, 2, 3, 4 and 5 in the boxes next to the names of candidates in order of preference; and

(b) may place further consecutive numbers in any or all of the boxes next to the names of the remaining candidates.[74]

## Consultation on the Terms of Reference:

During consultation on the Terms of Reference, section 100 was raised as a provision that should be considered by the Review on the basis that it is internally inconsistent and ambiguous as to the instructions to be included on ballot papers, with section 100(a) indicating that the elector has to number all of the boxes and then section 100(b) advising that the elector's vote will not count unless they mark a minimum number of boxes.

It is noted that this issue had previously been raised during the Tasmanian Legislative Council Inquiry which delivered its final report in 2016. In the final report, the Legislative Council Government Administration Committee "B", reported that the Inquiry had been provided with a number of examples where the provisions had caused voter confusion and possibly increased the risk of informal ballot papers being cast.[75]

The Committee was of the view that this issue did not require legislative change but that the TEC could address these concerns through the redrafting of House of Assembly ballot papers.[76]

Accordingly, the Committee recommended:

> *That ballot papers be redrafted by merging the instructions and placing them at the top of the ballot paper to avoid confusion and make it clear that voters have options in casting a formal vote.*[77]

It appears there has been ongoing uncertainty about whether this issue can simply be addressed administratively and during consultation on the Terms of Reference, it was suggested that the Tasmanian Act requires amending to remove the inconsistency.

One suggestion was that section 100 could be removed altogether, given that section 102 covers almost all of the matters dealt with in section 100. The only matter that does not appear in section 102 is the instruction in section 100(a) indicating that electors are to vote for all candidates in the order of choice.

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74 *Electoral Act 2004* (Tas), s 102(1).

75 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 11.

76 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 12.

77 Legislative Council Government Administration Committee "B" Final Report on Tasmanian Electoral Commission (2016), p 12.

### Interim Report:

The Interim Report outlined the relevant provisions in the Tasmanian Act and summarised the concerns that had been raised during consultation on the Terms of Reference. Feedback was sought on:

> ***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.*

This issue was only commented on in seven of the submissions received in response to the Interim Report. This included submissions from the Liberal Party of Australia (Tasmanian Division), the Tasmanian Labor Party, Institute for the Study of Social Change and Dr Kevin Bonham.

The majority of these submissions supported amending the Tasmanian Act to ensure consistency between sections 100 and 102. Dr Kevin Bonham commented:

> *I do not have a strong view on this proposed change but I do believe the instructions should (i) encourage the voter to number as many boxes as possible (ii) make the formality requirements (excluding any savings provisions that might also be added) clear and in the same place as the primary instruction. The trial format change for the Legislative Council election is a good example of (ii).*[78]

### Other Australian jurisdictions:

Most other Australian jurisdictions, including the Commonwealth, provide for ballot papers to be form which is set out in the legislation. These forms include instructions for voting. For example, the *Commonwealth Electoral Act 1918* (Cth) provides that:

> *Ballot papers to be used in a House of Representatives election shall be in Form F in Schedule 1.*[79]

Form F sets out the format of the ballot paper, including an instruction at the top of the ballot paper which states "Number the boxes from 1 to [here insert number of candidates] in the order of your choice". There is also a statement at the bottom of the form which says "Remember…….number every box to make your vote count".[80]

### Further information considered by the Review:

It is noted that prior to the Legislative Council elections in May 2019, the TEC announced that it would be trialling a new ballot paper with both of the following instructions shown above the list of candidates:

- Number the boxes from 1 to X in order of your choice.
- Your vote will not count unless you number at least Y boxes.

On previous ballot papers, the first instruction appeared at the top of the ballot paper with the second instruction at the bottom.

A survey of informal ballot paper survey conducted by the TEC after these elections shows no change in the number of apparent unintentional informal votes. Further, there was no change in the number of preferences used by electors.

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78 Dr Kevin Bonham "Submission to the Department of Justice, Tasmanian Government: Electoral Act Review Interim Report", p 3.

79 *Commonwealth Electoral Act 1918* (Cth), s 209(2).

80 *Commonwealth Electoral Act 1918* (Cth), Schedule 1, Form F.

### Recommendation:

The Review acknowledges that the changes to the ballot paper trialled by the TEC are consistent with the recommendations of the Legislative Council Inquiry and may assist in addressing concerns about the ballot paper instructions.

Notwithstanding these administrative changes, the Review considers there is a need for legislative change as suggested during consultation to address the inconsistencies in sections 100 and 102, remove any ambiguity and provide certainty in the future. To this end, the Review recommends that section 100 of the Tasmanian Act be amended to require a ballot paper to include instructions which are consistent with the requirements set out in section 102 for marking ballot papers.

**Recommendation 1(j):** That section 100 of the Tasmanian Act be amended to require a ballot paper to include instructions which are consistent with the requirements in section 102 for marking ballot papers.

## Informal voting:

For a House of Assembly election the current formality provisions under the *Electoral Act 2004* require an elector to mark at least 5 boxes on a ballot paper, in consecutive order, without omission or duplication. This means that any ballot paper that omits or duplicates a number within the minimum number of preferences will be informal.

### Consultation on the Terms of Reference

A submission was made by Dr Kevin Bonham to the Review in July 2018 in which he suggested that the formality requirements for House of Assembly elections should be "improved", and specifically raised the ACT provision which allows any vote that has a unique number 1 to be counted to the point that it exhausts. (The ACT uses the Hare-Clark system.)

Dr Bonham submitted that "adoption of the ACT rules would protect roughly 0.7% of Tasmanians from having their vote excluded from any influence by overly strict formality rules." He noted however, that votes that would exhaust at a given stage are disproportionally targeted for exhaustion on surplus transfers. In other words there would be an increase in the number of exhausted votes.

### Interim Report

The Interim Report posed the following consultation issue:

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

The Review received 6 submissions with reference to Consultation Issue 10.

The TEC stated that any changes to the formality provisions would need to be carefully considered, as there is the potential to reduce the effectiveness and accuracy of the Hare-Clark counting process. A reduction in formality rules for House of Assembly elections would:

- increase the likelihood that more candidates will be elected without a quota;
- increase the likelihood that more ballot papers will be exhausted and lost to the count (due to fewer preferences being provided); and
- have implications for filling vacancies within the House of Assembly.

The TEC advised that informality due to duplication or omission of numbers between numbers 2 and 5 accounted for less than 1% of ballot papers cast at the 2018 State election.

The Institute for the Study of Social Change and the Uniting Church Synod both supported the issue, with the Institute adding "provided the Returning Officer retain authority to determine the formality of votes".

Two submissions were received from private individuals. One stated that the current rules are fair. The second submitted that if such an amendment were made, the criteria for treating current informal votes as formal would need to be clear, specific and transparent.

### Further information considered by the Review

Research on this issue provided further information for the Review to consider:

- This category of informal voting has not markedly changed at the past 3 House of Assembly elections.[81]
- Prior to 1973, the minimum number of preferences for a vote to be formal was 3. In 1971 a Joint Parliamentary Committee of both Houses of Parliament recommended that increasing that minimum to the number of candidates in a division to be elected (at that time 7) would lead to a more effective and meaningful use of Hare-Clark.[82] There had been public concerns about the level of exhausted votes at House of Assembly elections, and the number of candidates getting elected well short of a quota.
- The Electoral Act was amended in 1973 increasing the minimum to 7. The total informality rate (combining all categories of informal voting) at the 3 subsequent House of Assembly elections decreased slightly.[83]
- The current formality rules in the ACT were not originally proposed for the 1993 Bill which introduced the Hare-Clark system into the ACT. Originally the formality rules for ballot papers were similar to Tasmania. However, the Bill also attempted to reintroduce to the ACT above-the-line voting which is not used in the Hare-Clark system. After much public debate about this, a further amendment to the Bill removed the above-the-line provisions but introduced a provision for a minimum of a single first preference to be counted as a formal vote.
- The ballot paper instructions remained unchanged, instructing voters to put a minimum number of preferences for at least as many candidates as there are vacancies (as per Tasmanian provisions). While the inconsistency between the formality criteria and the ballot paper instructions were noted by the Opposition, the amendments were agreed to and formed part of the final Bill passed by the ACT Legislative Assembly. Since then, the formality criteria in the ACT have remained unchanged.
- To change the formality rules in Tasmania as per the ACT creates a situation where the instructions on the ballot paper clearly state one position but the formality rules actually allow another. This has the potential to confuse electors, and creates additional issues for the TEC in educating and advising the community on how to complete a formal vote.

**Recommendation 1(k):** That the current formality rules in the Tasmanian Act be retained. Further, that the TEC actively pursue avenues to reduce unintentional informal voting by electors with literacy or vision problems.

81 In 2010 this category of informal vote was 0.68% of all ballot papers cast; in 2014 the figure was 0.78%; in 2018 it was 0.73%.

82 *Report of Joint Committee of Both Houses of Parliament – Electoral Act 1907*, Parliament of Tasmania, No. 35 of 1971, page 5.

83 The total informality rate at the 1969 House of Assembly elections was 4.72%. This decreased to 3.66% at the 1972 elections; 3.80% at the 1976 elections; and 3.85% in 1979. Information obtained from Parliamentary Election Reports available from https://tec.tas.gov.au/Info/Publications/index.html#election_reports.

It should be noted that informality surveys do not appear in the Parliamentary reports at this time so it cannot be determined exactly what types of informality existed.

### Ordinary voting outside division/adjourned polling:

Section 115(1) of the Tasmanian Act allows a person who is entitled to vote in one division to lodge a declaration vote at an ordinary polling place or mobile polling place appointed for another division. For example, a person who is enrolled to vote in Franklin can vote at a polling place in Bass. This provides flexibility for electors who are travelling within the State on polling day.

### Consultation on the Terms of Reference:

In its submission on the Terms of Reference, the TEC raised concerns that there may be potential problems relating to the out of division voting provisions in the event that an individual polling place has to close early on polling day.

Section 124 of the Tasmanian Act allows the Commissioner to adjourn polling at a polling place on polling day if for any reason it is not practical to proceed, for example, if there is damage or a threat of damage to the building due to storm, sudden flood or bushfire. The Commissioner can then arrange for the adjourned polling to be resumed at a later date, no more than 21 days after polling day.[84] Under section 124(3):

> *Where polling at a polling place in a division has been adjourned, only an elector who was entitled to vote on polling day at the election in that division and who has not already voted is entitled to vote at the adjourned polling.*

The TEC has suggested that in the situation where voting has been adjourned at a particular polling place and is then resumed at a later date, it is possible, that electors from any other division who did not vote on the polling day could subsequently vote at the resumption of the adjourned polling. This could potentially influence the outcome of the election in some circumstances.[85]

### Other Australian jurisdictions:

All other Australian jurisdictions have legislative provisions allowing for the adjournment of polling at individual polling places in certain circumstances such as riot, violence, fire, storm, flood or other similar event. Some jurisdictions have provisions in similar terms to section 124(3) whereby voting at the adjourned polling is limited to those electors who are entitled to vote on that day or in an election in that division or polling place.[86]

It is noted that the legislation in both the Commonwealth and NSW restricts voting in the adjourned poll to electors who are enrolled in the district, division or subdivision within which the voting centre or polling place is situated.

### Recommendation:

The Review accepts the TEC's comments concerning the potential difficulties or uncertainty arising from the interaction of sections 115 and 124 of the Tasmanian Act. It is noted that whilst section 124(3) attempts to restrict voting in an adjourned polling to those who are entitled to vote at the election in that division, it is arguable that by virtue of section 115, this could include anyone entitled to vote at the election in any division.

The Review therefore recommends that the Tasmanian Act be amended to clarify that voting at the adjourned polling is limited to electors who are enrolled in the division in which the relevant polling place is situated.[87]

**Recommendation 1(l):** That the Tasmanian Act be amended to clarify that where polling is adjourned at a polling place, for example, where a polling place is closed due to safety reasons such as storm damage or bushfire, only electors who are enrolled to vote in the division in which the polling place is situated are entitled to vote in the adjourned polling.

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84 *Electoral Act 2004* (Tas), s 124(2).

85 Tasmanian Electoral Commission "Submission for the Review of the Electoral Act", p 13.

86 *Electoral Act 1907* (WA), s 133; *Electoral Act 1992* (ACT), s 160(6); *Electoral Act 1985* (SA), s 88(2); *Electoral Act 2004* (NT), s 91(6).

87 *Commonwealth Electoral Act 1918* (Cth), s 243; *Electoral Act 2017* (NSW), s 176(4).

### Delivery of postal vote information:

Section 128(1)(a) of the Tasmanian Act provides that an election official is to "issue a ballot paper to the applicant by posting, or delivering by an approved method, to the address specified for this purpose on the application:

### Consultation on the Terms of Reference:

In its submission on the Terms of Reference, the TEC commented:

> *Each election, there are family members that may provide a PVA (postal vote application) to the returning officer or the TEC who can personally deliver the postal vote to the elector. The inclusion of the words "to the address specified for this purpose on the application" does not allow the postal vote to be provided to a person other than to the address specified.*[88]

The TEC suggested that section 128(1)(a) be amended by deleting the words "to the address specified for this purpose on the application".[89] This will allow electoral officers to issue postal votes in person to eligible voters, for example, by giving them to a family member who can personally deliver the postal vote to elector, and will save the cost of posting documents unnecessarily.

### Other Australian jurisdictions:

It is noted that other states and territories do not appear to require postal or declaration votes to be posted or delivered to a specific address. For example, the relevant provisions in NSW and Victorian legislation simply specify that the postal vote information is to be posted or delivered to the applicant.[90]

### Recommendation:

Taking into account the TEC's submission on this issue concerning administrative and cost issues, the convenience to applicants and family members and the position in other Australian jurisdictions, the Review recommends that section 128(1)(a) be amended to allow for postal vote information to be delivered in person to the applicant, including by issuing it to a third party such as a family member.

The Review notes that the TEC would need to establish appropriate security and privacy processes in issuing postal votes to third parties if this recommendation is accepted.

**Recommendation 1(m):** That the Tasmanian Act be amended to allow for postal vote information to be delivered in person to the elector, including by issuing the postal vote information to a third party such as a family member.

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

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

90 *Electoral Act 2017* (NSW), s 145(2); *Electoral Act 2002* (Vic), s 104(1)(a).

# Compliance and Enforcement

### Consultation on the Terms of Reference:

Two submissions in response to the Terms of Reference of the Review raised issues in relation to offence and enforcement provisions in the Tasmanian Act.

In its submission on the Terms of Reference, the TEC outlined that while the Electoral Commission has a number of responsibilities under the Tasmanian Act, including responding to queries and complaints about possible breaches of the Act regarding illegal or corrupt practices, its powers of demand or investigation are limited to electoral roll information and Legislative Council candidate expenditure information.

Section 9 of the Tasmanian Act outlines the functions and powers of the Electoral Commission, with section 9(1)(f) specifically providing for the Electoral Commission to investigate and prosecute illegal practices under the Act.

The TEC suggested that the Electoral Commission be provided with the power to conduct investigations into all offences under the Tasmanian Act in order to comprehensively administer the functions of the Commission under the Act.

The DPP also raised this point in his submission on the Terms of Reference, stating that the Tasmanian Act provides no mechanism for the Commission to carry out its function under section 9(1)(f). Further, he noted that while the Commission is responsible for ensuring that elections are conducted in accordance with the law, it has no power to demand documents or compel answers from persons.

The DPP further submitted that sections 187 (electoral bribery) and 188 (electoral treating) of the Tasmanian Act are unclear due to being extremely broadly defined and, on the face of it, there does not appear to be an element of fault in either provision.

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.*[91]

The DPP suggested that:

> *In my view, in order to provide 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 never cover normal political activity. If a fault provision was enacted this would make it clear.*[92]

The DPP noted 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 know rules of honesty and integrity."*[93]

91 Office of the DPP submission dated 26 July 2018, pp 4-5.

92 Office of the DPP submission dated 26 July 2018, pp 4-5.

93 *R v Glynn* (1994) 71 A Crim R 537 at p 542.

The DPP submitted that there are similar problems in relation 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 suggested that section 188 also requires an amendment to include a fault provision.

In its submission on the Terms of Reference the TEC suggested that offences under section 186 should be dealt with as summary offences with the penalty for the offences remaining unchanged.

Section 186 sets out a number of offences in relation to voting, including destroying a nomination form or ballot paper, forging a ballot paper, removing a ballot paper from a polling place, impersonating an elector for the purposes of voting at an election, voting more than once at an election, etc. Section 186(2) provides that these offences are punishable on indictment under the Criminal Code.

The DPP's submission agreed that consideration should be given to some offences in the Tasmanian Act to be prosecuted summarily.

The DPP stated:

> *If it is determined that some electoral offences should be prosecuted summarily, I recommend that this be achieved by the introduction of mirror offences, whereby there would be an indicatable crime and summary offence for the same conduct. If this were the case prosecution would elect the appropriate charge at the time of charging. It would allow offences to be charged on complaint or indictment depending on the circumstances of the case…There a number of examples where Parliament has enacted both indictable crimes and summary offences to cover the same conduct. This work well and allow for matters to be prosecuted in the appropriate jurisdiction depending on the seriousness of the alleged conduct and other relevant factors…If mirror offences were introduced for electoral offences, all prosecutions would likely be conducted by the Director of Public Prosecutions (DPP)."*[94]

## Interim Report

Consultation Issue 11 of the Interim Report focussed specifically on sections 187 and 188 of the Tasmanian Act, but also allowed for general consideration for any further changes that may be required to the current offence provisions:

> ***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.*

The Review received only 4 submissions relating to this consultation issue. The Liberal Party of Australia (Tasmanian Division) stated that it supported the views expressed by the DPP in this area. The Institute for the Study of Social Change indicated that it agreed with second part of the consultation issue. Two private individuals agreed that these sections of the Tasmanian Act should be enforceable.

94 Office of DPP submission dated 10 December 2018, p 2.

### Further consideration by the Review

The Review agrees with the position of the DPP in relation amending the bribery and treating provisions of the Tasmanian Act to include an element of improper conduct.

In addition to the specific issues raised in the Interim Report, the Review considered the technical issues raised by the TEC in relation to voting offences under section 186 of the Tasmanian Act. The offences are currently indictable and whilst it would seem appropriate for most of the offences under that section to summary offence, there may still be instances where it would be appropriate to deal with an offence under section 186 on indictment. The Review notes that similar offences in other jurisdictions are electable, indictable or summary.

The DPP's comments on mirror offences were considered and the Review agrees with this option in relation to section 186.

The Review acknowledges that the role of the TEC is to ensure elections are conducted in accordance with the *Electoral Act 2004*, and that further investigative powers under the Tasmanian Act are needed in order for the TEC to be able to carry out its legislative responsibilities.

The Review has concentrated on issues in the current Act rather than new compliance and enforcement provisions in relation to any future disclosure regime. However, the Review acknowledges that any reforms to the Tasmanian Act may require support in the form of new enforcement, compliance and offence provisions.

**Recommendation 1(n):** That in relation to compliance and enforcement:

(i) sections 187 (electoral bribery) and 188 (electoral treating) of the Tasmanian Act be amended, by including appropriate fault provisions, to ensure that the offences under those sections are enforceable;

(ii) the Tasmanian Act be amended to provide the TEC with investigative powers to allow it to meet its current responsibilities under the Tasmanian Act, particularly in relation to its functions under section 9(1)(f) of the Tasmanian Act;

(iii) electoral offences under section 186 of the Tasmanian Act be made mirror offences, whereby there would be an indictable crime and summary offence for the same conduct, and allow for offences to be charge on complaint or indictment depending on the circumstances of the case. Alternatively amend section 186 to provide for relevant offences to be electable with the agreement of the prosecution; and

(iv) other reforms to the Tasmanian Act be considered in the context of identifying whether any new enforcement, compliance and offence provisions are required to support those reforms.

# Associated Election Laws

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

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

The redistribution process is initially undertaken by the Redistribution Committee, which consists of the Electoral Commissioner, the Surveyor General and a representative of the Australia Statistician. Under the Act this body is required to make an initial proposal for redistribution of electoral boundaries.

Subsequently the Redistribution Tribunal is formed to undertake a process of public consultation and provide a further redistribution proposal and finally a determination with reasons. The Redistribution Tribunal consists of members of the Redistribution Committee along with the Chairperson and remaining member of the Electoral Commission.

### Consultation on the Terms of Reference

Two submissions were received to the Terms of Reference which were concerned that the members of the Committee were also members of the Tribunal which "reviewed" the initial proposal.

### Interim Report

The Interim Report outlined the relevant provisions in the *Legislative Council Electoral Boundaries Act 1995* and summarised concerns raised in relation to this issue. Feedback was sought on the following consultation issue:

> ***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.*

The Review received 4 submissions each of which briefly acknowledged agreement with reference to Consultation Issue 10.

### Further information considered by the Review

The Review considered the purpose of the redistribution process, and how the significant movement of the population within Tasmania may necessitate the dramatic change to the area covered by a division.

The Review looked at the current membership of both the Committee and Tribunal in relation to the redistribution processes which occur in all other Australian jurisdictions. It found that composition and operation of these bodies is consistent with other jurisdictions – it is similar to redistribution authorities in the ACT and the Commonwealth. In Queensland, NSW, NT, Victoria and WA the whole redistribution process is conducted by the one authority (three individuals) for the whole process.

The Review also considered:

- The redistribution process is consistent with the redistribution process that determines boundaries for the House of Assembly divisions.
- In the Tasmanian Act the responsibilities of the Committee and Tribunal are balanced against specific criteria they must consider, an extensive process of public consultation and the requirement to provide reasons for decisions.
- The expert knowledge of the members of the Committee (statistical, mapping and electoral knowledge) is essential during the Tribunal process to arrive at a final determination of boundaries including a boundary map.

- The members are independent statutory officers in their fields, and must comply with requirements of independence to be appointed to their positions.
- The two submissions concerned about the composition of the Redistribution Tribunal reflected dissatisfaction with a specific outcome of a redistribution rather than evidence of improper decision-making, partisan or bias in the performance of the Tribunal.

### Recommendation:

Taking into account all the factors, the Review concludes that there is no justification for changing the current composition of the Committee or Tribunal.

The Review finds that the name "Tribunal" is not a suitable name for the body making the final redistribution determination. The Tribunal in the redistribution process is a body making decisions of a technical nature, rather than being a tribunal of an administrative or civil nature. In the ACT and the Commonwealth the equivalent authority is called the "augmented Electoral Commission".

Accordingly the Review considers that the name of the Tribunal should be changed to more accurately convey its role in the redistribution process.

**Recommendation 2:** That the current composition of the Redistribution Committee and Redistribution Tribunal under the *Legislative Council Boundaries Act 1995* be retained, but that the name of the Tribunal be changed to more accurately describe the role of that body in the redistribution process.

# Section 2:
# Disclosure of Donations and Electoral Expenditure and Options for Public Funding

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

## Disclosure

This section addresses Consultation Issue 13 of the Interim Report, namely "If state-based disclosure rules are to be introduced in Tasmania, that consideration should be given to whether the Tasmanian 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."

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 Final Report deals with (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 3 of this Report.

As outlined in the Interim Report, the requirements under the Commonwealth Act in relation to disclosure of donations and electoral expenditure apply to the vast majority of Tasmanian state politicians by virtue of them being members of federally registered political parties.

There has, however, been a significant movement towards increased regulation and scrutiny within the other states and territories, over the last five years.

Significant reforms have been introduced in Victoria, NSW and Queensland during this period with NT commencing a raft of reforms to their legislation in January 2020. The reform of state based disclosure regimes in other states and territories has increasingly led to local criticism of elements of the Commonwealth regime as well as the lack of a state-based disclosure regime.

There was significant support for a state based disclosure regime expressed through submissions to the Interim Report. Of all the submissions that touched on the issue of disclosure, only one opposed the introduction of a state-based regime.

The Institute for the Study of Social Change explain this groundswell of support for disclosure as follows:

> *Weak disclosure laws also leave Tasmania vulnerable to perceptions of undue influence in policy making. Both the Grattan report into political influence and a number of recent studies note that the perception of undue influence – regardless of whether such influence has occurred – can corrode public trust in the democratic system and undermine the legitimacy of government.*[95]

Although there was an overwhelming expression of support for a state-based regime, this may not reflect consensus on the detail of such a regime. As required by the terms of reference of the Review, care needs to be taken to balance a range of interests including (but not limited to), freedom of speech, minimising unnecessary costs to the taxpayer as well as prioritising transparency in the democratic process.

The considerable research and analysis that has been undertaken in all jurisdictions as well as the guidance provided by the High Court, provides valuable insight into developing an appropriate system for Tasmania. Learning from the experience of other jurisdictions will also enable Tasmania to minimise any unnecessary cost and administrative burden on those wanting to participate in the democratic process in the state.

**Recommendation 3:** That, subject to further modelling and analysis to inform the final detail of the model, a disclosure system be introduced for political donations that are received by political parties and candidates, with the elements set out below and informed by models in other jurisdictions.

## Definition of gift

As outlined in the Interim Report, there is broad consistency in the definition of "gift" in electoral law across Australian jurisdictions. If a state-based disclosure regime were introduced in Tasmania, it seems appropriate to include a definition broadly consistent with the Commonwealth Act, and therefore with the other jurisdictions.

Section 287 the Commonwealth Act provides:

> ***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;[96] 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.
>
> The concept of a 'disposition of property' is further defined in this section as:
>
> ***disposition of property*** means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, and includes:
>
> (a) the allotment of shares in a company;

95 Institute for the Study of Social Change "Submission to the review of the Tasmanian Electoral Act" July 2018, p 4.

96 This refers to a payment under the Commonwealth public funding regime.

(b) the creation of a trust in property;

(c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property;

(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;

(e) the exercise by a person of a general power of appointment of property in favour of any other person; and

(f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person.

All Australian jurisdictions with disclosure regimes[97] include the 'provision of services without consideration… or with inadequate consideration' as within the meaning of a 'gift'. However, they all explicitly exclude 'volunteer labour' from their definitions of 'gift'.

This approach recognises the traditional role played by supporters of candidates in doorknocking, handing out electoral information, dealing with phone calls and other administrative and supporting tasks during an election campaign.

There is a grey area where someone's donation of time and effort could potentially be regarded as the provision of a service without consideration. This is recognised in the support materials provided by various electoral commissions across the country.

The SA Electoral Commissioner provides useful guidance on this issue:

> Volunteer labour is unpaid work performed by a person.
>
> Examples of volunteer labour include:
>
> a) handing out how-to-vote cards on polling day
>
> b) door knocking
>
> c) putting up corflutes[98].
>
> Volunteer labour does not include labour a person performs as part of their profession or trade, or would otherwise be paid for in the ordinary course of their work. For example, a graphic designer might design a candidate's campaign materials for no charge. This service is a gift and the price the designer would normally charge for such work must be recorded as the value of the gift. There have been a number of organisations that have provided the services of their employees to political parties to assist in campaign activities. These employees may have performed campaign work on paid time (during work hours while still receiving pay from their employer). These types of arrangements will be considered a gift.[99]

The NSW Electoral Commission has published a guideline specific to the issue of volunteer labour and the ancillary use of vehicles and equipment of volunteers:

> A volunteer is a person who provides labour to a party, elected member, candidate or group of candidates for no payment, or payment less than the market value.

97 Except Tasmania, which doesn't define 'gift' in its legislation.

98 'corflute' is a trade name for a double-sided board with a corrugated layer in between, made of plastic rather than paperboard so that it's stiff and relatively weather-proof.

99 "Guidance Note – Donations – Volunteer Labour and Gifts of Employee Labour" – Electoral Commission of South Australia https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-for-state-elections/guides.

> A volunteer does not include a person whose labour consists of providing products or services that the person supplies as a function of his/her profession or trade, or would otherwise be paid for in the ordinary course of their employment. For example, if a person is a sign writer and provides free sign writing services to a party for inadequate or no payment, the person is not a volunteer. The provision of those services is a political donation.[100]

The AEC website provides the following definition:

> A service provided free of charge to a party by an office-holder of the party or a party member, or any other person where that service is not one for which that person normally receives payment. Volunteer labour provided to a political party does not need to be disclosed as a gift by that person or the registered political party.

The interpretive materials of the various jurisdictions generally concur that 'volunteer labour' should be limited to unskilled work rather than something that could be regarded as a specialised or professional service.

**Recommendation 3(a):** The Tasmanian Act include a definition of "gift" that is generally consistent with the definition in the Commonwealth Act.

## Threshold for disclosure

The submissions made to the Interim Report identified that the threshold for disclosure of donations was a key issue of interest for stakeholders.

The Liberal Party of Australia (Tasmanian Division) indicated that the Commonwealth threshold of $14,000[101] was not too high. The Liberal Party of Australia (Tasmanian Division) expressed the view that a low threshold would disproportionately affect their capacity to fundraise as many of their donors are not public figures and donors would choose not to donate to avoid having their names and addresses published.

All other submissions commenting on a potential threshold indicated that Tasmania should introduce a threshold considerably lower than the current Commonwealth level.

There has been a significant downward shift on disclosure thresholds in Australia. As can be seen in Table 4 below, the Commonwealth threshold of $14,000 is now considerably higher than all state and territory thresholds.

The Senate Select Committee into the Political Influence of Donations in 2018 recommended a threshold of $1,000 and this was also supported by a large number of submissions to the Interim Report including from the Institute for the Study of Social Change, Community Legal Centres Tasmania, the Tasmanian Labor Party, the Tasmanian Greens and the Tasmanian Law Reform Institute.

If a disclosure regime were introduced in the state, a threshold of $1,000 would be in line with the majority of submitters to the Review as well as the general trend in other jurisdictions.

100 http://www.elections.nsw.gov.au/fd/documents/legislation_and_policies/guidelines/general_guidelines Guideline 21.

101 The disclosure threshold under the *Electoral Act 1918* is indexed annually. The threshold for 2019-120 is $14,000.

Table 4: Disclosure requirements for Recipients – Australian Jurisdictions

| | Cwlth | NSW | Vic | Qld | SA | WA | ACT | NT |
|---|---|---|---|---|---|---|---|---|
| **Disclosure threshold for gifts** | Over $14,000 (indexed) | Over $1,000 | Over $1,020 (indexed) | Over $1,000 | Over $5,000 | Over $2,500* | $1,000 | $1,000[102] |
| **Date threshold was introduced** | 2006[103] | 2008 | 2018 | 2017 | 2015 | 1996 | 2015 | 2004 |
| **Reporting period** | Annual, and within 15 weeks of polling day | 6 monthly, or 21 days during election period | Within 21 days | Within 7 days | 6 monthly, or weekly inside electoral period | Annual, and within 15 weeks of polling day | Annual with additional requirements during election year | Annual, and 30 and 60 days after polling day |

There was also considerable support amongst submissions for donations from a single donor to be aggregated over a year for the purpose of the disclosure threshold. Currently, under the Commonwealth system, multiple donations from a single donor that cumulatively exceed $14,000 do not have to be disclosed by the recipient party however they do have to be disclosed by the donor.

## Anonymous Donations and Recent Commonwealth Reforms

Several submissions to the Interim Report argued for a ban on any anonymous donations to parties or candidates. However, as the central concern about political donations is that they may unduly influence the recipient of the donation, it follows that there is a diminishing influence of donations, the smaller the value. Generally, other jurisdictions have recognised that requiring donor information on very small donations imposes an unnecessary burden on parties and candidates and challenges traditional models of "grassroots" fundraising, such as cake stalls and low cost raffles, while yielding little public benefit.

Since the writing of the Interim Report, the provisions of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (the FAD Reform Act) have commenced. There is still no requirement for donations between $1,000 and $14,000 to be disclosed however, the financial controller or agent of the political entity or political campaigner will now need to obtain, within six weeks, written affirmation that the donor is not a foreign donor. This could be achieved by including a check box on forms provided to donors when making donations.

The consequence of this reform is that federally registered political parties and third parties are now required to collect donor information from $1,000 upwards.

**Recommendation 3(b):** That a threshold be set for disclosure of donations received, informed by approaches in other jurisdictions.

102 Nb $1000 is for parties, candidates have a threshold of $200.

103 Prior to 2006, the threshold was $1500.

## Timeframes for Reporting on Donations

As can be seen in Table 4 above, jurisdictions have varying reporting timeframes. There has, however, been a shift towards disclosing information closer to the event, or what is often referred to as 'real-time reporting'.[104] The introduction of online reporting portals or systems makes the submission, processing and publication associated with reporting simpler.

The AEC, in its submission to the Senate Select Committee into the Political Influence of Donations, commented:

*Whether a particular disclosure regime is adjudged as "timely" will ultimately be a matter of judgement for commentators and other stakeholders. However, given the principles espoused in the previous section*[105]*, it would appear that disclosure closer to real time may provide a level of transparency to the public that optimizes engagement and confidence in the political process.*[106]

The current requirements under the Commonwealth Act are for returns to be submitted within sixteen weeks of the end of the financial year (this is usually around 21 October). The AEC then makes the returns available for public inspection by the first working day in February the following year.

There was strong support amongst the submissions to the Interim Report for a shorter timeframe than currently required under the Commonwealth regime. Suggested timeframes varied with one submission calling for reporting within 24 hours while others argued that a timeframe of one week (as is the case in Queensland) or 21 days (as in Victoria) were acceptable. The Institute for the Study of Social Change recommended a 7 day timeframe for the 12 months leading up to a state election.

A number of jurisdictions have developed a two-phase reporting schedule, with regular reporting for the most part but with more frequent regular reporting during an identified election period. This has the benefit of ensuring very timely information is available during the period when many donations are made. NSW, SA, ACT and NT have all opted for this type of model.

NSW requires reporting twice yearly outside the election period with reporting within 21 days during the election period. SA similarly have twice yearly reporting outside the election period, however in an election year from 1 January returns are required on 5 February and then weekly up until polling day in mid-March.

This two stage process appears to offer the benefit of regular ongoing reporting with more frequent reporting during the key election period. In SA, electors have the capacity to see all donations up to the week before polling day prior to casting their vote[107].

A single regular reporting period has the benefit of simplicity for reporting entities however if the period is short, this could be quite onerous for those involved. In Queensland, both a donor and the recipient of a donation must report on the donation to the Queensland Electoral Commission within 7 days. Victoria has recently moved to a 21 day reporting period with 7 days then allowed for the Victorian Electoral Commission to publish the report online.

The optimal timeframe is one that supports the transparency of timely information while recognising that reporting obligations for candidates, political parties and donors should not become an unreasonable administrative burden. It needs to be recognised that any disclosure system would also apply to independent candidates without the benefit of party administrative support. The reporting itself may not be onerous however the individuals involved may not be aware of the receipt immediately and may only process financial transactions intermittently.

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104 The term 'real time' is used increasingly by politicians and commentators although there is no strict definition for the term in this context. It can be assumed that for the purpose of disclosure 'real time' is referring to the reporting of a donation at the time of receipt rather than waiting to report it was part of a reporting period.

105 These were transparency, clarity, timeliness and enforceability.

106 Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters, I*nquiry into the conduct of the 2016 federal election and matters related thereto – financial disclosure* Feb 2017– and resubmitted to the Senate Select Committee into the Political Influence of Donations 2018.

107 Unless they vote prior to polling day.

As discussed further in Sections 3 and 4, there is also a need to consider any timeframe on reporting by donors and by third party campaigners when considering timeframes on parties and candidates, as there is a strong argument for consistent timeframes for all reporting.

There are therefore sound arguments for either a single rolling reporting timeframe or a two-phase reporting system. Which system is most appropriate for Tasmania, and the exact timing requirements for disclosure, could be ascertained through further analysis and modelling of the various options and their suitability to the Tasmanian context.

If a single rolling reporting timeframe were to be introduced in Tasmania, then a specified disclosure period of no more than 28 days would be considered best practice with reference to other jurisdictions.

**Recommendation 3(c):** There be a requirement that all donations over the specified disclosure threshold be disclosed to the regulator within a specified time period. This time period could either be a single rolling period of no more than 28 days or alternatively, a less frequent reporting period outside the election period with more frequent reporting during the election period.

**Recommendation 3(d):** Multiple donations received from a single donor during a reporting period be aggregated when determining whether the disclosure threshold has been exceeded.

## Disclosure of electoral expenditure

In addition to the reporting of individual donations, other jurisdictions also have requirements to report on electoral expenditure. This report is required to be submitted within a specified period after polling day.

The Commonwealth Act currently requires federally registered parties to undertake this kind of reporting. However, the electoral expenditure reporting under the Commonwealth Act relates to the federal election period and expenditure relating to the federal election. This reporting does not therefore provide an insight into expenditure relating to Tasmanian state elections.

The Tasmanian Act already requires Legislative Council candidates and members to report on their electoral expenditure for the period from 1 January of the year of their election until polling day (first Saturday in May). If expenditure is authorised prior to 1 January for electoral purposes, it must also be disclosed[108]. Each candidate must submit their report within 60 days of the result of the election being declared.

There are no requirements for House of Assembly candidates and members or political parties to report on their electoral expenditure under the Tasmanian Act.

As the elections for the House of Assembly do not have a fixed date, it is necessary to consider a means of identifying a clear period that could operate for disclosure of electoral expenditure to enable compliance should this change be introduced.

Under section 23 of the *Constitution Act 1934*, the House of Assembly expires four years from the return of the writs for its election. The writs for the 2018 Tasmanian state election were returned on 15 March 2018.

The Governor must issue writs of election between five and ten days thereafter.[109] Nominations must close on a date seven to 21 days after the issuance of the writ,[110] and polling day must be a Saturday between 15 and 30 days after nominations close,[111] meaning the election must take place by 14 May 2022. Therefore although the polling day is not fixed, there is the capacity to identify the last possible day for the election. A reporting period could be a period of time leading up to that last date.

108 s 5 *Electoral Act 2004.*
109 *Electoral Act 2004*, s 63.
110 Ibid, s 69.
111 Ibid, s 70.

As the period identified in such a way has the latest possible end date, it is worth nominating a longer period to ensure reporting best captures electoral expenditure. It is therefore suggested that for the purpose of electoral expenditure reporting the reporting period should commence 12 months prior to the last possible date of the election and conclude on polling day. The TEC could identify this period from the return of the writs on the prior election via their educational material and their website.

There does not appear to be any reason for altering the current reporting timeframe for Legislative Council members and candidates although it would be appropriate to bring the content of the reporting in line with the reporting required for House of Assembly candidates and members, and incorporate their reporting into the new online reporting system.

For Legislative Council candidates, it is proposed that this period would continue to commence on 1 January of the year of the respective election and conclude on polling day[112]. Reporting would continue to be required within 60 days of the result of the election being declared. In the event of a bi-election, the electoral period would commence on the issuing of the writs and conclude on polling day.

**Recommendation 3(e):** All candidates and political parties for House of Assembly elections be required to submit a return identifying all electoral expenditure, donations and debt during an identified electoral period and that the return be required to be submitted via the designated electronic system within a set period after polling day.

## An Online Reporting System

As mentioned previously, the development of online reporting portals has facilitated shorter reporting timeframes.

However, it is recognised that even with changes in technology, disclosure regimes still require the accurate input of detailed information by organisations. There also needs to be time provided for the regulator to ensure information is appropriate and accurate prior to publication.

It is also recognised that the data involved in such systems pose a cyber-security risk and care will need to be taken to ensure information provided online remains safe. Tasmania will continue to participate, in line with the 2018 COAG decision, in collaboration between electoral commissions, security and government agencies. There is the potential for Tasmania to benefit from the experience of other jurisdictions who have developed systems in recent years.

**Recommendation 3(f):** All disclosure and reporting obligations be managed through an online disclosure system which allows:

(i) easy and secure input of meaningful information by candidates, parties and third parties;

(ii) the public to access and interrogate all appropriate data; and

(iii) effective monitoring, auditing, investigation and enforcement.

**Recommendation 3(g):** It be an offence to receive a donation over the threshold for disclosure without recording the requisite identifying information.

**Recommendation 3(h):** It be an offence for a donor to provide false identifying information when making a political donation.

112 In the case of a bi-election, the reporting period could commence on the issuing of the writs and conclude on polling day.

# Caps on Electoral Expenditure and Donations

Caps on electoral expenditure and donations are intended to assist in levelling the playing field amongst parties and candidates, and reducing campaign costs and the need for political fundraising.

In Tasmania, there is currently an expenditure cap of $17,000 for candidates in Legislative Council elections. This amount increases by $500 each year. There is no expenditure cap on political parties or candidates for House of Assembly elections.

Caps on electoral expenditure are currently in place in NSW, ACT and SA for political parties. In NSW and ACT these caps also extend to third party campaigners. The NT Government has recently introduced a Bill[113] proposing $40,000 caps on electoral expenditure by political parties and the Queensland Government has recently announced proposed caps on political expenditure. Caps on donations for electoral expenditure are in place in NSW and Victoria and the Queensland Government has recently tabled a bill to introduce caps.

Table 5: Caps on expenditure and donations – Australian jurisdictions

| | Cwlth | NSW | Vic | Qld | SA | WA | ACT | NT |
|---|---|---|---|---|---|---|---|---|
| **Caps on electoral expenditure – Parties** | - | $11.3m | - | ** | $4m | - | $1m | *** |
| **Caps on electoral expenditure – third parties** | - | *$500,000 | - | ** | - | - | $40,000 | - |
| **Caps on donations for electoral expenditure** | Caps on foreign donations | Over $6,300 to a political party<br>Over $2,700 to a third party | Over $4,000<br>Max. 6 donations to third parties | ** | - | - | - | - |

* The High Court ruled that this cap is invalid in Unions *NSW v New South Wales [2019] HCA 1 ("Unions No.2")*.

** The Queensland Government has tabled legislation including:

- caps on electoral expenditure totalling around $8.5 million for parties
- caps on electoral expenditure of $1 million for third parties
- caps on donations of up to $6,000 to one or several candidates of the same party and up to $4,000 to any single party.

*** $40,000 caps to commence on 1 January 2020

Submissions received during the consultation process from the Tasmanian Greens, the Tasmanian Labor Party, the Uniting Church and a number of individuals called for caps on electoral expenditure for political parties and third parties. The Tasmanian Greens proposed a cap of $81,000 for individual candidates and $810,000 for party expenditure, increasing by $1,000 and $10,000 per year respectively.

113 *Electoral Legislation Further Amendment Bill 2019.*

The Tasmanian Labor Party recommended:

- Expenditure caps for political parties of $1 million.
- Expenditure caps for candidates in House of Assembly elections of $100,000.
- Increasing the expenditure cap for candidates in Legislative Council elections to $30,000.
- Expenditure caps for third party campaigners of $100,000.

Community Legal Centres Tasmania supported a cap on third party electoral expenditure.

The Tasmanian Greens and a number of individual submissions called for $3,000 caps on political donations. The Jacqui Lambie Network also supports a cap on donations, proposing a $10,000 cap. Unions Tasmania supported caution in relation to any caps on third parties and proposed that consideration of caps on political donations occur at a later stage.

The Institute for the Study of Social Change initially recommended that the focus of reform should be on the disclosure of spending and donations rather than imposing caps. The Institute has since, however, published a paper[114] recommending:

- Caps of $30,000 (indexed) per candidate up to a maximum of $750,000 for political parties in House of Assembly elections.
- Increasing the cap for Legislative Council elections to $30,000 per candidate.

The Liberal Party of Australia (Tasmanian Division)'s submission to the Review strongly opposed caps on electoral expenditure as well as any caps on political donations.

The High Court has found that caps on political expenditure can limit the implied constitutional freedom of political communication and require evidence as to their justification.[115] This would suggest that if the Tasmanian Government decided to introduce caps, then a clear evidence base as to the need for caps and the level of caps would have to be established.

Currently, there is no data on electoral spending by candidates, parties or third parties in House of Assembly elections. In the absence of this information it would be very difficult to calculate an appropriate cap for participants and campaigners and to demonstrate that the level of the cap was appropriate.

Despite the support for caps on electoral expenditure and donations in a range of submissions, there is currently insufficient evidence to determine whether they are genuinely needed or if problems exist in the Tasmanian election process that would be resolved through the introduction of caps. Tasmania does not have a fixed electoral cycle in the House of Assembly. If expenditure caps were to be introduced, consideration would have to be given to the appropriate period during which to cap expenditure.

**Recommendation 4:** That the need for caps on electoral expenditure for candidates for the House of Assembly be considered at a later stage in light of additional research and data on electoral expenditure including evidence gathered through a new disclosure regime.

114 Ecclestone, R and Jay, Z, 2019, *Insight Ten Campaign Finance Reform In Tasmania: Issues And Options*.

115 *Unions NSW v NSW [2019] HCA 1*.

# Section 3:
## Regulation of Third Parties

**Term of Reference 3:**
The level of regulation of third parties, including unions, during election campaigns

## Introduction

In Tasmania there is minimal regulation of the activities, donations and expenditure of third parties, such as unions, peak bodies, lobby groups and corporate bodies. Currently, the only regulations are the Commonwealth Act's 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.[116] There is no regulation of third party activity for House of Assembly elections under Tasmanian law.

Third party electoral campaign activity is regulated in all other Australian states and territories.

Where submissions addressed the issue of third party regulation there was general agreement that third parties should be regulated in a comparable way to political parties. The Tasmanian Greens, the Tasmanian Labor Party and the Institute for the Study of Social Change all supported third party regulation. The Liberal Party of Australia (Tasmanian Division)'s submission opposed any disclosure regime stating however it stated that if one were imposed for political parties, regulation should be equally applied to third parties.

## Definition of Third Parties

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

- Third party campaigners
- Associated entities
- Donors.

116 *Electoral Act 2004* (Tas), s 159.

### Third Party Campaigners

Third party campaigners are individuals or organisations who seek to influence elections through political expenditure.[117] These individuals or organisations are not contesting any election themselves but seek to influence the election campaign and/or specific policy issues.[118]

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

Third party campaigners 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.[119] 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, some trade unions and corporate members. In Tasmania, some unions would meet the definition of an associated entity and some would not.

### Donors

For the purpose of this Report, a 'donor' is a person or legal entity that makes a political donation. Most Australian jurisdictions require donors to disclose donations made over a certain threshold. The Commonwealth Act requires disclosure of donations that total over $14,000, while state and territory thresholds vary between $1,000 and $5,000.[120]

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

## Third Party Regulation in Australia

Recent reports including the 2018 Select Committee into the Political Influence of Donations[121] and the Grattan Institute report on access and influence in Australian politics have identified the considerable potential for third parties to influence electoral outcomes.[122]

Other Australian jurisdictions, including the Commonwealth, have undertaken significant reform in the regulation of third parties' political activity as part of their broader electoral reforms.

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117 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.

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

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

120 Other jurisdictions requiring donor disclosure - New South Wales, Victoria, South Australia, Queensland and the Northern Territory.

121 2018 Senate Committee into the Political Influence of Donations – Chapter 3: Political Donations: A Corrupting Influence?

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

The Commonwealth, NSW, Victoria and Queensland have all increased their regulation of third parties since 2017, and SA established a funding and disclosure scheme for third parties in 2015. A 2018 report from WA[123] recommended that the Electoral Act 1907 (WA) be reviewed and particular consideration given to limiting expenditure by third party campaigners. In the NT electoral reforms related to the regulation of political donations and election expenditure will commence on 1 January 2020.[124]

Types of third party regulations in place in other jurisdictions in Australia include:

- Registration requirements.
- Disclosure requirements in relation to expenditure and donations.
- Caps on expenditure on election campaigns.
- Caps on donations to political parties or candidates.
- Restrictions on the number of third parties a donor may donate in a given time period eg donations to three third parties in a financial year.
- Bans on foreign donations.
- Bans on anonymous donations.
- Bans on certain types of donors such as property developers or gambling organisations.

## 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 of 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).

**Recommendation 5:** *That, subject to any further modelling and analysis to inform the final detail of the model, 'associated entities' (entities that are controlled by or operate for the benefit of a registered political party) be registered and that their disclosure obligations be the same as those for political parties.*

## 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.

Submissions to the Review indicated broad support for Tasmania to adopt a disclosure regime for third party campaigners. Several submissions noted that it is in the public interest to increase the transparency of the influence third party campaigners and donors have on elections.

In the submissions received, there was general agreement that third parties should be regulated in a comparable way to political parties, with a similar or identical threshold for disclosure. However, few submitters provided any detailed comment beyond that support.

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

124 *Electoral Legislation Further Amendment Bill 2019.*

The Institute for the Study of Social Change recommended a disclosure regime comparable in threshold and timeframe as that introduced for parties and candidates. Various submissions noted that any third party disclosure regime should result in timely reporting and publishing requirements.

Some submissions raised the issue that the administrative requirements of a disclosure regime for third parties may be burdensome, particularly for smaller organisations, and this could adversely affect civic participation that is unrelated to electoral activity.

Potential mechanisms for minimising the administrative burden on smaller organisation could be;

- To only regulate campaigning that is for the dominant purpose of influencing voting at an election. This is a mechanism used in the Commonwealth Act[125] aimed at capturing relevant third party campaigning while allowing scope for non-partisan issues-based campaigning during elections.
- To limit the regulation of expenditure to the period commencing 12 months prior to the last possible date on which a State election could be held or the period of a state election (from the date of issuing of the writs to polling day) if called earlier. This would be in line with the recommended electoral period in Recommendation 3.
- To limit regulation to third party campaigners that spend over a set amount, for example $5,000, in electoral campaigning during the election period. This would exclude small organisations and those undertaking very small scale campaigning, recognising the lower risk they pose.

## Registration of Third Party Campaigners

Political parties and candidates contesting the election are known to voters during the election period, but third party campaigners may not be known publicly. Even with the proposed disclosure regime, requiring a report on their expenditure and donations to be submitted 15 weeks after polling day, their identities may not be made public until after the day of the election.

In New South Wales, third party campaigners are required to register prior to incurring expenditure during an election period. The Commonwealth also imposes a registration requirement on third parties, but this only applies to large campaigners (eg that spend $100,000 in a year).[126]

Few submissions made any specific comment on this issue, however the Tasmanian Labor Party and the Tasmanian Greens supported the registration of third party campaigners with the TEC.

Prior registration enables public awareness of who is participating in the electoral process and assists the electoral commission in its monitoring and compliance role.

Registration need not be a complex or arduous process, but rather potentially just an identification of the organisation, a key officer or representative and location. Registration would also provide the organisation with the benefit of establishing contact with the TEC. This could enable the TEC to assist the organisation with maintaining compliance with the requirements.

125 Electoral expenditure is expenditure incurred for the dominant purpose of creating or communicating electoral matter. Electoral matter is matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election. This includes influencing voters' preferences when they cast their votes. For example, a communication that suggests that voters should give their first preference to X, or their last preference to Y, is electoral matter. Even a suggestion to vote in a way that results in an informal vote is electoral matter. *"Not for Profits and the Commonwealth Electoral Act 1918"* Justice Connect 2019.

126 s 287F *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

**Recommendation 6:** That, subject to any further modelling and analysis to inform the final detail of the model, a disclosure regime be introduced for third party campaigners for electoral expenditure, donations and loans received during the election period. It should include the following elements:

a) That third party campaigners that spend over a defined threshold on electoral expenditure during the election period will be subject to regulation.

b) That regulation is limited to campaigning for the 'dominant purpose' of influencing voting at an election.

c) That a reporting period be set for disclosure of electoral expenditure, donations and loans received during that period, in line with the period identified in Recommendation 3.

d) That third party campaigners be required to register with the Tasmanian Electoral Commission prior to incurring expenditure over the defined threshold during an election period.

e) That, during an election period, a registered third party campaigner be required to disclose the receipt of a donation over the designated threshold to the TEC within a specified period (in line with Recommendation 3(e)). That third party campaigners be required to submit a return identifying all electoral expenditure, total political donations during the election period, and details of donors of donations exceeding the identified threshold. This return must be submitted within a set period of polling day.

f) That multiple donations received from a single donor during the electoral period be aggregated when determining whether the disclosure threshold has been exceeded.

g) That it be an offence for a third party campaigner to receive a political donation over the threshold for disclosure without recording the requisite identifying information.

## Donor Disclosure

In most Australian jurisdictions political donors are required to disclose details of donations to political parties, candidates and third party campaigners. This is in addition to the disclosure requirements on the recipients of the donations.

This dual disclosure regime provides the regulator with the capacity to cross check information provided regarding a gift and therefore minimises the risk of undisclosed or inaccurate political donations. It also provides interested members of the public with the capacity to search donating activity by donor as well as by recipient.

The Federal Act currently requires donors to disclose donations over the threshold and multiple donations to a single recipient are aggregated for the purpose of the threshold. Therefore a donor who donated three donations of $10,000 to a single party during a disclosure period would need to disclose however the recipient would not.

**Recommendation 7:** That political donors be required to disclose donations provided to political parties, candidates and third party campaigners, to mirror the disclosure requirements for the receiver of the donation.

# Caps on Third Party Expenditure and Donations

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 face legal challenge for its potential to infringe the implied constitutional freedom of political communication[127].

There are no Australian jurisdictions in which caps have been placed on third party expenditure without also capping the expenditure of political parties. Conversely, 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[128].

The Tasmanian Greens supported a cap on donations, and a cap on party expenditure, but did not consider expenditure caps for third parties. The Tasmanian Labor Party recommended $100,000 expenditure caps for third party campaigners (compared to a cap for political parties of $1 million and $30,000 for Legislative Council candidates). The Liberal Party of Australia (Tasmanian Division)'s submission stated that is it opposed to any caps on political donations and that if caps were introduced, the Party believes the caps should be lower on third parties than political parties and measures should be in place to ensure multiple third parties can't aggregate amounts to circumvent caps.

The Institute for the Study of Social Change initially submitted to the Review that evidence for caps could be gathered through a disclosure regime and any decision made at a later date. Subsequently in its *Insight Ten* report[129] the Institute recommended expenditure caps for candidates and parties, but did not consider caps for third parties. Community Legal Centres Tasmania also supported a cap on third party electoral expenditure.

Proposals for restrictions on donations need to be considered in the light of general funding arrangements for elections. Additional public funding for parties was provided as part of the recent Victorian reforms in recognition of the significant increase on restrictions on fundraising.

It is arguably 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.

**Recommendation 8:** That levels of third party political expenditure and donations to, as well as from, third parties be monitored following introduction of the proposed disclosure regime to inform consideration at a later stage of whether a cap on donations by or to third parties and/or electoral expenditure by third parties may be appropriate.

127 *Unions NSW v NSW [2019] HCA 1.*

128 It should be noted that on 1 January 2020, Northern Territory will commence regulating third party campaigners and will introduce a cap on expenditure for candidates and parties. They are not at this point, however introducing a cap on third parties.

129 Ecclestone, R and Jay, Z, 2019, *Insight Ten Campaign Finance Reform In Tasmania: Issues And Options*.

# Prohibited Donations

A significant number of submissions called for bans on donations from specific groups. Some submissions cited the experience of the 2018 election as reason to ban donations from gambling sources, however there was also support for banning donations from property development, liquor and tobacco related sources.

A ban on foreign donations was supported by a number of submissions, with some seeing recent Commonwealth moves to ban foreign donations as further reason to follow suit in Tasmania.

The Tasmanian Greens' submission supported a ban on corporate donors, or at a minimum donations from property developers, tobacco, liquor and gaming industries as well as foreign interests. The Tasmanian Labor Party's submission did not comment on bans in its submission however the Party did include in its election commitments a commitment to ban donations from tobacco companies and also foreign donations.

The submission from the Liberal Party of Australia (Tasmanian Division) indicated opposition to any bans as undemocratic and anti-free speech. The Institute for the Study of Social Change argued that evidence for bans could be gathered through a disclosure regime and any decision made at a later date.

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 lack of data on the extent of third party activity, it is difficult to make an informed judgement on whether any bans on donations may be required in Tasmania in future. Recent High Court judgments have indicated that it is possible to ban donations from certain entities or individuals however there are complex legal assessments required to ensure the constitutionality of such a ban.

There is also a challenge in determining how to best define the group intended to be banned. For example, in the public discourse about foreign donations, there are varying views as to who exactly can or should be banned from making a donation. A ban on foreign nationals or foreign companies would not prevent wholly foreign owned companies with an Australian Business Number (ABN) from donating.

**Recommendation 9:** That, noting the principle of freedom of speech, a prohibition on donations from specified industries and/or entities, including foreign donations be considered and that developments in this area in other Australian jurisdictions continue to be monitored, including any future High Court decisions.

# Section 4:
# Implementation and future review

## Resourcing and Implementation modelling

The preceding sections of this Final Report, particularly sections 2 and 3, recommend a number of significant legislative reforms, which, if implemented, will involve considerable change for the electoral system in Tasmania and its participants. This will include developing or adapting information systems, building compliance and enforcement capacity, drafting complex legislative provisions and developing educational and instructional resources.

Tasmania can benefit from the research and experience of other jurisdictions however, it is still necessary to ensure reforms are crafted so as to best suit the Tasmanian context. Each jurisdiction has developed their own legislative system with a unique combination of provisions.

In order to balance the benefit of increased transparency with the cost of implementation, modelling and further analysis is required on a number of variables in the recommendations in sections 2 and 3 to ensure they are adapted to the Tasmanian system and environment.

All recommended reforms under sections 2 and 3 will require the development or tailoring of information technology as well as administrative systems. The scoping of these systems would be useful before legislative reform is progressed to ensure the information technology is safe, efficient and effective.

The resourcing required in our jurisdiction in order to encourage compliance and effectively enforce a new regime has not yet been modelled. To date, the TEC has had limited capacity, both in terms of staff and legislative basis, to run complex investigations relating to electoral matters. The creation of a disclosure regime and registration of third party campaigners would require a significant transition for the TEC.

It is understood that most organisations, whether they are political parties, charities or community groups, already have regular reporting requirements of some sort. It is therefore recognised that the impost of electoral reforms could be mitigated by aligning with existing reporting requirements where possible.

**Recommendation 10:** That modelling and further analysis be undertaken in relation to resourcing and implementation, including to inform the best option regarding:

a) The specific timeframe/s for disclosure of donations (ie whether this should be the same timeframe year round or with a shorter timeframe during the election period, with reference to Recommendation 3).
b) The timeframe for submitting electoral expenditure reports to the TEC.
c) The amount of expenditure to trigger the classification of an organisation as a third party campaigner.
d) Enforcement and compliance resource requirements for the new disclosure regime for candidates, political parties, third party campaigners and donors.
e) Resource requirements to implement the proposed reforms, including information technology requirements and staffing for the TEC to oversee the new disclosure system and regulation of third party campaigners, including compliance and enforcement of the new requirements.
f) Whether a staged approach to implementing the reforms may be appropriate.

## Public Funding and Disclosure

Public funding of electoral expenditure was considered in the Interim Report as an initiative that could potentially accompany the introduction of a disclosure regime in Tasmania. Public funding for elections has been identified as part of a regime for more transparent electoral processes based on the rationale that this should reduce reliance on donors and their associated political influence.

Public funding is often associated with the introduction of regulatory mechanisms such as caps on donations that may reduce private funding of political parties or caps on electoral expenditure. Public funding can be a valuable part of a compliance regime for electoral regulation, because rather than imposing fines for breaches of electoral regulations, eligibility for public funding can be made dependent upon compliance.

Most Australian jurisdictions provide public funding for elections, with the exception of the NT and Tasmania. There are two types of public electoral funding currently available in 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'.[130]

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% in all jurisdictions apart from Queensland, where it is 6%, however the Queensland Government has tabled an amendment to reduce this threshold to 4%[131].

There are a number of options for a public funding model, ranging in expense from minimal assistance for transition to a disclosure regime, to providing funding for electoral expenses and administration.

The Commonwealth and the ACT calculate and pay entitlements based solely on the votes received by the candidate. The remaining jurisdictions with public funding cap public electoral funding to actual expenditure. NSW and Victoria allocate less per vote funding for upper house elections, while the remaining jurisdictions with upper houses, the Commonwealth, SA and WA all have the same funding for both houses.

Five jurisdictions provide administrative funding. The amounts provided vary widely from a maximum of just over $64,000 in SA, to around $3.4 million in NSW.

130 Muller, D, 2018, 'Election Funding and disclosure in Australian states and territories: a quick guide', p 5.

131 https://www.legislation.qld.gov.au/view/html/bill.first/bill-2019-052

The current bill before the Queensland Parliament includes doubling the rate of public funding alongside introducing caps on political donations and political expenditure.[132]

Table 6: Per vote public funding by jurisdiction

| | | Cwlth | NSW | Vic | SA | Qld (a) | WA | ACT | NT |
|---|---|---|---|---|---|---|---|---|---|
| **Per vote public funding** | **Lower House** | $2.77 | $4.66 | $6.12 | $3.23 | $3.14* | $1.93 | $8.43 | - |
| | **Upper House** | $2.77 | $3.50 | $3.06 | $3.23 | NA | $1.93 | NA | NA |
| **Administrative funding (max)** | | - | ~$3.4m | ~$1.8m | $64,568 | $3m | - | ~$533k | - |

(a) based on legislative requirements as at 1 December 2019

*$1.57 for independent candidates

Of the submissions that addressed the issue of public funding, the majority were supportive of its introduction. Many submissions saw public funding as going hand in hand with caps on expenditure as a means of preventing policy capture and enhancing the public trust of the democratic process.

The Tasmanian Greens support public funding along with caps on electoral expenditure and bans on corporate donations. The Tasmanian Labor Party noted that public funding for elections needs to be considered as part of the wider discussion regarding spending caps for parties and candidates.

The Liberal Party of Australia (Tasmanian Division)'s submission opposed using taxpayer funds to fund electoral expenditure. However, it also noted that a disclosure regime would lead to such a drop in the funding of political parties, that additional funding would be needed.

The submission by the Community Legal Centres of Tasmania specifically suggested that funding should be tied to expenditure and should be limited to candidates who receive more than 4% of first preference votes.

The submission by the Institute for the Study of Social Change indicated that a small amount of public funding would be justified for the purpose of assisting candidates, parties and third parties to comply with disclosure requirements, especially during the implementation phase. The Institute expressed concerns that without appropriate caps on electoral expenditure and/or donations, public funding can actually lead to increases in campaign spending. The submission also noted that the evidence that public funding reduces reliance on large private donations is limited.

The SA Electoral Commission has recently released a report[133] on the operation and administration of SA's funding, expenditure and disclosure legislation, which queries the effectiveness of public funding and caps on political expenditure as a method of promoting integrity and accountability in the electoral process. The report notes 'there is no evidence that donations have reduced since the inception of public funding, even if the capping of expenditure has reduced campaign costs.' [134]

The cost of publicly funding elections will vary according to the level of per vote funding chosen, the minimum threshold for a party or a candidate to receive funding and the level of any expenditure caps imposed.

132 https://www.legislation.qld.gov.au/view/html/bill.first/bill-2019-052.

133 Electoral Commission SA, Report into the Operation and Administration of South Australia's Funding, Expenditure and Disclosure Legislation, July 2019.

134 Electoral Commission SA, p 30.

Using the most recent election results from 2014 and 2018, and the approximate range of per vote funding across Australian jurisdictions, public funding of a House of Assembly election would cost between $260,000 $1 per vote) and $2.23 million ($8.50 per vote), based on candidates achieving a minimum threshold of 4% of first preference votes.

Legislative Council funding would cost between $290,000 ($1 per vote) and $990,000 ($8.50 per vote) per six year electoral cycle, based on a minimum threshold of 4% of first preference votes and a maximum funding cap of $17,000 per candidate (currently in place).

Tasmania could also make the decision to provide administrative funding either as an alternative to per vote funding or in addition. The TEC would need additional resources to administer this system.

Although some analysis has been done to look at the direct cost of a conventional public funding model in Tasmania, there has not been the opportunity yet to consider the comprehensive costs and benefits of various models for Tasmania.

**Recommendation 11:** That potential options for public funding and whether or not there should be public funding be considered as part of further analysis being undertaken prior to implementation of the proposed reforms, including the likely costs of the following identified options:

(a) Short term transitional funding to support candidates, parties and third party campaigners to implement the new disclosure regime and reporting requirements.

(b) Ongoing administrative funding to comply with the new requirements.

(c) Public funding for electoral expenditure generally, including models in other jurisdictions based on a percentage of the vote received by candidates and/or parties.

(d) In regard to (b) and (c) above, consideration should be given to the impacts of long-term public funding of elections on the fiscal strategy for Tasmania.

# 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.

**Consultation Issue 20:** In light of the High Court's decision in *Unions NSW & Ors v NSW*, if a cap on electoral expenditure by third party campaigners was to be introduced in Tasmania, what level of expenditure could be justified with reference to relevant example expenditure by third parties in recent State election campaigns? Should the reasoning in the High Court decision have wider application to caps on third party donations or other further matters?


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