Submission to the Department of Justice, Tasmanian Government:

Electoral Act Review

by Dr Kevin Bonham, submitted 19 July 2018

Summary:

This submission welcomes this overdue review and recommends as follows:

1. That section 191(b) of the Act be modified to allow for authorising information to be recorded in a social media user's profile or on a website linked to in their profile.

2. That section 196 (1) of the Act be repealed, subject to expansion of section 197 (or addition of an extra section) to include material that has the capacity to mislead concerning the source of the material (eg fake how-to-vote cards).

3. That section 198 (1) (b) (ii) be repealed but section 198 (1) (b) (i) be retained.

4. That Tasmania adopt close-to-real-time requirements for donations to parties, including serial donations, of $2000 or more per term.

5. That an expenditure register for non-party actors seeking to influence elections be established.

6. That Section 159 be reformed to eliminate a loophole in which non-party actors cannot incur expenditure to campaign for a single Legislative Council election but can campaign for other outcomes, such as that one of a group of people be elected or that a given person not be elected.

7. That formality requirements for voting in House of Assembly elections be modernised to save votes that contain unintentional omissions or duplications between the numbers 2 and 5.

Background

I have been involved in scrutineering, analysing and providing media coverage of various Tasmanian elections since 1988. My psephology website www.kevinbonham.blogspot.com.au analyses local, state and federal elections and politics and is well known to many in Tasmanian political circles. I also comment on elections and politics on Twitter: @kevinbonham . I am primarily a scientist by profession but an increasing proportion of my income comes from electoral and psephology related commissions and website donations; my doctorate is in science but my first degree included a political science major. This submission represents my own views only.

Section 191 (b) Social Media Authorisations

Section 191 (b) raises issues for use of "microblogging" style social-media websites such as Twitter. The name and address of the person authorising material must appear "at the end of the electoral matter".

This was a severe constraint when Twitter limited tweets to 140 characters as the authorisation, if included in each tweet, would take up most of the message. With the increase in the size of tweets to 280 characters, space is now less of a problem, but there is no guarantee Twitter will not reduce its tweet length, or that other microblogging sites having similar space issues will not become prominent. Proactive legislation should anticipate that this could be the case.

There is an additional problem with requiring every social media message to be authorised, and this is the immediacy of these messages. A person may be comfortable with having their name and address as authoriser of a comment known, but not with continually posting it prominently in a tweet where it can be easily seen by people who do not even live within Tasmania. This would be especially concerning if - as sometimes happens on social media - constantly tweeting one's address made it easier for unstable readers to make threats.

Proposal: *Allow internet users using social media websites to instead carry an authorisation statement on their profile page for that website. This could be done by adding a section 191 (3) outlining interpretation of 191 (1) (b) for social media users.*

Section 196 (1) - Prevention of use of name or likeness without permission

Section 196 (1) prohibits the use of photographs or likenesses of candidates or intending candidates without their permission, but the prohibition is limited to *"any advertisement, "how to vote" card, handbill, pamphlet, poster or notice*".

It is unclear why this restriction, which impacts severely on freedom of communication, is necessary. The briefing paper states that it is designed to control defamatory statements, however defamation law already controls those to the extent that they are not protected by implied freedoms of political communication. Whatever purpose is asserted for this provision, it is both so broad and so arbitrarily restricted that it is hard to see how it would be deemed to be "reasonably appropriate and adapted" as per the Lange test for implied freedom of communication. Freedom of speech aside it is possible that this provision is federally unconstitutional.

The restriction is also problematic because it arbitrarily imposes a restriction on advertisements, "how to vote" cards, handbills, pamphlets, posters and notices, but the definition of at least the first two of these, and also possibly the last, is unclear. This is especially so with the rise of online viral advertising that is not covered by a contract between advertiser and client.

However the simple repeal of Section 196 (1) creates a possible problem. At present Section 196 (1) effectively deters fake how-to-vote cards. A campaigner cannot, for instance, issue a blue how-to-vote card that looks like it was issued by the Liberal

Party but in fact assists other parties, because it is illegal to produce such a card without the consent of named candidates.

States that do not have a Section such as 196 (1) frequently have well-developed regulation of how-to-vote cards to prevent the handout of deceptive fake cards. However Tasmania also has a tradition of banning the handing out of material outside polling booths, which is cherished by many Tasmanian voters and which helps assist in discouraging regimented ticket voting and encouraging natural preference flows.

If Section 196 (1) is repealed, there will be nothing to clearly prevent fake how-to-vote cards and other forms of advertising that mislead voters concerning which party supports a statement, as a card does not necessarily mislead the elector "in or in relation to the recording of his or her vote" (ie in relation to the mechanics of it).

Proposal: *Repeal section 196 (1), but also insert a new section or subsection concerning a different form of misleading material to that included in S 197. The new section or subsection would make it an offence to release any form of advertising material that misleads the elector in relation to the authorship or source of the material.*

Section 198 1 (b) - Newspaper Coverage On The Day

S 198 (1)(b) prevents a newspaper from, on election day, publishing election advertisements ((i)) or publishing commentary about the election ((ii)).

S 198 (1)(b)(i) is simply consistent with other forms of advertising blackout; it is good that it is not possible for a party to (for instance) buy the entire front page of a newspaper on election day. I support keeping this section.

S 198 (1)(b)(ii) however restricts newspapers when other forms of mass media - including online media - are not similarly affected. The concern may have been that a newspaper report would dominate voter consideration of elections with too little time for an unfairly attacked candidate to reply. However in this age of diverse and instant media such a concern is groundless. There is no continuing justification for this section. It is simply a pointless and discriminatory restriction on debate.

Proposal: *Repeal section 198 (1)(b)(ii). Retain section 198 (1)(b)(i)*

Donation disclosures

I do not have a strong involvement in the donation disclosure debate but I believe that democracy is healthiest when potentially influencing donations of any significant size are disclosed in as close to real time as is practically possible.

I do not support cherrypicked lists of potential donor types that should be banned (cigarette companies, property developers, banks etc) as I believe it is better that such donations are disclosed and the voters can decide for themselves whether they wish to vote for a party that accepts donations from such a source.

I suggest an appropriate threshhold for donation disclosure would be any donation at any time (or any series of donations over a term of office) from the same source of $2000 or more. Also, I suggest that parties be required to disclose donations online in as close to real-time as possible (preferably within two weeks) and that they be required to disclose any series of donations ostensibly from different sources that they had reason to believe were in fact from the same source.

Regulation of non-party actor involvements

(I have chosen the term "non-party actor" as "third party" is confusing in this context.)

Concerning House of Assembly elections, I believe it would be appropriate to require all non-party actors (being forces other than registered state parties) that expend significant amounts of money on Tasmanian elections to disclose the amount spent. I have no view as to the threshhold for "significant" as yet.

Concerning Legislative Council elections, there is a problematic loophole in S 159 which prevents anyone other than the candidate or their agent from incurring expenditure "*with a view to promoting or procuring the election of the candidate or intending candidate as a Member of the Council."* The loophole, as demonstrated in the 2013 Nelson Legislative Council election, is that a non-party actor can incur expenditure while calling on voters to support one of a number of candidates, or to not support a particular candidate. If this section is to be retained, it should be modified to include any attempt to influence the outcome of the election. (I am not a fan of the Legislative Council spending restrictions, especially as they discriminate in favour of candidates who reuse signs from previous elections.)

Informal Voting

Since the theme of the review is "modernising" the Electoral Act I also believe the formality requirements for House of Assembly elections are relevant to the theme. In any case they should be improved anyway. A modern understanding of formality requirements should be that sometimes voters struggle with numeracy and make innocent errors and that we should include the intention of those voters - to the extent it can be included - instead of eliminating their votes entirely.

Informal votes at the 2018 election were 5.7% in Lyons, 5.6% in Braddon, 5.1% in Bass, 4.2% in Denison, 4.0% in Franklin. The TEC Report on Parliamentary Elections 2011-2014 found that close to half of the similar level of informal votes in 2014 were probably unintentional. Of these, a total of 2682 votes, around one-sixth of all informals, had repeated or omitted numbers between 2 and 5.

The ACT savings provisions for Hare-Clark allow any vote that has a unique number 1 to be counted to the point that it exhausts. (However, votes that would exhaust at a given stage are disproportionally targeted for exhaustion on surplus transfers.) 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.