Submission to the Department of Justice, Tasmanian Government:

Electoral Act Review Interim Report

by Dr Kevin Bonham, submitted 15 April 2019

In addition to my previous submission, this submission simply gives responses to some of the Consultation Issues raised in the Interim Report. Views given in my first submission have not changed except where indicated.

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 (including for electoral 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.

Responses to Consultation Issues questions

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.*

Not only should consideration be given to amending the Act in this way, but no consideration should be given to not amending it in this way, ie, it is a no-brainer that the Act should be amended. See comments in my previous submission.

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.*

This should also be considered a no-brainer for reform, the question being only how to deal with the potential gap in the regulation of misleading how to vote material. I do believe some regulation of how to vote cards is required as I am concerned that (i) the 100 metre exclusion zone would not prohibit the handing out of misleading cards outside that zone (handing out of cards occurs outside the zone in the ACT) (ii) the existing restriction on misleading an elector

in relation to their vote is too narrow or at best ambiguous to capture all forms of misleading behaviour. I think that simply amending Section 196 (1) so that it targets only how to vote cards is an adequate solution and should perhaps be implemented on the understanding that it will be reviewed in the following electoral cycle. An alternative solution mentioned in my first submission was to repeal 196(1) entirely but to add a new offence that prohibits releasing any form of advertising material that misleads the elector in relation to the authorship or source of the material. The advantage of such a solution would be that it would also ban material that gave a false impression of being endorsed by electoral authorities. Such material was problematic in the recent NSW election when parties issued "Important – Just Vote 1" signs that looked like they could be official material.

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*

I am still not comfortable with repealing this ban entirely. Tasmania is unusual in that a single newspaper holds an effective monopoly on local news in each of three portions of the state. A buyup of all space in a paper by a party on polling day might have a significant impact. Perhaps advertising could be allowed but subject to a limit as to space allowance per candidate or party. I see no reason to apply the provision to online or social media content as these forms of contact are very diversified with no market monopoly risks.

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.*

I have no specific proposal but agree with the quoted portion of the TEC's submission on this matter.

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.*

I support the proposed amendment and am familiar with the situation referred to. A situation involving destruction or loss of ballot papers has the potential to give rise to protracted legal challenges and recounts.

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.*

I again support the TEC's submission. Opportunities for the TEC to save money without compromising its function should be sought so as to better resource it for its core purposes.

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.*

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). If a new wording to reflect Section 102 is being considered it would be desirable to have further consultation on a specific proposed wording.

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

Yes as per my initial submission comments. Furthermore, there is interplay between this issue and the often proposed restoration of the House of Assembly to 35 members, as that would currently return the requirement to vote 1-5 without error to a requirement to vote 1-7 without error. In my submission to the House of Assembly restoration bill enquiry I calculated that this would be likely to increase informal voting rates, adding a further 0.5%-1%. So fixing the overly rigid interpretation of formality in the current rules would help in future-proofing the Act against future changes in the number of MPs.

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*

I agree that all these matters should be considered. Concerning timeframes for reporting I support making reporting as close to real-time as is practical. Concerning thresholds I support ensuring that thresholds cannot be rorted around by, for instance, making multiple donations each at just below the threshold.

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.*

I agree with this proposal. I am unconvinced Tasmanians require caps on electoral expenditure as they have frequently shown that they cannot be bought by big-spending campaigns if they are not receptive to the content. (An example was the 2016 federal Liberal campaign in the state.)

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.*

I would support parallel regulation at least in principle, as otherwise third parties will continue to conduct unaccountable proxy campaigns on behalf of or against specific political parties without the public knowing where the funding for this activity is coming from.

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

I agree with this proposal in general (see reasons in previous submission), although I believe banning foreign donations should be further considered.

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?*

I believe the High Court decision shows a need to tread warily in attempting to limit third party expenditure at all, and a more urgent response is to ensure adequate nearly-real-time disclosure of third-party donations to parties and expenditure on campaigns so that voters can make their own decisions using that information. I have no view on the level of limits that might be considered safe given the Unions NSW decision as that decision, on my understanding, did not set any lower bound in the case of NSW.