17 July 1996

Research Director
Legal, Constitutional and Administrative
Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

I enclose my submission to the Committee's inquiry on the issue of truth in political advertising.

Yours faithfully

Colin A. Hughes
Emeritus Professor
encl

SUBMISSION TO

THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

ON

TRUTH IN POLITICAL ADVERTISING

Colin A Hughes

17 July 1996

Ensuring truth in political advertising quickly reduces to the question whether untruth in political advertising should be prohibited, a matter dealt with authoritatively in the Second Report of the Commonwealth Parliament's Joint Select Committee on Electoral Reform (August 1984). As your Issues Paper No. 1 records, in its First Report (chap. 11) the Joint Select Committee had flagged the problem for future consideration whilst making some limited recommendations, but the prospect of an early election led to overly rapid legislative action to (i) sweep away the limited (on the reading given it in Evans v Crichton-Browne (1981) 33 A.L.R. 609) language of the existing section of the Commonwealth Electoral Act (s.161) and (ii) replace it with a prohibition of "any electoral advertisement containing a statement (a) that is untrue; and (b) that is, or is likely to be, misleading and deceptive" (renumbered s.329).

The Commonwealth Parliament, having legislated in haste then repented in equal haste - apart from the Australian Democrats who had brought the *Crichton-Browne* case and continued to support the original action, and recommended that:

> In its present broad scope the section is unworkable and any amendments to it would either be ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and the law of defamation. (para.2.81)

I agree wholeheartedly with that conclusion and recommend as totally persuasive the analysis which preceded it to any body required to reconsider this matter. The fact that the Commonwealth Parliament, despite frequent urging to do so over the subsequent decade, has not been prepared to restore the deleted provisions or introduce something similar ought to carry considerable weight.

Further, I disagree with the dissenting report by the then Senator Macklin when it says:

> Information is the lifeblood of a democracy and a citizen must rely to a large extent on the media for such information. A large amount of this information available during election periods comes from political parties and candidates by way of political advertisements. (p.45)

The first sentence is incontrovertible. However, it is doubtful whether the share of electors' information derived from partisan advertisements supplied via the media or directly could be called "large". The media purport to report what candidates and others say, directly or indirectly; they comment on what has happened and been said; and they reproduce messages from parties, candidates and others who have paid for that space or time. I think the last category is a poor third in influencing voters' decisions, and its effects cannot be isolated from those of the other two, predominant, sources. Thus regulation of political advertising will fail to achieve the objective of ensuring electors receive only "truthful"

information and are not misled though it may marginally improve the situation.

Whilst appreciating the point made in your Issues Paper No. 1 that the Committee will not be inquiring into particular past conduct and did not wish to receive complaints about past conduct, the soundness of the Joint Select Committee's Second Report conclusion can be usefully tested by reference to a few recent real world instances.

A successful candidate for Manly Council in New South Wales, the satirist Godfrey Bigot, claimed to be "a right-wing opportunist totally devoid of any principles". Had he put those words in an advertisement, they would probably be held a matter of opinion, not fact, and so not caught by any likely legislation. He continued:

> I'm also chairman of the Woodchipping Association, spokesman for the Tobacco Producers' Lobby, patron of the Koala Shooters' adviser to Alexander Downer, foundation member of the Moral Majority and a prominent homophobe. (*Sydney Morning Herald*, 25 June 1996)

Another councillor subsequently queried the validity of his election on the ground that some supporters of the Liberal Party might have voted for him believing that he was a member of Minister Downer's staff. Had that passage appeared in an advertisement, a prosecution might have failed because the text was unlikely to mislead the average elector, but depending on who might bring a prosecution Mr Bigot might have been charged and had to stand trial. What if he had claimed to possess a university degree which had not been awarded to him, or a class of university degree which was superior to the one he actually held? Or claimed to be a "family man" when he had been divorced with, say, cruelty having been proven against him? Yet again, might a statement avoid being found false by being expressed as a rhetorical question - a point which recalls the dispute about prohibiting push-polling?

A comparable incident during the 1996 federal election concerned a supposed "postcard", distributed as a dodger, which purported to have been sent from New York by the then Minister for Trade to an opponent in the electoral division the Minister was contesting. It said that he was travelling overseas "for a month or so - depends on how long the taxpayers' dollars last." One would like to think that most electors believe it is an appropriate function of the Minister for Trade to travel overseas, but if they believed the cavalier reference to their taxes to have been genuine, their voting intention might well have been influenced.

Should the refutation of such an allegation be left to the candidate who was attacked and their supporters, and possibly to unfavourable comment about those circulating it in and by the media, or should it be possible to secure some nominal punishment, which almost certainly will be well after the election? A provision such as the withdrawn s.161 of the Commonwealth Electoral Act is likely to be arbitrary in what

it selects to punish and could be silly in its application and enforcement.

A different potential difficulty with prohibition and punishment is suggested by a recent defamation case brought in New Zealand against Mr Winston Peters, MP. It was alleged a defamatory statement in general terms made outside Parliament was combined with an identification of the plaintiff as the subject of that statement but made in parliamentary proceedings. Mr Peters lost and is, I understand, to appeal. Unless truth in advertising legislation specifically overrides the Bill of Rights, a step not lightly taken, may not matter that would otherwise be prohibited as untrue and likely to mislead be protected by having been spoken in parliamentary proceedings first? That could only bring Parliament into disrepute, and would advantage incumbents or their allies over those candidates who lacked access to the protected forum.

Queensland itself provides an example relevant to a third type of difficulty which could be bracketed with the Committee's second issue - matter that is "too vague". A notorious political advertisement was the recycled "Willy Horton ad" of the 1992 campaign which contained two statements:

> When the Queensland Government thinks my daughter's life is only worth 15 months, something has to change ... It's Labor policy that lets convicted murderers, muggers and burglars out of jail before they finish their sentence. (*Sunday Mail*, 13 September 1992)

The first sentence might be held to be opinion rather than fact for this purpose, despite what has been said about the state of a man's mind being one of fact, and replacement of "When" with "If" would reduce the risk of prosecution still further. But whether something is someone's policy appears indisputably to be a matter of fact; administrative courts deal with such questions regularly. Such an advertisement if brought before a court could require it to consider, inter alia, whether a Government that was applying legislation passed under a previous Government had adopted that policy and made it its own, whether its application in a specific case was within the parameters contemplated by the previous Government or constituted an independent development which departed from them, whether prisoners were now serving smaller proportions of their sentences than under previous Governments, and so on.

During the development of the New Administrative Law judges have frequently stated that they are not competent to consider political and administrative questions, neither by professional training and experience nor by means of access to the sort of data on which decisions of that sort should be based. They are no better placed to do it under the guise of the criminal law or when asked to grant injunctions on statutory grounds than when other traditional or new remedies at administrative law are being sought. Moreover, if an injunction were being sought to prevent repetition during the current election campaign, achieving a hearing that addressed

the substantial merits of the case would be extremely difficult in the time-scale to which a campaign operates. Evidence of a satisfactory quality would take time to assemble; often the executive branch itself does not have sufficient relevant data for good policy evaluation.

Giving a monopoly of seeking injunctive relief to the Electoral Commission(er) would embroil in speculative partisan questions those who need to be, and be seen to be, as neutral as possible, and distract their attention at a time when their efforts should be concentrated on preparing for the poll. The Attorney-General is too much of a political partisan to be a suitable person to have the monopoly, or indeed to play any role in such matters. But to allow any candidate or elector to seek injunctive relief might, cost being the only disincentive, might inflict on the courts a considerable volume of work.

The list of pitfalls in the path of any legislation to prohibit untruth could be extended, but it may be more helpful to the Committee if I now respond directly to the issues as numbered in your Issues Paper No.1.

1. It is possible to legislate against false or misleading political advertising, but such legislation would often be ineffective because it could be circumvented in a number of ways. More importantly, it would not sufficiently achieve the major purpose of such legislation which is to improve the quality of the information used by electors to make voting decisions. Political information which was not contained in advertisements would not be so regulated.

2. "Too vague and controversial" might not be the right words, but in my opinion the subject matter is not readily amenable to criminal law processes. Obscenity, blasphemy and sedition also involve material and standards which could often be called "vague and controversial" which is why prosecutions for those crimes are rare and hardly ever satisfactory. On the other hand, the law of defamation, although much criticised, is much better adapted to this sort of dispute. Pascal's observation that what is truth on one side of the Pyrenees may not be truth on the other side extends from theology to politics.

3. The narrow reading of the *Crichton-Browne case* should be retained. It should be an offence to say by any means, including political advertising, that a candidate is dead or has been made bankrupt or is not an Australian citizen, because such a statement carries the clear implication that a vote for the candidate cannot be counted and will be wasted. Similarly, that an elector is not on the roll and need not attend the poll, or is ineligible to vote for any reason, or any other statement that goes to the mechanics of casting a vote. But

statements which go to making up the elector's mind as to which candidate or party should be supported should not be regulated by legislation.

4. Once more a real world example may assist. The Australian Competition and Consumer Commission is currently proceeding against Telstra over its response to Optus' promise of a 20 cents local phone call:

> ... [A]ccording to the commission, Telstra misrepresented Call Saver 15 by saying that:
>
> - Customers who made more than two local calls a day received a discount, which meant they paid 21 cents for all local calls.
> - Customers who made more than two local calls a day received a 15 per cent discount on all further local calls.
> - Discounts were available on all local calls if a customer registered for Call Saver 15.
> - Call Saver was available to all customers without any limitations.
>
> The commission says the minimum charge per call under Call Saver is 21.81 cents, not 21 cents.
> Further, it says, the first 60 calls attract no discount, and so the average call charge is somewhere between 21.81 and 25 cents.
> And local calls above $1000 a month do not qualify for the discount. (*Age*, 12 July 1996)

Campaign arguments, at least in recent election campaigns. are rarely so specific in detail and capable of testing with hard evidence. Compare the 1996 federal election argument as to whether there was "an $8 billion black hole" in the Government's finances. It may be significant that what the then Opposition proposed was a statutory obligation to make more official statistics available to support informed debate, not - though they have flirted with the possibility on other occasions - to prohibit misrepresenting economic data.

5. If the High Court has been reluctant in *Theophanous* to allow the law of defamation to restrict political debate, it might be expected to be even more determined to prevent the invocation of the criminal law. *Langer* can, I think, be distinguished on the ground that the words related to the essentially mechanical matter of marking a valid ballot-paper, a field the High Court has left to the Parliament. Debate about policy, on the other hand, looks like exactly the sort of subject matter the High Court would believe should be protected from interference. Establishing an absolute standard of truth against which statements could be adjudged so that those making statements which fell short of the standard could be punished would be contrary to the nature of political debate.

6. The present provisions of the Commonwealth Electoral Act are adequate, and uniformity of legislation in this field

is desirable. Variations in the law of defamation among various jurisdictions are notoriously unsatisfactory. Two election campaigns, one federal and one state or two at the state level, might overlap in time with resultant uncertainty and confusion as to whether an advertisement was legal or not.

7. Remedies ought to include measures which would (i) prevent repetition of the publication during the current campaign, (ii) restore the status quo ante by correcting falsehood introduced into the minds of electors by the publication, (iii) discourage new offences by the same or other persons, and (iv) prevent a wrong-doer from benefiting from their wrongful conduct.

The last is the most difficult to provide because it raises the question whether the outcome of the election in a particular electoral district (or conceivably even more widely) tainted by untruthful advertising ought to be overturned as it would be for bribery or other electoral offences. Imposition of a fine, or even a term of imprisonment (though the latter is unlikely to be imposed), unless it catches the candidate and prevents their election may be a small price for winning, paid perhaps by a man of straw who provides the formal authorisation for the offending advertisement. Unless the tainted election itself can be challenged, other sanctions are of limited value - but to allow such a challenge would go well beyond what is currently contemplated.

The media will be very reluctant to accept an obligation to publish a retraction gratis because they would seen it as the thin edge of a wedge into their control of their output. Compelling a candidate or partisan advertiser to pay for publication of the retraction may take time - or prove almost impossible. Accordingly, if this course - which is not recommended - were to be adopted, effecting publication should be made a responsibility of the Electoral Commission which would be given the right to recover the cost as a debt from the original advertiser.

Reference has already been made in this Submission to some of the difficulties with granting an injunction, either interlocutory or permanent, in matters of truth. There is a further problem: whilst the major parties and their candidates are ordinarily likely to obey an injunction, there may be other political activists, possibly candidates but not necessarily so, who would not be averse to the second round of publicity and martyrdom by imprisonment that failure to comply with an injunction can result in. The domestic and international publicity secured by Mr Albert Langer at the time of the 1996 federal election is a prize example. The remedy of an injunction could well give more extensive publicity to an original falsehood.

There is, on the other hand, at least one non-statutory remedy which might be encouraged by the Committee. The media could, as sometimes happens in the United States, appoint "campaign ombudsmen" who monitor what is being said in all its various forms including advertisements but especially on the TV channel, radio station or newspaper with which that "ombudsman" is concerned, and provide an objective counterpoint as to the accuracy or credibility of statements. The so-called "truth squads", on the other hand, have evolved into a form of knocking copy, and as the 1996 federal election campaign showed can be fairly effectively avoided by keeping secret until the last minute one's own public appearances.

8. I am uncertain what might be the effect of the South Australian defence of having taken no part in determining the contents of the advertisement on the very long-standing requirement that all political advertising be authorised so that in the last resort there is someone to accept responsibility. That requirement is well known, and in my experience it is rarely breached and then either by new players in trifling instances or, I think more commonly, by disreputable elements in the political process who produce documents which are often libellous and sometimes constitute criminal libel and distribute them furtively. I would be very reluctant to specify any defence which went beyond the existing common law defence referred to in your Issues Paper No.1 and, of course, the Crown's obligation to prove its case.

9. Because of the difficulty in correcting false material once it has been introduced into campaign debate, media liability for its publication is a highly desirable first line of prevention. If media outlets may be liable, they will watch what they are putting out, and as they are being paid to do so it is not unfair that they should take precautions and bear the consequent inconvenience and cost. It might be argued that full and free debate may be limited by media caution, but in the varied activities of an election campaign opportunities for a candidate or an interest to put out matter rejected by one medium or outlet will be available with other media or by direct distribution.

However I would not extend that liability to printers, as distinct from publishers, because they are generally less well placed to make informed decisions on possible breaches of the law and they are nowadays less regulated by electoral law than they once were. If the Committee were to recommend legislation and follow this recommendation, it might usefully flag a review of its operation after the first election at which it applied, and in particular a review of the position of other third parties who might be involved in preparation and dissemination of political material e.g. advertising agencies, mailing houses.

10. If there were legislation for truth in political advertising, and my recommendation is that there should not be, then only the courts are appropriate for its enforcement. The Electoral Commission, or any sort of ad hoc tribunal associated with the Commission, ought not to be embroiled in determining whether there has been a breach. However who decides whether the matter should be brought before the appropriate court is another matter. Candidates and registered parties should be able to lay a complaint with the police in the first instance, and if dissatisfied by failure to prosecute by the Crown then be able to bring the equivalent of a private prosecution. However opening the opportunity to initiate a prosecution to electors and interest groups would risk turning into a multi-ring debating circus a process which is essentially about choosing members for the Legislative Assembly and thereby a Government for the State.

11. Having previously doubted the need for control of how-to-vote cards, I now think that on balance it would be advisable. The change of opinion is attributable to the number and seriousness of abuses which are known to have taken place. Prior registration of cards by candidates who have nominated or by registered political parties (but not other individuals or groups) with the Electoral Commission on the Monday following close of nominations should be mandatory; refusal of permission should be appealable by the applicant to the District Court. Prohibition of the distribution of an unauthorised card or comparable material should not be confined to the vicinity of polling places or mobile or comparable polling activities but should be general throughout the State for the entire week ending with polling day.

12. See #11.