ELECTORAL COMMISSION
QUEENSLAND

IN REPLY PLEASE QUOTE	DJO: KD
CONTACT OFFICER	Mr D J O'Shea
TELEPHONE	(07) 3227 7249
FACSIMILE	(07) 3229 7391

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Mrs J Gamin MLA
Chairman
Legal, Constitutional and
Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Mrs Gamin

Thank you for sending me a copy of your Committee's Issues Paper regarding Truth in Political Advertising and for your invitation to make a submission in relation to matters raised in the Paper.

I am pleased to enclose the Commission's submission in relation to the Issues Paper.

Yours sincerely

D J O'Shea
Electoral Commissioner

QUEENSLAND

GPO BOX 1393 BRISBANE QUEENSLAND 4001 AUSTRALIA
LEVEL 6 FORESTRY HOUSE 160 MARY STREET BRISBANE

SUBMISSION BY THE ELECTORAL COMMISSION OF QUEENSLAND

TO THE

LEGAL CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

JULY 1996

INTRODUCTION:

This submission has been prepared in response to an invitation from the Chairman, Legal, Constitutional and Administrative Review Committee to address issues raised in Issues Paper No.1 of May 1996 pertaining to truth in political advertising.

The views of the Electoral Commission Queensland (ECQ) in relation to each of the issues listed in your paper are detailed concisely below followed by the background information upon which the Commission formed its opinions.

1. **Is it possible to legislate against false or misleading political advertising?**

ECQ is of the view that defining truth and legislating to regulate untruthful political advertising during election periods is impractical and unworkable.

2. **Does political advertising deal with concepts too vague and controversial to be determinable?**

ECQ believes that political advertising does deal with concepts which are too vague and controversial to be determinable particularly when the statements are opinions or predictions.

3. **Should there be legislation restricting false or misleading political advertising?**

As mentioned in response to Issue 1, ECQ is of the view that such legislation would be largely unworkable.

4. **What distinction, if any, is there between advertising which deals with political activities and advertising which deals with commercial activities?**

There are a considerable number of Acts of Parliament which seek to provide protection to consumers from false or misleading advertising promoting consumer products or investments. With such legislation, the courts are required to determine truth of facts alleged and can redress injustices by awarding damages.

The very nature of political advertising would, for most part, present grave difficulties for courts in determining the truth or otherwise of an advertisement. Furthermore, it is doubtful whether damages are an appropriate remedy for untruthful political advertising as an election would be decided some considerable time before the Courts consider the matters.

Rather, it appears that the better course of action for a candidate or party who is offended by the political advertising of opponents is to counter with appropriate advertising and allow the electors to decide what they wish to believe.

6. **What should be the form of any truth in political advertising legislation?**

If legislation is to be introduced in relation to truth in political advertising, an enactment similar to Section 113 of the South Australian Electoral Act 1985 is recommended. The S.A Legislation limits the offence to statements of fact which are inaccurate and misleading to a material extent and does not prohibit untruths in political advertising which would require subjective assessments of concepts, predictions or opinions.

7. **What remedies should be available or penalties imposed by the legislation? (Consideration may be given to injunctions, declaratory orders, withdrawal of advertisements, retractions, corrections, fines or damages)**

The only worthwhile remedy for persons/parties disadvantaged by untruthful political advertising is one that will address the injustice prior to polling day.

In practice such a remedy may be difficult to invoke or may be used unscrupulously to disrupt campaigns.

ECQ is of the view judgment of untruthful political advertising should remain with the electors and in cases of political defamation with the courts. Political journalists pay careful attention to campaign advertising during election periods and provide adequate information to enable electors to make up their minds as to the truth or otherwise of political statements.

8. **What defences should be provided for within the legislation?**

Particular legislative defences appear unnecessary. However the composition of legislation may require unique legal protection.

9. **What should be the position of third-party publishers?**

It is difficult to imagine how third party publishers could satisfy themselves as to the truthfulness of all political advertisements during the short election period. Maybe the person responsible for the placement of advertisements should provide the publisher with a certificate to the effect that the advertisement is factually correct. In other words, the onus of responsibility should be on the person authorising the advertisement.

10. **Who should determine whether there has been a breach of the legislation and what the appropriate remedy should be?**

If legislation is introduced to regulate political advertising, consideration needs to be given as to the appropriate body to investigate complaints and prosecute offences.

ECQ does not have investigative staff and even if it did have the resources, the number of complaints would likely interfere with the efficient conduct of the election.

Furthermore, any action taken by ECQ during an election period would impair its reputation for political neutrality and may influence electors in a manner disproportionate to the matter being investigated. Therefore ECQ would be most reluctant to seek injunctions or other direct action until after polling day in relation to any complaints it may receive.

11. **Are there sufficient controls upon the use of how-to-vote cards?**
12. **What additional controls, if any, are required in relation to how-to-vote cards?**

ECQ acknowledges that additional control could be introduced by having how-to-vote cards subject to Commission approval prior to issue.

This course of action would obviously delay the availability of the cards and persons who vote early would not have the benefit of candidates recommended preference allocations.

Furthermore, any legislation which requires the Commission's approval of how-to-vote cards should prescribe precisely the process that the Commission should follow.

For example, in fairness to all candidates, should the Commission release all approvals at the same time, thus delaying all approvals until after the last stragglers application is received and processed, or, should the Commission deal with applications on a "first in first out" basis thereby disadvantaging candidates in remote areas of the State who may need their how-to-vote card early because of the large number of postal voters in such areas?

ECQ considers that how-to-vote cards are a valuable source of information to electors.

BACKGROUND INFORMATION

The Second Report of the Joint Select Committee on Electoral Reform (August 1984) of the Commonwealth Parliament concluded inter alia;-

> 2.78 While everyone agrees that fair advertising is a desirable objective, the Committee concludes that it is not possible to achieve "fairness" by legislation.
>
> 2.79 Political advertising differs from other forms of advertising in that is promotes intangibles, ideas, policies and images. Moreover political advertising during an election period may well involve vigorous controversies over the policies of opposing parties".

The Australian Electoral Commission has, after considerable research, opposed legislating for truth in political advertising and in its "Supplementary Submission to the Joint Standing Committee on Electoral Matters" (October 1993) made the following recommendation:-

"4.1 Whilst the Australian Electoral Commission does not of course condone the publication of political material that is untrue or misleading, it opposes legislating for "truth in political advertising" because of the imponderables in a volatile political environment pre-election, the difficulty of assessing "policy" statements and the risks of manipulation/mischief/misuse, and particularly if the Commission were to have a role which could appear to compromise its neutrality and/or impose a burden of work such as to interfere with its electoral task.

4.2 The Australian Electoral Commission recommends that the Joint Standing Committee on Electoral Matters reject any suggestion that Section 329 of the Commonwealth Electoral Act 1918 be amended to make it an offence to print, publish, distribute or broadcast during an election period any matter that is "untrue".

The ECQ supports this recommendation as did the majority of the Joint Standing Committee on Electoral Matters in November 1994.

However, a dissenting report by four members of the Joint Standing Committee took the opposite view and recommended that the former subsection 329(2) of the Electoral Act, which prohibited misleading political advertising, be reinstated.

The relevant part of the dissenting report reads as follows:-

"Truth in Advertising

We disagree with the majority's conclusion (page 109) that no form of truth-in-advertising legislation is necessary. At the 1993 election it was clearly demonstrated that such legislation is needed to eliminate deliberate misrepresentation of a party's stated policies on particular issues. We note that if some of the misrepresentations which occur during election campaigns were to happen in the private sector, the perpetrators would find themselves liable to prosecution under the Trade Practices Act.

Truth-in-advertising legislation has worked very effectively in South Australia. The existence of such legislation at a national level would provide a means of protecting electors against misleading advertising".

The South Australian legislation referred to above is more limited in its approach to regulating political advertising than the repealed subsection of the Commonwealth Electoral Act which prohibits untruths, in that the South Australian Electoral Act (S113) prohibits inaccurate statements of fact.

The South Australian provision has been judicially considered in the Becker V Cameron cases. On 30 November 1994, the Magistrates Court found the SA State Secretary of the Australian Labor Party guilty of the offence of misleading advertising under Section 113 of the SA Electoral Act.

The decision was appealed to the Full Bench of the South Australian Supreme Court on the following grounds:

- whether the electoral advertisement contained a statement of fact which was inaccurate and misleading to a material extent;

- whether there was available defence of honest and reasonable mistake of fact and;

- whether Section 113 contravened the implied protection of freedom of speech in the Constitution.

On 5 July 1995, the Full Bench dismissed the appeal.

In brief, the facts of the case were:

A Liberal Party spokesperson during a radio interview in effect said that a Liberal Government would continue with a small program of school closures but would not look at schools with three hundred pupils.

The advertisement which offended took the following form:

> "Could this be South Australia? If the Brown Liberals win the election South Australia will change in ways you and your kids never imagined.
>
> The fact is the Brown Liberals have stated that any school with less than three hundred students will be subject to closure. We have three hundred and sixty-three schools with less than three hundred students. That's a big change.
>
> Don't let it happen. Don't let Mr Brown bring South Australia down."

The ruling of the Full Bench of the South Australia Supreme Court offers some encouragement for the view that legislation can effectively deal with incorrect statements of fact in political advertising. However such legislation would appear to have limited applications to the broad range of political statements made during an election period which is evidenced by the fact that there has only been one prosecution under this section since it was introduced in 1985.

Also, it should be noted that whilst the South Australian Electoral Commission receives complaints of breaches of the Electoral Act during election campaigns, it is the practice in that State not to take action in relation to the alleged offence until after polling day. Thus political advertising, true or untrue, may continue during an election campaign uninterrupted except for the threat of later prosecution.

Having regard to freedom of political communication, there must be some doubt whether the High Court of Australia would come to the same conclusion as the Full Court of the Supreme Court of South Australia. The High Court has struck down legislation which attempted to limit freedom of speech in the political arena. A classic example is the Commonwealth Political Broadcasts and Political Disclosures Act 1991 which attempted to place certain bans on political advertising but was declared invalid.

In 1994, the High Court further defined and extended the constitutional doctrine of the implied freedom of political communication in the Theophanous case.

In the Theophanous case, a majority held that there is implied in the Commonwealth Constitution a freedom to publish material:

(a) discussing government and political matters;

(b) . . .

(c) . . .

The majority also held that, in the light of the freedom implied in the Commonwealth Constitution, the publication will not be actionable under the law relating to defamation if the defendant establishes that:-

(a) it was unaware of the falsity of the material published;

(b) it did not publish the material recklessly, that is, not caring whether the material was true or false;

(c) the publication was reasonable in the circumstances.

If legislation must be introduced to require truth in political advertising, the ECQ recommends the misleading advertising provision in the South Australian Electoral Act which bans inaccurate statements of fact.

Consideration also need to be given to which body should receive complaints, undertake investigations and prosecutions.

Even if ECQ had the resources, it would be most reluctant to act during an election period because of the inevitability of accusations of political partisanship in decisions made. ECQ could easily become inadvertently involved in campaign tactics rather than concentrating its resources on managing the election.

Having regard to the multiplicity of political advertisements during election periods, injunctions or declaratory orders appear to be the only means of having untruthful statements corrected prior to polling day.

Prosecution of offences necessarily takes time and provides little comfort to a candidate who has been disadvantaged by an offending party. That is not to say that offences should not be prosecuted in due course following an election.

Once an offence of untruthful political advertising is created by legislation, the Electoral Act 1992 allows any candidate or ECQ to seek an injunction (Section 177). An injunction could prove an effective tactic for a candidate or political party to obtain publicity and to disrupt the advertising campaign of another party. With the existing media "black out" law prohibiting political advertising after Wednesday evening preceding polling day, a party's campaign could be seriously damaged by an injunction granted against it in the final week of an election period.

Accordingly, as the injunctive remedy has the potential to cause a grave injustice to political parties or candidates and disrupt the normal cut and thrust of electoral campaigns, ECQ is most reluctant to enter the political fray and seek injunctions during an election period.

Similarly, it would be equally difficult and unrealistic for third-party publishers to act as judge and jury in determining what is true and what is untrue before political advertisements are released to the public. Considerable delays could adversely affect parties if all advertisements were subject to a vetting process or legal consideration prior to publication.

The significance of how to vote cards has been reduced with the introduction of party affiliations of candidates on ballot papers. However, how to vote cards fulfil an important function by informing electors how a candidate or party recommends voters allocate their preferences.

How to vote cards provide the last source of information to electors in making a choice and the ECQ believes the importance of this source of information to electors should not be underestimated.

ECQ also believes that the replacement of how to vote cards with a general poster in voting compartments would not provide a satisfactory alternative particularly in cases where there are a large number of candidates (eg. 12 candidates contested the 1996 Mundingburra Election).

The argument against having general posters in voting compartments was succinctly expressed by the Electoral and Administrative Review Commission:-

> "If there were to be a statutory requirement that a general poster or posters in every voting compartment were displayed, consideration would have to be given to the effect on the validity of the election of a failure to discharge the responsibility. If the poster was not displayed, or was placed in a position where it was difficult to read, would this be a ground for challenging and overturning the election? Where a large number of candidates are standing, and some recommend alternative distributions of preferences, the size of the poster required could be a problem, as could the additional time required by each elector to find their preferred option. With separate cards it is relatively simple to take only the desired one, or to take all of them but use the preferred one in the compartment."

In recent years a common complaint regarding misleading how-to-vote cards arises where a major political party recommends a first preference for another party or an independent and the second preference vote for their own party. Currently, as long as these how-to-vote cards conform with section 161 of the Electoral Act 1992 (ie contains name and address of person who authorised the card and the name and place of business of the printer) no offence is committed.

If how to vote cards required the approval of the ECQ prior to issue, parties and candidates would experience delays whilst consideration is given to each card submitted.

Depending on the date specified in the election writ, close of nominations for candidates occurs between 8 to 18 days from the issue of the Writ.

Returning Officers issue ballot papers to postal voters as soon as candidates are known and pre-poll in person voting commences 3 days after the cut-off day for nomination of candidates.

Therefore voting would have started before candidates had the opportunity to:

(1) determine preference allocation;

(2) prepare draft how to vote cards to submit for approval;

(3) obtain approval, and

(4) print and despatch cards.

If legislation is introduced to require ECQ to approve how-to-vote cards prior to issue, it is important that the basis for giving approval and the process to be followed be carefully prescribed as delays will occur in the approval process.