UNSW AUSTRALIA

FACULTY OF LAW

GEORGE WILLIAMS AO

DEAN
ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR

23 October 2016

Committee Secretary
Joint Standing Committee on Electoral Matters
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the 2016 Federal Election

Thank you for the opportunity to make a submission to this inquiry. This submission deals with the following matters:

1. eligibility to vote;
2. truth in political advertising; and
3. campaign finance.

Eligibility to vote

The federal franchise should be broadened in two respects. **First, eligibility for overseas elector status should be extended.** To achieve this, the disqualification set out in section 94 of the *Commonwealth Electoral Act 1918* should be altered. This has the effect of denying the vote to electors who do not intend to resume residing in Australia within six years of leaving.

This disqualification appears to be based on a number of reasons, some of which are no longer relevant. These include concerns that Australians living overseas will be unable to keep in touch with political debates and issues locally.

The capacity now for Australia's large expat community to stay in contact with their home country makes such reasoning redundant. Moreover, Australia's electoral system should recognise the reality that Australia is increasingly integrated into global systems, including by way of the movement of its citizens. It is desirable that these people have the opportunity to remain strongly connected to Australia, including by voting.

Ideally, the franchise should be extended to any Australian citizen living abroad. As an alternative, the franchise might be extended to any Australian citizen living abroad, except where they have no intention of returning to the country, or where they do not intend to resume residing in Australia within a period of say 10 years.

SYDNEY 2052 AUSTRALIA
Telephone: 02 9385 5459
Mobile: 0414 241 593
george williams@unsw edu au

Second, the vote should be extended to 16 and 17-year-olds on a voluntary basis. Some nations have already made the shift, with voting in national or local elections occurring from age 16 in Austria, Germany, Norway, Switzerland, the Philippines, Argentina, Nicaragua, Brazil and Ecuador. Voting was extended to this age in the United Kingdom for the purposes of the recent referendum on Scottish independence. The Scottish Elections (Reduction of Voting Age) Act 2015 now extends the vote to all persons aged 16 years and older for Scottish elections generally.

Within Australia, the Northern Territory passed a law providing for the election of a Constitutional Convention to debate a new constitution. That law permits 16 and 17-year-olds not only to vote, but also to stand for the Convention.

My view is that the voting age should be reduced to 16 years for federal elections by way of a cautious, incremental path. It is notoriously difficult to get 18-year-olds to enrol and vote, in part because this can be a time of great upheaval in their lives. Many are moving from school to university or into employment, often out of home, and are forming new relationships. Joining the electoral roll can be low on their list of priorities.

On the other hand, 16 and 17-year-olds tend to be in a more stable family environment, and still at school. One key advantage of allowing them to vote is that joining the electoral roll and voting for the first time can be combined with civics education. It is a better age for gaining the knowledge and forming the habits needed to be an engaged Australian citizen.

Voting at 16 would be consistent with a number of other changes and opportunities at this age. People under 18 can leave school, get a job, drive a car and pay taxes. They can also enlist in the Australian defence forces, become a parent and, in exceptional circumstances, get permission to marry. If the law permits them to undertake these activities, it is hard to see why they cannot also vote.

It is often argued that 16-year-olds lack the knowledge about how government works to enable them to vote, and also the political maturity needed to cast an informed vote. This can be true, but these problems are not limited to this age group. Australians of all ages typically have low levels of knowledge about government, and can express disinterest about politics. Indeed, in my experience 16 and 17-year-olds tend to be more passionate about the future of our nation and their democratic rights than other sections of the community.

There should not be any rush to introduce the vote for 16-year-olds. At least initially, they should be given the option of voting, rather than it being made compulsory. The vote should only be extended to young people with the desire to take a direct part in Australian democracy.

Truth in political advertising

Truth in political advertising provisions can penalise false or misleading statements in electoral advertising. Such rules are designed to limit the potentially harmful impacts of misleading or untrue statements made during an election. False or misleading political advertising is adverse to the public interest. It risks distorting election outcomes, diverting voter attention from more substantive issues and may discourage people from running for public office.

There are two difficulties with introducing truth in political advertising laws. First, such laws may be unworkable. In the context of political campaigning, it is difficult to determine when advertising is a statement of fact rather than opinion and whether it can be deemed to be true or false. There is also a risk that any such law could be manipulated for political advantage by bringing litigation.

Secondly, there is a risk that any attempt to implement such provisions would infringe the freedom of political communication implied in the *Constitution.* In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court held that the constitution necessarily protects the ‘freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice at elections’ (at 560).

This freedom of political communication is not absolute. In *Lange*, the Court said that there are two questions that must be asked to determine whether the implied freedom has been infringed: (1) does the law effectively burden the freedom of political communication; and (2) if so, is the law reasonably appropriate and adapted to serving a legitimate end that is compatible with representative and responsible government (at 567). In the recent case of *McCloy v NSW* (2015) 89 ALJR 857, a majority of the High Court modified this test by applying a proportionality analysis to determine whether the law was reasonably appropriate and adapted.

Currently, South Australia and the Northern Territory have truth in political advertising laws. Section 287 of the *Electoral Act* (NT) says that 'a person must not, in an electoral paper, make a statement that is false or misleading in a material particular'. Section 113 of the *Electoral Act 1985* (SA) makes it an offence to authorise, cause or permit the publication of an electoral advertisement 'if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'. The Electoral Commissioner may request that an advertisement that infringes this provision be withdrawn and a redaction published.

In *Cameron v Becker* (1995) 64 SASR 238, the SA Supreme Court held that section 113 was constitutional, but also recognised its narrow application. Justice Lander said that the provision

> does not … preclude the publication of opinion or comment. It operates only in relation to elections, that is to say, it does not prevent the making of inaccurate and misleading statements unless they are published in electoral advertisements at elections and are calculated to affect the result of an election. Again, the prohibition is restricted to advertisements so that a person may make speeches that include statements of fact which are inaccurate and misleading. It does not penalise those who publish inaccurate and misleading statements of fact under an honest and reasonable mistake of fact. The section, in all those circumstances, is directed to a very small class of persons in very narrow circumstances (at 254).

There does not appear to have been a successful prosecution under the South Australian provisions. However, in its 2014 *Electoral Report*, the SA Electoral Commission noted a significant increase in complaints about inaccurate and misleading advertising (at 54). The Commission issued 11 cessation requests (at 56). It also recommended the repeal of the provisions, citing ethical concerns about the role of the Commissioner in determining whether electoral advertising is misleading. The commission noted that the provisions often require the Commissioner to 'determine who is 'right' or 'wrong' in terms of the two major parties' and can undermine the independence of the Commission (at 79). This suggests that, even as narrow as the South Australian provisions are, there are still issues with their workability.

In 1996, the Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly recommended the introduction of truth in political advertising provisions in the Queensland *Electoral Act.* The Committee relied heavily on a comparison with the regulation of 'misleading or deceptive' commercial advertising (at 18–25). The Committee concluded that truth in political advertising provision were workable. However, recognising the difficulties in enforcing any such laws, the Committee focused on the 'aspirational and deterrent effect' that such rules may have (at 28). The Committee was also of the opinion that truth in political advertising laws 'would be an acceptable and proportionate intrusion on the right to free speech' (at 29).

The Commonwealth and all the States and Territories do have laws which prevent a person from misleading or deceiving a voter in relation to the casting of their vote. For example, section 185 of the *Electoral Act 1992* (Qld) provides that a person must not, during an election period, print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election. However, these provisions are different from truth in political advertising laws as they are directed at 'the act of recording or expressing the political judgment which the elector has made rather than to the formation of that judgment' (*Evans v Crichton-Browne* (1981) 147 CLR 169 at 207–8).

Some international jurisdictions, such as Ohio in the United States, have attempted to implement truth in political advertising laws. However, in *Susan B Anthony List v Driehaus* 134 S. Ct. 2334 (2014), the 6th Circuit Court recently upheld a decision of the Ohio District Court invalidating the Ohio law on the basis that it infringed the right to free speech enshrined in the first amendment of the US *Constitution*. The Ohio law had provided that it is a crime to

> [p]ost, publish, circulate, distribute or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

In New Zealand, section 199A of the *Electoral Act 1993* (NZ) provides that a person is guilty of 'corrupt conduct' if they 'publish, distribute, broadcast or exhibit, or cause to be published, distributed, broadcast, or exhibited, in or in view of any public place a statement of fact that the person knows is false in a material particular.' However, this rule only applies on polling day and the two days immediately preceding polling day.

A final issue is who should bear the liability for publishing material that breaches truth in political advertising provisions. This may have implications for whether the law infringes the implied freedom. For example, the current South Australian laws are directed at '[a] person who authorises, causes or permits the publication of an electoral advertisement'. This could be directed at a candidate or political party authorising the advertisement or the television station or newspaper which runs the advertisement.

Although this issue was not considered in *Cameron v Becker*, the overlap of potential liability may suggest that the law is not 'appropriate and adapted to serving a legitimate end' and is thus more likely to infringe the implied freedom. In particular, if the burden falls onto publishers to determine whether the advertisement breaches truth in advertising laws, it may generally discourage the publication of political advertising. If the Parliament were to implement truth in advertising provisions, liability should be limited to person or organisation putting forward the point of view.

While it may be possible to frame truth in political advertising laws that are both constitutionally valid and enforceable, any such provisions would have to be cast in very narrow terms with only a small scope for application. Provisions of this nature would likely serve little more than a symbolic purpose. For these reasons, **I do not recommend that a truth in political advertising provision be incorporated into federal law.**

Campaign finance

It is widely accepted among experts and others that Australia's system of political finance law is broken, and open to exploitation and undue influence. This can give rise to a form of 'soft corruption' in which money may be given in return for access and the potential to bring about undue influence on decision-making and policy development. Such a system is clearly not in the interests of the Australian community.

The many problems with the current system have given rise to a large number of reports and recommendations. My view is that it is time **now to act by way of bringing about holistic reform to federal campaign finance law**.

Recent High Court decisions establish clear parameters for any such reform. In particular, the decision in *Unions NSW v New South Wales* (2013) 304 ALR 266 suggests that any attempt to limit donations to individuals on the electoral roll has an unacceptable risk of being struck down. On the other hand, the more recent decision in *McCloy* establishes that caps may be imposed generally upon donations, and that categories of donors may be banned where they give rise to an unacceptable risk to the political process.

Taking into account the legal constraints, I believe that federal law should be altered to bring about a system of campaign finance based upon the following features:

- all donations to candidates, political parties and third parties in respect of their political capped at say $5,000;
- real-time disclosure of all donations over $500, with the possibility of such donations being made to the eventual recipient via the Australian Electoral Commission or other body;
- in all cases, the source of the donation must be identified;
- donations made from a source that is exclusively foreign to be banned (that is, the ban should only extend to those persons without Australian citizenship, or entities not registered in Australia;
- caps placed upon expenditure by candidates, political parties and third parties in respect of their electioneering activities;
- a modest increase in public funding to political parties, subject to those parties meeting minimum standards of accountability, including by way of incorporation and internal standards as to member participation and independent dispute resolution; and
- strict sanctions for the breach of campaign finance rules, combined with the necessary resources for enforcement.

Yours sincerely

George Williams