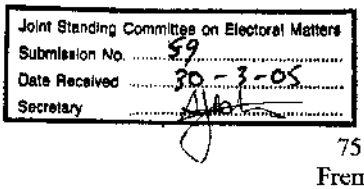
SUBMISSION NO. 59



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30 March 2005

The Secretary
Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Sir

I write as a private individual and publisher of a hobby website on electoral matters, www.pollbludger.com, in regard to the committee's inquiry into the conduct of the 2004 federal election.

My concern relates to section 350(1) of the Commonwealth Electoral Act 1918, regarding the defamation of election candidates. This reads as follows:

> (1) A person is guilty of an offence if the person makes or publishes any false and defamatory statement in relation to the personal character or conduct of a candidate.
>
> Penalty: $1,000 or imprisonment for 6 months, or both.
>
> Note: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.
>
> (1A) Subsection (1) does not apply if the person proves that he or she had a reasonable ground for believing, and did believe, the statement to be true.
>
> Note: A defendant bears a legal burden in relation to the defence in subsection (1A) (see section 13.4 of the *Criminal Code*).

This section remains in the Act despite a recommendation from the Australian Electoral Commission that it be removed, made in the Commission's Fifth Submission in Response to Questions on Notice to the JSCEM inquiry into the 2001 federal election on 24 April 2003 (http://www.aph.gov.au/house/committee/em/elect01/subs/sub198.pdf). The submission made the following observations with respect to section 350:

> Late in 2002 the High Court delivered two judgements that have a significant bearing on defamation litigation, particularly in cases relating to election campaigns. The two judgements were Dow Jones & Company Incorporated v Gutnick, and Roberts v Bass. Of significance is that both judgements contain

> elements suggestive of significant changes in defamation law. There is an increasing complexity in the relationship between consitutional provisions concerning political communication (or more accurately, 'speech attracting privilege') and disputes about the alleged defamation of a candidate during election campaigns. As a result the AEC has some concerns about the relevance of maintaining the defamation provision, section 350, in the Act ...
>
> According to the Director of Public Prosecutions' (DPP's) records, there has not been any prosecution for defamation under section 350 of the Act. The AEC received six formal written complaints about breaches of section 350 of the Act during the 2001 federal election. Of the six complaints received by the AEC, five were referred to the DPP for legal advice. Of the five complaints referred to the DPP, none of the complaints were considered to disclose an offence under section 350. No referrals relating to section 350 of the Act were forwarded to the DPP during the 1998 federal election. The fact that there has been no prosecution under this provision is explained by the fact that the threshold necessary to disclose an offence in criminal defamation matters is such that the DPP must be able to establish beyond reasonable doubt that the content was defamatory. Further, a majority of States have repealed common law criminal libel by enacting relevant legislation. Hence, candidates concerned about defamation can seek relief through civil proceedings within the relevant jurisdiction.

In relation to Dow Jones & Company Incorporated v Gutnick, the submission notes:

> In light of the Gutnick decision, the AEC is concerned that there may be a high degree of ambiguity, related to identifying the relevant jurisdiction and thus identifying relevant defamation law, surrounding the operation of section 350 with respect to material 'published' on the internet.

And in relation to Roberts v Bass:

> The basis of the High Court decision was that attempting to injure the political credibility of a candidate in the midst of an election campaign was defensible on the grounds of qualified privilege. The implication for the AEC is that an offence against section 350 will become even more difficult for the AEC to demonstrate ... the AEC is concerned that section 350 will be rendered a 'dead' provision. That is, that the DPP will be unlikely to prosecute any matters arising under section 350 unless they disclose such a high level of criminal intent as to disclose an offence attracting a criminal sanction. Previous experience suggests that this is unlikely. Moreover, given the amount of attention devoted to the relationship between the Commonwealth Constitution, statute and the common law (for example in the discussion of the Lange decision within the Roberts v Bass case), the AEC is of the view that in the unlikely event that proceedings did arise under section 350, constitutional issues relating to the implied guarantee of freedom of political communication would arise.

In describing the prospect of proceedings under section 350 as "unlikely", the Commission had apparently not reckoned on the possibility that they might be initiated privately, rather than by the Director of Public Prosecutions (although section 350 is prominently described in the AEC Candidates' Handbook along with a recommendation that candidates "initiate their own legal action to seek an injunction or other remedy as appropriate"). Two such actions were launched at Tweed Heads Local Court in the weeks following the October 9 federal election by Terry Sharples, who stood as a candidate of the Fishing Party in the division of Warringah under the name Edward Kelly. One of these actions, against journalist Damien Murphy of the Sydney Morning Herald, is still before the court; the other, against myself, was withdrawn by Mr Sharples on March 22 on the understanding that I bear my own costs. The actions related to descriptions of Mr Sharples' background as the instigator of legal actions involving Pauline Hanson's One Nation and his identity as a candidate running under a name other than that by which he came to national attention. Mr Sharples launched his prosecutions after the Australian Federal Police declined to act on his complaints, as was presumably the fate of any other such complaints lodged during the campaign.

A paper on defamation from Electronic Frontiers Australia (http://www.efa.org.au/Issues/Censor/defamation.html) notes that "in most jurisdictions, a private prosecution concerning criminal defamation requires the prior consent of, for example, the Director of Public Prosecutions, the Attorney-General, or a court order". This would appear to reflect an established principle that such limitations should exist owing in part to the likelihood that such prosecutions will raise constitutional questions, but it evidently does not apply to section 350.

I would also reiterate that the emergence of the internet presents new difficulties with respect to the section, over and above those canvassed by the Australian Electoral Commission. Through the course of Mr Sharples' actions the legal system has made no distinction between Mr Murphy, a journalist for a mass circulation newspaper, and myself, publisher of a non-profit amateur website with a highly specalist audience numbering no more than 2000. I presume that our legal costs to this point are not dissimilar, though the same could not be said of our capacity to bear them. It is evident that the existing state of affairs evolved in an environment where a "publisher" could be presumed to have significant resources at his or her disposal, and thus be able to bear the cost and inconvenience of contesting ultimately unproductive legal actions.

I therefore ask the committee to consider the advice of the Australian Electoral Commission and recommend the repeal of section 350 during the life of the current parliament.

Yours sincerely

WILLIAM BOWE