

Introduction

Background

- 1.1 Since 1983, each Parliament has created a Joint Committee on Electoral Matters (the Committee) to review the previous election. This Committee was similarly created in September 2016, following the election for the 45th Parliament on 2 July 2016.
- 1.2 Traditionally, the terms of reference for the Committee's election inquiries allow the Committee to inquire into any aspect of the previous election. This inquiry is different because the terms of reference provided by the Special Minister of State include a range of specific, additional topics, including: authorisation of voter communication, the donations and disclosure regime, and regulation of third parties.
- 1.3 The Committee has also been asked to provide interim reports on two topics which were the subject of substantial media coverage and community debate in 2016:
 - authorisation of voter communication, by 1 December 2016; and
 - foreign donations, by 3 March 2017.
- 1.4 This report considers authorisation of voter communication, consistent with the request of the Special Minister of State for an early report on this topic.
- 1.5 On 30 November 2016 the Special Minister of State agreed to an extension for the report to be tabled by 9 December 2016.

Context

- 1.6 Provisions on authorisations were included in the earliest Commonwealth electoral law in 1902 and remain in legislation today.¹ However, due to changes made to the legislation over time to address various issues as they arose, the existing regulatory regime is considered somewhat piecemeal and ineffective in some instances. Specifically, the legislation has not kept pace with technological changes and loopholes have emerged.
- 1.7 The Committee explored this issue, and noted that the legislation will need to evolve to ensure it can effectively deal with issues arising from new technology that is now routinely used as part of election campaigns.
- 1.8 In relation to authorisation of electoral materials, the Committee noted that regardless of the type of electoral materials, their purpose remains the same, and thus, authorisation is equally important for all forms of electoral material. In practice, authorising of electoral material is necessary to allow anyone to identify who is responsible for the electoral material, whether it is in print, broadcast or electronic form.
- 1.9 Authorising electoral material is considered important because authorisation provides clear context for the message and allows voters to have confidence in the message or point of view expressed in that material. It helps to ensure that the person or organisation putting the information into the public domain is accountable for that information. It is one of the checks and balances built into our electoral system to ensure integrity and accountability for campaigning in our democratic process.
- 1.10 A number of submitters and witnesses to the Committee's inquiry noted that the key issue is the right for electors to know who a message is from and who is responsible for it. For example, Mr Carroll, from the Australian Labor Party (ALP) commented:
- First, that the purpose of authorisation requirements is to allow electors to identify the person responsible for printing or broadcasting electoral advertisements. Second, that as far as possible the rules for authorisation should be format neutral. They should not vary in an arbitrary fashion, depending on the medium through which an advertisement is communicated. Thirdly, authorisation requirements should not interfere with the purpose of the advertisement, which is to communicate with electors about an election, which is fundamental to our national democracy.²
- 1.11 Mr Tony Nutt, Federal Director of the Liberal Party of Australia commented:
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1 Section 180 of the original *Commonwealth Electoral Act 1902* and section 328, for example, of the *Commonwealth Electoral Act 1918*, which superseded it.

2 Mr Noah Carroll, ALP, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 21.

... we want to uphold the rights of electors to know who is ringing them, or contacting them, or SMSing them or mailing them, or whatever, and that that is the higher priority rather than simply making it easier for those of us who participate in a political system as parties, candidates or third parties, or whatever, to do that. Yes, it is open to some improvement in that area, but the right of the elector is the key thing.³

1.12 In Australia, campaign activities have generally had ‘light touch’ regulation. The 2009 Green Paper on electoral reform stated:

Restrictions on campaign activities in Australia have only been seen as necessary where there are demonstrable reasons why certain campaign behaviours need to be restricted. The existing provisions seek to achieve a balance between the objectives of allowing an open campaign with participants free to engage in public debate, and of protecting candidates and voters from behaviour which is viewed as overly malicious or damaging to the integrity of the electoral process.⁴

1.13 Submitters and witnesses to the inquiry generally agreed that changes in election campaigning formats and techniques are a driver for change to authorisation requirements. For example, the Liberal National Party argued “in the interests of integrity and transparency, there is clearly a need for the authorisation requirements under the electoral law to be modernised.”⁵

1.14 However, in the wake of the most recent federal election, fresh concerns have been raised about authorisation of election material and questions have been asked about whether the current legislation is able to effectively address the modern techniques used in political campaign strategies.

1.15 Specifically, a move away from traditional communication methods such as print advertising, in favour of online social media and SMS, have significantly changed the landscape for the modern political campaign.

1.16 A number of submitters and witnesses suggested that the current rules are insufficient to deal with the changes in technology. For example, Mr Nutt drew the Committee’s attention to an excerpt from the ALP’s submission which provides that:

Authorisation rules have been developed over time and in a piecemeal fashion. As a result, the rules are confusing and difficult

3 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 33.

4 Australian Government Electoral Reform Green Paper, *Strengthening Australia’s Democracy*, 2009, p. 146.

5 Liberal National Party, *Submission 68*, p. 6.

to administer. There is an arguable case that the rules have not kept up with technological change and are unfit for the digital age.⁶

1.17 Similarly:

We believe that there are some urgent and compelling improvements that need to be made to arrangements for authorisation around all forms of communication to electors... We are certainly open to and happy to participate in a process around the modernisation and improvement of language and best practice in terms of the regulation of these matters.⁷

1.18 The Australian Greens submitted that:

We recognise the importance of voters being aware of the source of party, candidate and third party communications during election campaigns. With the growth in a range of electronic platforms for election communications the form this takes will need to vary.

For example as a message on Twitter is only 140 characters the traditional form of authorisation required on printed materials would not be appropriate.

We believe that the overarching requirement is that the voter who reads or views a communication is aware of who it comes from. So if the party or candidate is adequately identified in the communication that is adequate. With Twitter that would be by their Twitter name, provided that the name or associated description is not misleading or false.⁸

1.19 In relation to SMS, evidence was received by the Committee which discussed the need for new regulations specifically around SMSs. Mr Nutt commented:

We think that those SMS messages need to be properly regulated, and the principle is that an elector should be able to tell who the message is from and what the conveyance mechanism is.⁹

1.20 The Liberal Democratic Party highlighted inconsistencies but concluded authorisation was not required:

It is an absurdity that a paper handbill containing electoral information requires authorisation text but a cotton t-shirt bearing

6 ALP, *Submission 69*, p. 3.

7 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 32.

8 The Australian Greens, *Submission 89*, p 6.

9 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 32.

exactly the same electoral information does not. Such inconsistencies with the legislation and its enforcement lead us to conclude that the preferable approach is to remove the requirement for authorisation completely.¹⁰

- 1.21 In addition, concerns were raised with the committee in relation to the 2016 election because electoral materials were disseminated by individuals or organisations claiming to be a Commonwealth entity. Current legislation makes it an offence (Division 148 of the Criminal Code Act 1995) to impersonate a Commonwealth official, but this does not extend to a Commonwealth entity.

Report

- 1.22 The Committee notes that several strong themes emerged in the evidence provided, suggesting first that legislation should be amended to meet new needs, and second, that effective regulation should meet three principles:
- ⇒ Accountability – parties and other participants should be held to account and be responsible for their political statements;
 - ⇒ Traceability – those who authorise electoral materials should be identifiable and traceable for enforcement and other purposes; and
 - ⇒ Consistency – in the application of the rules and requirements to all electoral material.
- 1.23 The report also outlines Committee recommendations including a separate authorisations part/division within the Act and an objects clause to clearly articulate the purpose of the legislation.
- 1.24 Finally, the Committee notes it has received 125 submissions and has held nine public hearings in all capital cities, except Darwin to date. The Committee acknowledges the assistance provided by witnesses at the hearings. The Committee intends to hold further public hearings in regional and remote locations in Australia in 2017.

¹⁰ Liberal Democratic Party, *Submission 42*, p. 2.

