

# The case for truth in political advertising reform in Tasmania

*Laws against misleading advertising are feasible and popular.*

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## SUMMARY

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With deceptive advertising already affecting the Tasmanian political landscape, the case for truth in political advertising laws is strong. A recent publication in a Tasmanian newspaper has further highlighted the need to stamp out misleading political advertising. Almost nine in 10 Tasmanians say Tasmania should pass truth in political advertising laws.

This paper addresses the Tasmanian Government's objections to legislating truth in political advertising laws as part of the review of the *Electoral Act* currently underway, namely that:

- *Truth in political advertising amendments would be out of scope of the current review of the Electoral Act and require additional consultation:* The law review is broad in scope, and has already contemplated reforms not explicitly in its terms of reference (TORs). Truth in political advertising laws are not complex, particularly as they can be based on existing laws in South Australia and the ACT. In fact, the ACT Legislative Assembly did not conduct a consultation process before legislating its laws.
- *Such laws are subjective:* Findings of fact are routine by regulators, courts and tribunals, and misleading advertising is no different. The South Australian experience shows most decisions are respected, and few are contested.
- *Resolving disputes may lead to long periods of electoral uncertainty:* As mentioned above, most decisions are respected. But if misleading advertising

has changed the course of an election, “electoral uncertainty” is a small price to pay for that to be remedied.

- *The laws create a lot of extra work:* The Electoral Commission of South Australia needed five positions to handle election complaints (less than half of which concern misleading advertising), compared to 7,282 staff positions for the election as a whole.
- *It would be premature to legislate truth in political advertising laws ahead of the federal inquiry:* The Joint Standing Committee on Electoral Matters (JSCEM) is currently conducting an inquiry into the 2022 election, including misleading advertising. However, JSCEM will be considering the matter from a federal perspective. It is the states and territories that have led truth in political advertising laws. If there are innovations from the JSCEM process, laws can be amended to include them.

## INTRODUCTION

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The right-wing Australian Christian Lobby (ACL) conducted polling in Tasmania in September–October 2022 that asked respondents their opinion based on false premise. Respondents were told: “the Tasmanian government is considering new laws to make it illegal for parents or grandparents to question their child’s intention to change gender”. It found that 79% of Tasmanians were not aware of the (non-existent) new laws, 76% did not think parents or grandparents who question their child’s intention to change gender should face criminal charges and 54% would be less likely to vote for an MP who wanted to make it illegal for parents or grandparents to question their child’s intention to change gender.<sup>1</sup>

The Tasmanian Government is not considering such laws. Nonetheless, on 9 November 2022, The Mercury published an ACL ad that read “Plan to criminalise parents who question their children’s wish to change gender? Likely lose government!” with a link to the polling results.

The ACL may be referring to the Tasmanian Government’s commitment to give effect to recommendations from the Tasmanian Law Reform Institute (TLRI) that include criminalising certain “Sexual Orientation and Gender Identity conversion” practices that cause serious physical or mental harm. TLRI is an institute based at the University of Tasmania, co-founded with the state government and the Law Society. At the request of LGBTQA+ stakeholders, it conducted a review of Tasmanian law in relation

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<sup>1</sup> ACL (2022) *Tas poll results: Anti-parents’ rights Sept–Oct 2022*, [https://www.acl.org.au/anti-parentsrights\\_poll\\_report](https://www.acl.org.au/anti-parentsrights_poll_report)

to sexual orientation and gender identity (SOGI) conversion practices, which it defines as:

acts or statements that are aimed at changing, suppressing, or eradicating the sexual orientation or gender identity of another person; and are based on a claim, assertion or notion that non-conforming sexual orientation or gender identity is a physical or psychological dysfunction that can be suppressed or changed.<sup>2</sup>

Earlier this year, the final report was released, including a recommendation that it should be an offence to prescribe SOGI conversion practices that cause (or that a person was reckless about causing) serious physical or mental harm.<sup>3</sup> Premier Jeremy Rockliff has said that he will consult and take advice before introducing legislation that gives effect to TLRI's recommendation, although he has also been clear that he is supportive of this reform.<sup>4</sup>

It is presumably this commitment to give effect to a recommendation to introduce an offence in relation to serious physical or mental harm that has been distorted by the ACL into a government plan to criminalise a parent questioning a child's wish to change gender. This is despite being inconsistent with the recommendations from the TLRI, who in their report clarified that any legislative response to conversion practices would not apply to supportive care, mentoring or guidance by a parent or guardian to a child.

The ACL's use of untrue or misleading content in its lobbying has strengthened calls from civil society groups, the Greens and independent MHA Kristie Johnston for Tasmania's current reform of the *Electoral Act 2004* (Tas) to include truth political advertising laws.

Such reform should be straightforward. As discussed below, there are already such laws in place in South Australia and the ACT, and public support for truth in political advertising is near universal.

The Tasmanian Government raised five concerns with implementing truth in political advertising laws as part of the review of the *Electoral Act*, without ruling out reform

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<sup>2</sup> TLRI (2022) *Sexual orientation and gender identity conversion practices*, pp 16–17, <https://www.utas.edu.au/law-reform/news-and-events/tlri-news/reforms-needed-to-address-lgbtqa-conversion-practices-in-tasmania>

<sup>3</sup> TLRI (2022) *Sexual orientation and gender identity conversion practices*, p ix

<sup>4</sup> O'Connor (2022) *Premier – SOGI conversion practices*, <https://tasmps.greens.org.au/parliament/premier-sogi-conversion-practices>

altogether. All of these concerns are addressed below and none should be able to stand in the way of this important, simple and popular reform.

South Australia has had truth in political advertising laws since the mid-1980s. The ACT introduced legislation in 2020 along very similar lines. These laws have repeatedly been shown to address misleading political advertising in a timely and fair-handed way.

SA's *Electoral Act 1985*, section 113, makes it an offence to authorise or cause to be published electoral advertisements that are materially inaccurate and misleading. The SA Electoral Commissioner can request such advertisements be withdrawn from further publication and a retraction published; they can also apply to the Supreme Court to enforce withdrawal and/or retraction.

The maximum penalty for materially inaccurate and misleading advertising is \$5,000 for individuals or \$25,000 for a body corporate. The Court of Disputed Returns can also invalidate the results of an election on the grounds of misleading advertising, if that advertising affected the election result.

## **PUBLIC SUPPORT FOR TRUTH IN POLITICS REFORM**

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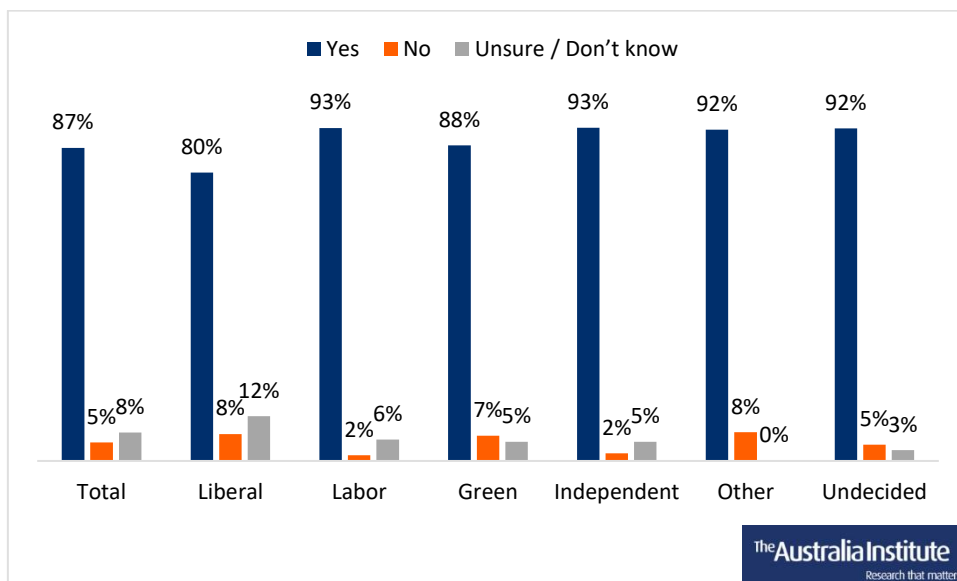
Australia Institute polling in April 2021 found 87% of Tasmanians say Tasmania should pass truth in political advertising laws so that it is illegal for political parties and candidates to publish ads that are inaccurate and misleading.<sup>5</sup>

Across all voting intentions, at least 80% of Tasmanians said Tasmania should pass truth in political advertising laws (as shown in Figure 1).

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<sup>5</sup> Australia Institute (2022) *Polling: Good government in Tasmania*, p 1, <https://australiainstitute.org.au/report/polling-good-government-in-tasmania/>

**Figure 1: Truth in political advertising laws, by voting intention**



Source: Australia Institute (2022) *Polling: Good government in Tasmania*, p 1, <https://australiainstitute.org.au/report/polling-good-government-in-tasmania/>

## ADDRESSING GOVERNMENT CONCERNS

In parliamentary debate on amendments to the *Electoral Act 2004* (Tas) on 10 November 2022, Attorney-General Elise Archer identified concerns with the proposal from multiple submitters to the review process (including the Australia Institute) for truth in political advertising laws. Each concern is quoted below, along with information that addresses each concern.

### Out of scope of current law review, additional consultation required

Any proposal to introduce such laws would require careful consideration and consultation. This has not occurred at this stage, given that the issue was considered to be out of scope of the Electoral Act Review and was not included in the draft bill which went out to consultation.<sup>6</sup>

The terms of reference for the review include ‘modernising’ the current Tasmanian Electoral Act, which is plainly broad enough to encompass truth in political advertising

<sup>6</sup> House of Assembly (2022) *Report of debates, 10 November 2022*, pp 91–92, <https://www.parliament.tas.gov.au/HA/proceedings/2022/HADaily10November2022.html>

laws.<sup>7</sup> The Government has proposed many amendments to areas of the Act not explicitly flagged in the terms of reference. The Government could have proposed truth in political advertising under the current review's TORs but chose not to.

Regarding whether further consultation is necessary, the ACT Legislative Assembly did not conduct a consultation process before implementing truth in political advertising reform, closely following the SA model. The longstanding South Australian model serves as a working demonstration of how the law will function, and the experiences of the Electoral Commission of South Australia mean there are few surprises in resourcing or processes required.

The Tasmanian Electoral Commission is already responsible for regulating Tasmanian elections, including offences relating to advertising and other campaigning.<sup>8</sup> In South Australia, handling complaints about misleading advertising is just part of the commission's larger complaints handling responsibilities.

## Such laws are subjective

[I]n its report on the 2020 ACT Legislative Assembly election, the ACT Electoral Commission expressed concerns that the assessment of political statements requiring complex and often subjective judgment of concepts, policies, figures and theories and is outside of what the commission statutory function should be. ...

In addition, the ACT Electoral Commission was concerned that its determination of the truth or otherwise of political advertising could raise accusations of political partisanship and effect the commission's reputation which is based on neutrality and independence.<sup>9</sup>

The South Australian experience shows that an independent umpire can make calls on misleading advertising quickly and fairly, and the Electoral Commission's findings are almost always respected. Few parties or candidates subject to a negative finding reject it or challenge it in the courts.<sup>10</sup>

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<sup>7</sup> Department of Justice (2018) *Electoral Act review – terms of reference*, <https://www.justice.tas.gov.au/community-consultation/closed-community-consultations2/electoral-act-review>

<sup>8</sup> *Electoral Act 2004* (Tas), ss 190–198

<sup>9</sup> House of Assembly (2022) *Report of debates*, 10 November 2022, pp 91–92

<sup>10</sup> Browne (2019) *We can handle the truth*, pp 9–11, <https://australiainstitute.org.au/report/we-can-handle-the-truth-opportunities-for-truth-in-political-advertising/>

If Tasmania's legal system truly struggled with the notion of truth, there is no area of law that could operate. Whether it is consumer, criminal or defamation law, courts routinely decide what is true or not. In fact, Australian consumer law already requires businesses to not engage in misleading or deceptive conduct, a test that is much stricter than any truth in political advertising law.<sup>11</sup> If businesses and business regulators can manage, political actors and electoral commissions should be able to as well.

## Resolving disputes may lead to long periods of electoral uncertainty

The ACT Electoral Commission also raised issues around enforcement, suggesting that political participants may decide to risk post-election sanctions in the hope of electoral advantage. If the consequence of a positive prosecution for a breach of the truth in political advertising laws is formally disputed in an election through the Supreme Court, this could provide for potentially long periods of electoral uncertainty following the conclusion of each election.<sup>12</sup>

As mentioned above, the South Australian experience demonstrates that the Electoral Commission's decisions are almost always respected. However, for truth in political advertising laws to function, they must have a deterrent effect, which involves the possibility of a formal dispute.

Ultimately, if misleading advertising has been so egregious and extensive that it has changed the course of an election, then "electoral uncertainty" is a small price to pay for the effect of the misleading advertising to be remedied. The alternative is for perpetrators of misleading advertising to reap the benefits of such advertising, as would be the case under the current laws.

## The laws create a lot of extra work

It was also suggested that investigating complaints would significantly increase the commission's workload during election periods.<sup>13</sup>

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<sup>11</sup> For the requirements in consumer law, see ACCC (n.d.) *False or misleading claims*, <https://www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims>; Juebner (2018) *Misleading or deceptive conduct claims: Practical hints for practitioners*, pp. 8–10, <https://www.vicbar.com.au/file/5691/download?token=hsbloa4Y>

<sup>12</sup> House of Assembly (2022) *Report of debates, 10 November 2022*, pp 91–92

<sup>13</sup> House of Assembly (2022) *Report of debates, 10 November 2022*, pp 91–92

The Electoral Commission of South Australia (ECSA) planned to use five or more staff to manage electoral complaints during the 2022 election period (noting that misleading advertising complaints make up less than half of all electoral complaints).<sup>14</sup> It used only two staff as recently as 2014, although this was considered too few for the volume of work.<sup>15</sup> Either way, this is a minimal resourcing requirement compared to the 7,282 staff positions ECSA required to run the 2018 state election.<sup>16</sup>

With Tasmania's relatively smaller size, fewer than five positions would presumably be needed. For comparison, the Tasmanian Electoral Commission had 1,858 staff positions for the 2021 state election.<sup>17</sup>

## Premature to legislate ahead of federal inquiry

I note that the Joint Standing Committee on electoral matters in the Commonwealth Parliament have fairly recently been asked to inquire into and report on all aspects of the conduct of the 2022 Federal Election campaign. One of the terms of reference of this inquiry is the potential for truth in political advertising laws to enhance the integrity and transparency of the electoral system. Again, it seems hasty to proceed at this stage with including a provision in our legislation prior to the outcome of this federal analysis which may give us some direction to head in as a consistent approach which would be no doubt optimal.<sup>18</sup>

The federal Joint Standing Committee on Electoral Matters (JSCEM) is considering truth in political advertising laws in its inquiry into the 2022 election.<sup>19</sup> However, that is no reason to delay legislation at the state or territory level. The states and territories have

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<sup>14</sup> Documents 5, 9 and 11 in the FOI request of 27 August 2021, <https://www.elections.act.gov.au/about-us/freedom-of-information>

<sup>15</sup> Not counting the commissioner, seconded staff or the team at the Crown Solicitor's Office. For more details, see Electoral Commission SA (2014) *2014 state election report*, p 53, <https://ecsa.sa.gov.au/about-ecsa/publications/publications-state-election-and-by-election-reports>

<sup>16</sup> Electoral Commission SA (2018) *2018 state election report*, p 22, <https://ecsa.sa.gov.au/about-ecsa/publications/publications-state-election-and-by-election-reports>

<sup>17</sup> Tasmanian Electoral Commission (2021) *2021 parliamentary elections snapshot*, p 1, <https://www.tec.tas.gov.au/Info/Publications/index.html>

<sup>18</sup> House of Assembly (2022) *Report of debates, 10 November 2022*, pp 91–92

<sup>19</sup> Joint Standing Committee on Electoral Matters (2022) *Inquiry into the 2022 election: Terms of reference*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/2022federal-election/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2022federal-election/Terms_of_Reference)



led on truth in political advertising laws, as the South Australian and ACT examples show. Tasmania does not need to wait for reform at the federal level.

Even if the JSCEM does make recommendations for federal truth in political advertising laws, the Tasmanian Parliament can amend any it introduces if appropriate. Then-ACT Attorney-General Gordon Ramsay flagged that the ACT Government would consider amending the laws ahead of the next election:

We do have some concerns about the workability of the scheme. If we are returned, we will be working closely with the Electoral Commissioner to address some of the practical issues that the commission may face in the running of the scheme; but we support the amendment.<sup>20</sup>

Despite keeping the option open, the ACT Government has not so far felt the need to amend the laws.

## CONCLUSION

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Tasmanians should be confident that the political information being put to them is accurate and truthful. Laws against misleading political advertising, like those in place in South Australia and the ACT, would help ensure that this is the case.

On the face of it, the ACL would be subject to laws like this, were Tasmania to implement them, as they are not limited to parties and candidates or to advertising during an election period. Whether a particular piece of advertising, like the ACL's *Mercury* ad, would breach the laws would have to be weighed up by the Electoral Commission.

The Tasmanian Government has raised concerns with the implementation of truth in political advertising laws. This paper addresses those concerns, allowing for Tasmania to outlaw misleading advertising ahead of the next state election.

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<sup>20</sup> ACT Legislative Assembly (2020) *Hansard (27 August)*, [https://www.hansard.act.gov.au/hansard/9th-assembly/2020/debates\(HTML\).htm](https://www.hansard.act.gov.au/hansard/9th-assembly/2020/debates(HTML).htm)