

3 August 2009

The Executive Officer
Electoral Matters Committee
Parliament House
East Melbourne, 3002

**GPO Box 3161
Melbourne VIC 3001**

info@libertyvictoria.org.au
www.libertyvictoria.org.au

☎ 03 9670 6422
☎ 03 9670 6433

Dear Sir/Madam,

Parliamentary inquiry whether the provisions of the *Electoral Act 2002 (Vic)* should be amended to make better provision for misleading or deceptive content

Liberty Victoria welcomes the opportunity to make this submission to the Electoral Matters Committee.

Liberty supports amendments to s 84 of the *Electoral Act 2002* to prohibit clear and serious cases of misleading or deceptive conduct influencing the decision by a voter about who to vote for.

The present s 84 of the Act has been given a narrow interpretation by the courts and tribunals and its operation confined mostly to cases where a voter has been misled in the actual casting of the vote, i.e the physical act of marking the ballot paper. It has been held not to apply to cases where the voter has been misled in the formation of a judgment or decision about who to vote for.

This interpretation has been said to be dictated by the High Court decision in *Evans v Crichton-Browne* (1980) 147 CLR 169, which dealt with s 161(e) of the *Commonwealth Electoral Act 1918*, which was similar to s 84 of the Victorian Act.

It is not entirely clear whether *Evans v Crichton-Browne* does dictate such a narrow interpretation of s 84, as the Court said (obiter dicta) at 205 that s 161(e) might apply to “a statement that a person who wished to support a particular party should vote for a particular candidate, when that candidate in fact belonged to a rival party.” Nor was the Court in expressing its actual decision at 204 definitive that s 161 was only concerned with “statements which are intended or likely to affect an elector when he seeks to record and give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment.”

Nevertheless courts and tribunals in Victoria have tended to assume that *Evans v Crichton-Browne* does require that s 84 of the Act be

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confined to cases of misleading conduct in relation to the physical marking of the ballot paper: see, e.g., *Balogh v Municipal Electoral Tribunal* [2007] VCAT 1955. In New South Wales a less restrictive approach has been taken: *Consadine v Strathfield Municipal Council* (1981) 44 LGRA 435.

The Government could sponsor a test case to seek a reconsideration of whether s 84 is confined in the way that has been assumed. It is at least arguable that s 18 of the *Charter of Human Rights and Responsibilities Act* 2006 (the right to participate in public life) justifies a wider interpretation of s 84 than has previously been adopted. However, there is no certainty about the outcome of such a test case nor even when an appropriate case might emerge.

Liberty Victoria therefore supports an amendment to put the matter beyond doubt.

In drafting such an amendment, care must be taken to maintain the proper boundary between the political and the justiciable. By and large the public must be trusted to separate the wheat from the chaff of political debate. The free exchange of views and ideas and usually the surest safeguard of the truth. But this is not always so and there should be some recourse to legal action in clear and serious cases, especially where the misleading or deceptive conduct occurs at a time or otherwise in a way which makes it impossible to counter, e.g. at the last minute on the eve of an election.

Liberty also considers that the prohibition should apply irrespective of intent, i.e even where the person who engaged in the misleading or deceptive conduct was not aware that it was misleading or deceptive. However, where the deception was deliberate this should be an aggravating factor to be considered in setting the penalty.

We do not currently have a form of words in mind but would be pleased to consider that further once other submissions have been received. It is worth noting that s 113 of the South Australian *Electoral Act* 1985 is wider than s 84 of the Victorian Act and might be a useful point of reference for any draft amendment.

Liberty would not support an amendment which resulted in election results being set aside. The only sanction should be a fine, as under the current s 84.

If you have any queries on the above please contact me on 9225 8840.

Yours sincerely,



Michael Pearce SC
President