

20202021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ELECTORAL LEGISLATION AMENDMENT (STOP THE LIES) BILL
2021**

EXPLANATORY MEMORANDUM

(Circulated by the authority of Zali Steggall OAM MP)

Electoral Legislation Amendment (Stop the Lies) Bill 2021

General Outline

1 This Bill amends the Commonwealth Electoral Act to prohibit misleading and deceptive political advertising during Federal elections. The Bill prohibits advertising that contains a statement of fact which is misleading or deceptive to a material extent or is likely to mislead or deceive to a material extent. Further, the Bill prohibits parties, candidates and campaigners from impersonating or passing off material as being from another candidate. This seeks to address developments in technology which make it easier to fraudulently impersonate a candidate such as deep fakes.

2 The Bill creates a complaints process through the Australian Electoral Commissioner who may order a retraction of the statement and/or an apology to the effected party. At the same time, a complaint can be pursued through the Courts.

Background

3 The main purpose of the Bill is to address the volume of misleading and deceptive political advertising that occurs during Federal elections. Each election, a number of advertisements and claims by candidates, their parties and associated campaign groups, are published that are untrue and designed to mislead or deceive the voter about the position or platform of an opposing candidate. The result of this has been an erosion of trust in political advertising and in politicians generally. In addition, it reduces the efficiency of electoral participation.

4 Australia has had no shortage of examples of misleading and deceptive advertising campaigns. The ‘Mediscare’ (2016) and ‘Death Tax’ (2019) campaigns respectively sought to mislead electors about alternate policies. The 2019 election also saw signs in Mandarin “mimicking the purple theme of the Australian Election Commission” claiming that preferencing the Liberal Party is the “correct way to vote”. These prominent examples are the tip of the iceberg. The advent of social media and the ability to micro target advertisements to particular audiences increases the need for minimum standards to apply to political advertising and misleading and deceptive content.

5 These recent examples were successful in provoking fear and suspicion of alternate policies and candidates. The veracity of campaigns such as these could now be tested through this legislation in a timely way as the evidence on which such advertising would be based could be challenged through a more detailed analysis in a statement of fact in proceedings.

6 Polling by The Australia Institute indicates that 9 in 10 Australians want truth in political advertising legislated.¹ The Competition and Consumer Act regulates against misleading and deceptive advertising in trade and commerce. The concept of preventing misleading and deceptive advertising is not foreign to the private sector and should not be viewed as an attempt to curtail political expression or freedom of speech. Instead this Bill seeks to apply the same standards that is expected in respect to provision or sale of goods and services to the political realm.

7 This Bill is designed to implement safeguards in Australia against misleading and deceptive advertising.

Impact on democracy

8 Preventing misleading and deceptive political advertising is vital to a well- functioning democracy. Disinformation increases the cost of participation in the democratic process and prevents the electorate from holding a candidate to account if their victory is based on deceit.

9 Electoral participation should be relatively easy and not costly. Misleading or deceptive conduct and the spread of disinformation increases the cost of participating in elections which can decrease voter turnout or the efficacy of their participation because they are inadequately informed.

10 Disinformation casts off facts which reduce the understanding of voters about the true nature and issues of the election. It clutters the free speech condition with misleading and deceptive conduct. Justice Guadron in *Australian Capital Television Pty Ltd v Commonwealth* stated that the implied freedom of political communication is not absolute: rather, it 'is concerned with the free flow of information and ideas, it neither involves the right to disseminate false and misleading material nor limits any power that authorises law with respect to material answering that description'.² The Australian High Court has also insisted that the implied right to freedom of speech in Australia is to be understood, not as an individual right, but as a social condition.³ Thus, the implied freedom should be viewed as a social condition where the marketplace of ideas only operates efficiently where the free speech is true. Hill, Baltutis and Douglass argue that if we accept that free speech is a social condition, then any speech act that fails to promote, or which negatively affects the efficiency of the marketplace of ideas will fail to qualify as an act of free speech and election disinformation would certainly fail to qualify.⁴

¹ <https://australiainstitute.org.au/report/we-can-handle-the-truth-opportunities-for-truth-in-political-advertising/>

² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 217

³ Damien O'Brien 'Parliamentary privilege and the implied freedom of speech' (1995) 25(6) *Queensland Law Society Journal* 25(6). For specific cases see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens and Others v West Australian Newspapers Limited* (1994) 182 CLR 211. Also see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 217 (Guadron J)

⁴ Hill, Baltutis and Douglas (2021) *South Australia's Truth in election Advertising Laws: Basis for a Model for the Rest of Australia*, University of Adelaide, 24

11 Various international studies have demonstrated a causal link between increasing volumes of fake news or disinformation and election outcomes unduly influenced by the disinformation. For example, Zimmerman and Kohring (2020) demonstrate this link in the 2017 German election, Jones-Jang et al (2020) on the US 2018 midterms and Cantarella et al (2019) on the Italian elections.

12 Australia has often been a leader in democratic innovation, and this legislation is a genuine step towards improving the functionality of our democracy. This Bill does not constrain political expression, rather it improves the efficiency of free political communication by removing disinformation.

Influence of Technology

13 The Bill recognises the changing nature of political communication and the advent of new technology which is further enhancing the scope for misleading and deceptive advertisements to proliferate unchecked. The modern political campaign has a new set of threats created through digital platforms. The advent of social media has enabled candidates, parties and interest groups, to spread information quickly to mass audiences, without regulation of the veracity of the message. This legislation seeks to prevent the dissemination of false information via advertising.

14 The work of the Australian Competition and Consumer Commission through the *Digital Platforms Inquiry* highlighted the need for greater regulation of social media content to prevent the dissemination of misinformation.⁵ The release in February 2021 of the *Australian Code of Practice on Disinformation and Misinformation* provides for a voluntary self-regulatory mechanism by social media companies of the accuracy of content distributed through their platforms.⁶ However, that code does not address the matter of misleading or deceptive political advertising as there is no current legal mechanism to underpin the code in that regard. This Bill provides that mechanism and would complement a furthering of that work by providing a third-party complaints vehicle and an enforcement mechanism to address the spread of misinformation during election campaigns for personal gain.

15 The deployment of bots and micro targeting during the 2016 US Presidential Election was largely attributed to foreign interference in the election. Twitter admitted that more than 50,000 Russia-linked accounts used its service to post automated material about the 2016 US election⁷. Australia reacted to this foreign interference by passing the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 which prohibits only political donations from foreign sources.

16 As witnessed in the 2020 US Presidential election campaign, many of the tactics employed by foreign actors in the 2016 election were deployed by domestic actors. The use of bots and micro targeting of advertising makes it

⁵ <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

⁶ <https://digi.org.au/disinformation-code/>

⁷ https://blog.twitter.com/official/en_us/topics/company/2018/2016-election-update.html

significantly more difficult to discover and prosecute mistruths being spread through traditional and social media. The storming of the US Capitol Building by supporters of then President Donald Trump, motivated in large part by an online campaign of misinformation from the Trump campaign, which falsely claimed that the election had been stolen. It was a vivid indication in the real world of the violent consequences of factually-baseless communication. That development in the United States should provoke a close examination of what could be done to prevent the spread of such misinformation and deceptive campaign material in Australia. This Bill creates both enforceable and normative impacts of legislating against the dissemination of misleading and deceptive political advertising which would assist in addressing these concerns.

17 A further concern is the use of deep fakes and advertising of unknown or confusing origin. A deep fake is a video or voice recording of a person in which their face or body has been digitally altered so that they appear to be someone else, typically used maliciously or to spread false information. It could include the use of a candidate's image, a political party's colours or logos, or other insignia in a way which is misleading and confuses the electorate as to the origin of the advertisement. The World Economic Forum has warned that deep fakes could be weaponised in an election, citing examples of where they have been used in election campaigns in Belgium, Malaysia and Gabon to destabilise governments and political processes.⁸

18 The Brookings Institute argues that deep fakes are well on their way to not only distort the democratic discourse but also erode trust in public institutions at large.⁹ This technology has already been deployed in Australia during the 2020 Queensland election campaign, while the advertisement was clearly labelled as not being the Queensland premier, it is an example of the use of this technology in Australia and the promoters paid over \$7,000 to promote the video into Facebook feeds of Queenslanders and was viewed up to 1 million times. Deep fake technology is becoming increasingly accessible and more sophisticated through improvements in computing power and artificial intelligence.

19 The 'Mediscare' campaign is an Australian example of advertising which offended the sensibilities of the electorate in the way it passed itself off as being issued by a government department. While the Mediscare campaign is now prohibited by amendments to the Criminal Code (see s 150.1), the offence is limited to conduct which purports to be on behalf of a Commonwealth body. A candidate or political party would not be protected by it. This Bill amends the *Commonwealth Electoral Act* to expressly prohibit the production and distribution of material that impersonates or passes-off as being another election participant.

Existing Commonwealth provisions

⁸ <https://www.weforum.org/agenda/2020/10/deepfake-democracy-could-modern-elections-fall-prey-to-fiction/>

⁹ <https://www.brookings.edu/research/is-seeing-still-believing-the-deepfake-challenge-to-truth-in-politics/#cancel>

20 At present the Commonwealth Electoral Act s329 prohibits the publishing or distribution of material that is likely to mislead or deceive an elector in relation to the casting of a vote. This clause has been narrowly interpreted by the Courts in *Evans v Crichton-Browne*¹⁰ to only cover the process of how to physically cast a vote, not the decision that leads to that vote. The current prohibition in s329 of the Electoral Act provides for potential regulatory enforcement or successful prosecution following the decision in *Garbett v Liu*. Retaining s329 will also ensure that misleading conduct which is not comprised in an electoral advertisement (so defined) or which does not contain a statement of fact, but which is otherwise targeted at the casting of the vote, will remain prohibited.

State and Territory Legislation

21 The South Australian Electoral Act s113 has prohibited misleading or deceptive statements of fact in electoral campaigns since 1985. Similar language was employed in the Australian Capital Territory Electoral Act amendment to s297A that unanimously passed the Legislative Assembly in August 2020. The South Australian legislation has survived constitutional scrutiny in the South Australian Supreme Court in *Cameron v Becker*.

22 Since 1997, there have been 315 complaints made to the South Australian Electoral Commissioner regarding misleading or deceptive statements of fact and 27 determinations in favour of the complainant resulting in a retraction and/or apology.¹¹ Many experts in the field of integrity believe that this model reflects the most appropriate mechanism to improve the integrity of claims made during election campaigns in the Australian context.

23 This Bill follows a similar structure and complaints mechanism to these existing examples in State and Territory legislation which have demonstrated efficacy and normative impacts on the volume of misleading and deceptive advertising during election campaigns.

Financial Impact

24 Nil

¹⁰ (1981) 147 CLR 169.

¹¹ Hill, Baltutis and Douglas (2021) *South Australia's Truth in election Advertising Laws: Basis for a Model for the Rest of Australia*, University of Adelaide, 60

Statement of compatibility with human rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

1 This Bill amends the Commonwealth Electoral Act to prohibit misleading and political advertising during Federal elections. The Bill prohibits advertising that contains a statement of fact which is misleading or deceptive to a material extent or is likely to mislead or deceive to a material extent. Further, the Bill prohibits parties, candidates and campaigners from impersonating or passing off material as being another participant. This seeks to address developments in technology which make it easier to fraudulently portray a candidate.

2 The Bill creates a complaints process through the Australian Electoral Commissioner who can order a retraction of the statement and/or an apology to the effected party. Ultimately recourse to the Courts is available where a dispute is unable to be satisfactorily settled by the Commissioner.

3 The main purpose of the Bill is to address the volume of misleading and deceptive political advertising that occurs during Federal elections. Each election, a number of advertisements and claims by candidates, their parties and associated campaign groups are published that are untrue and designed to mislead or deceive the voter about the position or platform of an opposing candidate. The result of this has been an erosion of trust in political advertising and in politicians generally. In addition, it reduces the efficiency of electoral participation.

4 Australia has had no shortage of examples of misleading and deceptive advertising campaigns. The ‘Mediscare’ (2016) and ‘Death Tax’ (2019) campaigns respectively sought to mislead electors about the alternate policies. These campaigns were successful in provoking fear and suspicion of an alternate policies and candidates. The veracity of these campaigns could be tested through this legislation, the evidence which underpins them could be challenged through a more detailed analysis of the statements of fact that substantiate the campaign. The 2019 election also saw signs in Mandarin “mimicking the purple theme of the Australian Election Commission” claiming that preferencing the Liberal Party is the “correct way to vote”. These prominent examples are the tip of the iceberg, the advent of social media and the ability to micro target advertisements to particular

audiences demonstrate a far greater issue with the ability to regulate political advertisements and truth.

5 Polling by The Australia Institute indicates that 9 in 10 Australians want truth in political advertising legislated.¹² The Competition and Consumer Act regulates against misleading and deceptive advertising in trade and commerce. The concept of preventing misleading and deceptive advertising is not foreign to the private sector and should not be viewed as an attempt to curtail political expression or freedom of speech, rather this Bill seeks to apply the same standards to the political realm that is expected in respect to provision or sale of goods and services.

6 This Bill is designed to implement safeguards in Australia against the misleading and deceptive advertising.

Human rights implications

7 The amendments proposed in this Bill engage the following rights under the International Covenant on Civil and Political Rights (ICCPR):

- the right to freedom of expression (Part III, Article 19, Section 2); and
- the right to take part in public affairs (Part III, Article 25).

The right to freedom of expression

8 The right to freedom of expression is contained in Article 19 of the ICCPR. It includes the 'freedom to seek, receive and impart information and ideas of all kinds,' regardless of medium (Article 19(1), ICCPR).

9 This right is engaged because the Bill seeks to limit freedom of expression by making unlawful the printing, publication or distribution of certain content, where that content is electoral matter within the meaning of section 4AA of the Commonwealth Electoral Act.

10 The right to freedom of expression is not absolute and may be limited by law, to the extent those limitations are necessary for the respect of the rights or reputations of others; or the protection of, inter alia, public order (Article 19(3) ICCPR).

11 In addition to the instances of misleading or deceptive conduct within Australian elections outlined above, there is a developing global view that the number of deep fakes and misinformation campaigns and their ability to penetrate the electorate will only increase.

¹² <https://australiainstitute.org.au/report/we-can-handle-the-truth-opportunities-for-truth-in-political-advertising/>

12 Various international studies have demonstrated a causal link between increasing volumes of fake news or disinformation and inefficient election outcomes. For example, Zimmerman and Kohring (2020) demonstrate this link in the 2017 German election, Jones-Jang et al (2020) on the US 2018 midterms and Cantarella et al (2019) on the Italian elections.

13 The World Economic Forum has warned that deep fakes could be weaponised in an election, citing examples of where they have been used in election campaigns in Belgium, Malaysia and Gabon to destabilise governments and political processes.¹³ The Brookings Institute argues that deep fakes are well on their way to not only distort the democratic discourse but also erode trust in public institutions at large.¹⁴

14 The increasing availability of targeted online advertising means such conduct can also be distributed in mass to those people identified as being most susceptible to it.

15 The work of the Australian Competition and Consumer Commission through the *Digital Platforms Inquiry* highlights the need for greater regulation of social media content to prevent the dissemination of misinformation.¹⁵ The release in February 2021 of the *Australian Code of Practice on Disinformation and Misinformation* provides for a voluntary self-regulatory mechanism by social media companies of the accuracy of content distributed through their platforms.¹⁶ However, that code does not address the matter of misleading or deceptive political advertising as there is no current legal mechanism to underpin the code in that regard. This Bill provides that mechanism and would complement a furthering of that work by providing a third-party complaints vehicle and an enforcement mechanism to address the spread of misinformation by politicians during election campaigns for personal gain.

16 The right of a person to freely express any view must be balanced against the need to protect the broader public when exercising their voting franchise as well as the faith of the public in our democratic institutions. The Bill does this by only constraining the ability of a person to disseminate electoral advertising or other content which either contains a statement of fact which is misleading or deceptive *to a material* extent, or which wrongly passes itself off as having been produced by a particular political actor.

17 The Commonwealth Electoral Act already contains a comparable, albeit narrower, limitation on the freedom of expression in section 329(1), which makes it unlawful for a person to print, publish or distribute any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

¹³ <https://www.weforum.org/agenda/2020/10/deepfake-democracy-could-modern-elections-fall-prey-to-fiction/>

¹⁴ <https://www.brookings.edu/research/is-seeing-still-believing-the-deepfake-challenge-to-truth-in-politics/#cancel>

¹⁵ <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

¹⁶ <https://digi.org.au/disinformation-code/>

18 The new limitations introduced by the Bill are further necessary for the overall protection of the rights and reputations of political participants, along with the protection of public order by limiting the proliferation of misinformation in the political realm.

19 They do not otherwise impose any restrictions on individuals expressing their political views, including opinions, or contributing to public discourse on elections, government and political actors. In this way, the limitations proposed by the Bill are reasonable and proportionate.

20 The Bill is compatible with the right to freedom of expression.

The right to take part in public affairs

21 The right to take part in public affairs is contained in Article 25 of the ICCPR. This right provides that ‘every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to take part in the conduct of public affairs.’ None of the distinctions mentioned in Article 2 of the IPCC are relevant to the provisions of the Bill.

22 This right is closely linked to the right to freedom of expression and accordingly, the Bill is engaged in a similar context. The Bill only seeks limit the right to take part in public affairs, to the extent that participation involves the dissemination of electoral matter that contains materially misleading or deceptive factual statements, or which incorrectly passes itself off as having been produced by a particular political actor.

23 These limitations are necessary, reasonable and proportionate for the reasons outlined above. The Bill does not otherwise impose any restrictions on individuals participating in the political realm.

24 The Bill is compatible with the right to take part in public affairs

Conclusion

25 The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Notes on clauses

Part 1—Preliminary

Clause 1—Short title

2 Clause 1 specifies that the short title of the Bill, once enacted, will be the *Commonwealth Electoral Amendment (Stop the Lies) Act 2021*.

Clause 2—Commencement

3 Clause 2 provides for the Bill to commence as an Act on the 28th day after Royal Assent.

Clause 3—Schedules

4 Clause 3 clarifies the interaction of schedules in this Act with others in the Commonwealth Electoral Act.

Schedule 1—Amendments

Part XXB Misleading and deceptive political advertising

5 Item 1 inserts the following provisions to amend the *Commonwealth Electoral Act 1918*.

321J Definitions

6 Defines an election participant, what it means to engage in conduct and to publish.

321K Electoral matter that is misleading or deceptive etc.

7 321K Electoral matter that is misleading or deceptive etc. specifies that a person must not publish or distribute political advertisements that are misleading or deceptive.

8 This section also prohibits the ability to impersonate or pass-off material as being another person or published by another person. This is targeted at the use of technology to mislead or deceive with the most extreme example being the use of deep fakes to completely imitate the image or voice of a potential candidate to deliberately mislead or deceive voters about what has been said.

321L Complaints

9 321L Complaints allows any person to make a complaint to the Electoral Commissioner regarding a breach under 321K.

321M Powers of Electoral Commissioner

10 321M establishes the powers of the Electoral Commissioner to investigate and take action to remedy the breach

321N Powers of courts

11 321N establishes the powers of the courts and referral powers. This includes the ability of the Electoral Commissioner or a candidate who had made a complaint to the Commissioner to make an application to the court to prosecute the alleged breach. 321N(2) inserts clauses to prevent vexatious litigation of a claim to limit the ability of litigants to abuse the court process for political or personal gain.

321P Offence

12 Outlines the offence and remedies available which may include a fine of up to 50 penalty units for individuals or 250 penalty units for a body corporate.

2 Section 329 (at the end of the heading)

13 Specifies that the clause is restrained to the casting of a vote as read by the High Court of Australia in *Evans v Crichton-Browne*.

3 After subsection 383(10)

14 Clarifies that the injunctions provided for in s383 are not applicable to the offences outlined in s321K as the remedies for those offences are entirely contained in s321.