



Tasmanian Unions

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Electoral Act Review

Submission to the Tasmanian Government
Department of Justice,
Office of the Secretary

15th of April 2019

1. Introduction

Unions Tasmania is pleased to make this submission on the Tasmanian Government's *Electoral Act Review – Interim Report*, December 2018 (**'Interim Report'**), further to our submission in July 2018 on the terms of reference and guiding principles set out in the Tasmanian Government's *Electoral Act Review – Fact Sheet 1*, June 2018.

Unions Tasmania is the peak body for trade unions in Tasmania. With 25 affiliate union in Tasmania, we represent approximately 50,000 union members across industry, in both the public and private sectors. We are also the local branch of the Australian Council of Trade Unions (ACTU).

Unions Tasmania welcomes this review and the positive role it will have in increasing transparency and public confidence in our democracy. We note with disappointment that the Grattan Institute in 2018 ranked Tasmania as the least transparent state when it comes to our electoral disclosure laws. This no doubt contributes to Tasmania's ever diminishing trust and confidence in our political system and its representatives.

Union members were vocal and swift in their condemnation third party donations from the gambling lobby in the 2018 State Election and were highly critical of the fact that they were unlikely to ever find out in full the source and amount of those donations, estimated to be in the millions.

Unions Tasmania submits that any change to Tasmania's *Electoral Act 2004* (**'Tasmanian Act'**) and associated laws must not disadvantage civil society organisation, including unions, who play a positive role in our representative democracy. The union movement will not support any measures that are unfairly aimed at reducing our ability to collectively voice the concerns of workers.

We make further comment below regarding issues in Section 2 and Section 3 of the Interim Report, with emphasis on their potential application to unions.

2. Section 2: Disclosure and Electoral Expenditure

Unions Tasmania has previously stated our position of support for a state-based disclosure regime. We proposed a set of principles in our initial response and we stand by those principles. With regard to section 2 of the Interim Report, given its focus is on a disclosure regime for political parties of which we are not, we confine our response to the following comments regarding appropriate resourcing of the Tasmanian Electoral Commission.

Unions Tasmania agrees that if any state-based disclosure regime is introduced, compliance issues, such as any proposed new penalties, limitation periods and any investigative powers of the regulatory authority will require detailed consideration. The Tasmanian Electoral Commission is already underfunded, and Unions Tasmania supports the creation of direct public sector jobs within the Tasmanian Electoral Commission to support any new disclosure regime.

3. Section 3: Disclosure and Electoral Expenditure, and Regulation of Third Parties

In relation to sections 2 and 3 of the Interim Report, we reiterate the following points made in our submission of July 2018, with additional comments in relation to specific Consultation Issues which may apply to unions.

Unions Tasmania supports the principle that the public has a right to know who is campaigning on election issues. The Tasmanian community is well aware that our State lags the rest of the nation in electoral disclosure requirements and transparency, and rightly demands that the Tasmanian Government implement an electoral disclosure regime. We do, however, make the very clear and critical distinction between political parties and corporate lobby groups, civil society organisations and unions who are often described as third-party campaigners.

Unions campaign to give voice to the concerns of workers, regardless of who is in government and play a significant role in their members' democratic participation. Members join unions in part because we exist to provide a collective voice in the democratic process that they would not have if they acted alone.

Our members expect us to campaign in various spheres – workplace, community, public, industrial, political – when it advances their interests. The workplace relations system is embedded in State and Federal legislation that can only be changed by lawmakers; like other civil society organisations we must engage in the democratic process before, during and after elections.

But, despite the important role we do play in giving our members a political voice, third party campaigners are fundamentally different to political parties and should not have the same regime of regulation applied to them.

First and foremost, unions do not have solely political aims. The structure, functions and status of third parties compared to political parties are markedly different, as set out extensively in reports prepared for the NSW Electoral Commission in 2010¹ and 2012². In summary, key differences include:

- Whereas third parties such as unions campaign to win on issues, political parties are the only ones which campaign to win government, and which combine representative, electoral, participatory, agenda setting and governance functions, making them the central intermediary structure between society and government.
- Political parties are wholly political organisations, whereas most third-party campaigners have multiple organisational purposes and their campaigns are fluid and multidimensional. In addition to providing services to members, unions campaign year-round in the interests of their members, in the industrial and the

¹ Tham, J., *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (2012) pp75-77, quoting Tham, J., *Towards a More Democratic Political Finance Regime in New South Wales* (2010) pp19-20

² Tham, J., *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (November 2012) pp77-82

political spheres. Unlike political parties, the practical separation of specific election campaign activities would prove distinctly challenging and cumbersome for third parties.

- Third party organisations such as unions are non-profit organisations which rely predominately on member subscriptions for their funding. Many are small organisations without inhouse resources to deal with complex or onerous compliance requirements.

Unions Tasmania points out that, in addition to any issues-based campaigning at election time, we have a number of other priorities that are greater than any individual election result.

These include providing workplace health and safety (WHS) training to union officials and health and safety representatives, providing legal and industrial advice, connecting members of the public to their relevant unions, organising professional development and training, giving workers a voice on health and safety and superannuation and recruiting members to unions. This is not an exhaustive list.

We submit that any system to regulate third parties during elections should take account of the differences between them and political parties outlined above and should not be designed to curtail the participation of civil society organisations including unions, in our democracy, for example by creating structural disadvantage for them, or being too complicated, burdensome or costly for them to implement.

We further that submit that individual unions operating in Tasmania and Unions Tasmania ourselves are small organisations, many with only one or two staff in the State. In addition, for unions that are officially affiliated to the Australian Labor Party (ALP), they are already regulated as associated entities under Part XX of the *Commonwealth Electoral Act 1918* and subject to reporting requirements by the Registered Organisations Commission.

Unions Tasmania shares the concern expressed in the Interim Report that caps on expenditure for third party campaigners have the potential to stifle political discourse and communication.

However, whereas the Interim Report appears to consider this effect of stifling political discourse and communication to be a risk only in the event that no cap is placed on spending of political parties, we draw attention to the recent attempt in New South Wales to starkly disadvantage third party campaigners by capping their electoral expenditure at less than one twentieth of the expenditure cap of political parties.

The Interim Report compares election funding and disclosure settings across Australian jurisdictions and notes multiple High Court challenges to the New South Wales legislation³ including questions around its detrimental effect on democracy. In the weeks since the Interim Report was released, this lop-sided application of caps in the

³ Interim Report, page 50

New South Wales legislation was also struck down by the High Court⁴. Such legislation should rightly be rejected.

Unions and other civil society organisations are substantially different to political parties as outlined above. Unions Tasmania submits that any changes to the Tasmanian Act should not be allowed to stifle political discourse and communication, or unfairly disadvantage third parties compared to political parties.

3.1. Consultation Issue 16

Unions Tasmania supports the introduction of a state-based disclosure regime for political donations received by political parties and candidates in Tasmania. We submit that if corresponding regulation of disclosures and donations for third parties is also introduced, this regulation should not necessarily mirror that of political parties and candidates, but should take into account the differences in structure, role and function outlined above between third parties and political parties, so as not to unfairly disadvantage the former.

3.2. Consultation Issue 17

In relation to Consultation Issue 17 in the Interim Report, in the event that any additional regulation of third parties is introduced in Tasmania, Unions Tasmania makes the following points.

- Unions and other civil society organisation campaigns have a number of goals, objectives and functions that are not limited to elections. A definition of electoral activity must not be so broad as to capture all campaigning throughout the year. For example, public sector unions regularly advocate to strengthen and protect Tasmania's public health system, as a normal part of advancing the interests of their members who work in that system, whether there is an election underway or not.

Some union campaigns may span many years. A relevant example of this is the Big Steps campaign by United Voice to achieve equal pay for educators in the female dominated early childhood education sector. It would be unfair and unreasonable for such campaigns to be included in a definition of electoral activity when they effectively continue year-round.

- Further, since Tasmania does not have a fixed electoral cycle, we urge against a definition that would lead to unreasonable reporting periods for unions and other civil society organisations which campaign throughout the year. If a state-based disclosure regime is introduced for third parties, then we would advocate for a reporting period commencing at the issue of writs and concluding at the date of election.

⁴ Unions NSW v New South Wales [2019] HCA 1, accessed 8 February 2019, <http://eresources.hcourt.gov.au/downloadPdf/2019/HCA/1>

Unions Tasmania encourages the Government to consider, as part of this review, fixed electoral terms.

- As it has been clearly demonstrated that unions do not have solely political aims, we urge against the creation of any new classification that would incorrectly define the type of organisation that unions are and impose additional compliance burdens on them. It would not be fair or reasonable to create an inaccurate classification of political campaigners as a new additional category to third party campaigners if the effect of that would be to require them to have the same disclosure obligations as political parties.
- If a state-based disclosure regime is put in place, it is our view that this would provide adequate regulation of third parties. Therefore, we do not support the registration of third parties with the Tasmanian Electoral Commission prior to making any electoral expenditure.
- As expressed in our submission of July 2018, Unions Tasmania supports timely disclosure of electoral donations by political parties and candidates. We support the disclosure of donations within weeks, not months or years but we make the important point that disclosure requirements for third parties and unions must be realistic and manageable, so as not to disadvantage their participation in the democratic process, given the small resourcing available to civil society organisations including unions, to manage compliance.
- Trade unions have aims that are not solely political and whilst some have an affiliation with a political party, they are already regulated under other legislation as outlined above. We do not support the creation of an additional compliance burden for unions by including them in any new regulation of 'associated entities'.

3.3. Consultation Issue 18

The High Court decision in January striking down the capping regime in New South Wales should serve to encourage a cautious approach in relation to caps and third parties.

Unions Tasmania submits that it is problematic to discuss caps in isolation. We note that where caps exist in other jurisdictions, they are often accompanied by public funding to political parties and candidates. Unions Tasmania points out that capping third parties creates additional burdens as they do not receive public funding. How electoral activity is defined is relevant to this consideration as well.

We support the proposition that a new regime for caps on political donations by third parties be considered at a later stage with further investigation and research to inform the discussion.

3.4. Consultation Issue 19

The Tasmanian community may never know the full amount of money spent by the gambling lobby, particularly those business interests invested in poker machines, to influence the 2018 Tasmanian State Election, but there is no doubt that community sentiment is against corruption of politics by corporate interests and big business. The same can be said of other jurisdictions where bans are in place for donations from specific big business interests, which repeatedly are perceived to secretly and unduly influence elections in order to buy political influence which will lead to their financial profit⁵.

Unions Tasmania would support bans on political donations from big property developers and tobacco interests.

3.5. Consultation Issue 20

Unions Tasmania submits that comparing expenditure in different jurisdictions to assist in determining a possible cap in Tasmania will not necessarily deliverable an equitable result given the different scale of organisations campaigning in the jurisdictions, geographic boundaries, cost and scale of local media market and size of population in particular.

As we have referenced throughout this submission, and in line with our earlier response to this review, the lack of a political disclosure regime in Tasmania makes it practically impossible to look back at our most recent election and make an assessment on appropriate expenditure.

Like many Tasmanians, we could not escape the print, television and radio media saturation by gambling and hotel industry associations during the campaign in favour of retaining poker machines in Tasmania's pubs and clubs. Comparatively, Unions Tasmania did no television or print advertising during this campaign. We estimate this expenditure totaled millions of dollars but cannot verify that.

Unions Tasmania submits that the decision in *Unions NSW & Ors v NSW* [2019] HCA 1 serves to strongly counsel lawmakers to exercise caution when capping the political donations of third-party campaigners in a way that would effectively serve to curb the implied freedom of political communication under Australia's Constitution.

4. Conclusion

Above all, reform of the Tasmanian Act should provide the transparency to enable timely public scrutiny of who is giving money to political parties and how much that funding is. The Tasmanian community, including working people and their unions, have expressed their outrage at the extraordinary resources thrown into the 2018

⁵ Orr, G., "In McCloy case, High Court finally embraces political equality ahead of political freedom" *The Conversation*, 8/10/15: <https://theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746> Accessed 18 February 2019

Tasmanian state election by businesses with gaming interests, and expect this reform to address the issue of big business buying elections, among others.

Reform of the Tasmanian Act must at the same time support the democratic participation of Tasmanian people and civil society organisations including unions.

Unions Tasmania is pleased to make this submission and welcomes fair reforms that strengthen and protect democracy in Tasmania.