

Internet comment on electoral matters

Supplementary Submission to Parliamentary Electoral Matters Committee

Inquiry into the Conduct of the 2004 Federal Election and Matters

Related Thereto

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Internet comment on electoral matters: Supplementary Submission

Recent public comments have raised the possibility that Section 328 of the Electoral Act could be applied to Internet sites. The effect would be to criminalise anonymous political or social comment, to the extent that this is deemed to be 'electoral material'. Particular concern was expressed in relation to the site <http://www.johnhowardlies.com/> which listed purported false statements by the Prime Minister, Mr Howard.

In my submission to the inquiry I argued that consistent application of the Electoral Act to Internet publications would appear to imply that it is permissible to publish electoral matter, without identifying details as part of ordinary editorial content, but that advertisements, presented as a discrete part of the page or site would require authorisation, whether they were paid for or published without charge. In particular, I argued that comments (which are commonly submitted under pseudonyms) should be viewed analogously to letters to the editor calls to talkback radio programs, for which identifying details are not required.

The purpose of this supplementary submission is to respond to a number of questions raised during my appearance before the committee.

Identification of commenters

The source of my information regarding the status of letters to the editor was *Australian Electoral Commission Electoral Backgrounder No.15 on Electoral Advertising* (attached), which states:

21. There is no requirement for the identification of the authors of "letters to the editor" in newspapers and journals. Similarly, there is no law requiring the identification of talkback radio callers during an election period.

The suggestion was raised during the hearing that it might be desirable for authors of blogs to require commenters to supply them with names and addresses. I would like to raise the following points in response:

- (a) This would not satisfy the requirements of Section 328
- (b) Given the resources available to blog authors, checking the validity of names and addresses would be impossible in practice
- (c) Pseudonymous comment is the norm rather than the exception in blogs, and discussion of non-political topics frequently involves mention of personal and employment matters that could

be very damaging if the name of the author were known. Many commenters would be unwilling to comply with this requirement

Practicality of requiring identification

The question was raised during hearings as to whether the extension of Section 328 to blogs and similar sites would be legally effective and technically feasible. In both cases, I believe the answer is negative. As an experiment, I created a blog with the title 'Section 328 Doesn't Work' located at <http://sectionthreetwoeight.blogspot.com/> using the popular package Blogger, which also provides free publishing. The process took less than five minutes and required no identification beyond the provision of an email address, which was not checked. Blogger promised not to reveal this information to anyone and, in any case, anonymous email addresses are freely available from many suppliers.

Any attempt to take legal proceedings against a site of this kind would face obvious difficulties. The Blogger hosting service is located in the United States, and US residents are not bound by the Australian Electoral Act. An attempt to have a site of this kind closed down on the basis that the absence of identification violated Australian electoral law would almost certainly be regarded by the US courts as being in violation of the First Amendment to the US Constitution. Furthermore, the choice of jurisdictions is essentially unlimited. All that is required to set up a blog is some freely available software and a hosting service. So even if the US courts were willing to act against blog sites publishing Australian electoral matter without identification, this would be of little value.

Even supposing that the jurisdictional problems could be overcome, the time involved in the necessary litigation would almost certainly exceed the length of an election campaign.

Many of these difficulties would also apply in relation to civil or criminal defamation action. However, in these cases, time is not of the essence and foreign courts would be more likely to recognise Australian jurisdiction. Hence, to the extent that the material published in anonymous political weblogs is defamatory, it would be better to proceed under defamation law than under the Electoral Act.

Practical implications

Although the extension of Section 328 to cover weblogs and comments would have no practical effect on sites like JohnHowardLies.com, set up for the duration of an election campaign and abandoned thereafter, it would have a substantial negative effect on continuing blogs such as johnquiggin.com. As noted in the original submission, this site includes regular posts on matters of political interest and is open to comments, most of which are published under pseudonyms. Although the appropriateness of pseudonymous comment has been debated, the practice is well established, and is unlikely to change in response to alterations to Electoral Law.

A requirement that comment on these sites include the name and address of the author would effectively require that comments be closed for the duration of election campaigns (in fact, a literal reading of the Act suggests that there is no limitation to declared campaign periods).

Also as noted, many blogs are published anonymously and contain personal material, discussion of workplace events and so on. A number of bloggers have been dismissed from employment or suffered other adverse personal consequences as a result of identifying themselves or being identified. Thus, there are strong reasons for protecting anonymity in these contexts. The effect of a requirement for identification would require such bloggers to refrain from discussing any political matter (that is, any matter of current interest) for the duration of election campaigns (or, on a strict reading, at any time).

Summary

Application of Section 328 to blogs and comments would have no practical impact in preventing the anonymous publication of defamatory or irresponsible political material on the Internet. To the extent that such publication can be prevented at all, existing defamation law provides a superior avenue.

On the other hand, application of Section 328 would have a severe chilling effect on the most rapidly expanding and innovative section of the media, with substantial adverse effects on Australian culture and, ultimately, on technological progress.