

Political acts and practices exemption

Introduction

- 5.1 Political parties registered under Part X1 of the *Commonwealth Electoral Act 1918*¹ (the Electoral Act) are exempted from the operation of the Bill altogether.²
- 5.2 Clause 7C also exempts the political acts and practices of political representatives (consisting of a member of a Parliament or a councillor of a local government authority) and their agents at Commonwealth, State and local level in relation to their participation in elections, referenda or other aspects of the political process. The exemption applies to contractors of political representatives, subcontractors and volunteers for registered political parties.

Rationale for exemption

- 5.3 In his Second Reading Speech on 12 April 2000, the Attorney-General, the Hon Daryl Williams AM QC MP, stated, in relation to this exemption, that it recognised that:

Freedom of political communication is vitally important to the democratic process in Australia. This exemption is designed to

1 The definition of 'registered political party' is contained in clause 6(1) of the Bill.

2 Clause 6C(1) excludes registered political parties from the definition of 'organisation'.

encourage that freedom and enhance the operation of the electoral and political process in Australia.³

- 5.4 The Attorney-General expressed confidence that the exemption would not 'unduly impede the effective operation of the legislation.'⁴ The Attorney-General's Department noted that there are competing interests in this area and that 'one of them is the functioning of the democratic system.'⁵
- 5.5 The Committee also notes that there is a strong competing public interest in the collection of personal information and communication with constituents if an open effective democratic system is to be maintained.
- 5.6 The Attorney-General's Department confirmed that it was intended to make the exemption broad but it was not in a position to comment further.⁶ The exemption would apply to 'lists, information collected about people in the neighbourhood by political parties'⁷ and would allow a political party to sell its information databases.⁸ The Department also confirmed that the exemption would mean that people would not be able to access information held about them by a political party and would have no remedy if the information held about them were wrong.⁹ Nor would people be able to ask a political party to remove their name from the party's lists.¹⁰
- 5.7 The Privacy Foundation stated that they understood that two arguments had been given in favour of this exemption.¹¹ The first argument is that privacy law could be abused during an election campaign as a result of the political process being obstructed through a party being besieged by demands from a figure in an opposing party for access to all the records held about them.¹²
- 5.8 The Privacy Foundation stated that the second argument was that the exemption is necessary to give effect to the implied constitutional freedom

3 The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, 12 April 2000, House of Representatives, *Hansard*, p.15077.

4 Ibid. No additional information is provided in the *Explanatory Memorandum*.

5 Attorney-General's Department, *Transcript*, p.27.

6 Attorney-General's Department, *Transcript*, p.29.

7 Ibid, *Transcript*, p.29.

8 Ibid, *Transcript*, p.30. See also evidence of the Privacy Commissioner, *Transcript*, p.38.

9 Ibid, *Transcript*, p.29.

10 Ibid, *Transcript*, p.29. The Federal Privacy Commissioner said, in oral evidence, that the exemption as currently drafted 'does have some pretty horrific side effects that I can only conclude are unintended consequences.' He cited as examples not being able to see what information is held by a political party or getting information corrected, *Transcript*, p.37.

11 Privacy Foundation, *Submissions*, p.S520.

12 Ibid, *Submissions*, p.S520.

of political speech.¹³ The Privacy Foundation stated that its advice from constitutional law experts is that the limited right to free political speech which has been recognised in the *Constitution* 'does not impose any relevant limitations on governments protecting individuals from how political parties or anyone else collect, store and use personal information'.¹⁴

- 5.9 The Privacy Foundation stated that it suspected that the reason for the exemption 'is that it protects the highly sophisticated campaign techniques of political parties which rely on building substantial databases to target voters'.¹⁵
- 5.10 There was not detailed evidence before the Committee of the broader context in which privacy should be placed taking account of the political environment in which this exemption will operate. Notably, the way privacy principles may overlap or even impinge on other complex political issues was not addressed.
- 5.11 The Committee notes that there is already some existing regulation of the handling of information by Members of Parliament, such as provisions of the Electoral Act and a number of Parliamentary standing orders and procedures. As a result of this there are a number of other bodies that also have an interest in the handling of information in the course of the parliamentary and electoral process. These include the Australian Electoral Commission, the Joint Standing Committee on Electoral Matters the House of Representatives Standing Committee of Privileges and the political parties. The Committee is aware that several of these organisations are currently reviewing practices and procedures in relation to the handling of information.

The Federal Privacy Commissioner's comments

- 5.12 In his press release of 12 April 2000, issued to coincide with the Bill's introduction into Parliament, the Federal Privacy Commissioner was critical of the proposed exemption. He stated that he did 'not think that the proposed exemption for political organisations is appropriate'.¹⁶ He argued that:

13 Ibid, *Submissions*, p.S520.

14 Ibid, *Submissions*, p.S520.

15 Ibid, *Submissions*, p.S520.

16 Mr Malcolm Crompton, Federal Privacy Commissioner, *Press Release*, 12 April 2000.

if we are to have a community that fully respects the principles of privacy and the political institutions that support them, then these institutions themselves must adopt the principles and practices they seek to require of others. I believe that political organisations should follow the same practices and principles that are required in the wider community.¹⁷

- 5.13 The submission from the Privacy Commissioner reiterated these concerns. He expressed concern that political parties ‘could use personal information they collected for any purpose they choose including selling it for a commercial purpose.’¹⁸ They would not need the consent of people to use their personal information.¹⁹
- 5.14 However these arguments must be balanced against the imperative to ensure that Members of Parliament can appropriately serve their electorates. Effective representation of constituents is the essence of the functioning of a system of representative democracy. The Committee is of the view that the fundamental importance of effective representation has tended to be overlooked in the comments of many who have criticised this exemption. In order for a Member of Parliament to ensure that he or she is properly addressing the concerns and interests of his or her constituents it is necessary to be able to collect information concerning the electorate and its constituents and the issues that are relevant to the life of that community.

Federal and State Electoral Commission comments

- 5.15 The Australian Electoral Commission (AEC) provided information to the Committee about the permitted provision of enrolment information to registered political parties and Members of Parliament (MPs). They advised, in their submission, that the AEC provides enrolment information electronically in CD-ROM format on a monthly basis to all registered political parties and MPs. The information includes the names, addresses, salutations, postal address, date of birth and gender of electors.²⁰
- 5.16 Section 91A of the Electoral Act governs the permitted purposes to which enrolment information provided to political parties and MPs can be put. Political parties and MPs cannot use enrolment information provided to

17 Ibid.

18 Privacy Commissioner, *Submissions*, p.S381.

19 Ibid, *Submissions*, p.S381.

20 Australian Electoral Commission (AEC), *Submissions*, p.S50.

them in electronic form for any purpose other than those purposes permitted by the Electoral Act. Section 91B makes it an offence to misuse enrolment information obtained under section 91 for commercial purposes.²¹ The Committee noted that the purposes permitted under the Electoral Act appear very similar to those outlined in Clause 7C of the Bill. The AEC emphasised, however, that:

...whilst the Electoral Act prohibits the commercial or non-electoral use of personal elector information provided by the AEC to registered political parties and MPs, there remains a real risk that any person, such as an employee, party worker, or contractor, who is able to access the elector information databases from the electorate offices of MPs, for example, is in a position to use or pass on unexamined personal elector information for non-electoral purposes.²²

5.17 In its submission the AEC noted that:

...if the enrolment information provided by the AEC were to be repeatedly merged with personal information from other sources, there would come a point at which it might no longer be legally recognised as enrolment information, thereby avoiding the penalties in section 91B of the Electoral Act.²³

5.18 The AEC expresses its concern that:

... personal elector information obtained by political parties from the AEC is merged with personal information obtained from other sources to build powerful electronic databases for electoral campaign purposes.²⁴

5.19 The AEC also expressed concern at the accumulation of personal information by political parties through for example actively soliciting postal vote applications.²⁵

5.20 In addition, the AEC expressed concern at the lack of access by the public to information held by political parties to be able to check it and if necessary correct it.²⁶ They stated that there was no limit to the sort of information that may be held.²⁷ The AEC stated, in its evidence, that its

21 Ibid, *Submissions*, p.S50.

22 Ibid, *Submissions*, p.S53.

23 Ibid, *Submissions*, p.S51.

24 Ibid, *Submissions*, p.S54.

25 Ibid, *Submissions*, pp.S51-52.

26 Ibid, *Transcript*, p.93.

27 Ibid, *Transcript*, p.93.

...apprehension arises from the fact that the primary public source of information provided to political parties and members is the role [sic] provided by the Australian Electoral Commission legislatively. That is the connection, the link, and the basis for the apprehension. ...[It] contains detail beyond what is otherwise publicly available.²⁸

5.21 While the AEC acknowledges that the major political parties believe that their elector information databases make an important contribution to the democratic process by allowing them to more precisely target their constituencies, the AEC says that it 'remains concerned about the reach and impact of these private databases'.²⁹

5.22 The AEC notes that the exemption provided in the Bill would mean that the elector information databases currently maintained by the major political parties would remain unregulated.³⁰ It submits that the most serious consequence of that is that:

...electors would have no statutory right to check their own information on these databases to ensure accuracy and to avoid misrepresentation. This will not contribute to public transparency and accountability in the electoral process, and could have a longer term impact on public confidence in the integrity of the electoral system.³¹

5.23 The AEC concluded that

allowing political parties to continue to maintain electronic databases containing personal information on 12 million Australian electors, without allowing electors to check their own personal information, must be regarded as a serious privacy issue.³²

5.24 Concerns were also expressed by the South Australian Electoral Commissioner albeit with a different focus. The South Australian Electoral Commissioner expressed concern that Federal MPs and political parties are provided with elector information that is not available to State MPs, for example, information concerning date of birth and gender.³³ He states that:

28 Ibid, *Transcript*, p.94.

29 Ibid, *Submissions*, pp.S52-53.

30 Ibid, *Submissions*, p.S53.

31 Ibid, *Submissions*, p.S53.

32 Ibid, *Submissions*, p.S54.

33 Electoral Commissioner, South Australia, *Submissions*, p.S103.

whilst information is given to federal members and political parties to service their electorate, there is the potential for that information to be passed to State members thus contravening the provisions of the State Act.³⁴

5.25 The Commissioner stated that his ‘overall concern’ is to:

...protect the privacy of personal information collected for the express purpose of ensuring the eligibility and integrity of the vote by an individual elector.³⁵

5.26 The Committee notes again the necessity of balancing these concerns against the importance of ensuring that the system of representative democracy can function effectively. In order for a Member of Parliament to effectively represent his or her constituents it is essential that they be fully informed about the needs and interests of their constituents. This is an instance in which a strong competing public interest may run counter to the general principle of protection of privacy.

Arguments for the deletion of the exemption

5.27 The Privacy Foundation, for example, is

...strongly opposed to the broad exemption for political parties for their activities in connection with an election, a referendum, or other participation in the political process.³⁶

5.28 The Privacy Foundation argues that political parties should have access to the:

... same information collection and marketing techniques which other organisations in the community have, but under the same rules. These simply establish fair information practices so that voters know who is collecting and using their personal information.³⁷

5.29 Both the Foundation and the Australian Consumers Association (ACA) submitted that the exemption ‘set something of a double standard’³⁸ of

34 Ibid, *Submissions*, p.S103.

35 Ibid, *Submissions*, p.S105.

36 Privacy Foundation, *Submissions*, p.S519.

37 Ibid, *Submissions*, p.S520.

38 Australian Consumers Association, *Submissions*, p.S88.

'one rule for political leaders, and another rule for the rest of the community.'³⁹

5.30 In a similar vein Privacy NSW stated that it had great 'difficulty in accepting that there is any ethically defensible basis for such a comprehensive exclusion.'⁴⁰ Its view is that:

... parties and politicians engage in particularly intensive and controversial processing of personal information. To exclude these activities in their entirety sends the contradictory message that politicians do not care to be bound by the same kind of standards they propose to impose on other sections of the population. It implicitly denies that privacy is an individual right.⁴¹

5.31 The Communications Law Centre also stated:

It is inconsistent for the government to pass legislation subjecting one sector of the community to privacy legislation while at the same time granting a wholesale exemption to an area of activity that has the potential for serious privacy breaches.⁴²

5.32 They argue:

There is no reason why participants in the political process should not be subject to standards regulating how they collect, use, disclose and store personal information.⁴³

5.33 They suggest that:

... individuals would be no less concerned about the use of their personal information for political acts and practices than they would be about the use of that information in the private sector.⁴⁴

5.34 The Committee has taken careful note of these concerns. The Committee, however, is concerned to ensure that the appropriate balance is achieved and that the necessity for the effective representation of constituents as the essential feature of fully representative democracy is not overlooked. The Committee has considered where the balance should lie and has made recommendations that would clarify the exemption to ensure that it is used only for legitimate parliamentary and electoral purposes. These are outlined further at paragraph 5.47 below.

39 Privacy Foundation, *Submissions*, p.S519.

40 Privacy NSW, *Submissions*, p.S292.

41 Ibid, *Submissions*, p.S292. See also the evidence of the Privacy Commissioner, *Transcript*, p.39.

42 Communications Law Centre, *Submissions*, p.S336.

43 Ibid, *Submissions*, p.S336.

44 Ibid, *Submissions*, p.S336.

Possible amendments to the exemption

- 5.35 Suggestions for responding to the problems raised have tended to revolve around attempting to understand and explain the precise issue the exemption is intended to target.
- 5.36 Professor Greenleaf started from the premise that the ‘only legitimate interest’ that politicians and political parties have in being ‘exempted’ in any way from an obligation to respect people’s privacy is that there is some ‘potential for the Privacy Act to be mis-used by one political party against another during the electoral process, with possible interference in the democratic process resulting.’⁴⁵ It appears to the Committee that this oversimplifies the matter and does not deal with the modern role of a Member of Parliament and the ongoing nature of the electoral process. Professor Greenleaf regards the ‘blanket exemption in the Bill’ as ‘completely unnecessary to address that problem’ and recommends that the current exemption be deleted.⁴⁶ The Privacy Foundation agrees with his assessment that this is the only legitimate issue that has been identified.⁴⁷
- 5.37 Professor Greenleaf suggests that all that is needed is to remove the Privacy Commissioner and the Act from the ‘heat of the electoral process’.⁴⁸ He suggests that where a complaint is made against a political party or an associated body, once writs have been issued for any election in which the political party has candidates, the Privacy Commissioner should be required to immediately cease to investigate any such complaint. Once the poll has been declared for all seats in which the political party has candidates, the Privacy Commissioner may resume investigation of the complaint.⁴⁹
- 5.38 The Federal Privacy Commissioner is of the view that once the problem that needs to be resolved has been identified the exemption could be better targeted.⁵⁰ He suggested some mechanism so that, if an individual felt aggrieved for whatever reason, that individual could seek to see the information held, and if necessary, have it corrected.⁵¹ The Commissioner goes on to recommend that if ‘the problems cannot be identified

45 Professor Greenleaf, *Submissions*, p.S304.

46 Ibid, *Submissions*, p.S304.

47 Privacy Foundation, *Submissions*, p.S520.

48 Professor Greenleaf, *Submissions*, p.S304.

49 Ibid, *Submissions*, p.S305.

50 Privacy Commissioner, *Transcript*, p.36.

51 Ibid, *Transcript*, p.37.

accurately at this time, the exemption should be removed from the legislation.⁵²

- 5.39 Both Privacy NSW and Mr Dixon of the Privacy Foundation surmised, along with Professor Greenleaf, that the problem sought to be addressed by way of the exemption was the way privacy legislation may be used to obstruct the political process during an election period. Mr Dixon stated that the best way to deal with that was to address it through the access and correction principle (NPP 6) and provide an exception to that principle rather than a blanket exemption to political parties.⁵³
- 5.40 It is also worth pointing out that the South Australian Electoral Commissioner outlined the way that South Australian legislation specifically addresses one aspect of the issue. Under section 27A of the *Electoral Act 1985 (SA)* the Electoral Commissioner 'may, on application by a prescribed authority, provide ... any information in the Electoral Commissioner's possession about an elector.'⁵⁴
- 5.41 Section 27A(3) provides that 'information is not to be disclosed to a person of a prescribed class if the elector has requested the Electoral Commissioner in writing not to do so'.⁵⁵ The Commissioner states that, since section 27A has been in force 8.93% (91,736) of the total electors enrolled have indicated that they do not want Members of Parliament (among others) to be given information that may be available under this section. Only electors notifying additions or amendments to the roll database have addressed this question. Prior to section 27A being passed information was only released after consultation with the Privacy Committee.⁵⁶

Conclusions

- 5.42 The Committee did not believe that these suggestions adequately responded to the heart of the issue that the exemption seeks to address.
- 5.43 As the Attorney-General's Department stated, the exemption is seeking to strike a balance between competing interests.⁵⁷ One of them is the freedom of political communication that is vitally important to the democratic process in Australia and, allied to it, the functioning of the

52 Ibid, *Submissions*, p.S381.

53 Privacy Foundation, *Transcript*, p.98.

54 Electoral Commissioner, South Australia, *Submissions*, p.S101.

55 Ibid, *Submissions*, p.S101.

56 Ibid, *Submissions*, p.S103.

57 See paragraph 5.4 above.

democratic electoral system and representative democracy. Competing with these is the interest of individuals in protecting their privacy.

- 5.44 It is the Committee's view that it is important to recognise the duty of a Member of Parliament to represent his or her constituents and properly represent the community. To do that effectively demands that parliamentarians respond more specifically, carefully and in a more targeted way to their electorate. This requires the collection and use of a certain amount of information concerning constituents so that local Members of Parliament know as much about the area and the people they represent as possible. This is also consistent with the time-honoured principle that the Member of Parliament should be able to carry out his or her duties without impediment.
- 5.45 It is also crucial that Members of Parliament be able to freely and fully engage in the democratic process. Such participation in parliamentary and electoral discourse is absolutely essential to the vitality and proper functioning of representative democracy.
- 5.46 It is the proper functioning of the democratic system, it seems to the Committee, that the exemption appears to be targeting. However, if that is the aim, the drafting of the exemption needs to clearly indicate the intention that it be used for such legitimate purposes as serving constituents and not, for example, for commercial interests. The Committee's recommendations are consistent with accepted definitions used in relation to parliamentary entitlements and reflect the nature of the role of a Member of Parliament.
- 5.47 The Committee has also recommended a new provision be inserted to make it clear that the exemption does not extend to the sale or disclosure of information collected by a political party or political representative in the course of their duties to anyone not covered by the exemption. This is intended to ensure that the exemption is framed in a way that serves the legitimate interest in the proper functioning of the democratic system and representative democracy and does not go beyond this.

Recommendation 11

The Committee recommends that clause 7C (1)(c) be amended by deleting '...another aspect of the political process' and replacing it with '...in parliamentary or electoral matters.'

Recommendation 12

The Committee recommends that clause 7C (2) (b) (iii) be amended by deleting 'the participation in another aspect of the political process...'

and replacing it with ‘the participation in the parliamentary or electoral process.’

Recommendation: 13

The Committee recommends that a new provision be inserted to provide that clause 7C does not allow a political party or political representative to sell or disclose personal information collected by the political party or political representative in the course of their duties to anyone not covered by the exemption.

- 5.48 The experience and involvement of members of the Committee in the parliamentary and electoral process leads them to conclude that any personal information concerning constituents and their circumstances held by Members of Parliament is treated with the utmost discretion and care. The Committee did not receive evidence that indicated that there have been instances where politicians or political parties have misused personal information provided to them by their constituents.
- 5.49 The Committee would be very concerned if any evidence of abuse of this exemption were to emerge. This issue should be monitored. Should any such evidence emerge, the Committee suggests the Government consider referring the exemption to the Joint Standing Committee on Electoral Matters for further consideration or ensure that it is reviewed as part of the broader review of the Bill that is to occur in two years’ time.