

# CHAPTER 6

## GOVERNMENT ADVERTISING

### Introduction

6.1 This chapter considers possible regulation of government advertising to prevent misuse for party political purposes. Two of the bills address this issue:

- Part 2 of the Charter of Political Honesty Bill 2000 [2002] introduced by Senator Murray; and
- the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 introduced by the Hon Mr Kim Beazley MP.

6.2 The chapter discusses:

- the background to the issues;
- current regulation of government advertising;
- the aims of the bills;
- previous proposals for change;
- the feasibility of regulating government advertising through legislation;
- evidence on the Charter of Political Honesty Bill 2000 [2002]; and
- evidence on the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

### Background

6.3 Government awareness or information campaigns are an accepted mechanism to familiarise target audiences with new initiatives, policies or programs and inform them about how they might benefit, or what they need to do to comply with new requirements. The Commonwealth Government has been described as ‘generally one of the largest national advertisers in Australia’.<sup>1</sup>

6.4 One of the main criticisms levelled at government advertising is that it is open to misuse by government in order to promote its own political interests. Mr Gary Johns, a former federal minister, stated:

While a party in government will continue to argue the right to inform the electorate of changes to the law and programs, Opposition will continue to criticise such expenditure as party-political right up until the time it is their turn to govern! Nevertheless, the opportunity for parties to sell their message at public expense

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<sup>1</sup> Government Communications Unit, ‘Central Advertising System’, at <http://www.gcu.gov.au>.

provides a significant advantage over competitors and begs some form of regulation.<sup>2</sup>

6.5 In recent years there has been increased interest in possible controls over the political content of government advertising, particularly since concerns were raised about the 1998 Government information campaign on its proposed taxation reform.<sup>3</sup> An ANAO review of monthly expenditure on government advertising between July 1989 and August 1998 showed marked increases prior to elections, with a dramatic jump in July and August 1998.<sup>4</sup> The ANAO suggested that the pattern of expenditure could raise questions about the nature and purpose of government advertising, particularly in the lead up to elections.<sup>5</sup>

6.6 Opposition members, however, were more forthright in drawing conclusions about this expenditure. Senator Faulkner told the Senate:

The Auditor-General was less coded than usual in his report when he quoted the principles implemented by the New Zealand Audit Office which leave no room for ambiguity:

A government should not disseminate material that...is designed to secure, or has the effect of attempting to secure, popular support for the party-political persuasions of the members of the government.

There can be no doubt at all that the \$20 million GST ad campaign fails this clear test. The entire campaign was consciously designed to elicit popular support for a party political policy in an election campaign.<sup>6</sup>

6.7 During the 2000 Budget Estimates process, members of the Finance and Public Administration Legislation Committee also questioned the substantial expenditure budgeted for government advertising in 1999–2000.<sup>7</sup>

## Current regulation of government advertising

6.8 There are very limited restrictions on government advertising by way of legislation, although some non-reviewable guidelines have been developed.

### *Legislation*

6.9 The *Commonwealth Electoral Act 1918* sets out certain requirements for identifying the source of authorisation of electoral advertisements.<sup>8</sup> The *Broadcasting Services Act 1992*

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2 G Johns 'Desirability of Regulating Political Parties', *Agenda*, vol. 8 no. 4, 2001, p. 295.

3 See for example D Light 'Selling out' *The Bulletin*, 12 September 2000, pp. 40-1; M. Price 'Propaganda then, promotion now' *The Australian*, 20 June 2001; 'The wrong message', Editorial, *The Sydney Morning Herald*, 20 June 2001.

4 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, pp. 28-29. A federal election was held in October 1998.

5 *ibid*, p. 30.

6 Senator John Faulkner, Senate *Hansard*, 31 March 1999, p. 3555. See also, Mr David Cox MP House of Representatives *Hansard*, 8 March 1999, p. 3377.

7 Senate Finance and Public Administration Legislation Committee *Hansard*, 24 May 2000, pp. 425-453.

8 Section 328. The Act's requirements are discussed in more detail in Chapter 5 in relation to electoral advertising.

(the Broadcasting Act) imposes conditions on broadcasters with regard to broadcasts of ‘political matter at the request of another person’ or ‘matter relating to a political subject or current affairs’. What constitutes ‘political matter’ is only broadly defined in the Act.<sup>9</sup> The effect of the conditions is that such material must be broadcast with identifiers (for example, the name of the party, the location of the office and the person authorising the advertisement) in a format approved by the Australian Broadcasting Authority (ABA). If the requirements are not met, the broadcaster rather than the advertiser is liable.<sup>10</sup>

6.10 In 1998 the ABA released guidelines to assist in determining what is ‘political matter’ for the purposes of the Broadcasting Act. The guidelines state that such matter ‘must, when viewed objectively, be capable of being properly characterised as participation in the political process or an attempt to influence or comment on that process, the administration of government or those who participate in those activities’. The guidelines note that it is important to consider the content of the broadcast; the overall presentation including tone, style and emphasis; the nature and style of any accompanying audio visual material; and the context of the broadcast.<sup>11</sup>

6.11 In relation to government advertising, the ABA’s guidelines advise that:

The broadcast of such matter will only constitute political matter if it goes beyond merely informing the viewer or listener...A distinction can be drawn between an advertisement which only informs and one which is likely to influence the viewer or listener.<sup>12</sup>

6.12 Soon after the guidelines were introduced, the Leader of the Opposition in the Senate raised concerns with the ABA about the Government’s community information and education program for taxation reform.<sup>13</sup> The ABA found the advertisements complied with the Broadcasting Act in relation to the required ‘authorisation tags’, but made no finding as to whether the advertisements were ‘political matter’ under the Act.<sup>14</sup> The ANAO subsequently found that the advertisements conformed with both broadcasting and electoral law, as discussed below at paragraphs 6.29-6.31.

### ***Advice to government on advertising***

6.13 The Government Communications Unit (GCU) in the Department of the Prime Minister and Cabinet is responsible for oversight of and advice to agencies on the design and implementation of government information campaigns. The GCU also manages a centralised government advertising system to achieve effective media planning and cost-effective advertising, keeps a register of communications consultants and maintains a ‘whole of government’ approach to communications activities.

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9 That is, ‘political matter means any political matter, including the policy launch of a political party’ (*Broadcasting Services Act 1992*, Schedule 2, clause 1).

10 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, p. 22.

11 ‘Guidelines for the Broadcasting of Political Matter’, p. 3. The intent of the person requesting the broadcast is not usually relevant.

12 *ibid*, p. 5.

13 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, p. 22.

14 *ibid*, p. 26. The report also noted that the ABA was not conducting any subsequent review of that issue.

6.14 Major and sensitive campaigns, whether or not they include paid advertising, are first approved by the responsible Minister and then, following discussion with the GCU, referred to the Ministerial Committee on Government Communications (MCGC) for approval. ‘Sensitive’ information activities are described as those which cover issues that might offend sections of the community or produce negative reactions from target groups. The MCGC also considers any market research proposal valued at \$100 000 or more.

6.15 Established in 1982, the MCGC is chaired by the Special Minister of State and has three other permanent members. The Minister responsible for a particular information activity also attends during consideration of that activity. The MCGC’s procedures are detailed in the *Guidelines for Australian Government Information Activities*,<sup>15</sup> which also set out the principles for government information programs. Those principles stress fairness and equity, efficiency and effectiveness, impartiality and clarity, and attention to the special needs of particular groups of people, such as the young, those in rural areas and people whose first language is not English.

6.16 However, the Guidelines do not address the issue of party political content. They also have no legal status, and actions taken by the MCGC are not reviewable in any formal way.

## **The aims of the bills**

6.17 The main objectives of each bill and the processes by which they propose to regulate government advertising are briefly summarised below.

### ***The Charter of Political Honesty Bill 2000 [2002]***

6.18 Part 2 of the Charter of Political Honesty Bill 2000 [2002] proposes a Government Publicity Committee to monitor and enforce compliance by public authorities with statutory guidelines for government advertising campaigns.<sup>16</sup> The proposed Government Publicity Committee is to comprise the Auditor–General, the Ombudsman and ‘a person with knowledge and experience in advertising’ to be appointed by the Auditor–General.

6.19 Thirteen guidelines are set out in the Schedule to the Bill. The Schedule is included at Appendix 5. Guidelines 1 to 6 require that campaigns should provide objective, factual and explanatory information that can be substantiated, that facts can be clearly distinguished from opinion and that any comparisons are not misleading. Guidelines 7 to 10 direct against the use of advertising for party political purposes. Guideline 11 states that an advertising campaign should include a statement of its objective. Guidelines 12 and 13 state that no expenditure should be undertaken until the relevant legislation to implement the relevant policy, program or service has received assent, except where emergency issues of public safety or public order arise. The Bill’s guidelines draw heavily on those suggested by the Auditor-General as modified by the Joint Committee on Public Accounts and Audit (discussed below at paragraphs 6.32-6.37), but are much more condensed.

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15 GCU *Guidelines for Australian Government Information Activities: Principles and Procedures*, available at <http://www.gcu.gov.au>.

16 Section 7.

6.20 The Bill provides that if the Government Publicity Committee considers that an advertising campaign does not comply with the guidelines, it may direct that the campaign be withdrawn or modified. The committee can also determine whether the objective of a campaign is legitimate, and whether a campaign is likely to achieve its stated objective. If not, the committee can order that the campaign be withdrawn.

6.21 The Bill provides that the Government Publicity Committee may institute proceedings in the Federal Court if a Commonwealth agency or employee fails to comply with its directions. The Federal Court may grant an injunction, including an interim injunction, against the person or agency and make an order (not defined) in relation to the contravention.

### ***The Government Advertising (Objectivity, Fairness and Accountability) Bill 2000***

6.22 The second Bill aims ‘to require government advertising to meet minimum standards with respect to objectivity, fairness and accountability and to prohibit the use of taxpayers’ money on advertising which promotes party political interests’.

6.23 The Bill adopts a different approach from the Charter of Political Honesty Bill by proposing enforcement through the court system. The *Financial Management and Accountability Act 1997* currently contains a criminal offence (with a maximum penalty of seven years’ imprisonment) that applies where a minister or official misapplies or improperly uses or disposes of public money.<sup>17</sup> The Bill seeks to amend the Act to state that, without limiting the generality of those terms, it is improper to use or permit the use of public money for a ‘government information program’ (not defined) that does not comply with the principles and guidelines set out in the schedule to the Bill. (Accordingly, it is for the courts to evaluate whether or not there has been a breach of those principles and guidelines.)

6.24 The schedule comprises four parts which state that material:

- should be relevant to government responsibilities;
- should be presented in an objective and fair manner; and
- should not be liable to misrepresentation as party political;

and that distribution of sensitive material should be controlled.

6.25 The schedule is a copy of the ANAO’s suggested principles and guidelines (discussed below at paragraphs 6.27-6.30), with only two changes.<sup>18</sup> The Schedule is included at Appendix 6.

## **Previous proposals for change**

6.26 This section outlines the guidelines proposed by the ANAO and the Joint Committee on Public Accounts and Audit, on which the guidelines in the current bills, particularly the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, draw heavily.

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17 Section 14.

18 The two underlying principles and an introductory sentence in the second section are omitted from the schedule. The other provisions are identical.

Some relevant initiatives in Australian States and the United Kingdom are also canvassed briefly.

### ***The ANAO's proposals***

6.27 In 1998, following correspondence from the then Leader of the Opposition and from members of the public, the ANAO reviewed the Government's taxation reform community education and information program. During the review, the Auditor-General received advice from the Australian Government Solicitor (AGS) on some key considerations, including whether the expenditure had contravened the Constitutional requirement that appropriate moneys are spent 'for the purposes of the Commonwealth'.<sup>19</sup>

6.28 The AGS advised that money could legitimately be spent to explain and advertise a policy which had not been implemented, or which might not be implemented until a future term of government. The AGS also emphasised that the fact that a matter is 'political' under broadcasting or electoral law does not mean that it is not spent for the purposes of the Commonwealth:

It needs to be recognised that the core of the Executive Government is made up of Members of Parliament in the political party or parties which command a majority of the House of Representatives. Therefore there is an intimate link between the Government and one or more political parties. Provided the policy is developed, explained and advertised for the Commonwealth Government qua Government, this link is no basis for arguing that this is not done for the purposes of the Commonwealth.<sup>20</sup>

6.29 The ANAO found that there had been no breach of broadcasting or electoral law. In summary it stated:

...on the basis of the evidence available and legal advice, the ANAO concluded that the Government acted legally and officials acted ethically.<sup>21</sup>

6.30 However, given the limited regulation of the political content of government advertising, the ANAO also concluded that the adoption of conventions, principles and guidelines that provided more specific guidance on the use of government advertising would be helpful. A set of 'Suggested Principles and Guidelines for the Use of Government Advertising' was developed, drawing on reports from Queensland and Victoria, as well as Canada, the United Kingdom and New Zealand.<sup>22</sup>

6.31 The ANAO concluded that if Parliament had concerns about the use of government advertising, it was the responsibility of the Government and the Parliament to develop clear guidelines to differentiate between party political and government material on the basis that:

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19 Section 81 of the Constitution requires that funds are to be appropriated 'for the purposes of the Commonwealth'. The AGS advised that implementation of a policy at a future date or possibly not at all would not bar appropriation to 'develop, explain and advertise a policy'.

20 Quoted in ANAO *Taxation Reform: Community Education Information Programme*, Audit Report No. 12, October 1998, p. 25.

21 ANAO *Taxation Reform: Community Education Information Programme*, Audit Report No. 12, October 1998, p.14.

22 *ibid*, pp. 57-60.

The main trade-offs in this area of accountability are basically matters for the Government and Parliament as they impact directly on their operations, processes and political advantage or disadvantage.<sup>23</sup>

### **The content of the ANAO's suggested principles and guidelines**

6.32 The two underlying principles of the ANAO guidelines state that:

- all members of the public have equal rights of access to comprehensive information about government policies, programs and services which affect them, except where providing this information would be a breach of government responsibility; and
- governments may legitimately use public funds to explain their policies, programs and services and to inform the public about their obligations, rights and entitlements.

6.33 The guidelines are in four parts as summarised below:

- **Material should be relevant to government responsibilities.** A campaign must be a 'routine and integral' part of government policy development for a targeted group with needs identified by market research. Examples include: dissemination of scientific, medical or safety information; or for the purposes of Government accountability; or to inform the public of new, existing or proposed policy proposals or revisions.
- **Material should be presented in an objective and fair manner.** This means that information must be 'objective, factual and explanatory', that is, unbiased, capable of being substantiated and with fact clearly distinct from opinion. Further, any comparisons made should not be misleading.
- **Material should not be liable to misrepresentation as party political.** This means the material should not intentionally promote or be perceived as promoting party political interests; should be couched in unbiased and objective language; should not directly attack or scorn the views of others such as opposition parties; and should avoid party political slogans or images, including possible restrictions on ministerial photographs.
- **The distribution of sensitive material should be controlled.** As a general rule, material of a politically controversial nature should not be circulated unsolicited to the electorate unless specifically requested. Further, government advertising should not be used for party political purposes, and media placement should be targeted on a needs basis. Advertisements must be produced cost effectively and expenditure should be justifiable under a cost/benefit analysis. Hence 'objectives which have little prospect of being achieved, or which are likely to be achieved only at disproportionate cost, should not be pursued without good reason'. Advertisements must also comply with all relevant laws and with purchasing and procurement policies.

### ***The Joint Committee of Public Accounts and Audit***

6.34 In 2000 the Joint Committee of Public Accounts and Audit (JCPAA) reviewed the ANAO's report and recommended very similar guidelines for adoption. In his foreword to the report, the JCPAA Chairman noted that the issue of government advertising guidelines is 'highly controversial (party political)' but that the guidelines, 'while not perfect nor totally agreed by all the Committee, do represent the majority and largely consensual views of the

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23 *ibid*, p. 30.

Committee'.<sup>24</sup> However, the report stated that there were different views within the Committee on whether the guidelines should be enshrined in legislation.<sup>25</sup>

6.35 While the JCPAA guidelines closely follow those of the Auditor-General, there are some differences:

- The underlying principles include an additional clause which states that government information campaigns should not be party political.
- Under the second sub-heading that states that 'material should be presented in an objective and fair manner', the JCPAA guidelines include three new criteria which address accessibility of information. The guidelines require particular attention to be given to communicating with identified groups, including rural communities, Aborigines, women and those whose first language is not English.
- In place of the Auditor-General's guidelines requiring that 'distribution of sensitive material should be controlled', the JCPAA guidelines include a short statement that 'distribution of unsolicited material should be carefully controlled', with no further elaboration.
- There is an additional set of criteria which require that 'material should be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability.' The guidelines state, among other things, that information campaigns should be justified by a cost/benefit analysis, that there should be a clear audit trail regarding decision-making and the media placement should be determined and targeted 'on a needs basis' and 'without favour'.

6.36 The report contains no explanation for the changes made to the ANAO's guidelines. The Committee's very brief report comments only that committee members were unable to reach agreement on a full report into the issues and had chosen to 'focus on the central issue', namely a new set of draft guidelines.<sup>26</sup> The report noted that the Deputy Chair of the JCPAA Committee had also argued that an objective test should be incorporated in the guidelines to distinguish between expenditure of public money on legitimate information campaigns and its misuse as party political advertising. In particular he stressed that:

- no public money should be spent on mass media advertising, telephone canvassing or information services, on-line services, direct mail or other distribution of unsolicited material until legislation has been passed giving the government authority to implement the policy, program or service described in the campaign;
- where a proposed public information or education campaign covers a matter which does not require legislation, an appropriation for the specific purpose of the public information or education campaign must be obtained; and
- the only exclusions to these requirements should be where major issues of public health, public safety or public order may arise at short notice.<sup>27</sup>

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24 JCPAA, *Guidelines for Government Advertising*, Report No. 377, September 2000, p. iii.

25 *ibid*, p. 3.

26 *ibid*, p. 2.

27 *ibid*, p. 2.



6.37 The Deputy Chair's suggestions were not adopted in the JCPAA's report. However, the Committee notes that the Charter of Political Honesty Bill 2000 [2002] largely adopts those suggestions: the requirement to include a statement of the campaign's objective and the first and third of the points above have been included in the schedule (clauses 11, 12 and 13).

### ***Other jurisdictions***

6.38 Over the last decade there have also been various State reviews which have considered the regulation of government advertising.

6.39 In Queensland, following consideration of a report by the Electoral and Administrative Review Commission, the Parliamentary Committee for Electoral and Administrative Review recommended the adoption of guidelines which, amongst other things, would state that material should not be party political.<sup>28</sup>

6.40 In Western Australia, the Commission on Government also recommended guidelines which included a statement of principle that it is improper for governments to use public funds for publicity and advertising in order to gain a partisan political advantage.<sup>29</sup> However, the Commission concluded that no legislation should be introduced, but that government guidelines would be combined with the public complaints procedure through the Advertising Standards Council.<sup>30</sup>

6.41 In New South Wales, a private member's Bill to regulate government advertising was introduced in 1995 but lapsed on the prorogation of Parliament.<sup>31</sup>

6.42 In the United Kingdom, guidelines for the Government Information Service contain specific references to the convention that government information activities should not be, or be liable to misrepresentation as being, party political.<sup>32</sup> The guidelines note that while a publicity campaign can create political credit for the party in government, this must not be its 'primary or a significant purpose'.

## **Is legislation to regulate government advertising feasible?**

6.43 Many submissions to the inquiry supported better regulation of government advertising, although not all agreed that legislation was the best way to achieve that end.

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28 Queensland Legislative Assembly, Parliamentary Committee for Electoral and Administrative Review, *Review of Government Media and Information Services*, April 1994.

29 Western Australia, Commission on Government *Report No. 3*, 1996, Chapter 11 and Appendix 3B.

30 *ibid*, para 11.6.5. The Government response to that report accepted the recommendations in principle, subject to the suggested guidelines being 'examined in detail' (*Government Response to Commission on Government Reports Nos 1-5*, October 1996, p.25).

31 Government Publicity Control Bill 1995, introduced by Mr Tink MLA. The Bill lapsed on the prorogation of Parliament in February 1999. The Bill proposed a committee similar to that proposed by the Charter of Political Honesty Bill 2000 [2002], comprising the New South Wales Auditor-General, the New South Wales Ombudsman and a part-time member selected from a list prepared by the Advertising Standards Council and appointed by the Premier (see discussion in Western Australia Commission on Government *Report No. 3*, 1996, pp. 299-300).

32 *Guidance on the work of the Government Information Service*, <http://www.cabinet-office.gov.uk/central/1999/workgis/workgis.htm> (14 March 2002). The guidelines provide that the rule governs not only decisions about what may be published, but also the content, style and distribution of published material, and that 'this basic rule' has been accepted under successive governments (para 4).

6.44 The KCELJAG submission prepared by Professor Charles Sampford and Mr Tom Round explained how unregulated government advertising could distort the democratic process:

[Ministers] would find it highly useful, if they could get away with it, to have their party-political advertising (praising their own party and/or denigrating their opponents) paid from public funds, leaving more in their party's own coffers. This is objectionable because it creates an uneven 'playing field'...A party might get itself re-elected, not because it has governed in ways the voters approve, but simply because it has governed. Electoral success can easily become self-perpetuating, because the Opposition cannot match the advantage given by millions of government advertising dollars.<sup>33</sup>

6.45 However, the KCELJAG argued that, to establish an effective regime to deal with undesirable conduct, a three-tiered approach was required: coordinated ethical standard setting, legal regulation and institutional reform. As the submission noted:

...legal rules not anchored in the values of the individuals these rules seek to regulate may fail for lack of ethical support.<sup>34</sup>

6.46 In the case of government advertising, ethical standards would need to be built into the government advertising approval process and the organisational and management structures of the political parties.<sup>35</sup>

6.47 Ethics expert Dr John Uhr welcomed the bills as providing an opportunity for Parliament to take greater responsibility for specifying appropriate standards for government office holders, commenting:

Self-regulation by the political executive is a necessary but insufficient part of 'responsible parliamentary government': this Bill [the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000] can send a message that Parliament is prepared to take note of community standards and to devise means for holding government accountable to those standards.<sup>36</sup>

6.48 Dr Noel Preston also welcomed the bills' proposals to regulate such matters, in recognition of the fact that 'the spending of public money to support party political purposes is clearly unethical'. However, he considered that these matters would continue to be politically contested, as indicated by the difficulty Australian states have experienced in implementing constraints on government advertising.<sup>37</sup>

## **Evidence on the Charter of Political Honesty Bill 2000 [2002]**

6.49 The proposals in the Charter of Political Honesty Bill 2000 [2002] for the regulation of government advertising campaigns were given in-principle support by numerous

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33 Submission no. 22, p. 13.

34 Submission no. 22, p. 4.

35 Submission no. 22, p. 4.

36 Submission no. 16, p. 4.

37 Submission no. 21, p. 10.

submissions, with several preferring its approach to that taken in the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

6.50 However, some significant concerns about the Bill were raised and are discussed below. They are:

- lack of precision in the guidelines;
- difficulty in determining whether campaign objectives are legitimate;
- the implications for the offices of the Auditor-General and the Ombudsman;
- enforcement of committee directions by the courts;
- lack of due process, including lack of review of committee decisions; and
- the inclusion of provisions on government advertising with other more general parliamentary issues in the Bill.

6.51 Some alternatives to the committee model were suggested and are also discussed below.

### ***Lack of precision in the guidelines***

6.52 As noted, the guidelines attached to the bill are based on the draft guidelines devised by the Auditor-General and revised by the JCPAA. The guidelines in this Bill are much condensed, amounting to only thirteen statements. Unlike the other models, no examples or factors to be considered in determining whether a particular guideline has been contravened are provided.

6.53 The Clerk of the Senate commented that the proposed Government Publicity Committee would be making ‘highly subjective determinations’ because of the vagueness and uncertainty of the guidelines.<sup>38</sup> The Deputy Auditor-General, Mr Ian McPhee expressed a similar view, noting that it would be an ongoing challenge for the committee to judge whether a campaign proposal fell outside the guidelines.<sup>39</sup>

6.54 The KCELJAG submission suggested that it might be preferable to separate the guidelines and principles into two groups: those standards which are legally enforceable and those which Ministers and agencies ‘are directed and encouraged’ to promote.<sup>40</sup>

### ***Difficulty in determining whether campaign objectives are legitimate***

6.55 Several submissions pointed to difficulties with the proposed power of the Government Publicity Committee to determine whether an objective of an advertising campaign was legitimate (clause 9(2)).

6.56 The Clerk of the Senate commented that the uncertainty of the guidelines would be ‘greatly increased’ by this proposed power.<sup>41</sup> Mr Lockett stated that the question of whether the objective of a campaign is legitimate:

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38 Submission no. 4, pp. 4-5.

39 *Committee Hansard*, p. 33.

40 Submission no. 22, p. 16.

is essentially a political judgment and whether or not the campaign is likely to achieve that objective is a management decision that ultimately reflects on the competence of the government. Neither is essentially a matter of political honesty.<sup>42</sup>

### ***Implications for the office of the Auditor–General and the Ombudsman***

6.57 A major concern raised in submissions was the effect the Bill would have on the role and functions of the Ombudsman and the Auditor-General.

6.58 Senator Murray told the Committee that the Auditor–General and the Ombudsman were included in the proposed Government Publicity Committee because of their reputation as independent officers of integrity ‘under any government’.<sup>43</sup>

6.59 However, their inclusion raised some serious concerns. The Clerk of the Senate succinctly explained how different in nature the new responsibilities would be compared with their existing responsibilities:

The Auditor-General’s role is to examine public expenditure and to report to the Parliament on questions of legality, control and economy. The Ombudsman investigates complaints about administrative action and reports to the Parliament on legality and fairness of administrative dealings with citizens. To add to these roles that of determining the propriety of government advertising and, in effect, making binding rulings on the propriety of advertising, would give the two officers unrelated functions likely to confuse their existing roles.<sup>44</sup>

6.60 The ANAO submission expressed a similar view, stating that the proposed responsibilities of monitoring and enforcing compliance by public authorities and appointing the third committee member were executive functions:

A long-standing and generally accepted principle in our system of Government is that the role of the Auditor–General does not involve the performance of executive functions...[T]he exercise of executive functions would raise potential conflicts and tensions within the Auditor–General’s audit responsibilities.<sup>45</sup>

6.61 Similarly, the Ombudsman noted that his membership of the committee would give him quite different powers from those he currently exercised:

[T]he Bill would give the Committee (including me) a power to direct that particular action should be taken, with such directions to be capable of enforcement by the Federal Court. To date, the powers given to my office have been powers to recommend and, if necessary, to put a matter into the Parliamentary forum. A power to direct—in effect, to substitute the Committee’s opinion for that of the relevant Ministers or agency managers—would depart from this position. It would require me to go beyond the formation of an opinion about an action that has

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41 Submission no. 4, p. 2.

42 Submission no. 12, p. [3].

43 *Committee Hansard*, p. 33.

44 Submission no. 4, p. 4.

45 Submission no. 15, p. 2; Ian McPhee, *Committee Hansard*, p. 27.

occurred and require me, as a member of the Committee, to assume a role in managing the affairs of an agency.<sup>46</sup>

6.62 Professor Richardson agreed, stating that the process would detract from the Ombudsman's central role and 'the persuasive nature of that role'.<sup>47</sup>

6.63 The Ombudsman pointed to the likelihood of controversy:

The Bill would place the Committee and its members squarely within the political process and would bring them into conflict with Ministers and agencies in relation to subjective assessments of the intended and actual effects of advertising campaigns. The Bill would almost inevitably embroil the Auditor-General and me in political controversy and that would be likely to raise questions about the independence, public reputation and integrity of our respective offices. This could damage public confidence in our core responsibilities.<sup>48</sup>

6.64 This view was echoed in other submissions.<sup>49</sup>

6.65 More specific difficulties were also raised. Both the Ombudsman and Professor Richardson noted that legislation specifically prevents the Ombudsman from investigating the actions of ministers, but that the Committee would be able to take action against a minister under the Bill.<sup>50</sup> Professor Richardson suggested that if the Ombudsman were to be involved in legal proceedings, he or she should at least be an officer of parliament.<sup>51</sup> The Ombudsman also noted that his jurisdiction in relation to Commonwealth contractors is unclear, which could be an obstacle where a Commonwealth agency had asked an external body to manage an advertising campaign.<sup>52</sup>

6.66 Another concern was the proposal to give the Auditor-General the responsibility for appointing the third member of the proposed Government Publicity Committee (clause 6(1)(c)). The Auditor-General also has the power to determine whether any paid employment would or might conflict with the member's committee duties, in which case the member's appointment would cease to have effect (clauses 6(5) and 6(6)). The KCELJAG submission noted that the Bill 'would effectively give the Auditor-General two votes out of three' on the committee.<sup>53</sup> The Clerk of the Senate agreed that it was not appropriate to give one member of the committee the power to determine whether another member was disqualified.<sup>54</sup>

6.67 The KCELJAG submission raised another concern about future appointments of these statutory officers:

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46 Submission no. 5, p. 3.

47 Professor Jack Richardson, ANU, submission no. 24, p. 2.

48 Submission no. 5, p. 3.

49 See for example, Professor Jack Richardson, submission no. 24, p. 2, commenting on the inclusion of the Ombudsman on the proposed committee.

50 *Ombudsman Act 1976*, s.5.

51 The Auditor-General is an officer of Parliament under the *Auditor-General Act 1997*, s. 8, but the Ombudsman is an independent officer who may report to Parliament under the *Ombudsman Act 1976*.

52 Submission no. 5, p. 2.

53 Submission no. 22, p. 21.

54 Submission no. 4, p. 6.

The Ombudsman and Auditor-General enjoy public trust and credibility due to the perceived independence of their offices. However, they are still appointed by processes that the Executive Government ultimately controls. If these officers were given this added responsibility of vetting government advertising, it might tempt governments to appoint those who were seen as reliable or likely to have favourable views of their message.<sup>55</sup>

6.68 The Ombudsman noted that any ongoing conflict with ministers could be a problem as the Ombudsman's resources are determined by the Government.<sup>56</sup>

6.69 Concerns were also raised about the expertise required to perform this function effectively. At the public hearing, the Acting Ombudsman, Mr Oliver Winder, told the Committee that the Ombudsman's office had no expertise in dealing with advertising. He also advised that he knew of no other ombudsman in the world with such a role.<sup>57</sup> The Ombudsman's submission did, however, note that there were other ombudsmen who engage in some monitoring of ministerial activity, including overseeing a leadership code or related set of standards.<sup>58</sup>

### ***Enforcement of committee directions by the courts***

6.70 Senator Murray stated in his submission that 'a powerful and independent' committee was 'more suited to the task of scrutinising government advertising than a reluctant and slow moving judiciary'.<sup>59</sup> At the public hearing, Senator Murray explained the rationale of his approach compared with the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000:

The nub of the difference between the two bills addressing this issue is that the Labor Bill says 'Delay adjudication on this matter until it is taken to a court and let the court decide whether people have behaved improperly.' The Democrat view is that it is an immediate political issue which needs to be dealt with at an administrative level so that people can be advised if an advertisement breaches a set of guidelines, a code of conduct, or whatever.<sup>60</sup>

6.71 A number of submissions to the inquiry preferred the approach taken by Senator Murray's Bill to that of the other Bill. Mr Lockett considered that the former approach was likely to be more effective than relying on the courts to rule on the merits of government decisions.<sup>61</sup>

6.72 However, the Ombudsman expressed concerns that by giving the Government Publicity Committee the powers to refer matters to court, the Bill opened up the likelihood of 'unedifying litigation' between the Committee and Commonwealth agencies. The

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55 Submission no. 22, p. 22.

56 Submission no. 5, p. 3.

57 *Committee Hansard*, p. 17. The KCELJAG submission also noted that the skills of the Auditor-General and the Ombudsman did not necessarily make them 'the best experts available' for ruling on the propriety of government advertising (submission no. 22, p. 22).

58 Submission no. 5, p. 3.

59 Submission no. 13, p. 16.

60 *Committee Hansard*, p. 3.

61 Submission 17.

Ombudsman considered that litigation might also be a ‘slow and inflexible tool to deal with a changing situation’.<sup>62</sup>

6.73 More significant legal issues regarding the role of the courts were also raised. The Clerk of the Senate commented that it was not appropriate to refer a matter to the courts for enforcement of committee directions:

The court would not be given the task of determining whether a particular campaign breached the criteria in the bill...The task of the court would be limited to determining whether an agency or person failed to comply with a direction of the committee. In effect, the court would be used simply as the sheriff to enforce the directions of the committee, an entirely inappropriate role for the court to perform. The proposed arrangement may also be unconstitutional. It is similar in principle to the legislative arrangements which were found to be invalid by the High Court in the *Brandy* case, and violates criteria enunciated by the Court.<sup>63</sup>

6.74 Professor Richardson raised another constitutional issue:

Some of the so-called guidelines have a heavy political content e.g. (7), (8), (9) & (10). In deciding whether to enforce a decision of the Committee under clause 10 of the Bill the Federal Court could thus be called upon to traverse essentially political issues...The Constitution embodies the separation of powers of government and questions of a political nature should not be left to a Court created under Chapter III of the Constitution to decide.<sup>64</sup>

### ***Lack of due process, including review of committee decisions***

6.75 The Ombudsman noted that the Bill ‘contains no guarantee of fair process, including an opportunity for people subject to criticism to make submissions before action is taken’. In particular, he noted that the Bill contained no equivalent to section 8(5) of the *Ombudsman Act 1976*, which requires the Ombudsman before making a critical report to allow the relevant individual or agency to appear and make submissions. The Ombudsman submitted:

Not only might this lead to the reputations of agencies and individuals being unfairly damaged, it may lead to the Committee issuing directions without having considered all relevant factors.<sup>65</sup>

6.76 The Clerk of the Senate also criticised the unlimited power of delegation the Bill gives to the Ombudsman and Auditor-General (clause 6(7)). He noted:

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62 Submission no. 5, p. 3.

63 Submission no. 4, p. 5. In *Brandy vs Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 the High Court held certain provisions of the *Racial Discrimination Act 1975* to be constitutionally invalid. The provisions allowed the Human Rights and Equal Opportunity Commission to register its determinations in the Federal Court, so that they would take effect as orders of the court. The High Court held that these provisions were invalid because they breached the constitutional separation of judicial power and executive power. Provisions allowing the Federal Court to review the determinations did not save the law from invalidity.

64 Submission no. 24, p. 2.

65 Submission no. 5, p. 3.

As the delegation is not confined to officers in the respective offices, if the bill were passed it would not be known who would actually be exercising the extensive powers of the committee.<sup>66</sup>

6.77 In its review of the Bill, the Senate Standing Committee for the Scrutiny of Bills expressed concerns about the powers of the proposed committee in determining whether a government advertising campaign complied with the guidelines and whether the objective of such a campaign was likely to achieve its stated objective. The Scrutiny of Bills Committee sought advice from Senator Murray about why no provision had been made to involve a judicial officer in either the determination or review of these matters.<sup>67</sup>

6.78 Senator Murray responded that he had not intended to exclude judicial review of committee decisions. He advised that the process of natural justice would apply to those decisions, and if:

... the Committee were to abuse its powers by, for example, acting in pursuit of an improper purpose, basing its decision on irrelevant considerations, acting under dictation or sub-delegating its authority, those decisions could be successfully challenged in the courts.<sup>68</sup>

6.79 Senator Murray therefore concluded that there was no need to provide a further avenue for review. He also advised that the Government Publicity Committee itself would be a mechanism for reviewing decisions made by ministers or their delegates and so was an improvement on the current process in that:

Decisions currently made by ministers or their delegates are not subject to any effective review process. Far from allowing the exercises of arbitrary non-reviewable power, this Bill provides for a much needed avenue of review to soften the arbitrary nature of existing powers.<sup>69</sup>

### ***Structure of the Bill***

6.80 Several submissions from experts in legal and ethical issues, including Dr Preston,<sup>70</sup> Dr Uhr<sup>71</sup> and Dr Carney,<sup>72</sup> suggested that the provisions on government advertising should be in separate legislation from those dealing with parliamentary matters, either because of the complexity of the issues or because of the distinction between executive and parliamentary functions. The Committee agreed with this view as discussed in chapter three, paragraphs 3.99–3.101.

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66 Submission no. 4, p. 4. Ms Enid Jenkins (submission no. 8, p.3) also argued that the Bill should specify who would be eligible to be a delegate.

67 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 15 of 2000*, 1 November 2000, pp. 9–10.

68 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 519.

69 *ibid*, p. 519.

70 Submission no. 21, p. 9.

71 *Committee Hansard*, p. 9.

72 Submission no. 11, pp. 2–3.



### *Alternatives to the committee model*

6.81 Some alternatives to the proposed Government Publicity Committee were suggested.

#### **Parliamentary committee**

6.82 The Ombudsman suggested that a parliamentary committee could be established. Parliament could set the standards to be considered, which ‘might amount, in effect, to a Code against which the Committee could consider an advertising campaign’, either by reference from Parliament, on its own motion or following a complaint. The Ombudsman stated:

A Committee operating in such a way would be a mechanism to ensure that actions taken in the political field have consequences in Parliament.<sup>73</sup>

6.83 The Ombudsman suggested that the parliamentary committee might recommend action ‘related to a Minister’ or reimbursement to the relevant agency of money spent on politically partisan advertisements.<sup>74</sup> During the public hearing, the Acting Ombudsman, Mr Oliver Winder, confirmed support for the parliamentary committee model:

...because that would put it back into the process of politics, which it largely is.<sup>75</sup>

6.84 Deputy Auditor–General, Mr Ian McPhee, also supported the parliamentary committee model for similar reasons, stating:

... probably a parliamentary committee might be the best placed of all to make these judgments because, at the end of the day, the sorts of decisions as to what people think about the appropriateness or otherwise of advertising proposals are very much made in this place.<sup>76</sup>

6.85 However, Mr McPhee noted that any body which had the ‘right of veto’ over an executive government advertising program would find its role difficult.<sup>77</sup>

6.86 A contrary view was expressed by the Clerk of the Senate. He preferred the establishment of a separate independent body, such as a government advertising tribunal, which would adjudicate on precise guidelines, arguing:

A parliamentary committee really appropriately can only be looking at what goes on in the parliamentary sphere; with this body it would be looking at the activities of government as a whole. I see merit in having some independent body outside the political system here.<sup>78</sup>

6.87 The Clerk of the Senate suggested that although it did not appear feasible to regulate the amount of money spent on a particular campaign other than through the normal political process, it might be feasible to formulate ‘fairly precise rules’ which could limit a

73 Submission no. 5, p. 4.

74 Submission no. 5, p. 4.

75 *Committee Hansard*, p. 24.

76 *Committee Hansard*, p. 33.

77 *Committee Hansard*, p. 34.

78 *Committee Hansard*, p. 4.

government's use of certain forms of advertising for party political purposes.<sup>79</sup> Such guidelines might address issues such as prohibiting the use of photographs of ministers in advertisements,<sup>80</sup> a practice which was described by one member of the public as 'an ego trip at taxpayers' expense' that should be banned.<sup>81</sup>

6.88 Responding to questions about the possibility of parliament appointing an independent person with ethical, governance or advertising training, the Acting Ombudsman, Mr Winder, told the Committee that this could be a feasible option. However, any independent appointee would still experience problems in interpreting the guidelines.<sup>82</sup>

### **Pre-clearance of government advertising**

6.89 Other evidence to the Committee stressed that pre-clearance of major government advertising campaigns was essential. Former member of the Queensland Parliament and former Chairman of its Parliamentary Members Ethics and Parliamentary Privileges Committee, Mr Clem Campbell, considered that the proposed Government Publicity Committee had merit but that its major role should be to give prior approval for significant government advertising programs:

It will be too late to send government advertising material to the committee after the material has been aired or circulated widely. Major government advertising campaigns are not produced overnight and often have a long production period. The Government Publicity Committee could be directed to report timely—within one or two weeks—on any aspect of a program that does not meet the guidelines.<sup>83</sup>

6.90 The Deputy Auditor-General, Mr McPhee, suggested that another alternative was to require the relevant minister to report to Parliament prior to the campaign:

There needs to be some reporting against the guidelines by the responsible minister at the time a decision is being made to get some disclosure to the parliament about his or her assessment about the proposal...By getting some disclosure of the reasons for the government's decisions against whatever guidelines are agreed...you could at least allow the parliament to debate it if it wished.<sup>84</sup>

6.91 The KCELJAG submission also suggested there should be a form of 'pre-clearance' for government advertising, with a 'fast-track' procedure in cases of 'genuine and demonstrable emergency'.<sup>85</sup> However, rather than giving Parliament the power to 'approve' government advertising, the KCELJAG submission considered that a 'neutral arbiter' (a term on which the submission did not elaborate) should be established to consider government advertising campaigns against set criteria. The KCELJAG suggested the following criteria for consideration:

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79 *Committee Hansard*, p. 2.

80 *Committee Hansard*, p. 2.

81 Mr Bob Holderness-Roddam, submission no. 1, p.1.

82 *Committee Hansard*, p. 24.

83 Submission no. 10, p. 2.

84 *Committee Hansard*, p. 34.

85 Submission no. 22, p. 9.

- public funds must not be spent to persuade or influence voters to support or oppose a particular candidate, political party, policy or proposed law; and
- public funds must not be spent on advertising any policy:
  - before that policy has been enacted into law—unless such advertising gives equal weight to arguments for and against such policy; and
  - after that policy has been enacted into law—unless such advertising encourages people to comply with the law, or offers useful information to assist them in complying with or benefiting from the law.<sup>86</sup>

## **Evidence on the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000**

6.92 As noted above, many submissions supported in principle the objective of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 to ensure that government is accountable for how it spends public funds. For example, Dr Uhr welcomed the Bill's explicit aim of establishing 'minimum standards' to regulate government advertising through amendment of the Financial Management and Accountability Act.<sup>87</sup>

6.93 However, almost all submissions that commented on the Bill expressed serious concern about the proposed creation of a criminal offence, punishable by a maximum of seven years' imprisonment, by reference to guidelines which were considered to be too vague.

6.94 The Clerk of the Senate elaborated on this point:

Inconsistency with the principles and guidelines in the schedule would be extremely difficult to determine because of the vague and subjective character of the guidelines. The bill would require the courts to determine whether material is presented in a[n] unbiased manner, distinguishes between facts and comment or opinion, promotes party-political interests, is free of partisan promotion or political argument and avoids party-political slogans or images. These are not the kinds of questions which courts are equipped or accustomed to determine, and there would be a high likelihood of any prosecutions failing because the courts found the criteria too vague and subjective to be the basis of a criminal sanction.<sup>88</sup>

6.95 The Clerk referred in particular to the inclusion in the guidelines of phrases such as 'suitable uses for government advertising', 'as a general rule' and 'care should be taken'. He commented:

If the bill were enacted and were to go before the High Court on a test of its validity, it would be a temptation to judicial activism, and the Court might throw out the whole statute on the ground that it is impossibly vague as a proscription of criminal behaviour.<sup>89</sup>

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86 Submission no. 22, pp. 14-15.

87 Submission no. 16, p. 3.

88 Submission no. 4 p. 2.

89 *ibid.*

6.96 Dr Gerard Carney expressed similar concern about making violations of the principles and guidelines the subject of criminal sanctions.<sup>90</sup> So too did Professor Jack Richardson, who argued:

It is a fundamental principle of the criminal law that a crime should be clearly defined so that a reasonable person is left in no doubt whether his or her conduct amounts to a crime...

Different persons could hold quite different opinions as to whether particular official conduct amounts to an infringement of the guidelines applied individually or collectively to that conduct.<sup>91</sup>

6.97 The Attorney-General's Department expressed a similar view.<sup>92</sup>

6.98 Submissions from members of the public also criticised the vagueness of the guidelines. Ms Enid Jenkins argued that the guidelines requiring material to be presented in an objective and fair manner, and in particular that information should be presented in an 'unbiased' and 'equitable' manner, would be extremely difficult to enforce because interpretations would differ widely.<sup>93</sup> Mr Lockett concluded that the guidelines 'would probably be ineffective in achieving their objective and because of their subjective nature would probably create more disputes than they resolve'. He described the guidelines as 'a grab-bag of provisions which range from probably completely redundant...to simply commonsense...or to incomprehensible'.<sup>94</sup>

6.99 Professor Richardson also criticised the proposed scheme on a more fundamental basis:

... [T]o invoke the criminal law to deal with a situation which is essentially political is inimical to the traditions of the Australian criminal law system, in which crimes are created according to levels of conduct not politically motivated.<sup>95</sup>

6.100 At the public hearing, the Clerk of the Senate agreed with this view, stating that he did not consider that the regulation of government advertising was 'an area for criminal sanction and prosecution in the courts'.<sup>96</sup>

6.101 Senator Murray's submission also argued that the Bill established 'an unworkable framework' for regulating government advertising for two reasons:

- the courts are 'most unwilling to rule on political questions or on the merits of government decisions', including 'imputing to government ministers improper party political motives for government programs, including advertising programs'; and

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90 Submission no. 11, p. 3.

91 Submission no. 24, p. 1.

92 Submission no. 17, pp. 1-2.

93 Submission no. 8, p. 1.

94 Submission no. 12, pp. 3-4.

95 Submission no. 24, p. 1.

96 *Committee Hansard*, p. 3.

- the Bill imposed an onerous burden of proof for the offence, particularly in light of the high penalty.

6.102 Senator Murray submitted that the effect would be to allow ‘all but the most blatant examples of partisan advertising’ to escape prosecution. Even if a prosecution succeeded, the process could not reclaim money spent or prevent the political party from reaping the benefits of the advertising campaign. He concluded that the Bill ‘simply fails to meet the need for a timely and effective means of regulating government advertising’.<sup>97</sup>

6.103 As noted above in paragraph 6.43, the KCELJAG submission urged that any ethics regime should give primary emphasis to the provision of prior advice, and stated:

The fact that many of these Principles and Guidelines are so broad that their interpretation and application may not be obvious in advance makes it even more crucial to have a system of authoritative prior advice in place.<sup>98</sup>

6.104 As an example, the KCELJAG submission argued that the requirement for an information campaign to be developed in response to ‘an identified need by identified recipients based on appropriate market research’ was so broad that Commonwealth officers might be reluctant to develop initiatives that could later be determined to have violated the guideline. Among other criticisms the submission made of particular guidelines were the following:

- the requirement to inform the public of new, existing or proposed government policies needed reconsideration: information must be ‘useful’, not merely informative;
- whether it was appropriate to fund campaigns that are proposed but not enacted policy; and
- the prohibition on ‘directly’ scorning or attacking the view of other political parties or groups should be amended, to prohibit criticism that is gratuitous rather than proportionate and necessary to the goal of informing the public.<sup>99</sup>

## Conclusions and recommendations

6.105 The Committee considers it is an integral part of a properly accountable system of government that government advertising is not used as a vehicle for promoting party political interests. However, whether it is possible to legislate effectively against such conduct is a difficult issue, as evidenced by submissions to the inquiry.

6.106 The Committee considers that both bills present substantial difficulties.

6.107 The Committee’s chief concern with the Charter of Political Honesty Bill 2000 [2002] is the role and function of the proposed Government Publicity Committee. As members of that Committee, the Auditor-General and the Ombudsman would be required to act in ways that are inconsistent with their establishing legislation, particularly in relation to investigating the actions of ministers and initiating enforcement procedures against government agencies. The Auditor-General and the Ombudsman as members of the

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97 Submission no. 13, p. 15.

98 Submission no. 22, p. 16.

99 Submission no. 22, pp. 16-20.

committee may be called upon to direct management of government programs and dictate to responsible ministers. Such functions represent a substantial departure from their current roles.

6.108 The Committee heard strong evidence that, in carrying out their duties as committee members, the Offices of the Auditor-General and the Commonwealth Ombudsman may become embroiled in political controversy. Public confidence in their roles as independent regulators and reviewers of government agencies, as well as the confidence of parliament, may be damaged. There is also a risk that future appointments to these offices may become politicised, or that their funding may be detrimentally affected by their activities on the proposed Government Publicity Committee.

6.109 The Committee also heard evidence of other serious flaws in the proposed committee. Giving the Auditor-General the responsibility for appointing and, in effect, removing the third committee member is undesirable. The Ombudsman's uncertain jurisdiction in relation to Commonwealth contractors may prove an obstacle where an external body is to manage an advertising campaign. The unlimited power of delegation proposed for the Ombudsman and Auditor-General makes exercise of the committee's powers uncertain, and the lack of any mechanism to review committee decisions is undesirable. Some serious constitutional issues about the proper role of the courts in relation to the proposed committee's decisions were also raised.

6.110 The Committee therefore believes that while the appointment of these two office-holders to the proposed Government Publicity Committee on the basis of their impartiality and integrity may have seemed attractive, in practice the system would present major difficulties.

6.111 The Committee therefore does not support the implementation of Part 2 of the Charter of Political Honesty Bill 2000 [2002].

6.112 In relation to the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, the Committee heard different but even more serious concerns. Most submissions expressed severe reservations about the proposed creation of a serious criminal offence defined by reference to vague and uncertain guidelines.

6.113 As several legal experts pointed out, it is a fundamental principle of our criminal law that offences should be clearly defined. The Bill as drafted would put the courts in the untenable position of trying to determine whether a crime had been committed by reference to vague criteria and policy statements. The Committee also heard reservations about the appropriateness of the courts traversing matters which were essentially political in nature, particularly in light of their traditional reluctance to interfere in such issues.

6.114 For these reasons, the Committee does not support the implementation of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

### **Recommendation No. 6**

**6.115 The Committee recommends that Part 2 of the Charter of Political Honesty Bill 2000 [2002] relating to government advertising and the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 should not proceed because of fundamental flaws in both bills.**

6.116 The Committee nevertheless considers that there is strong evidence to support the argument that the current arrangements for the regulation of the political content of government advertising need to be improved in the face of public criticism.

6.117 As the Committee's examination of current arrangements has revealed, the present guidelines on government advertising offer no guidance to departments or ministers on the avoidance of political content in government advertising campaigns. The process is administered by the Government Communication Unit in the Department of the Prime Minister and Cabinet, and decisions about the appropriateness of any major or 'sensitive' campaign are made by the Ministerial Committee on Government Communications.

6.118 Under this system, it is the ministry itself which determines what constitutes responsible use of the ministerial office in relation to government advertising. The fact that there are no rules or guidelines preventing the party political use of government advertising means that decisions about content and presentation style are wholly in the power of the Executive. This lack of guidance allows the party in government to conduct government advertising campaigns, particularly in the lead up to an election, without any reference to standards regarding the appropriate use of public monies to promote government interests as distinct from party interests.

6.119 It is widely acknowledged, as evidenced by the submissions that the Committee received, that the distinction between what is party political and what is not is difficult to codify. However, as a minimum the Committee considers that the *Guidelines for Australian Government Information Activities: Principles and Procedures* should include a clear statement of the fundamental principle: that government information programs should not be, or be liable to misrepresentation as being, party political. This principle has been recognised in the United Kingdom's equivalent guidelines, with elaboration on how that principle is to be applied. The Committee sees no reason why similar material should not be contained in the Australian guidelines.

#### **Recommendation No. 7**

**6.120 The Committee recommends that the *Guidelines for Australian Government Information Activities: Principles and Procedures* issued by the Government Communications Unit in the Department of the Prime Minister and Cabinet be amended to refer explicitly to the fundamental principle that government information programs should not be, or be liable to misrepresentation as being, party political, and should provide guidance as to how that principle is to be applied in practice.**

6.121 While guidelines for government agencies are important, the Committee is not persuaded that this amendment alone will provide sufficient safeguards against the expenditure of public funds on advertising that promotes party political interests.

6.122 During this inquiry the Committee heard various suggestions as to the appropriate mechanism for ensuring proper scrutiny of expenditure on government advertising. The Committee considers highly persuasive the arguments that these are essentially political matters and that consequently it is for Parliament as a whole to examine, decide and issue detailed guidelines on what is appropriate.

6.123 Because of flaws in the two bills which the Committee has considered above, the Committee believes that more detailed consideration of the regulation of government

advertising is essential. The Committee considers it would be appropriate for this matter to be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament, as set out in recommendation 2, for further consideration and development of appropriate guidelines.

6.124 That committee should also have the opportunity to consider proposals raised during this inquiry such as the establishment of a parliamentary committee to adjudicate on the guidelines for government advertising or the introduction of some form of pre-clearance procedure for major government advertising campaigns including the requirement for the responsible minister to report to parliament on proposed government advertising campaigns.

6.125 The guidelines proposed by the Auditor-General and the JCPAA, in combination with evidence received during this inquiry, should be used as a basis for developing a detailed set of standards.

### **Recommendation No. 8**

**6.126 The Committee recommends that the issue of appropriate guidelines for government advertising campaigns be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament for further consideration.**

**Senator Brett Mason  
Committee Chair**