

***Human Rights and
Equal Opportunity Commission***

Human Rights Commissioner

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The Hon. Michael Duffy MP
Attorney-General
Parliament House
Canberra A.C.T. 2600

CC: Senator Hon.. Nick Bolkus
Minister for Administrative
Services
Parliament House
Canberra A.C.T. 2600

Dear Attorney

By letter on 20 March I indicated to your colleague the Minister for Administrative Services that I had serious concerns regarding the consistency of the Government's proposal to ban political advertising in the electronic media with Australia's international treaty obligations. In particular, I was concerned with obligations flowing from our ratification of the International Covenant on Civil and Political Rights (ICCPR), which is incorporated in Federal legislation in the Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act) and by reference to which this Commission has a number of functions.

My letter and a short statement which I sent to your office also indicated that I would, on receipt of details from the Government of the decision taken by Cabinet, consider what, if any, further action should be taken or avoided to ensure that Australia complies with its obligations at international law and advise the Government accordingly.

Senator Bolkus wrote to me on 26 March in terms which, while promising co-operation, indicated that no information beyond his press release of 19 March would be available to me at that point. No further information has been provided to me on a formal basis, although I am aware of a number of statements by Senator Bolkus in response to questions in Parliament.

Section 14 of the HREOC Act states that, for purposes of the performance of its functions, "the Commission may make an examination or hold an inquiry in such manner as it thinks fit".

Having carefully considered the information available, I am satisfied that a complete ban on political advertising on radio and television as proposed would clearly constitute a breach of our obligations under the ICCPR. I thought it would be more useful to the Government (given your responsibilities with respect to legislation) to advise you accordingly at this point, rather than awaiting the development of legislation along lines impermissible under the Covenant.

1. STANDING COMMITTEE REPORT

While I am not obliged, as a matter of law, to consider the deliberations of Parliamentary Committees I believe the importance of this issue, the limited amount of information available to me, the fact that the Parliament is still seized of the issue, and the terms of the legislation just referred to, make this appropriate in this instance. I have also adopted this course because the Minister for Administrative Services has referred (Hansard, Senate, 10 April 1991, p.2198) to the report of the Joint Standing Committee on Electoral Matters, "Who pays the piper calls the tune: minimising the risks of funding political campaigns" (Report no.4, June 1989) as supporting the proposed ban.

However, the Report of the Standing Committee, in my respectful opinion, is unsatisfactory as a basis for the restrictions apparently recommended therein and, a fortiori, for the more restrictive ban now proposed - even if regard is had only to the majority Report and not to the dissenting reports issued.

I say "apparently recommended" since the list of recommendations preceding the body of the Report contains no reference to paid political advertising. Despite this, the following passage (ostensibly a recommendation) appears at paragraph 10.4:

Free time for political advertising should apply for both Federal and State elections subject to the following conditions:

1. there be no paid political advertising on radio or television from the date of the Issue of the Writs to polling day; and
2. all registered political parties or candidates accepting free time on radio or television submit to the AEC a return which discloses all donations, incomes and expenditures, irrespective of the purposes for which they were received or made. (The requirement for this disclosure is contained in Recommendation 3.)

The restriction proposed in paragraph 1. is expressed as being a condition of free time for political advertising. However, it appears that the Committee contemplated a ban on paid political advertising by any party or person irrespective of whether they accept such free time.

This recommendation is clearly less restrictive than the proposal adopted by Cabinet since it applies only for a defined period. It would, nonetheless, face many of the same problems of justification as the more sweeping proposal.

The majority report discusses the concept of a complete ban on political advertising in the following terms:

9.8 While some viewers may support a complete ban on political advertising it would have a direct effect on freedom of speech by reducing opportunities for discussion during election periods when voters are determining the candidate or party they wish to support.

9.9 Most witnesses disagreed with a complete ban on political advertising, claiming that it would have an adverse effect on freedom of speech and in particular would disadvantage citizens and groups who wished to bring issues before the electorate. The beneficiaries of a complete ban would be the existing major parties.

It should be noted first that the Standing Committee Report clearly endorses the view that a ban on political advertising "would have a direct effect on freedom of speech".

Second, paragraph 9.3 refers to a complete ban reducing opportunities for discussion "during election periods". Obviously the effects of the much more extensive ban now proposed would be wider than this, and would raise concerns in relation to freedom of speech more broadly than the ban which was condemned (although apparently also proposed) by the Standing Committee majority report.

I believe it is therefore clear that the Standing Committee Report cannot be construed as a satisfactory basis for the proposed ban.

1.1 FREE TIME

I note that, whereas the Standing Committee recommendations include expansion of free time entitlements, the Minister for Administrative Services has indicated that the ban presently proposed "will include a ban on paid and unpaid political advertising and free time currently provided by the ABC" (Hansard, Senate, 11 April 1991, p. 2309).

1.2 OVERSEAS EXPERIENCE

The Report reviews the position in a number of jurisdictions in relation to political advertising. It summarises this review in a table which indicates that paid political advertising is permitted in:

Australia, Canada, Federal Republic of Germany, New Zealand and the U.S.A;

and is not permitted in:

- Austria, Belgium, Denmark, Finland, France, Ireland, Israel, Italy, Japan, Netherlands, Norway, Sweden, Switzerland, and the U.K.

Study of the text of the Report, however, indicates that, even if the Report can be relied on for accurate information (and in some respects it cannot), this table is misleading. The information provided in the text of the Report is also misleading and/or incomplete in important respects.

Several of the countries identified as prohibiting "political advertising" are in fact stated to prohibit only party political advertising, within a defined period of an election. Moreover, and in my view equally importantly, our research indicates that of those States which prohibit paid political advertising, all but one - Norway - permit

some form of political advertising in the electronic media.

The only State referred to which prohibits all political advertising in the electronic media (that is, Norway) in fact permits no advertising whatsoever on its exclusively, State-owned media. The identification of Israel as not permitting political advertising appears, similarly, to be of dubious relevance - since the sole broadcaster is noted by the Report to be state owned. Moreover, the prohibition identified, under the Election Law (Propaganda) Act 1959, s.15(a), relates only to elections.

In my considered view, it is clear that for a State which does not permit any electronic media advertising to fail to make an exception in relation to political advertising does not raise the same issues as the case of a State prohibiting access for certain purposes to media owned and operated by others and which do engage in paid advertising in other fields.

The Report's discussion of New Zealand commences by stating that "New Zealand has followed the United Kingdom in adopting restrictions on its broadcast media". It is clear, however, that for relevant purposes this is not accurate. (Indeed, the Report itself acknowledges that New Zealand permits paid political advertising in the electronic media and the United Kingdom does not.)

To the extent, therefore, that Cabinet or the Minister relied on information provided by this Report concerning members of the community of nations which some may consider comparable to Australia (the so called "Western democracies") it would appear that the Government may have been materially misled.

2. RELEVANCE OF OVERSEAS PRACTICE

This Commission's responsibility is to interpret the rights recognised in the ICCPR "as that Covenant applies in relation to Australia" (HREOC Act s.3). This includes interpreting the Covenant in accordance with accepted rules of international law.

The accepted principles of interpretation of treaties at international law, reflected in the Vienna Convention on the Law of Treaties (Article 31), require that the terms of a treaty are to be interpreted in good faith and in accordance with their ordinary meaning. (The High Court has confirmed that the Vienna Convention should be referred to for applicable principles of interpretation of treaties: Commonwealth v. Tasmania (1983) 158 Commonwealth Law Reports 1 at 93, per Gibbs CI; at 177, per Murphy 3; at 222-223, per Brennan 3.)

Other means of interpretation, including State practice - to the extent that this is relevant - are secondary.

Subsequent conduct by States Parties in the application of the treaty may be taken into account in interpreting the nature of the obligations, although it remains a factor of only secondary importance. In any event, if that practice is inconsistent with the ordinary meaning of the relevant provisions, it cannot be taken as modifying the nature of the obligations. It cannot be countenanced that parties to human rights

treaties are free by subsequent conduct - other than the procedures for denunciation provided for or by unanimous agreement - to defeat basic obligations thereunder. This would be contrary to the fundamental principle of good faith, and contrary to the rule that a treaty be interpreted according to its object and purposes.

Moreover, the fact that several States Parties to the ICCPR may have legislation imposing restrictions on political advertising would not, in itself, establish that those States consider such restrictions justified under the ICCPR. It is equally possible that in framing the relevant legislation the ICCPR was simply not adverted to. (This would be consistent with a great deal of evidence, including in Australia, that once these basic human rights treaties are ratified they are often remembered only in Departments of Foreign Affairs or Departments of the Attorney-General, or in smaller sub-divisions of government having specific responsibility for human rights matters which may not always be consulted prior to formulation of proposals affecting human rights.)

In any case, the practice of banning political advertising is plainly not universal or sufficiently widespread to evidence a general agreement on interpretation among States Parties to the ICCPR - even if those countries which have introduced and maintained such a ban can properly be considered to have done so in reliance on a particular view of Article 19 of the ICCPR.

The only case of which I am aware concerning comparable restrictions on the media being explicitly defended as consistent with a human rights treaty is that of the United Kingdom Government in X and the Association of Z v. United Kingdom [App. no. 4515/70, 12 July 1971]. In that case the European Commission on Human Rights held (in a decision giving only the most cursory consideration to the fundamental human rights issues involved) that a ban on paid political advertising was permissible under the European Convention on Human Rights.

I believe the government's advisers may have considered this decision in preparing the submission on which the Cabinet reached its recent decision. However, in my considered view, that decision does not dispose of the issue under the ICCPR - for the following reasons.

The European Commission's determination was based on a provision of the European Convention expressly indicating that licensing of television and radio remained permissible. The International Covenant on Civil and Political Rights omits any such provision, precisely (as indicated by the travaux preparatoires) because of concerns during drafting that such a provision might be interpreted to permit excessive limitations on free expression through these media. (Licensing requirements, particularly for technical purposes, were contemplated as permissible under the provision of Article 19, which permits limitations necessary for "public order", but only on the basis that these requirements are consistent with the right itself.)

Moreover, the most recent relevant decision of the European Court of Human Rights (the decisions of which carry greater authority than the determinations of the European Commission) indicates that the adequacy of the European Commission's

1971 view, even as an interpretation of the European Convention, is open to serious doubt. (This decision occurred only last year and I believe advice to the Minister or the Cabinet may not have taken it into account.)

In Groppera Radio A.G. v. Switzerland [(1990) 12 European Human Rights Reports 321 at 339] the Court emphasised that the European Convention did not permit any licensing restrictions whatsoever, but only those consistent with the object and purpose of Article 10 (the Article recognising freedom of expression) as a whole. The discussion by the European Commission in its 1971 decision, by contrast, fails to discuss this principle adequately or indeed at all, and appears to treat the provision permitting licensing as permitting any restriction whatsoever on relevant media.

It is clear, therefore, that the decision of the European Commission in X and the Association of Z v. United Kingdom cannot be taken as representing the position under the ICCPR.

The European Commission in its 1971 decision adverted to practice in European States, including the fact that many permitted no advertising whatever on radio or television, in determining the width of the provision of the European Convention permitting licensing. To the extent that such practice is relevant, it should be noted that in June 1990, in Copenhagen, the Organisation on Security and Co-operation in Europe agreed to ensure:

that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.

Notwithstanding suggestions to the contrary therefore, it appears clear that the trend of overseas practice is in the opposite direction to that indicated by the proposed ban.

Beyond these considerations, however, Australia is bound by international law to fulfil its obligations under the ICCPR, irrespective of how consistently other States honour theirs.

3. FREEDOM OF EXPRESSION AND INFORMATION

I turn now, therefore, to those treaty obligations. While a concluded view cannot be expressed on all aspects of possible variations of the proposed ban on political advertising, it is possible to state that:

- a complete ban on all political advertising on radio and television as proposed would be an interference with the rights to freedom of expression and information recognised in ICCPR Article 19.2, would exceed the permissible limitations under ICCPR Article 19.3, and accordingly would be contrary to the human rights recognised in the ICCPR;
- a ban as proposed would for some purposes also be inconsistent with the political rights recognised in ICCPR Article 25.

3.1. ARE THESE RIGHTS AFFECTED?

ICCPR Article 19.2 provides:

Everyone shall have the right to freedom of expression; *this* right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice [emphasis added].

This right would clearly be restricted by a ban on the advertising of a particular category of ideas and information - i.e. "political" advertising. (Difficulties in defining what is "political" and the consequences of these difficulties are considered below).

The rights of two classes of individuals are affected: (1) the rights of those wishing to impart such information and ideas and (2) the rights of those wishing to receive them. It is particularly important from a human rights standpoint to emphasise that while most of the opposition expressed to the proposed ban has come from persons and organisations within the first of these categories, the most serious effect of this ban relates to its impact on the accessibility of information for blind and other sight impaired Australians (who presently number 110,000) and the more than one million Australians who are functionally illiterate. (As discussed in more detail below, discriminatory impact is one reason for finding restrictions on rights impermissible under the ICCPR.)

Restriction of the rights recognised in Article 19.2 would arise from the proposed ban notwithstanding that advertising remains available through other media, since as emphasised above, Article 19.2 specifies that freedom of expression includes freedom for everyone to receive or impart ideas "through any ... media of his [sic] choice".

The statement issued by the Minister for Administrative Services on 19 March announcing the Government's decision appears to assert that no issue of freedom of expression is raised since this freedom is already restricted by the expense involved in advertising in the electronic media. The Minister has subsequently re-stated this proposition, albeit in more colloquial terms; thus "what we are talking about in terms of banning political advertising is not free speech; we are talking of bought speech" and "it is not free speech; it is bought speech" (Hansard, Senate, 11 April 1991, p. 2315). While I understand the point the Minister is making it is not, with respect, one that goes to the substance of our treaty obligations. It is basically a play on words addressing a different issue (which I deal with below).

First, even with respect to this issue, available information indicates that advertising, on non-metropolitan radio at least, is within the means of, and a major medium of communication for, a range of groups with limited resources.

Second, and more fundamentally, the fact that the exercise of a right in practice is already limited to some extent (particularly by non-government actors or by economic considerations) cannot mean that all further restrictions, particularly those imposed by Government, are permissible. This is the case whether the practical restrictions

existing are or are not themselves consistent with the right. (A more dramatic illustration of this point would be that the right to life recognised in Article 6 of the ICCPR remains binding on governments notwithstanding limitations on enjoyment of this right in many countries through disease, starvation, the activities of death squads etc. Indeed, rather than relieving governments of their obligations, these factors underline the duty of government to take measures to promote and protect the right in question.)

The U.N. Human Rights Committee (which is the international body responsible for monitoring observance of the ICCPR) has pronounced on the effect of practical factors such as control of mass media on the enjoyment of freedom of expression as follows:

Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3. [General Comments adopted by the Human Rights Committee under ICCPR Article 40(4), General Comment no.10: Article 19, UN.Doc.CCPR/C/21/Rev.1, p.9.]

This concern, however, would be validly and properly addressed by appropriately extending access to the electronic media to those not enjoying it, rather than denying such access (and accordingly also denying the right to freedom of expression) to all parties.

However, as already noted, the Minister for Administrative Services has indicated that rather than free time entitlements being expanded, these are to be further restricted, with allocation of free time by the Australian Broadcasting Corporation being limited to party political launches.

In any case, the allocation of free time to political parties (conditional on their qualifying by reference to a level of popular support), even on an expanded basis, would not guarantee that a ban on paid advertising on radio and television did not restrict freedom of expression in violation of the ICCPR. This is so for several reasons:

- (a) Such allocation does not address the rights of individuals in, or on behalf of, parties below this qualifying level of support to express their ideas or convey information (and the corresponding rights of others to receive these ideas and information).
- (b) The proposed ban is not restricted to political parties but will apply to any advertising of a "political" nature. On the information available to me it does not appear to be contemplated that any person or organisation refused or liable to be refused permission to advertise on this basis will instead be granted free time (and it is difficult to see how this could occur)
- (c) The proposed ban is to apply not only in a defined period prior to an

election, but at all times. It does not appear to be contemplated that free time will similarly be available at all times, rather than only in the context of election campaigns. Whatever limitations on timing of advertisements may be permissible, in my considered view there is no basis for any view that freedom of expression as recognised in ICCPR Article 19 means, so far as expression of political ideas and information in the electronic media is concerned, freedom of expression only for political parties and only once every three or four years.

Third, the principle advocated by the Minister for Administrative Services would, if seriously pursued, justify not only a prohibition of paid political advertising in any media, but a ban on many of the means of effective expression, of political ideas in modern Australian society.

Clearly, the view that "bought speech" cannot be "free speech" would authorise a ban not only on political advertising on radio and television, but also political advertising in print media. Further, I can find no cogent reason why this would not apply equally to publications produced and distributed by political parties or other organisations, or by individuals, on their own behalf, since these are also forms of "bought speech".

The Minister's proposed principle would also authorise a ban not only on advertising but on other commercial forms of political pronouncements, including political comment or reporting by commercial television or radio or newspapers, since these means of expression also constitute "bought" speech.

Political posters also generally cost money to produce and would similarly constitute "bought speech". Further, political meetings of any significant size also require financial resources, (for matters such as hire of a venue and public address systems).

In summary, it is difficult to conceive what speech, other than the unaided human voice, might not be categorised as "bought speech".

I have thought it may be helpful to allude to the foregoing examples not to suggest that the Government or the Minister for Administrative Services has any intention to ban these further categories of political speech, but to demonstrate that the distinction between "free speech" and "bought speech" is neither sustainable nor helpful in the context of ascertaining our international legal obligations.

3.2 PERMISSIBLE RESTRICTIONS

Since I have concluded that the proposed ban clearly restricts the rights recognised in ICCPR Article 19.2 (contrary to the view advanced by the Minister for Administrative Services), the issue is whether this restriction falls within one of the permissible exceptions.

Article 19.3 stipulates that some restrictions are permissible, but in my view this derogation only extends to those grounds which are expressly referred to.

I have reached this conclusion having regard to our other treaty obligations and, in particular, to the provisions of Article 5 of the ICCPR, which state:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant (emphasis added).

This clearly establishes that the only permissible limitations on rights recognised in the ICCPR. are those recognised in the Covenant itself.

Article 19.3, then, specifies that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary..

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

It is therefore indisputable that to be permissible under Article 19.3 and accordingly to be permissible under the Covenant a restriction must be:

- provided by law; and,
- necessary; and
- such that the necessity be demonstrated by reference to one of the categories of restriction provided.

3.2.1 Provided by law

- i The proposed ban could only be implemented in the Australian context by legislative means. This would satisfy one element of this criterion. However (as indicated by the "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" and associated commentary) there are a number of other requirements.¹
- ii. A law imposing a restriction must be accessible and reasonably ascertainable in its effect [see e.g. Sunday Times v. U.K. (1979) 2 European Human Rights Reports 245 at 271, interpreting the equivalent requirement that restrictions be "provided by law" under the European Convention on Human Rights]. No

1. These principles, reported and discussed in (1985) 7 Human Rights Quarterly, were agreed in 1984 by a meeting of 31 experts in international law, including several members of T.J.N. supervisory bodies as well as academic experts. The "Principles" have no authority of their own, but are widely accepted as reflecting the basic principles of interpretation to be applied to the relevant provisions of the Covenant.

problem as to accessibility appears. As to ascertainability, however, considerable difficulty could arise in determining what advertising is 'political' and therefore proscribed.

There has been some suggestion that the Australian Broadcasting Tribunal and/or the Australian Electoral Commission would bear responsibility for this determination. Such a mechanism, if itself provided by law and subject to appropriate review, might render the restriction sufficiently ascertainable for this purpose - but only if the administrative body responsible for such determinations is itself required to make determinations on sufficiently ascertainable criteria.

- iii. The law must be consistent with other requirements of the Covenant. This interpretive principle restates the effect of Article 5.1, noted above.

3.22 Relevant grounds of restriction

3.2.2 (a) Rights and reputations of others

There has been no suggestion, nor is there evidence to suggest, that a restriction on political advertising similar to the proposed ban is necessary to protect the reputation of any person.

It might be argued that the proposed ban, being intended to protect the integrity of the political process, and to prevent distortion of that process by disproportionate resources being available for advertising, is directed to protecting the individual political rights recognised in ICCPR Article 25, including the right "to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, **guaranteeing the free expression of the will of the electors**" [emphasis added].

While less sweeping restrictions - such as limitations on campaign spending - might be supported on this basis, such an argument for the proposed ban on all political advertising in the electronic media must effectively address two sets of objections:

- First, as discussed below, restrictions must be only such as are "necessary" for the purpose to be pursued. No evidence appears why less restrictive means cannot be used to address any need which may exist.
- Second, a complete ban on political advertising in these media may, in itself, interfere with the rights recognised in Article 25 for some persons, as discussed below.

3.2.2(b) National security; public health

No suggestion has been made, nor does any evidence appear, to connect the proposed

ban to "national security" or to "public health".

3.2.2.(c) Public morals; public order (ordre public)

The statement issued by the Minister on 19 March indicates that the purpose of the proposed ban is to prevent corruption in the political process, by means of reducing the pressure on political parties to raise increased amounts of funds.

Existing case law dealing with "public morals" has broadly addressed community morality rather than the morality of public officials. This heading could, however, arguably include measures against official corruption.

However, the heading "public order (ordre public)" is potentially of more relevance. This heading is clearly wider than the concept of "public order" in the sense usually understood in Anglo-Australian law (dealing with prevention of breaches of the peace, offensive behaviour etc). It extends to "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded" (Siracusa Principles, Principle 22; and see A. Kiss, "Permissible Limitations on Rights" in Henkin (ed.) *The International Bill of Rights*, 1981). It equates with the "police power" in United States jurisprudence, permitting regulation in the interests of legitimate public purposes. This power must itself, however be exercised in a manner consistent with human rights (see Lockwood, Finn and Lubinsky, "Working Paper on Limitation Provisions", (1985) 7 *Human Rights Quarterly* 35, at 59).

Although there is no clear case law on the issue, there is little difficulty in relating the purpose of preventing political corruption to the heading "public order (ordre public)". Plainly, the political process is central to public order.

The issue, therefore, is not whether the proposed ban is related to a permissible purpose, but whether it is a permissible means of achieving that purpose.

3.2.3 Is the restriction necessary?

It is clear that a Parry to the Covenant, limiting the right to freedom of expression and claiming that the limitation is necessary on one of the permissible grounds, must evidence, rather than simply assert, that necessity- Pietroroia v. Uruguay (Views Adopted by the Human Rights Committee, U.N. Doc A/36/40 p.150).²

The "Siracusa Principles"³ indicate that a limitation required to be necessary must:

² This is reflected in Principle 12 of the 'Siracusa Principles', which states that "the burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State".

3. Principle 10

- (a) be based on a permissible ground of limitation;
- (b) pursue a legitimate aim;
- (c) respond to a pressing public or social need; and
- (d) be proportionate to the legitimate aim pursued.

These principles reflect those which have been applied by the European Court of Human Rights (in interpreting the comparable limitation provision regarding freedom of expression in the European Convention) in a number of relatively recent cases: see for example Handyside v U.K., (1979) 1 European Human Rights Reports 737; Sunday Times v. U.K. (1979) 2 European Human Rights Reports 245; Barthold v. Germany (1985) 7 European Human Rights Reports 383; Lingens v. Austria (1986) 8 European Human Rights Reports 103.

3.2.3(a) Permissible ground of limitation

As discussed above, requirement (a) is satisfied by reference to "public order (ordre 3

3.2.3(b) Legitimate aim

For present purposes it may be simply accepted that the elimination of political corruption is a legitimate aim and that requirement (b) is, accordingly, also satisfied.

Requirements (c) and (d) however require closer examination.

3.2.3(c) Pressing social need

There is clearly some evidence of political corruption in Australia. In the case of Queensland, at least, there has been recent evidence of long standing and widespread corruption - to which the Minister for Administrative Services referred in his statement of 19 March. There are allegations of corruption in Western Australia presently before a Royal Commission, and criminal proceedings pending related to some of these allegations. Allegations of corruption are also being investigated in other jurisdictions, including Tasmania.

The Minister's statement indicates that the Federal Government intends by legislating in terms of the proposed ban (as well as introducing more comprehensive disclosure requirements) to prevent corruption occurring at the Federal level. (This could be interpreted to concede that no prima facie evidence of such corruption in the Federal political process presently exists.)

It is probable, however, that preventive measures are justified pursuant to this criterion where the harm to be prevented is sufficiently serious, even where there is no conclusive evidence that the harm is presently occurring. Measures to prevent political corruption Federally (and in other jurisdictions where no evidence of present corruption has been shown) would therefore not, per se, be impermissible.

The absence of evidence of present need remains relevant, however, in assessing the proportionality of the measures taken to the need to be addressed. That is, while a "clear and present danger" (in the more stringent terms required by United States jurisprudence on restrictions on First Amendment rights – including the freedom of the press) is not an absolute requirement for permissible restrictions under the ICCPR, such a "clear and present dangers would justify more extensive restrictions than a less certain potential threat.

3.2.3(d) Proportionate means

On the basis of the text of the ICCPR and of the relevant jurisprudence, proportionality of a restriction to permissible ends may be approached in a number of ways.

(I) Is the restriction only what is necessary

Article 19.3 states that restrictions "shall only be such as ... are necessary" for the permitted purposes. If a restriction is over-inclusive - that is, restricts the right in question beyond what is necessary for the permitted purpose - it should be regarded as impermissible. Emergency situations, where less precise tailoring of measures may be accepted as possible, are catered for by the derogation provisions in Article 4. This Article requires a "public emergency which threatens the life of the nation", and advice to the United Nations of this and the derogation from rights - rather than by the more routine limitation provisions contained in Article 19 itself. It is clear that the conditions for derogation are not met here, and therefore that the restriction must be permissible under Article 19.3 to be permissible at all.

The proposed ban appears to go beyond what can be shown to be necessary. Indeed it appears to do so in a number of respects:

(i) Bodies affected

First, the proposed ban goes beyond what has been shown to be necessary in relation to bodies affected. Even if it were established that a ban on radio and television advertising by political parties or by groups funded by or associated with political parties were necessary to prevent political parties being improperly influenced, the proposed ban goes beyond this to include advertising by bodies with no such funding or association on the basis that such advertising has some "political" content.

In my considered view there is no evidence that such a restriction on the activities of such bodies (and consequently the rights of their members or of those who wish to receive the information and/or ideas imparted by them through the electronic media) is necessary for the stated purpose. For this purpose it would be necessary for the Government to demonstrate, at least, that it is impracticable to determine which groups are, and which are not, independent from political parties.

(ii) Election related advertising or all political advertising

A complete ban on all political advertising would go beyond what has been demonstrated to be necessary for the purpose advanced. The stated purpose of the proposed ban relates to the expense of advertising for electoral purposes, and the potential of this expense to lead to political corruption. However, a complete ban would apply not only to advertising calculated and likely to influence the result of an election, but to any advertising of a "political" nature at any time. Unless a definition is adopted restricting "political" advertising to advertising calculated to influence the result of an election this is a substantially wider concept. No evidence appears that such extended coverage would be necessary to achieve the stated purpose.

It is not necessary for this purpose to determine at this point whether the former Human Rights Commission was correct in its view that restrictions operating during an election period were permissible. (Human Rights Commission, Report no 16 Freedom of Expression and Section 116 of the Broadcasting and Television Act 1942). It should not, however, be assumed that the views expressed in that Report represent the views of this Commission and correctly state the present position at international law.

(iii) Scope of "political" advertising

The Minister for Administrative Services indicated in his statement on 19 March 1991 that regard will be had in drafting the proposed legislation to the definition of "electoral matter" in the Commonwealth Electoral Act. The relevant portion of the Minister's statement was as follows:

A total ban will be achieved by an amendment to the Broadcasting Act 1942. Political advertising will be defined as advertising containing 'electoral matter' as currently defined in the Commonwealth Electoral Act. The ban will apply to registered and non-registered political parties and to third party advertising.

The definition in question (provided in section 4 of the Act) states succinctly that:

"electoral matter" means matter which is intended or likely to affect voting in an election.

A definition along these lines would address the objection noted above that a ban on all political advertising cannot be justified by reference to the electoral process. It would not, however, provide sufficient restriction on the scope of the ban to render it permissible.

Given the range of social issues which are, or it is argued or proposed should be, the subject of action or decision by government in Australia, and which therefore may be electoral issues, there appears little or no effective limit to the range of matters which might (in the absence of a more restrictive definition) be regarded as "political" and therefore potentially be subject to the proposed ban.

Other areas of the law also suggest that a wide view of what matters are political might validly be taken.

Advertising which advocated changes in the law or in government policy would be within or close to the meaning which, on the basis of relevant principles of the law of trusts, the law would ordinarily ascribe to the term "political". In extradition cases, concerning whether an offence is of a "political character", the courts have similarly taken "political" objects to include not only the object of "overthrowing or changing the government" but also that of "inducing it to change its policy" [*Cheng v. Governor of Pentonville Prison* [1973] 2 All England Reports 204 at 209 per Lord Diplock].

Unless specific exemptions were provided for advertising by Government or its agencies, advertising promoting a law or program which is the subject of any political contention may also, arguably, be caught by the proposed ban.

For example, any electronic media advertising comprised in the Government's Community Relations Strategy might come within such a ban, since this Strategy is premised on the concept of multiculturalism, which has in itself been the subject of partisan political debate.

Advertising intended to provide information to social security beneficiaries on changes to the law - such as advertising intended to remove confusion regarding "deemed interest" on bank accounts - may even be proscribed as political since the administration of these areas is a matter of continuing political controversy. A similar position could well apply in relation to advertising related to law and justice - including "law and order" advertisements not containing any explicit partisan message - since these areas are also potential or actual areas of political controversy.

Exemptions to permit advertising of government programs or services, or changes to the law, from the proposed ban, while narrowing its reach, would raise additional problems of discrimination - unless similar exemption was provided for advertising critical of such laws, programs and services.

(II) Is the restriction the least restrictive means available for the purpose?

Restrictions are required to be "only ... such as ... are necessary" for the permitted purposes. If means are reasonably available to achieve the permitted purpose which impose less restriction on the rights concerned than the measure proposed or adopted, it cannot be said that the restriction is only such as is necessary.

For the proposed ban not to be regarded as impermissible on this basis, it would need to be shown that less restrictive means - such as disclosure of donations, applying limits to electoral spending, expanding entitlements to free time and enforcing and/or strengthening existing laws against corruption - would not be effective in achieving the result aimed for. In my considered view this has not, to this point, been demonstrated.

(III) Proportionality: balancing test

In a number of cases, including Handyside v. United Kingdom (supra), the European Court on Human Rights has applied a more general concept of proportionality, weighing the need and the aim to be achieved against the importance of the right affected and the severity of the restriction thereon. On this basis, in addition to the lack of evidence of immediate need, the over-inclusiveness of a complete ban on all electronic media political advertising by all persons at all times and the availability of less restrictive means, the fundamental importance of the rights to freedom of expression and information in a democratic society also weighs against the proposed ban.

3.3 DISCRIMINATION

Article 2.1 of the ICCPR requires States Parties to the Covenant to respect and ensure the rights recognised therein to all individuals within their territory and subject to their jurisdiction:

without distinction of any kind, such as race, colour, religion, political or other opinion, national or social origin, property, or other status.

The effect of this provision is to constitute non-discrimination as one of the elements of each of the substantive rights recognised (as indicated by the European Court of Human Rights [Airey v. Ireland (1979) 2 European Human Rights Reports 395 at 318] by reference to the analogous provision of the European Convention on Human Rights (Article 14).

In the European context, this means that the Court, if it finds a restriction to be permissible in other respects (that is, by reference to the requirements that the restriction be prescribed by law, and necessary for a permissible purpose), will nonetheless go on to examine whether the restriction is discriminatory, and if it so finds the restriction will be regarded as impermissible. [For example, to set the age for marriage at 18 would not be an impermissible interference with the right to private life, but to set the age at 18 for citizens and 21 for aliens would be impermissible.]

A similar position applies under the ICCPR, including in relation to Article 19.

It would clearly be impermissible, as discrimination on the basis of political opinion in the exercise of the right to freedom of expression, to permit advertising promoting the effectiveness of Government enterprises, or promoting or providing information on Government policies and services, and not to permit advertising criticising those enterprises, policies or services.

As already indicated, there are very serious grounds for concern that the proposed ban will have a disproportionate impact, and in my view a discriminatory impact, on those Australians unable to obtain information from the print media - either because

of disability or illiteracy.

While exact figures are unknown, it is certain that a very, large number of Australians in each category would be affected..

For these people, it is particularly important that the right to impart and receive information and ideas "through the media of his [or her] choice", explicitly recognised in ICCPR Article 19.2, be respected - including where this involves transmission of political ideas or information through the electronic media.

4. POLITICAL RIGHTS; ARTICLE 25

The relevant provisions of ICCPR Article 25 specify that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

This fundamental right of every citizen to take part in public affairs depends, in large part, on having equal access to information on public affairs. This right is therefore intimately connected with the right of every person to receive political information and ideas through the media of his or her choice. At least for those people lacking effective access to information through other media (through disability, illiteracy or for other reasons), a ban on political advertising in the electronic media is likely to have a discriminatory impact on their right to take part in public affairs.

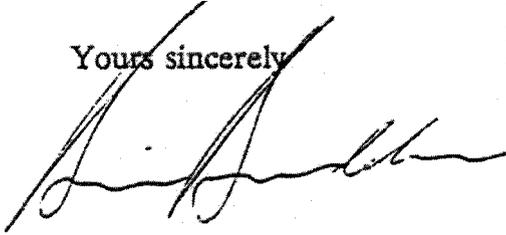
Restrictions on access to information in the media of their choice may also affect the ability of such persons to make informed electoral choices. This would constitute an interference with their rights under Article 25(b) to elections "guaranteeing the free expression of the will of the electors". This is so irrespective of whether any effect on the outcome of an election overall, or for any particular seat, can be demonstrated.

I emphasise, therefore, that this conclusion does not depend on any view that paid political advertising is essential for the overall result of elections to be fair or to represent the will of the electorate, The rights recognised in Article 25 are individual rights. They must therefore be guaranteed and respected for each elector, not simply regarded as a right inhering in the electorate as a whole.

8. CONCLUSTON

For the reasons set out, it is therefore clear, in my considered opinion, that the proposed ban on, political advertising on radio and television would be inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights. I have not addressed a number of relevant considerations arising from other international human rights pursuant to which Australia has undertaken commitments. These include, in particular, the Declaration on the Rights of Disabled Persons, which is incorporated in Federal legislation. I will be pleased to provide further advice as soon as the Government provides me with the information promised in Senator Bolkus' letter of 26 March.

Yours sincerely



BRIAN BURDEKIN
Federal Human Rights Commissioner