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REPORT OF THE

# *ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act  
1990 on the Lobbying Disclosure Bill

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*Presented to the House of Representatives  
pursuant to Section 7 of the New Zealand Bill of  
Rights Act 1990 and Standing Order 262 of the  
Standing Orders of the House of Representatives*

1. I have considered whether the Lobbying Disclosure Bill (“the Bill”) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I have concluded that the Bill appears to limit freedom of expression as affirmed by s 14 of the Bill of Rights Act. The limitation cannot be justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

### **The Bill**

2. The general policy of the Bill is to increase transparency around the activities of professional lobbyists directed at Members of Parliament and their staff. The stated purpose of the Bill is to increase transparency of decision making by executive government by establishing a Register of Lobbyists and a Lobbyists’ Code of Conduct and providing powers to the Auditor-General to investigate alleged breaches of the Code. The Bill requires registration of any lobbyist who engages in lobbying activity for payment. The Bill makes it an offence to engage in a lobbying activity without being registered. Lobbyists would also have to file returns with the Auditor-General on their lobbying activity.
3. Under the Bill, lobbying activity is defined broadly and occurs where an individual, company, firm or organisation undertakes for payment to communicate with any public office holder about, generally:
  - the proposal or development of any legislation, regulation, policy or programme of the Government; or
  - the awarding of any grant, funding, contribution, contract, or other financial benefit by or on behalf the Government.

Organisation and payment are also defined broadly and would include people working for or owning shares in an incorporated firm or small business. Public office holder is, however, defined narrowly and only covers Members of Parliament (including Ministers) and their staff. The Bill provides specific exemptions from the definition of lobbying activity for public submissions made to the House of Representatives and requests for information. The Bill states that Members of Parliament, any person employed by a public service department,<sup>1</sup> members and employees of local authorities and representatives of a foreign government do not need to file returns on lobbying activity when acting in their official capacity.

### **Freedom of Expression**

4. Freedom of expression is a fundamental human right. It must be protected and preserved.
5. Article 19 of the United Nations Universal Declaration of Human Rights states “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the International Covenant on Civil and Political Rights provides similar protection.

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<sup>1</sup> Limited to those listed in Schedule 1 to the State Sector Act 1988



6. The First Amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. George Washington remarked “If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”
7. New Zealand Members of Parliament, too, have expressed the importance of this right. “... All should be given the right to express a view no matter how disconcerting it should be, on even the most difficult or abhorrent of issues... Implicit in free speech is the idea that the community benefits from an untrammelled exchange of views and that every participant might have something to add to our enlightenment.”<sup>2</sup>
8. Freedom of expression is an essential barrier to state tyranny. Without the ability to freely express views and opinions, citizens can be silenced by the state. When free, frank and open communication on any issue is curtailed, freedom is lost.

#### **Section 14 of the Bill of Rights Act (freedom of expression)**

9. Under New Zealand law, section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
10. In *Brooker v Police*, McGrath J noted that “freedom of expression is a right which is basic to our democratic system”<sup>3</sup> and in support cited the Supreme Court of Canada:<sup>4</sup>

The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment.
11. The Bill seeks to regulate the ability of lobbyists to engage in lobbying activities; in particular imparting information to, or receiving information from, Members of Parliament and Ministers. It also regulates the ability of Members of Parliament and Ministers to receive information. The Bill makes it a criminal offence to impart information in the manner contemplated by the Bill without being a registered lobbyist.
12. Whilst a requirement to register as a lobbyist and the imposition of various obligations to disclose publicly information about lobbying activities undertaken do not prevent expression, they do limit the ability to express information freely. Some people may be dissuaded from expressing themselves because of the implications of the Bill.
13. I therefore consider that the Bill is prima facie inconsistent with s 14 of the Bill of Rights Act.

<sup>2</sup> Keith Locke MP, Booksellers should defend freedom of expression <http://www.greens.org.nz/node/26518>, 4 July 2011

<sup>3</sup> [2007] NZSC 30, [2007] 3 NZLR 91, (2007) 23 CRNZ 346 at [114].

<sup>4</sup> *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

### Are the limits on freedom of expression justified in a free and democratic society?

14. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision of *Hansen v R*, the s 5 inquiry may be summarised as:<sup>5</sup>

(a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?

(b) If so, then:

i. is the limit rationally connected with the objective?

ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement the objective?

iii. Is the limit in due proportion to the importance of the objective?

*Is the objective sufficiently important and rationally connected to the limit?*

15. The objective of the Bill is to increase transparency of decision making by executive government by regulating lobbying activity directed at Ministers, Members of Parliament and their staff. This is a sufficiently important objective to justify some limitation of the right to freedom of expression.

16. Regulating the ability of lobbyists to engage in lobbying activities with Ministers, Members of Parliament and their staff is rationally connected with that objective.

*Is the impairment on the right greater than reasonably necessary?*

17. The limits on freedom of expression sought to be imposed by the Bill are greater than reasonably necessary to meet the objective. This is because, primarily due to poor drafting, the Bill goes well beyond the activities of professional lobbyists to include a wide range of other activities.<sup>6</sup>

18. For example, the Bill will capture the actions of some state sector employees who regularly communicate with Ministers in respect of legislative proposals in the course of their employment within the definition of lobbying activity. This is because employees are undertaking tasks on behalf of their organisation for payment (wages). Clause 7(6) of the Bill seeks to avoid this outcome by specifically excluding any person working for any department listed under Schedule 1 to the State Sector Act 1988. However, the Bill does not similarly exclude other departments in the executive branch of government that are not part of the public service such as New Zealand Police and the New Zealand Defence Force.

<sup>5</sup> The proportionality test under s 5 of the Bill of Rights Act, as applied in *Hansen v R* [2007] NZSC 7 [123], draws on the test articulated by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *R v Chaulk* [1990] 3 SCR 1303. See for example, *Hansen*, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.

<sup>6</sup> Compare this to the Canadian Lobbying Act (RSC 1985 c 44 (4<sup>th</sup> Supp)) that provides for two tiers of both lobbyists and public office holders, broad exclusions for Crown employees and a de minimus rule where the Act does not apply to an organisation where the lobbying activities do not form a significant part of one employee's duties.



19. The Bill will also capture people who send a one-off email to their Member of Parliament on behalf of their incorporated firm or small business regarding any government policy. This is because the Bill does not exclude from its scope organisations who are not professional lobbyists and do not have significant involvement in lobbying. The Bill may also capture a person from a media outlet who arranges a face-to-face interview between a journalist and a Minister.
20. The examples above illustrate the dramatic over-reach of the Bill. Individuals in the examples above may restrain themselves from making communications if they did not want to be considered a lobbyist and incur potential criminal sanctions for communicating with Ministers or Members of Parliament. This is an unacceptable and dangerous limit on freedom of expression.

*Is the limit in due proportion to the importance of the objective?*

21. This Bill significantly limits core democratic expression. In going well beyond what would be required to regulate the activities of lobbyists, it risks creating a chilling effect for average New Zealanders who may fear criminal sanctions for merely communicating with a Member of Parliament on behalf of their business in relation to government policy. This would be an unacceptable limit on a core element of freedom of expression.

### **Conclusion**

22. For the above reasons, I have concluded that the Bill appears to limit s 14 of the Bill of Rights Act and this limit cannot be justified under s 5 of that Act.



Hon Christopher Finlayson  
**Attorney-General**