

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Electoral (Public Opinion Polls)
Amendment Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 260 (2) of the Standing Orders of
the House of Representatives*

I have considered the Electoral (Public Opinion Polls) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 4 of the Bill appears to be inconsistent with section 14 of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260) I draw this to the attention of the House of Representatives.

The Bill

Clause 4 of the Bill would insert a new section 222A into the Electoral Act 1993. New section 222A establishes a 28 day period prior to a general election or a by-election during which it would be an offence, punishable by a fine on summary conviction not exceeding \$5000, to publish or re-publish the result of a public opinion poll in relation to that election. Polls taken both before and during the 28-day period would be included. To 'publish' poll results is broadly defined as making public by 'any means', including "commenting publicly".

According to its explanatory note, the Bill seeks to address the perceived problem where "considerable emphasis and publicity is given to polling of voters and subsequent results. The material produced is frequently used by the media and others to publicise personal assertions and is often used in a manner designed to further influence voters in a particular direction. Material used or misused in this way to influence voters can and has created disadvantage for one party or individual over another in a manner not consistent with the principles of fairness or democracy."

The Bill of Rights Act issue in the Bill

As I have noted, the Bill prohibits publication of public opinion polls by anyone, including the media, over a 28-day pre-election period. Clearly, therefore, it places a *prima facie* limit on the "right to freedom of expression, including the freedom to seek, receive, and impart information and opinion of any kind in any form" affirmed by section 14 of the Bill of Rights Act. The more important question is whether that limit can be said to be "reasonable and demonstrably justified in a free and democratic society" in terms of section 5 of the Bill of Rights Act. In essence the enquiry under section 5 (as set out by the Court of Appeal in *Moonen v Film & Literature Review Board* CA 42/99 17 December 1999) is twofold: first, whether the provision serves an important and significant objective; and second, whether there is a rational and proportionate connection between that objective and the provision.

Important and Significant Objective

The objective of the Bill, as stated in its explanatory note, is to ensure "fair and ...balanced" elections, given that in the view of the Bill's promoter opinion poll material is used to influence voters in particular directions to the detriment of some parties or individuals.

In *Thomson Newspapers Co v Canada (Attorney-General)* [1998] 1 SCR 877, the Canadian Supreme Court assessed the constitutionality of legislation that prohibited the publication of results of opinion surveys on how electors would vote in an election. In

finding that the restriction was an unjustifiable infringement on freedom of expression, the Court stated that "Canadian voters must be presumed to have a certain degree of maturity and intelligence. They have the right to consider the results of polls as part of a strategic exercise of their vote".

I am not aware of any rigorous analysis in New Zealand of the extent to which public opinion poll information is manipulated by the media. Nor am I aware of authoritative empirical evidence relating to the effect of opinion poll results on the New Zealand electorate. Moreover, in the context of New Zealand's Mixed Member Proportional (MMP) electoral system, which is arguably amenable to strategic voting, poll information may be seen as vitally important by some voters. Some voters may *want* their vote to be influenced by poll information and, for this reason, may wish to access that information. For these reasons, on the evidence available to me, I am not able to say that the *stated* objective of the Bill is "important and significant" such that it warrants overriding the right to freedom of expression.

However, as well as the objective of the Bill stated in its explanatory note, I have also considered what may be an underlying purpose of the Bill, namely the prevention of publication of inaccurate or erroneous polls. In *Thomson* the Canadian Supreme Court held that preventing inaccurate polls from having an impact on the outcome of elections was an important and significant objective. Given the arguable similarity between the New Zealand and Canadian societies, and the importance of accurate poll information in an MMP environment, I have assumed that an objective underlying the Bill may be sufficiently "important and significant" to justify some limits on freedom of expression.

Rational and Proportionate Connection between Objective and Proposed Measure?

However, in terms of section 5 of the Bill of Rights Act as noted above, I must also consider whether there is a rational and proportionate connection between the Bill's objective (of preventing inaccurate public opinion polls from having an impact on the outcome of elections) and the measures proposed to effect that objective.

It can be argued that a 28-day prohibition on the publication of opinion poll results is rationally related to this underlying objective. If no polls are published or discussed in the month preceding polling day, there is little danger that voters will rely on incorrect data when casting their ballot.

Nonetheless, a provision must be *proportionally as well as* rationally related to the objective underlying the provision. The new section 222A will prohibit the publication of any poll results (potentially from the previous 3 years) in the 28 days leading up to an election. If the underlying objective of the Bill is to militate against the effect of *inaccurate* information on voters' choices, I do not consider it necessary to prohibit the publication of *all* poll results over a 28-day period. In my view there may also be alternatives to the Bill, which achieve its underlying objective, but are less intrusive on the right to freedom of expression.

For example, the month leading up to polling day provides adequate time for people who disagree with poll information to put alternative points of view or present alternative poll findings. Accordingly a restriction on publication limited to the period more immediately preceding an election (where, due to time constraints, opponents or


commentators have less ability to counter allegedly incorrect data) may be a justifiable alternative. So too may be a requirement that pollsters publish the methodological information relating to the poll.

In assessing this Bill, I have paid particular regard to the fact that it would interfere with the flow of information at a time when New Zealanders undertake their most important democratic duty, namely, deciding who will form the government. The free flow of political information lies at the heart of freedom of expression. In my view the democratic model cannot work properly if access to information is unreasonably restricted, particularly in the context of an electoral system which is amenable to strategic voting. Accordingly, limits on political speech may have to reach a higher threshold than some other forms of speech in order to be considered reasonable and justified in a free and democratic society. I also note that the prohibition of opinion polls in the month leading up to an election is not common internationally.

Consequently I consider that, on the basis of information available to me, clause 4 of the Bill cannot be said to be proportionally related to an underlying objective of preventing inaccurate poll results from affecting the outcome of general elections or by-elections. Accordingly, clause 4 of the Bill cannot be considered a reasonable and demonstrably justified limit on the right to freedom of expression in terms of section 5 of the Bill of Rights Act.

Conclusion

I conclude that clause 4 of the Electoral (Public Opinion Polls) Amendment Bill appears to be inconsistent with section 14 of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.



Hon Margaret Wilson
Attorney-General