

7 May 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Regulatory Standards Bill

Purpose

1. We have considered whether the Regulatory Standards Bill (the Bill), a member's Bill in the name of David Seymour, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We have prepared the advice on the final version of the Bill received.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (the right to freedom of expression) and s 27 (the right to justice). Our analysis is set out below.

The Bill

3. The purpose of the Bill is to improve the quality of regulation (meaning Acts of Parliament and secondary legislation) in New Zealand. The Bill's principles apply to Acts of Parliament and secondary legislation, excluding legislation made by local government.
4. The Bill will only come into force if the majority of electors voting in a referendum, held in accordance with the Schedule, support the Bill coming into force.
5. The Bill has three key components. It:
 - a. provides a benchmark for good regulation through a set of regulatory principles that all regulation should comply with;
 - b. provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles; and,
 - c. provides for monitoring of the certification process through a new declaratory role for the courts.
6. The principles included in cl 6 are that legislation should:
 - a. be consistent with certain specified aspects of the rule of law;
 - b. not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person;
 - c. not take or impair property without the consent of the owner unless certain criteria are satisfied (including payment of full compensation);
 - d. not impose a tax except by or under an Act;

- e. not impose a charge for goods or services unless the amount of the charge is reasonable (in relation to both the likely benefits of the goods or services to the payer and the costs of efficiently providing the goods or services);
 - f. preserve the courts' role of authoritatively determining the meaning of legislation;
 - g. provide a right of appeal on the merits against certain decisions affecting any liberty, freedom, or right referred to above, and should state appropriate criteria for making those decisions;
 - h. not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted;
 - i. not be made unless there has been a careful evaluation of certain matters (for example, the issues concerned, the effectiveness of the existing law, the options, the benefits, and any reasonably foreseeable adverse consequences);
 - j. produce benefits that outweigh the costs of the legislation; and,
 - k. be the most effective, efficient, and proportionate response to the issue concerned that is available.
7. Clause 6(2) states that any incompatibility with these principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society. Clause 6(3) states that nothing in the principles limits the Bill of Rights Act.
8. The Bill allows the courts to provide declarations of incompatibility where they believe that the principles have been breached. This power is declaratory only; no power is introduced for the courts to strike down legislation, to issue injunctions against Parliament or the Crown, or to award damages to those adversely affected by regulation that is incompatible with the principles.
9. Clause 2 of the Bill states that this Bill will only come into force if the majority of electors voting in a referendum support it coming into force. The Schedule of the Bill largely replicates Referendums Framework Act 2019. Advice on the consistency of the Bill for this Act with the Bill of Rights Act has previously been given by Crown Law which concluded that it was consistent with the Bill of Rights Act.¹

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

10. The limits placed on referendum advertising in this Bill impose limits on the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
11. 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. This right extends to all forms of communication, including

¹ See Crown Law's advice to the Attorney-General dated 19 July 2019 – 'BORA Vet: Referendums Framework Bill – Consistency with the New Zealand Bill of Rights Act 1990', publicly available at [bora-referendums-framework-bill.pdf \(justice.govt.nz\)](https://www.justice.govt.nz/bora-referendums-framework-bill.pdf)

advertising.² The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.³ Several clauses in the Schedule engage the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Right not to be compelled to provide certain information

12. Clauses 43 and 44 of the Schedule require referendum advertisements to include promoter statements and comply with election advertisement content requirements, respectively.
13. Clause 46 of the Bill requires an application to the Electoral Commission for registration as a promoter to be made in the form required by the Electoral Commission, including the provision of certain identifying information, and, if the applicant is not an individual, to be accompanied by evidence of the authority to make the application.
14. Clause 63 requires promoters whose total referendum expenses in respect of any regulated period exceed \$100,000 to file a return of referendum expenses with the Electoral Commission. Clause 64 requires the Electoral Commission, if it has reasonable grounds to believe that such a return may contain false or misleading information, to obtain a report on the return from an auditor and requires that certain information must be provided and specified in such a report.
15. Clause 64(1) states that if the Electoral Commission has reasonable grounds to believe that a return filed may contain false or misleading information, the Electoral Commission may require the registered promoter to obtain a report on the return from an auditor. Clauses 64(2) and (4) outline what must be stated in the report by the Auditor. Clause 64(5) states that the auditor must have access, at all reasonable times, to all records, documents, and accounts that relate to the registered promoter's referendum expenses and that are held by the registered promoter. The auditor may also require the registered promoter to provide any information and explanation that, in the auditor's opinion, may be necessary to enable the auditor to prepare the report.

Limits on name of promoter

16. Clause 47 of the Bill requires the Electoral Commission to refuse an application for registration if the application does not comply with the requirements in clause 46, if the promoter is not eligible to be registered, or if the name of the promoter is indecent or offensive or is likely to cause confusion or mislead electors. This also engages the right of freedom of expression but is clearly justified.

Limits on who can be a promoter

17. Clause 35 of the Bill states that a person is entitled to promote a referendum advertisement if the person is a registered promoter, or is an unregistered promoter, but does not spend more than \$13,600.00 in relation to the advertisements.

² *RJR MacDonald Ltd v Canada* [1995] 3 SCR 199 (SCC).

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

Discussion

18. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of the Bill of Rights Act. This s 5 inquiry asks:
- a. does the provision service an objective sufficiently important to justify some limitation on 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 of the objective?
 - iii. is the limit in due proportion to the importance of the objective?⁴
19. The disclosure and reporting requirements within the Bill support the important objectives that were identified in the previous Crown Law advice of:
- a. providing transparency and accountability;
 - b. promoting participation in New Zealand's democracy;
 - c. maintaining public and political confidence in the administration of referenda;
 - d. preventing undue influence of wealth on electoral outcomes; and,
 - e. enhancing transparency of the referendum process.
20. That advice stated:
- “Further, in Harper v Attorney-General (Canada), a case which concerned the regulating of third party electoral advertising, the Supreme Court of Canada held that requirements of registration, self-identification on advertisements and disclosing the nature of expenditures “serves the interests of transparency and an informed vote in the political process”.⁵”*
21. It also identified that a perceived lack of integrity can undermine the public acceptance of a referendum outcome. This is a significant constitutional objective and there is a rational link between this objective and the provisions in the schedule of the Bill.
22. We consider that, on balance, the requirements are proportionate to the importance of the objectives outlined above. The restrictions also minimally impair the right, are linked to the relevant objective, are proportional and don't impair the right more than is necessary to enhance the transparency of the election process. In addition, the information that may be required under the Bill is regulatory in nature and of limited expressive value. Promoters covered by the Bill are those considered to have a higher level of public accountability, and these entities or individuals have chosen to engage in

⁴ *Hansen v R* [2007] NZSC 7 [at 272].

⁵ *Harper v Canada (Attorney-General)*, [2004] 1 SCR 827 at [48].

electoral activities which already have a reasonable expectation of content regulation and reporting.

23. For these reasons, we consider that any limits within the Bill on the right to freedom of expression are justified in terms of s 5 of the Bill of Rights Act.

Section 27 – Right to Justice

24. Clause 18 of the Bill states that the referendum must not be questioned except by petition to the High Court for an inquiry into the conduct of the referendum or any person connected with it in accordance with Part 3 of the Bill.
25. This imposes a limitation on the right to justice in s 27(2) of the Bill of Rights Act because the Bill prevents the outcome of the referendum being judicially reviewed.
26. We agree with the position that the previous Crown Law advice took in relation to this point:

“The objective of the limitation is to maintain public confidence in the outcome of the referendum and to limit the ability of people to challenge a result they did not vote for. The limitation is rationally connected to this objective and does not limit the right to justice more than is reasonably necessary.”

Conclusion

27. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel