

Te Tari Ture o te Karauna

# Crown Law



14 October 2016

Attorney-General

**Broadcasting (Election Programmes and Election Advertising) Amendment Bill  
(PCO20145/7.0) — Consistency with the New Zealand Bill of Rights Act 1990  
Our Ref: ATT395/260**

1. We have examined this Bill for consistency with the New Zealand Bill of Rights Act 1990. We have concluded that while the Bill raises issues under s 14 of the Bill of Rights Act, it appears to be consistent with that Act in terms of s 7.
  - 1.1 The Bill follows the Justice and Electoral Committee Inquiry into the 2014 General Election and addresses a number of the recommendations of that inquiry on broadcasting and election advertising. The amendments are designed to enable political parties to communicate with voters through digital media more flexibly and cost-effectively, while maintaining existing safeguards and restrictions. Although the proposed amendments do not represent a significant departure from the existing approach the new Part does raise issues under the Bill of Rights Act.
  - 1.2 The Bill maintains the prohibition on broadcasting of election programmes, subject to certain exceptions. The Bill amends the exceptions, removing provisions relating to the broadcasting of opening and closing addresses to provide greater flexibility in the broadcasting of election programmes. The requirement that Television New Zealand and Radio New Zealand provide broadcast time for such addresses free of charge is to be removed by the Bill. Although political parties may only purchase time on broadcast media from the funds allocated a party under the Bill, for the first time the funding allocations will be able to be used during the election period for election advertisements on the Internet, in addition to television and radio as currently permitted.
  - 1.3 The provisions of the Electoral Act 1993 governing election advertising interact with this Bill. In particular, the requirements for promoter statements on election advertisements and expense limits will continue to apply. However, the funding allocations made under the Broadcasting Act will continue not to count towards the general Electoral Act expense limits.

- 1.4 The restrictions on the broadcasting of election programmes constitute a limitation on s 14 of the Bill of Rights Act. We conclude however that these limitations are justifiable on the basis that they are reasonable limitations arrived at after due consideration and justifiable as means of ensuring fair, transparent and orderly elections, in accordance with s 12 of the Bill of Rights Act.

## Analysis

### *Outline of the Bill*

2. The Bill replaces Part 6 of the principal Act (Parliamentary election programmes), with the new Part 6 ‘Election Broadcasting’.

### *Interpretation*

3. The interpretation clause introduces a definition of ‘broadcaster’, limiting the term to television and radio broadcasters (cl 69).

4. Election programme is defined in the following terms:

**election programme** means a programme that—

- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of a constituency candidate; or
  - (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of a constituency candidate; or
  - (c) advocates support for a constituency candidate or for a party; or
  - (d) opposes a constituency candidate or a political party; or
  - (e) notifies meetings held or to be held in connection with an election
5. In essence an election programme is a partisan programme.

### *Provisions applying to broadcasters*

6. Clause 70 of the Bill maintains the overarching prohibition on the broadcast of an election programme, subject to certain exceptions.
7. Currently the Broadcasting Act provides an exception to the prohibition on the broadcast of election programmes for opening and closing addresses,<sup>1</sup> and requires Television New Zealand (“**TVNZ**”) and Radio New Zealand (“**RNZ**”) to provide time for the broadcasting of these addresses free of charge.<sup>2</sup> The Bill removes the provision that relates to opening and closing addresses.<sup>3</sup> The Bill removes the requirement for TVNZ and RNZ to provide time for the broadcast opening and closing addresses free of charge.<sup>4</sup> The Bill maintains the obligation on broadcasters to give identical terms to parties and constituency candidates buying comparable broadcasting time (cl 72). These amendments are intended to respond to the Justice and Electoral Committee’s recommendation to provide greater flexibility for how parties choose to use their allocation.

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<sup>1</sup> Broadcasting Act 1989, s 70(2)(a).

<sup>2</sup> Broadcasting Act 1989, s 71.

<sup>3</sup> Compare s 70(2)(a) of the Act and cl 70 of the Bill.

<sup>4</sup> The Bill removes ss 71 and 71A of the Act that require TVNZ and RNZ to provide time to political parties free of charge for opening and closing addresses.

8. The remaining exceptions to the prohibition on the broadcasting of election programmes are paraphrased below:

Party election programmes

- 8.1 A broadcaster may broadcast an election programme promoted by a party, during the election period, and paid for from money allocated to the party under the Act (cl 70(2)).<sup>5</sup> In this manner the Bill maintains the restriction on political parties' ability to broadcast election programmes.

Candidate election programmes

- 8.2 A broadcaster may broadcast an election programme promoted by and relating solely to a constituency candidate, and which encourages voters to vote for that candidate, broadcast during the election period, and the broadcast costs may, but need not, be paid from money allocated to the party under the Act, (cl 70(3)). While this exception does not limit spending on the broadcast of candidate election programmes to the funding allocation, any such spending is subject to the general limits on expenditure contained in the Electoral Act.<sup>6</sup>

9. The Bill maintains the exclusion from the prohibition on broadcasting election programmes for news, comment and current affairs or any non-partisan advertisement (cl 70(4)).
10. The Bill maintains the existing prohibition on the broadcast of election programmes on television and radio on certain days and times (Sunday, ANZAC Day, Christmas Day, Good Friday and Easter Sunday) (cl 71).
11. As in the current Act, the Bill provides that s 4(1)(d) of the current Act, which requires competing views to be present on issues of public importance, does not apply to election programmes (cl 73). Section 4(1)(a)-(c), (e) continue to apply, which require a broadcaster to ensure programme standards are consistent with good taste and decency, the maintenance of law and order, and the privacy of individuals, and with any approved code of broadcasting practice applying to the programmes.

*Funding for election programmes and election advertisements*

12. Clause 74 of the Bill provides that the Minister of Justice must give the Electoral Commission notice of the amount of money to be appropriated to be allocated to parties for funding the production and broadcasting of election programmes and the production and publishing of election advertisements on the Internet.
13. The current Act only provides for funding to be allocated for the cost of broadcasting election programmes on television or radio, not the Internet.<sup>7</sup>
14. Clauses 75 to 80F substantially maintain the existing procedural requirements for the allocation and use of funding. These include requirements that parties notify the

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<sup>5</sup> Clause 79 provides for public money to be appropriated to be allocated to political parties for spending on election programmes and advertising.

<sup>6</sup> Electoral Act 1993, s 266A.

<sup>7</sup> Broadcasting Act 1989, s 74.

Electoral Commission of their qualification for allocation; the Commission consult with parties; the Commission has regard to specified criteria in making and varying allocations; and requirements on how parties may use allocations. The requirement under the current Act that broadcasters complete returns on broadcasting time will be removed by the Bill.<sup>8</sup>

15. Clause 80A(2) provides that the Part does not restrict the amount of money parties can spend on production of election programmes or advertisements, broadcasting candidate election programmes or publication costs in relation to election advertisements (subject to the expenditure limits contained in the Electoral Act).

#### *Offences*

16. The Bill maintains the existing offence provision relating to broadcasting (cl 80G) but the Electoral Commission's duty to report suspected offences to the Police will be removed by the Bill.

#### ***Bill of Rights Act implications***

17. The Part imposes limitations on the s 14 right to freedom of expression through the various constraints on broadcasting election programmes. Consequently, it is necessary to consider whether these constraints can be justified in terms of s 5 of the Bill of Rights Act 1990 on the basis of their intended objective, which is the conduct of fair, orderly and transparent elections.

#### *Objective of the proposed amendments*

18. The existing regime was designed to ensure that parties had a fair opportunity to reach the public, by providing an opportunity for voters to hear from all parties. The new Part 6 continues to pursue that objective but, as the explanatory note to the Bill explains, it “enables political parties to communicate with voters through digital media more flexibly and cost-effectively, while maintaining existing safeguards and restrictions.”
19. The Court of Appeal observed in *Alliance Party v Electoral Commission & Ors* the existing regime “significantly constrains the ability of political parties to communicate their messages directly to voters...there is a distinct constraint upon activities that could otherwise be undertaken by political parties in relation to the general election, the most important exercise in a democracy.”<sup>9</sup>
20. The regime reflects two overarching and generally accepted principles that apply to election advertising in New Zealand (including programmes on broadcast media). Firstly, for reasons of equity such advertising should be subject to expenditure limits and, second, should be conducted in a transparent way. As the Court of Appeal in *Alliance* noted, “[i]f there is a purpose for close control of electoral broadcasting in New Zealand today, it must be grounded on a democratic principle of fairness of access.”<sup>10</sup> With the exception of the United States courts,<sup>11</sup> there is a broad consensus across comparable jurisdictions that reasonable constraints upon electoral advertising and electoral expenditure are justifiable in order to ensure balance and

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<sup>8</sup> Broadcasting Act, s 79C.

<sup>9</sup> *Alliance Party v Electoral Commission & Ors* [2010] NZCA 4, at [18] – [19].

<sup>10</sup> *Alliance Party v Electoral Commission & Ors* [2010] NZCA 4, at [11].

<sup>11</sup> See, by way of recent prominent example, *Citizens United v Federal Election Commission*, 558 US 310 (2010).

transparency in electoral campaigning.<sup>12</sup> Bill of Rights advice from this Office on electoral legislation has consistently referred to and applied these principles.

21. We note that the underlying justification for regulating the broadcasting of election programmes may be premised on broadcast media (television and radio) remaining the principal source of entertainment and information for most New Zealanders, and a more effective way of garnering electoral support than other media. The particular effectiveness of broadcast media as a means of communication supports the argument that ensuring fair access is a pressing and substantial concern.<sup>13</sup>

*Limitation on political expression – s 14 of the Bill of Rights Act*

22. The principal issue raised by the proposed new Part 6 is whether the limitations on broadcasting election programmes, and therefore limits on political expression, can be justified in terms of s 5.
23. The Bill restricts free expression in relation to elections in the following ways:
  - 23.1 Political parties' access to broadcast media is restricted to the election period and to the amount of broadcasting time they can purchase from the funding allocated to them under the Broadcasting Act, and these funding allocations are subject to certain regulatory requirements (cl 70);
  - 23.2 Candidates may only access broadcast media in respect of candidate election programmes, and not to promote the party they may belong to (cl 70);
  - 23.3 Election programmes not promoted by parties or candidates may not be broadcast on television or radio. Therefore, third parties can use broadcast media only to run issue-focused material that does not expressly, or appear to, advocate support for or opposition to any party or candidate (cl 70); and
  - 23.4 Election programmes may not be broadcast during the times prescribed by cl 71 of the Bill.
24. These restrictions infringe the freedom of electoral participants (parties, candidates) and third parties to communicate with the voting public at an election time. These restrictions raise two principal questions:
  - 24.1 Is the regime proposed through the Bill (prohibition on broadcast of election programmes subject to exceptions) a justified limitation on freedom of expression?
  - 24.2 Is the restriction on election programmes at certain times (during an election period and not on specifically proscribed days and times) a justified limitation on freedom of expression?

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<sup>12</sup> See *General Comment on the right to participate in public affairs, voting rights and the right of equal access to public service* CCPR/C/21/Rev.1/Add.7, paras. 19 & 25 (United Nations Human Rights Committee); *Bowman v United Kingdom* (1998) 26 EHRR 1, [43] and *Animal Defenders International v United Kingdom* (App No 48876/08 (GC)) [106]-[112] (European Court of Human Rights); and *Libman v Quebec* (Attorney-General) [1997] 3 SCR 569, [47]-[50] & [52]; *R v Bryan* [2007] 1 SCR 527, [9]; and *Harper v Canada* (Attorney-General), [2004] 1 SCR 827, [87].

<sup>13</sup> See for example, Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2014) at 195 – 6.

*Analysis - General restrictions*

25. The limitation of parties' access to broadcast time to the amount they can purchase with their funding allocation prevents well-resourced parties from having disproportionate access to broadcast media, and therefore serves the objective of promoting equity between parties.
26. One of the criteria for the allocation of funding is the party's result in the preceding election (cl 78(2)(a) and (b)). Equal funding to all parties, irrespective of their size and importance, is difficult to justify. New Zealand is not alone in allocating funding to parties having regard to previous election results, and the result of previous elections is an obvious and objective means of assessing the relative importance and influence of a party.<sup>14</sup> However, funding based solely on this criteria would disadvantage small and new parties, therefore other criteria such as any other indications of public support for a party (cl 78(2)(e)) and the need to provide a fair opportunity for each party to convey its policies to the public (cl 78(2)(f)) provide a counter-balance.
27. The prohibition on the broadcast of partisan programmes that are not promoted by a party or constituency candidate is necessary to prevent the restrictions on parties and candidates from being circumvented by the broadcasting of election programmes promoted by third parties in addition to broadcasts parties and candidates have purchased.
28. The chilling effect of this prohibition is ameliorated in two ways: the preservation of the ability to broadcast news, comments or current affairs, or non-partisan advertisements as a public service (cl 70(4)); and the ability of candidates, parties and third parties to publish election advertisements on the Internet, subject to the provisions of the Electoral Act imposing spending limits and regulatory requirements. Furthermore, third parties are not prohibited from using broadcast media to run issue-focused material that does not expressly, or appear to, advocate support for or opposition to any party or candidate.
29. We consider these limitations, particularly given the increasing pervasiveness of media other than television and radio, are proportionate to the objective of ensuring fair elections.<sup>15</sup>
30. Accordingly we consider that these limitations on freedom of expression are justified in terms of s 5 of the Bill of Rights Act.

*Analysis - Time restrictions*

31. Allowing partisan broadcasting at any time would favour parties with greater resources, therefore the limitation of election broadcasts to the election period is directed towards the objective of equity between candidates and parties.
32. This time period restriction is also a necessary corollary of the restriction on broadcasting of party election programmes paid for out of party funding allocations. Although these may be made before the beginning of the relevant election period

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<sup>14</sup> Butler and Butler *The New Zealand Bill of Rights Act – A Commentary* (2<sup>nd</sup> ed., LexisNexis, Wellington, 2015) at 13.23.4 and 13.23.7.

<sup>15</sup> See for consideration of this issue: *Watson v Electoral Commission* [2015] NZHC 666, at [165].

(cl 79(6)), the allocation process only commences in the year in which Parliament is due to expire (cl 75).

33. The Bill prohibits such broadcasts on television at certain times on Sundays or Anzac Day, and on television or radio at any time on Christmas Day, Good Friday or Easter Sunday. A breach of this provision would constitute an offence under cl 80G. The prohibitions on broadcasting election programmes at certain days and times contained in cl 71 of the Bill potentially limits s 13 of the Bill of Rights Act, the right to freedom of thought, conscience, religion and belief.
34. To the extent that these clauses restrict political expression on these particular days on the basis of their religious significance to the Christian faith and represent the state favouring days of associated with the Christian faith they raise a potential inconsistency with s 13. However, the days subject to cl 71 are recognised in New Zealand as designated common pause days of rest and recreation.<sup>16</sup> Irrespective of the historical religious significance of three of the days, their status as common pause days has continued for secular reasons, rather than religious ones.
35. Furthermore, as in the case of the general restrictions, the time period restriction does not impact upon the ability of candidates, parties or third parties to publish election advertisements in other media, subject to the spending limits and regulatory controls of the Electoral Act.
36. We consider the prohibition on broadcasting election programmes outside the election period and on the days specified in cl 71, particularly given the increasing pervasiveness of media other than television and radio, are proportionate to the objective of ensuring fair elections.
37. We therefore consider that these limitations on freedom of expression are justified in terms of s 5 of the Bill of Rights Act.
38. For the sake of completeness, we note that imposition of regulatory requirements in respect of the broadcast of election programmes and the associated funding allocations, while potentially a disincentive for such activity, is a reasonable measure to promote transparency and therefore public trust.

### **Conclusion**

39. We conclude that the limitations on the s 14 rights posed by the Bill are justifiable in terms of s 5.
40. In accordance with Crown Law policy this advice has been peer reviewed by Vicki McCall.

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<sup>16</sup> Although we note other public holidays are not subject to the prohibition, for example, Waitangi Day and Labour Day.

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