

20 July 2019

Attorney-General

**Electoral Amendment Bill (PCO21109/13.0) — Consistency with the New Zealand Bill of Rights Act 1990**

**Our Ref: ATT395/295**

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 freedom of expression issues under s 14 of the Bill of Rights Act, it appears to be consistent with that Act in terms of s 7.

**Outline of the Bill and issues raised**

2. The Bill amends the Act to allow New Zealand-based electors to apply to enrol, or to update their enrolment details, on election day, and for that application to be processed for the purpose of qualifying the elector's vote in that election.
3. The Bill also extends the latest date for the return of the writ to 60 days after its issue.
4. The Bill removes the prohibition on designating any licensed premises under the Sale and Supply of Alcohol Act 2012 as a voting place. This will enable the Electoral Commission (the Commission) to designate any premises, or part of any premises, such as supermarkets (off-licences) and conference centres, community clubs, and sports facilities, (on-licences), as voting places. The Bill amends the Act to allow the Commission to conduct the preliminary count of ballot papers in a designated place away from the voting place where that is necessary.
5. The Bill amends the Act to allow an ordinary vote to be issued to any voter who can be found on the electronic roll at the time at which they go into a voting place. This will enable any voter who can be marked off the electronic roll to be issued an ordinary vote, including those who have enrolled after writ day.
6. The Bill also clarifies that a special vote declaration can be treated as an application to enrol or update an elector's enrolment details. The enrolment form and special vote declaration form largely contain the same information and so the change will enable the Commission, in future, to approve the special vote form to also be an enrolment form.

7. The Bill also updates the provisions of the Electoral Act that provide for managing polling disruptions. The Bill:
  - 7.1 empowers the Electoral Commission to respond to a wide range of polling disruptions that either prevent voters from voting, or risk the overall administration of the election:
  - 7.2 broadens the definition of the types of events that would require the use of the provisions for managing polling disruptions:
  - 7.3 empowers the Commission to utilise or adapt existing voting processes in the Electoral Act where there is a polling disruption:
  - 7.4 amends the existing Electoral Act power to adjourn polling due to a disruption on polling day:
  - 7.5 restricts the release of the preliminary vote count where a polling disruption delays the close of polling, and makes any unauthorized release of the vote count an offence, and
  - 7.6 provides that the rules that apply to interfering with voters during the advance voting period would also apply to any polling that resumes after an adjournment period. These rules are targeted to the actual voting place and a 10m “buffer zone” around the voting place.

## **Analysis**

8. We see no Bill of Rights Act issues arising from the Bill’s proposals to enable election day enrolments, to designate a wider range of polling places, or with the Bill’s expanded mechanisms to enable the Commission to deal with election day disruptions whether natural (eg earthquake) or man-made (eg civil disruption).
9. However, the Bill also provides that if as a result of an unforeseen or unavoidable disruption the close of the poll at any polling place is delayed the Chief Electoral Officer must not disclose any information about the results of a preliminary count of votes cast at any other polling place until the close of polling at all polling places (new s 195C(1)). This means that if there is a disruption on polling day, a preliminary count of votes at any polling place must not be disclosed until the close of the poll at all polling places.
10. The effect of s 195C(1) is mitigated by s 195C(2) which provides that the Chief Electoral Officer may disclose information about the results of a preliminary count of votes cast if he or she considers that such disclosure will not unduly influence voters who have yet to cast their votes.
11. Any person who, knowing that as a result of an unforeseen or unavoidable disruption the close of the poll at any polling place has been delayed and the Chief Electoral Officer has not disclosed the results of that poll at that polling place or any other polling place, discloses information about those results commits an offence and is guilty of a corrupt practice (new s 195C(3)).

12. The new offence provision restricting the release of the preliminary vote count where a polling disruption delays the close of polling in our view raises s 14 Bill of Rights Act freedom of expression issues.
13. The provision raises a question of whether the restrictions on publicising election results until polling day is completed 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.
14. We take the view that freedom of expression rights under the NZBORA mean that the preliminary vote count should be released as soon as possible. This reflects the high value placed on freedom of expression during a general election, and the constitutional importance of elections and political expression.<sup>1</sup>
15. This value is reflected in s 174(1) of the Electoral Act, which requires the manager of each polling place to commence a preliminary count of the votes “as soon as practicable after the close of the poll”. Section 174(4) then requires that the results of this preliminary count be reported to the Returning Officer “as soon as possible after ascertaining a result of the voting”. Each returning officer then reports these preliminary results to the Electoral Commission.
16. While at present no statutory provisions regulate the Electoral Commission’s announcement of the preliminary vote count to the public, the Commission has a practice of publicly releasing the preliminary vote count as and when it is reported to the Commission by each returning officer.
17. In our view the proposed offence provision is significant as the potential delay in releasing results is not time limited, and the offence provision also applies to anyone, not just electoral officials.
18. We understand the rationale for the offence provision is that if a release of preliminary results were to occur whilst voting is still taking place (or has been adjourned until a later date) in some polling places, then voters at those polling places would have additional information not available to others, and potentially could make their voting decisions using information about other voters’ voting preferences. Such information could then alter how they choose to vote, affecting the final election result.
19. The Electoral Act currently seeks to prevent voters from obtaining information about other voters’ voting on polling day:
  - 19.1 s 174E requires that early votes be counted in secret before the close of polling day; whilst s 174G(2) makes it a corrupt practice to disclose information about the result of the count of early votes before the close of polls;
  - 19.2 s 197(1)(d) makes it an offence to “at any time before the close of the poll, conduct in relation to the election a public opinion poll of persons voting before polling day”.

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<sup>1</sup> Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015), at 13.23.1.

20. In our view arguments in favour of an absolute ban on disclosure of election results in the event of an unforeseen or unavoidable disruption until all voting is completed, and for making a breach of such a ban a criminal offence, are not well founded.
21. In *R v Bryan*,<sup>2</sup> the Canadian Supreme Court upheld (by a 5-4) majority, non-disclosure of voting results in Canada, but the non-disclosure there (a 3 hour delay at most) was much more limited than that possible here. Moreover, the majority in *Bryan* accepted there was sufficient evidence of the harm that might result from not delaying the results. We are aware of no equivalent evidence here. In addition, the minority in *Bryan* found evidence of harm was speculative and inconclusive, and that the harm of suppressing “core political speech” was profound.<sup>3</sup>
22. We also note the Canadian electoral offence provision at issue in *Bryan* was subsequently repealed.
23. In their Bill of Rights text, Butler and Butler note a 2005 German Constitutional Court decision refusing to issue an interim injunction prohibiting the airing of early election results meaning that one constituency (where the original candidate had died) voted in the full knowledge of the election results.<sup>4</sup>
24. Further, in a recent High Court of Australia case the appellant sought orders delaying the publication of federal election results in eastern states until the close of polls in Western Australia, arguing that release of those results might affect the outcome in Western Australia. The written judgment is not yet available, but the High Court unanimously rejected the claim.<sup>5</sup>
25. We acknowledge the possibility that publication of incomplete election results may influence voters in an electorate where voting has been postponed to vote differently. We also note the possibility that such publication may have a greater effect in an MMP electoral system. However, the material cited above, and the absence of evidence of harm that may result from the publication of voting results before all voting is complete, leads us to the conclusion that an absolute ban on the publication of results until all voting is complete would not be justified in terms of the Bill of Rights Act. In saying that we are focussing on the interests of the public in a democratic society in receiving election results as soon as possible.
26. However, the Bill does not impose an absolute ban; under new s 195C(2) the Chief Electoral Officer may release results before voting is complete, if he or she considers that such disclosure will not unduly influence voters who have yet to cast their votes. In these circumstances, and without resiling from the proposition that freedom of expression is critically important during a general election, the new offence provision seems broadly consistent with existing restrictions upon release of voting information before polling closes on polling day, and appears consistent with the objective of fair and orderly elections.

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<sup>2</sup> *R v Bryan* 2007 SCC 12

<sup>3</sup> *Bryan* n 2 above at 107.

<sup>4</sup> Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary*, n 1 above, at 13.23.19.

<sup>5</sup> *Palmer & Ors v Australian Electoral Commission & Ors* [2019] HCA Trans 088 (7 May 2019).

## **New section 195D**

27. Proposed s 195D of the Bill provides that the rules that apply to interfering with voters during the advance voting period also apply to any polling that resumes after an adjournment period. These provisions limit s 14 rights to freedom of expression.
28. However, these rules are only targeted to the actual voting place and a 10m “buffer zone” around the voting place, unlike the election day rules which are significantly more restrictive and cover the entire country. Without s 195D there would be no applicable voter interference rules of any kind for the voting places where polling resumes after an adjournment.
29. Consistent with the advice we gave in relation to a 2016 Electoral Amendment Bill,<sup>6</sup> we consider proposed s 195D is broadly consistent with existing restrictions upon electoral canvassing on polling day. We conclude 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.

## **Conclusion**

30. We conclude that the limitations on s 14 freedom of expression rights posed by proposed new sections 195C(1), 195C(3) and 195D of the Bill are justifiable in terms of s 5 of the Bill of Rights Act.

## **Crown Law**

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<sup>6</sup> Electoral Amendment Bill (PCO18955/2.18)