

Te Tari Ture o te Karauna

Crown Law



31 August 2016

Attorney-General

Electoral Amendment Bill (PCO18955/2.18) — Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/257

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 ss 12(2), and 14 of the Bill of Rights Act, it appears to be consistent with that Act in terms of s 7.
2. In short:
 - 2.1 The Bill follows the Justice and Electoral Committee Inquiry into the 2014 General Election and adopts a number of recommendations of that inquiry. These are predominantly administrative and/or formal in character, but several proposed amendments do raise issues under the Bill of Rights Act.
 - 2.2 The Bill provides that Registrars of Electors and deputy Registrars of Electors are not qualified to be a candidate or to be elected as a member of Parliament. These provisions limit the s 12 Bill of Rights Act right to parliamentary candidacy. We conclude, however, that these limitations are justifiable on the basis that they apply to individuals who choose to accept responsibilities under the Electoral Act 1993 and are reasonable limitations arrived at after due consideration and justifiable as means of ensuring fair, transparent and orderly elections.
 - 2.3 The Bill also creates a new offence provision, relating to interfering with or influencing advance voters. The new section provides that there is a buffer zone of 10 metres around the entrances to advance voting places, although the Electoral Commission may specify a smaller buffer zone for a particular advance voting place. It makes it unlawful to do any of the listed things in an advance voting place or its buffer zone while the advance voting place is open for voters. The Electoral Commission may also remove or obliterate material intended or likely to influence voters. These provisions limit s 14 rights to freedom of expression. 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.

- 2.4 Clause 97 replaces section 199A, following the High Court decision in *Peters v Electoral Commission* [2015] NZHC 394. New section 199A refines the provisions that make the publication of false statements to influence voters an offence if the false statements are first published or republished during the period beginning 2 days immediately before polling day and ending with the close of the poll. These provisions limit s 14 rights to freedom of expression. However, 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.

Analysis

Outline of the Bill and Bill of Rights Act issues raised

3. The Bill introduces a provision disqualifying Registrars of Electors and deputy Registrars of Electors from being a candidate or to be elected as a member of Parliament. (cl 14). These provisions limit s 12(b) rights to become a member of Parliament.
4. The Bill also creates a new offence provision, relating to interfering with or influencing advance voters. (cl 95). These provisions limit s 14 rights to freedom of expression.
5. Proposed new section 199A refines the provisions that make the publication of false statements to influence voters an offence if the false statements are first published or republished during the period beginning 2 days immediately before polling day and ending with the close of the poll. (cl 97). These provisions limit s 14 rights to freedom of expression.
6. All three provisions raise a common question of whether the various limits on political and electoral activity 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. These are dealt with in turn.

Issue under ss 12(b) and 14

7. The broad point raised by cll 14, 95 and 97 is whether these limitations on electoral activity and expression can be justified in terms of s 5.
8. With the exception of the United States courts,¹ there is a broad consensus across cognate jurisdictions that reasonable constraints upon electoral advertising and electoral expenditure are justifiable in order to ensure balance and transparency in electoral campaigning, including in respect of sources of funding.²
9. Applying that standard, the proposed amendments appear reasonable:

¹ See, by way of recent prominent example, *Citizens United v Federal Election Commission*, 558 US 310 (2010).

² 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].

- 9.1 The cl 14 proposed disqualification of Registrars of Electors and deputy Registrars of Electors from being a candidate or to be elected as a member of Parliament is consistent with longstanding similar restrictions on Electoral Commissioners, Deputy Electoral Commissioners and Returning Officers. The provision mitigates risks to electoral integrity and serves to maintain public confidence in the electoral process. Moreover these individuals have accepted responsibility for those roles, and the restrictions do not apply to the public at large they do not constrain electoral activity to any significant degree;
- 9.2 While it may be accepted that freedom of expression is critically important during a general election³, the new offence provision relating to interfering with or influencing advance voters extends only to a limited “buffer zone” recognizing wider restrictions during an election campaign, when full public debate is critical, could not be justified. The cl 95 proposal is broadly consistent with existing restrictions upon electoral canvassing on polling day, and appears consistent with the objective of fair and orderly elections;
- 9.3 Clause 97 (the proposed new section 199A) refines the provisions that make the publication of false statements to influence voters an offence if the false statements are first published or republished during the period beginning 2 days immediately before polling day and ending with the close of the poll. The provision was not recommended by the Select Committee but follows the recent High Court decision in *Peters v Electoral Commission* [2015] NZHC 394, which interpreted s 199A more widely than the way in which that section had previously been interpreted by the Electoral Commission. The proposed section applies only to knowingly false statements published in the last 2 days before the election, where there is reduced opportunity for scrutiny or rebuttal of election statements.
- 9.4 Clauses 95 and 97 are measures intended to enhance electoral integrity and public confidence, and the very important ability of voters to exercise their free will at elections. They offer only limited interference in the right to freedom of expression.
10. We conclude that the limitations on the ss 12(b) and 14 rights posed by cll 14, 95 and 97 of the Bill are justifiable in terms of s 5.
11. In accordance with Crown Law policy this has been peer reviewed by Vicki McCall.

Peter Gunn
Crown Counsel

³ Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015, at13.23.1.

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