

19 July 2019

Attorney-General

BORA Vet: Referendums Framework Bill — Consistency with the New Zealand Bill of Rights Act 1990

Our Ref: ATT395/296

1. I have examined version 3.10 of the Referendums Framework Bill (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”).
2. I advise that while the Bill limits the rights guaranteed by ss 14 (freedom of expression) and 27 (right to justice), those limitations appear justified in a free and democratic society.

The Bill

3. The purpose of the Bill is to provide a single set of legislative provisions to govern the conduct of referenda held in conjunction with the 2020 General Election.
4. A referendum may be conducted under the Bill only if it is either declared by an Act or an Order in Council to be a referendum for the purposes of the Bill.¹ The Bill includes a sunset clause and will be repealed on 1 July 2022.²
5. The Bill largely reproduces the same legislative framework for the conduct of referenda as will apply to the conduct of the General Election. It also replicates the regulatory regime that applies to third party promoters in respect of election advertisements, to apply to any promoters of referendum advertisements.
6. The purpose of these provisions, as stated in the explanatory note to the Bill, is to provide an appropriate balance between freedom and expression and transparency.

Section 14 – Right to freedom of expression

7. The limits placed on referendum advertising under Part 3 of the Bill impose limits on the right to freedom of expression affirmed by s 14 of the Bill of Rights Act.
8. Section 14 of the Bill of Rights Act provides that everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and

¹ Clause 5(1).

² Clause 3.

opinions of any kind in any form. This right extends to all forms of communication, including advertising.³

9. The Bill raises two *prima facie* limits on a promoter's right to freedom of expression. Firstly, it imposes self-identification and registration requirements on those who promote⁴ referendum advertisements⁵ during the regulated period.⁶ The Bill makes it an offence to wilfully contravene the registration or self-identification requirements.⁷ Secondly, the Bill places a restriction on the total referendum expenses that a registered promoter may incur in relation to referendum advertisements.⁸ It is an offence to pay referendum expenses in excess of the maximum amount.⁹
10. While the Bill contains inconsistencies with the right to freedom of expression, s 5 of the Bill of Rights Act requires consideration to be had to the extent to which the limitations are rationally connected and proportionate to objectives of sufficient importance in a free and democratic society.¹⁰
11. The restrictions on referendum advertising have several objectives: to provide transparency and accountability; to promote participation in New Zealand's democracy; to maintain public and political confidence in the administration of referenda; to prevent undue influence of wealth on electoral outcomes, and to enhance transparency of the referendum process.
12. 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".¹¹
13. If the referendum process is perceived to lack integrity, this could undermine public acceptance of the outcome of the referendum. This is a manifestly important constitutional objective and there is a rational connection between this objective and the proposed regulatory regime in Part 3 of the Bill.
14. The restrictions must be minimally impairing of the right, and the means proposed must be tailored to that objective.¹² Although promoters are prevented from engaging in unlimited expression, the effect of this limitation is outweighed by the beneficial effects of the limits upon the electoral process. The restrictions are minimally intrusive, proportional and do not impair the right to freedom of expression more than is reasonably necessary for the purposes of enhancing transparency of the referendum process.

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

⁴ Clause 38.

⁵ Clause 39.

⁶ Clause 42.

⁷ Clause 75.

⁸ Clause 45.

⁹ Clause 78.

¹⁰ *R v Oakes* [1986] 1 SCR 103; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

¹¹ *Harper v Canada (Attorney-General)*, [2004] 1 SCR 827 at [48].

¹² *Canada v JTI-MacDonald* [2007] 2 SCR 610 at [42]-[45].

Section 27 – Right to justice

15. Clause 27 of the Bill provides 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. A petition of inquiry must be filed no later than 28 days after publication of the result of the referendum by notice in the *Gazette*.¹³
16. This imposes a limitation on the right to justice in s 27(2) of the Bill of Rights Act because the Bill precludes the ability to apply for judicial review of the outcome of the referendum.
17. 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.

Summary

18. The Bill limits the right to freedom of expression by placing restrictions on referendum advertising during the regulated period and the right to justice by precluding the ability to apply for judicial review of the outcome of the referendum.
19. Pursuant to s 5 of the Bill of Rights Act, the Bill would only be inconsistent with those rights if the limitations are not demonstrably justified in a free and democratic society. For the reasons given above, they appear to be justified limits serving a constitutional objective of ensuring transparency and maintaining public trust and confidence in the referendum process.
20. In accordance with Crown Law's policies, this advice has been peer reviewed by Bronagh McKenna, Crown Counsel.

Noted

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Hon David Parker
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/ /2019

¹³ Clause 28(3)(a).