

REGULATORY IMPACT STATEMENT

ELECTORAL AMENDMENT BILL: ADVANCE VOTING 'BUFFER ZONES' & PROHIBITION ON FALSE STATEMENTS TO INFLUENCE VOTERS

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice. It provides an analysis of options in relation to two issues which are proposed for inclusion in an Electoral Amendment Bill and/or Regulations.

The two issues are:

- a campaign-free 'buffer zone' around and inside advance voting places (AVPs), and
- the prohibition on publishing false statements to influence voters on election day and the 2 days prior, and how this should relate to ongoing or repeat publication.

Assumptions and limitations on analysis undertaken

Our analysis for options for AVP buffer zones assumes that compliance with a 10 metre campaign-free zone (the preferred option) will be high. We have assumed that individuals and groups will accept the need to respect the voting place and locate themselves more than 10 metres away. This is based in part on the Electoral Commission's (the Commission's) experience at the 2015 Northland byelection where this was trialled on a voluntary compliance basis, with some success.

Although the Electoral Commission received a number of enquiries and complaints about campaign activity in and around AVPs at the 2014 General Election, the extent of campaign activity in the immediate vicinity of AVPs at the 2014 General Election, or the number of AVPs that encountered this problem is not known.

We dismissed a general extension of the election day campaigning ban to the advance voting period as unfeasible. This is a much larger issue than the conditions around AVPs. The weeks in which advance voting occurs are in the midst of the election campaign and this is a critical time for political expression and for voters to be informed.

Our analysis of options for the prohibition on publishing false statements to influence voters assumes that an amended, narrow section 199A of the Electoral Act would result in fewer complaints under s 199A at future elections than under the status quo. The reach of section 199A has potentially been extended beyond the Electoral Commission's previous application by a recent High Court decision, but the impact of this ruling has not yet been tested at a general election. This means it is not possible to definitively quantify the level of risk the status quo may present.

We have not considered repeal of s 199A. This was based on our assumption that the policy objective, namely to have strong disincentive against making deliberately false statements late in the election campaign when they cannot be adequately addressed through other complaints processes, remains relevant.

If our assumptions for either issue prove incorrect there is some risk of more complaints under, and breaches of, the respective prohibitions.

A handwritten signature in blue ink, appearing to read "C Hubscher". The signature is fluid and cursive, with a large initial "C" and a long, sweeping underline.

Chris Hubscher
Manager, Electoral and Constitutional Policy
Ministry of Justice
Date: 22 / 6 / 2016

Objectives

1. The overarching objective of the electoral system is to promote the legitimacy, integrity and efficiency of New Zealand's democracy. This means upholding public confidence and participation so that voters are empowered to vote in free and fair elections.
2. This objective has a number of elements and these are set out as criteria below, against which options will be assessed.
3. The criteria are interrelated and may be in tension with one another. For example, too much emphasis on managing risks of undue influence will erode free expression, and vice versa. Because both are necessary an appropriate balance must be struck between them. Where options involve tradeoffs these are highlighted.

Criteria

4. *Law is understood and meets public expectations:* Electoral law should be clear, consistent and offer certainty. Elections need public acceptance, and what is regulated at election time should meet the expectations of the voters and those campaigning.
5. *Administrative feasibility:* Electoral law should be cost-effective and feasible to administer, and clear in its effect for both participants and regulators. The impact of this criterion on the analysis below is limited. This because most options focus on small adjustments to existing rules and practices.
6. *Maintain electoral integrity and public confidence:* The law should uphold the integrity of, and public confidence in, the electoral system by managing risk and perception that voters are subject to undue influence, interference or intimidation.
7. *Engagement and freedom of expression:* Electoral law should promote a positive voting experience, political engagement and participation. Compliance costs and barriers to participation should be minimised. Limits on freedom of expression and political participation should be focused and proportional.

Basis for review and analysis

8. Both initiatives are supported by the Electoral Commission, and are proposed for the Electoral Amendment Bill and/or Regulations which follows the Justice and Electoral Committee Inquiry into the 2014 General Election. An Inquiry follows each election as a cross-parliamentary opportunity to review and improve the operation of electoral law.
9. The proposal for AVP campaign-free 'buffer zones' follows a recommendation by the Inquiry that the Government should consider 'prohibiting campaigning and the display of campaign material within, and in the immediate vicinity of, advance voting places.'
10. The proposal to refine section 199A of the Electoral Act follows issues raised by the recent High Court decision in *Peters v Electoral Commission*.¹ This occurred too late to be considered by the Inquiry.

¹ CIV 2015-485-222 [2015] NZHC 394

Constraints

11. The key constraint is time; if the proposals are to be in operation for the 2017 General Election the Bill will need to be passed by April 2017. This is so that the Electoral Commission has sufficient time to prepare and to issue guidance to political participants.

Status quo and problem definition

Campaign-free zones around advance voting places ('AVPs')

12. The Electoral Act 1993 ('the Act') provides for rules at election time to uphold integrity of elections and allow electors to cast their votes free from undue influence, interference or intimidation.
13. There is a general prohibition on electioneering on election day, in s 197(1)(g), with some exemptions (eg. for rosettes and party headquarters signage). Returning Officers have the power to remove offending material and to recover expenses incurred in doing so. There is also a prohibition on interfering with an elector in a voting place or on the way there with the intention of influencing their vote, in s 197(1)(a). This applies throughout the whole voting period.
14. While these prohibitions are in place, during the advance voting period there is nothing to stop political participants wearing campaign material inside advance voting places (AVPs) or campaigning directly outside AVPs, as long as they do not directly interfere with voters.
15. At the 2014 General Election the Electoral Commission ('the Commission') received complaints from voters about campaigning immediately outside AVPs and supporters wearing campaign material when voting in AVPs. Some voters felt intimidated. Due to a law change, 2014 was also the first parliamentary election where candidate scrutineers could be present in AVPs. Complaints were received about scrutineers and supporters wearing campaign material inside AVPs.
16. While the polling place staff asked campaigners to exercise restraint in the vicinity of AVPs this was not successful at all locations.
17. As voters increasingly prefer to vote in advance (up from 14.7% in 2011, to 29.3% in 2014) this further raises the issue of inconsistency between the substantial campaigning restrictions on election day and the much more permissive regime during advance voting. There is a need to keep up with electors' expectations of a good voting experience.
18. There is also some risk under the current law that parties, candidates and other political participants do not have sufficient certainty regarding:
 - where they can locate themselves when campaigning without being the subject of complaints or being requested to move by voting place staff,
 - what behaviour is permitted inside voting places, both during advance voting and on election day, and
 - how to avoid activity reaching the threshold of interfering with voters under section 197(1)(a) of the Act.

Options and impact analysis

Campaign-free zones around advance voting places ('AVPs')

19. Election day prohibitions limit some freedom of expression in order to facilitate the free expression of the will of the electorate. The 'blanket' election day rules cannot apply throughout the advance voting period, however, because the advance voting period is a critical time for the election campaign. This Regulatory Impact Statement considers options for a small, focused measure to bring the conditions immediately around AVPs into closer alignment with the conditions on election day.

Option 1: Status quo

Description

20. Under the status quo there is no prohibition on campaigning in the immediate vicinity of AVPs or wearing campaign material inside AVPs. The Electoral Commission could continue to encourage restraint around AVPs and seek voluntary compliance from political participants.

Assessment

21. A voluntary compliance approach does not offer the certainty needed for election rules to be understood. It entails inconsistency between election day and the advance voting period in terms of the conditions around voting places that voters can expect. The lack of regulation will decreasingly meet voters' expectations as advance voting increases.
22. The administration of the status quo, where AVP staff continue to seek voluntary compliance around AVPs, still entails some work and resource from the Electoral Commission. The lack of controls and certainty also increases the risk of disruption inside and around AVPs. The voluntary approach was not always successful at the 2014 election.
23. The perception, even if cases are isolated, that the large numbers of electors voting at AVPs may be exposed to activity and influence that would not be acceptable on election day risks public confidence in the election and the electoral framework. While there was a reasonable level of voluntary compliance at the 2015 Northland byelection, at a general election the public needs to be have confidence that there is integrity from voting place to voting place, and electorate to electorate. For these reasons, and to be equitable for participants, the rules need to be respected and upheld consistently.
24. While this option limits the participation and freedom of expression of campaigners the least, it does not address the risk that some voters may feel intimidated or feel there are barriers to their own participation when going to vote at an AVP. Risks that the voting experience is a negative one may be detrimental to participation rates.

Option 2: 10 metre campaign-free buffer zone around AVPs

RECOMMENDED OPTION

Description

25. Under this option the Electoral Act would define a 'buffer zone' 10 metres from any entrance to an advance voting place in New Zealand. Campaigning of the kind prohibited on election day would be prohibited inside this zone and inside the AVP during the advance voting period. The 10 metre distance was recommended by the Electoral Commission after trialling it at the 2015 Northland byelection.
26. The Commission would have discretion to allow a lesser distance for a particular AVP, if necessary for practical reasons. For example, a lesser distance may be desirable where the buffer zone reaches onto a busy city street, to avoid inadvertent breaches.
27. The AVP campaigning prohibition would be a new section modelled on existing restrictions in s 197 of the Electoral Act which apply to election day and to interfering with voters on their way to a voting place. The penalty would be aligned with the existing s 197 penalty of a fine not exceeding \$20,000, upon conviction.
28. The same s 197(2) defences will be provided, covering material which was exhibited inadvertently or which ceased immediately upon request. Existing provisions in ss 198 and 199, which give the Returning Officer the power to remove offending material and recover expenses incurred in doing so, and to not refer inconsequential breaches, will also apply.
29. Scrutineers will still be able to wear a party rosette in the voting place as the Act provides an exemption. The buffer zone will not apply to other categories of special voting such as overseas voting or mobile advance voting at hospitals or rest homes.

Assessment

30. This option better achieves certainty for campaigners about what is permitted inside voting places and how to avoid the offence of interfering with voters. It will also better meet voters' expectations of the conditions when casting a vote. This option will more closely align the conditions around AVPs with those around voting places on election day, so that the principle of the sanctity of the vote can be understood across the whole voting period.
31. Any added cost from the administration of this option should be negligible and within the Electoral Commission's baselines, given that the Electoral Commission already seeks voluntary compliance around AVPs. This option is not expected to lead to many prosecutions and the attendant costs, given the relative success when trialled in Northland on a voluntary basis and the clarity, defences and warnings that will be provided.
32. This option best mitigates risks to electoral integrity and public confidence. It will reduce risk and perceptions of interference, intimidation and undue influence of people going to vote. By upholding a positive voting experience, this option helps promote voter participation.

33. The new prohibition will entail a limitation on freedom of expression for political parties and others who would like to campaign or display election advertisements. This is, however, a small and proportionate limit as the prohibition only applies very close to AVPs and the same behaviour will be permissible more than 10 metres away. A small zone means behaviour is only restricted in the more extreme cases, such as where that behaviour might approach 'interference' or where voters who wish to avoid this activity on their way to vote are unable to do so.

Option 3: Campaign-free buffer zone for AVPs, larger than 10 metres

Description

34. Under this option the buffer zone would function as in **Option 2** above, but in a larger radius around AVPs. The same penalties, defences, discretion and related provisions would apply.
35. Tasmania and Northern Territory, for example, use a distance of 100 metres. A larger distance is not specified here because the same tradeoffs apply, in different degrees, wherever the limit is drawn and this analysis finds that a significantly larger zone is not desirable.

Assessment

36. Consideration has been given to a 'buffer zone' larger than 10 metres, and this would serve objectives similar to *Option 2*. However a larger zone in which campaigning was prohibited would no longer focus on the behaviour most likely to concern or obstruct voters.
37. Because both free political expression and safeguards for voters are desirable at an election, a balance must be struck between the two. As the distance increased the area covered would be larger than necessary to preserve the immediate integrity of the advance voting place. It would also become more likely that the limit on freedom is disproportionate, and unjustifiable in the midst of an election campaign when public debate is important. For these reasons this option does not strike the necessary balance and would not meet the expectations of voters and campaigners.
38. As the size of the buffer zone increased, the Electoral Commission would have a bigger job to monitor it. It would be harder to see and identify the offending material and behaviour. It would be more likely that the buffer zone extended through obstacles, making it more likely that the Commission would need to exercise its discretion. A significantly larger zone would also have significant implications for the Commission's ability to find suitable places for AVPs, and increase the likelihood of impact on pre-existing uses.
39. Compliance may also be lower with this option as, at a greater distance, there is greater risk of inadvertent breach. There would be some risk of larger numbers of complaints and, possibly, of prosecutions.

Conclusions and recommendations

Campaign-free zones around advance voting places ('AVPs')

40. We recommend Option 2, whereby the Electoral Act 1993 and/or Electoral Regulations 1996 are amended to introduce a new prohibition on campaigning or displaying campaign material inside advance voting places or within 10 metres of their entrances. The type of behaviour prohibited, penalties, defences and related provisions should align with existing provisions in ss 197 and 198 of the Electoral Act.
41. We support this option because it mitigates risks of disruption or interference, and upholds public confidence. It offers greater consistency and certainty of law, and should facilitate compliance.
42. The tradeoff in the limitation on freedom of expression is proportionate and is the minimum necessary to meet these objectives. The defences and provision for warnings help ensure the offence and penalty is proportionate and reasonable. It is considered that any significantly larger buffer zone would limit freedom of expression more than is necessary to maintain the integrity of the voting place and uphold public confidence, and be less feasible in practical terms.

Status quo and problem definition

Section 199A prohibition on false statements published in the 3 day period to influence voters

43. Section 199A of the Electoral Act 1993 provides that publishing false statements to influence voters is a corrupt practice. There is a reasonably high threshold to meet this test. The published statement must:
 - be knowingly false, and in a material particular,
 - be made on election day or the 2 days prior, and
 - be made with the intention of influencing the vote of any elector.
44. Corrupt practice offences are the most serious under the Electoral Act and are punishable by up to 2 years imprisonment and/or a fine of up to \$40,000. A person found guilty of a corrupt practice offence cannot vote and cannot be an MP or stand for Parliament for 3 years.
45. In October 2015, the High Court found in *Peters v Electoral Commission* that statements first published more than 2 days prior to election day will be subject to s 199A if they simply remained where they were earlier published. This would not require that there be any act taken to republish, promote or share the previously published statement within the s 199A period.
46. This decision raised some issues with s 199A and there is an opportunity to consider amendment to clarify and future-proof the provision.
47. The interpretation widened the range of material which could be subject to the s 199A prohibition substantially beyond the Commission's previous understanding. The Commission had argued that the intent of s 199A was to prohibit false statements being first published immediately before election day, rather than simply remaining accessible to the public in that time. The Commission considered the intent of s 199A was to address false statements made too late in the campaign to be addressed through normal complaints processes, or through rebuttal or media scrutiny.
48. The Select Committee that recommended the enactment of s 199A noted it did not wish to see freedom of expression unduly limited during election campaigns. It considered that "there is a very narrow class of expressions which should be limited in order to protect the integrity of electoral decisions, being deliberately false statements of fact made on election day and the two preceding days with the intention of influencing the vote of any elector".
49. While the test in s 199A was intended to set a high threshold, the wide interpretation of the application of s 199A to any material that continues to be accessible within the 3 day period regardless of when it was first published has significant implications for parties, candidates, third parties, media and commentators, particularly when it comes to posting on websites, social media and blogs. A person who just leaves material up during the two days before election day or on election day that they posted earlier, without taking any further active steps, can be at risk of breaching the provision.
50. Given there will often be significant room for debate about the truth of a statement and the knowledge of the person making it, and given the serious penalties for breach, s 199A has significant implications for freedom of expression. It could discourage commentary and could also lead to larger numbers of complaints under s 199A.

51. There is also no requirement to complain about an offending statement when first becoming aware of it. While there are other remedies, for example the Advertising Standards Authority, a person could wait until the s 199A period to complain so that that offence provision applies.
52. These problems will likely be exacerbated by the nature of the internet and the large amount of material stored, cached or difficult to take down, such as on social media and blogs.

Options and impact analysis

Section 199A prohibition on false statements published in the 3 day period to influence voters

53. Section 199A covers “publishing, distributing, broadcasting, exhibiting, or causing any of these to occur, in or in view of any public place.” The options below consider how this, and the time period defined in the section, should relate to ‘first’ publication or active dissemination.

Option 1: Status quo, offence covers earlier statements which remain accessible

Description

54. The current s 199A prohibition on making false statements to influence voters in the last days of the election cycle has been interpreted to include statements made earlier but which remain accessible to the public. In *Peters v Electoral Commission*, the Court found that material posted online at a prior time, and not promoted but still available on election day or the 2 days prior (the 3 day period), would be subject to s 199A.

Assessment

55. There is a risk that the status quo, by being cast too wide, will not accord with public expectations and will not be well understood. For example, the current provision could be applied to:
 - historical false statements archived on a website or social media, if it could reasonably be argued the intent was to influence the vote of any elector, and
 - false statements made earlier in an election campaign where the complainant waits until the s 199A period so that the offence provisions apply, rather than using other existing complaints processes.
56. The status quo is also inconsistent with how online material is dealt with elsewhere in the Electoral Act. Other provisions give exemptions from election advertising rules for personal political views posted online and, on election day, for material posted online earlier but not promoted or added to on election day. Section 199A, under the status quo, deals less well with the nature of the internet and provides no equivalent allowance.

57. A widely-cast offence may well discourage the publishing of false statements and reduce the risk that voters are unduly influenced. However, there will often be significant room for debate about the truth of a statement made during the election campaign. The scope and seriousness of this provision of this could discourage genuine political commentary, expression and engagement. The current provision is likely to be applied to false statements first made outside the period defined by s 199A. There is a risk that this brings into scope of what is a very serious offence a larger range of material than may be desirable or intended.
58. The offence, as interpreted, is not related to acts taken in the 3 day period. This poses a risk that the offence and corrupt practice are committed inadvertently, as the offending material could have been posted at any time. There is also the risk that s 199A extends to material which the publisher has attempted to 'take down' from the internet or does not anticipate is stored on social media.
59. There is also some risk that a larger amount of material in scope of s 199A will lead to a larger number of complaints and referrals, and the administrative burden this entails for the Electoral Commission and Police.

Option 2: Statements are included where acts are taken to disseminate, publish or republish in the 3 day period

RECOMMENDED OPTION

Description

60. This option would amend s 199A so that it did not include material, of the kind at issue in *Peters v Electoral Commission*, which merely remained passively accessible during the 3 day period.
61. This would function in a way similar to s 197(2A) of the Electoral Act where it is a defence to election day prohibitions if material is placed online before the day, is only available to people who voluntarily access it, and it is not promoted on the day.
62. Under this option s 199A would apply where, in the 3 day period, a person:
 - first issues/publishes the false statement, or
 - takes some additional action to further publish/distribute a previous false statement (e.g. further copies of an existing brochure, or re-posting online), or
 - promotes or shares the false statement, or website containing the statement, or
 - has any of the above occur, based on arrangements they made before the 3 day period.

Assessment

63. The option better meets public and participant expectations, and limits the restriction on freedom of expression, by ensuring the serious offence under s 199A relates to actions taken in the defined 3 day period.
64. This option focuses on and mitigates the risk to public confidence and electoral integrity from false statements being published to unduly influence or deceive voters. It provides sufficient disincentive to publish such material at times when there is little opportunity for media/public scrutiny.

65. This option recognises that the mischief to be addressed is largely the initial publication or actions taken to disseminate and does not seek to regulate to the ongoing, passive availability of that material. Alternative complaints processes can deal with earlier false statements and those which simply remain accessible in the 3 day period.
66. This option mitigates the risks that people inadvertently breach s 199A, or are unable to avoid breaching it because of material published online which has been stored/cached or cannot be effectively taken down. It also avoids the difficulties with application to print media which is in circulation and 'remains accessible' in this way. It is expected that the number of complaints and prosecutions under a narrow provision may be lower. In these ways this option ensures the restriction is proportionate and makes compliance and administration easier.

Option 3: Only statements first published/made in the 3 day period are included

Description

67. This option would narrow s 199A to only apply to statements published for the first time in the 3 day period. The prohibition would not apply to further instances of that statement or distribution of a statement made before this period. It would not apply to an earlier false statement which remains accessible in the 3 day period without further promotion.

Assessment

68. This option recognises that if a statement is first published earlier, even to a small audience, there has been some opportunity for the substance of that statement to be brought to the attention of the media and to undergo scrutiny. However, as in the *Peters v Electoral Commission* decision, this does not adequately deal with 'republication'. Whilst the status quo is too broad in respect of republication or distribution, this option is too narrow and unable to address it.
69. Under this option there is greater risk that voters are influenced or perceived to be influenced by false statements on election day or the two days prior. A statement could be published early in the election period to a small audience, where it or any rebuttal is not widely heard, and then be distributed to a larger audience in the 3 day period. This would be detrimental to public confidence in the integrity of the election, and would likely not meet public and participant expectations of the rules.
70. While this narrower option would limit freedom of expression the least, the fairly minor limitation involved – only being applicable to knowingly false statements – is outweighed by the disadvantages above.
71. While this narrower construction of s 199A could clarify the time and scope issues under s 199A, it does not meet the criteria well. Indeed there is some risk that drawing an explicit line at first publication will highlight issues which could make administration and compliance difficult, such as determining the point at which a statement that is similar in substance to one published before the 3 day period qualifies as a new statement (when it would be covered by this option) or as a mere republication (when it would not be).

Conclusions and recommendations

Section 199A prohibition on false statements published in the 3 day period to influence voters

72. We recommend Option 2. There is an opportunity to amend and clarify s 199A to ensure it remains fit for purpose in future and in online contexts. The recommended option would amend section 199A of the Electoral Act 1993 so that the offence of publishing false statements to influence voters in the 3 day period does not cover statements which are posted earlier and remain passively available in the 3 day period. It should be made explicit that s 199A applies to statements either first published in that period or actively disseminated further in that period.
73. This will ensure that the offence, sanction and the restriction on freedom of expression entailed are proportional to the objectives. This option is considered to best balance the arguments made for wider and narrower conceptions of s 199A, and will ensure the law is clear and well understood.
74. This option further avoids the major disadvantages of the wider and narrower options and is consistent with how advertising and personal political comment online are dealt with elsewhere in the Electoral Act.

Consultation

75. The Electoral Commission has been consulted and is supportive of the conclusions reached in this Regulatory Impact Statement.

Implementation plan

76. Both of the proposals in this RIS will be implemented by the Electoral Commission as part of its normal preparations for the 2017 General Election.
77. The Commission will incorporate any required changes to processes resulting from the Electoral Amendment Bill and/or Regulations into its instruction manuals and training for electoral officials. Where appropriate new processes will be developed and tested by the Electoral Commission to ensure risks are mitigated and that the integrity of the electoral system is maintained. It is important that there is enough lead-in time for this to occur.
78. Any changes to rules and requirements will be communicated by the Commission to electoral participants and the general public as part of its election guidance and communications. It is important that there is enough lead-in time for participants to understand and prepare for the changes.

Financial Implications

79. While the administrative costs associated with the two proposals in this RIS have not been estimated, we expect these to be minor. The proposals may be cost-neutral as they only involve small modifications to current practice. The Electoral Commission has indicated that it will be able to administer both of these without the need for additional funding.

80. While the AVP proposal will require monitoring by AVP staff, if the proposal did not proceed AVP staff would continue to monitor the conditions of AVPs and encourage voluntary compliance. The preferred option for s 199A will reduce the scope of this offence and the costs both from complaints being made to the Commission, from referrals being made to Police and from any prosecutions.
81. These proposals will have minimal financial impacts on parties or individuals. Compliance with the 10m buffer zone proposal is expected to be high and would only require individuals/groups to move electioneering activities small distances. The s 199A proposal would result in a reduced scope for individuals to be captured by this offence and hence potentially incur the fines associated with this.
82. These proposals require changes to the Electoral Act and/or Electoral Regulations, but do not have impacts on other Acts or regulations.

Monitoring, evaluation and review

83. Both of the proposals in this RIS will be subject to the normal monitoring, evaluation and review process that occurs after each general election.
84. Under the Electoral Act, following each election the Electoral Commission is required to review the administration of the election and report to the House. Following this, it is convention that the Justice and Electoral Committee conducts an inquiry into the law and administrative procedures for the conduct of the general election.