

Electoral (Vacancies) Amendment Bill

7 August 2003

Attorney-General

Electoral (Vacancies) Amendment Act PCO5352/7

Our Ref: ATT114/1197(13)

1. Yesterday afternoon I received a copy of the above Bill to consider for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). The Bill was introduced into the House under urgency yesterday evening. As reported to officials yesterday afternoon, I advise that no provision in the Bill appears to be inconsistent with BORA.

Background

2. The Bill provides that current ss 55(1)(b) and (c) of the Electoral Act 1993 do not apply to any Member of Parliament (clause 4 of the Bill). Those two provisions of the 1993 Act provide that a Member of Parliament vacates his or her seat if he or she takes any oath, declaration or acknowledgement of allegiance or adheres to any foreign prince or power or does, concurs, or adopts any act whereby he or she may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject or a citizen of any foreign state or power. The disapplication of ss 55(1)(b) and (c) of the 1993 Act is to have retrospective effect (clause 5 of the Bill). Next, a new basis for the vacating of a seat is created, viz, where a Member of Parliament who is a New Zealand citizen ceases to be a New Zealand citizen (see clause 6 of the Bill). Finally, the duration of the Bill is limited: it expires at the end of the current Parliament (see the combined effects of clauses 2 and 3 of the Bill).

BORA consideration

3. Although I am of the view that the Bill is BORA consistent I touch on one matter that raised an issue as to discrimination arising out of clause 6 of the Bill.
4. To understand the issue it is important to recall the basis upon which a person is qualified to be a Member of Parliament. As matters stood under the 1993 Act as at the date of the last General Election, a person was qualified to be a Member of Parliament if they were a registered elector and, further, either (1) a New Zealand citizen; or (2) a person who was, on 22 August 1975, registered as an elector (see ss 47(1) and 47(3) Electoral Act 1993). With effect from 1 February 2003 only registered electors who are New Zealand citizens are qualified to be a Member of Parliament (see Electoral Amendment Act 2002, ss 8(1) and 8(4)). This citizenship requirement was the subject of

two transitional provisions. First, any person who was, prior to 1 February 2003, a sitting Member of Parliament and who was qualified on the basis of being registered as an elector on 22 August 1975 continues to be a Member of Parliament notwithstanding his or her non-citizenship (see s 8(2) Electoral Amendment Act 2002). Second, it is provided that a person, who is qualified to be a Member of Parliament on the basis of being a registered elector on 22 August 1975, and who was a Party List candidate at the last General Election, is not disqualified from becoming a Member of Parliament after 1 February 2003, by reason of his or her no-citizenship (see s 8(3) Electoral Amendment Act 2002).

5. I have been informed that no persons are currently Members of Parliament on the basis of having been on the Electoral Roll on 22 August 1975. There are, however, a small number of persons who are Party List candidates for parties with Members of Parliament qualified on the basis of a Party List, who are qualified solely on the basis of having been on the electoral roll on 22 August 1975. It is conceivable, therefore, that between now and the end of the current Parliament a person could become a Member of Parliament who is not a New Zealand citizen. Such a person would not be affected by clause 6 of the Bill.
6. A potential issue of discrimination arises in respect of clause 6 of the Bill. It arises because it might be said that whereas a New Zealand citizen Member of Parliament can lose his or her seat by ceasing to retain New Zealand citizenship, the same cannot occur in the case of a non-citizen Member of Parliament. Accordingly, clause 6 singles out New Zealand citizens for different treatment.
7. Assuming, for the sake of argument, that clause 6 gives rise to a case of *prima facie* discrimination on grounds of citizenship contrary to s 19 BORA, the issue that arises is whether such different treatment can be justified in terms of s 5 BORA ("justified limitation"). In my view, it can be.
8. First, the mischief at which clause 6 of the Bill is aimed is targeting for removal from Parliament those Members of Parliament who lose what, since the 2002 Amendment Act, is regarded as a fundamental prerequisite to membership of Parliament. The fact that on a transitional basis there may enter Parliament certain persons who would not be subject to the new vacating ground does not detract from the legitimacy of clause 6.
9. Second, in context, clause 6 of the Bill can be legitimately viewed as merely being a consequential amendment to the 1993 Act which plugs the lacuna in the 1993 Act (as amended by the Electoral Amendment Act 2002) which would allow a person to be qualified to be a Member of Parliament on the basis of his or her New Zealand citizenship (s 47(3) as amended), yet, on the current drafting of s 55(1) of the 1993 Act, retain membership of Parliament even though he or she had renounced or been deprived of the fundamental qualification to membership, i.e. New Zealand citizenship. In that regard I note that in its very recent report, *Question of privilege relating to the application of s 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven* (AJHR I.17C), the Privileges Committee (at p 6) noted that during its inquiry it had been

pointed out that "a Member who loses or renounces New Zealand citizenship is not caught by the disqualification provisions of s 55(1) [of the 1993 Act]. This is certainly anomalous and suggests that s 55 was overlooked in 1975 when New Zealand citizenship was first made a prerequisite for election. It is something that any review of s 55 should address." The terms of clause 6 of the Bill can be seen as amounting to a response to this anomaly.

10. Third, in my view it is legitimate for the legislature to identify the loss of New Zealand citizenship as something calling for vacating a seat, even though no equivalent disqualification provision is provided for those persons who may in the course of the current Parliament, become Members of Parliament and be non-citizens.
11. In this regard, it is to be noted that an examination of ss 15-17 Citizenship Act 1977 (the primary substantive provisions dealing with loss of New Zealand citizenship) emphasises how difficult it is to lose New Zealand citizenship. Renunciation of citizenship must follow prescribed procedures (see s 15 of the 1977 Act and/or s 8 of the Citizenship Regulations 2002) and deprivation of citizenship can only occur where either (1) it has been obtained by fraud, misrepresentation, etc (s 17 of the 1977 Act) or the particular citizen has (voluntarily) acquired another citizenship and "acted in a manner contrary to New Zealand interests" (s 16(a) of the 1977 Act) or the particular citizen has voluntarily exercised the privileges/performed the duties of another citizenship in a manner that is "contrary to New Zealand interests" (s 16(d) of the 1977 Act).
12. In particular, and as noted above, deprivation of New Zealand citizenship can only occur through conduct that can be fairly regarded as disloyal (e.g. renunciation of New Zealand citizenship; acquisition of another citizenship in circumstances that are contrary to New Zealand interests) or, broadly speaking, dishonest (acquisition of citizenship through fraud/misrepresentation). Just because there may be difficulty in defining with precision other sorts of activities and/or conduct which can be defined as being disloyal and, therefore, calling for loss of a Parliamentary seat, (and here again I refer to the Privileges Committee report (pp 5-6), is no reason for Parliament not to be free to target loss of citizenship as a sufficient ground for disqualification on its own.

Conclusion

13. For these reasons, I am of the view that no provision of the Electoral (Vacancies) Amendment Bill is inconsistent with BORA.

Yours sincerely

Andrew Butler
Crown Counsel

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine

whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Electoral (Vacancies) Amendment Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.