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Dear Mr Buchanan

Scope of Parliamentary Service Appropriation - Advertising and Publicity by Parliamentary Parties

Our Ref: OAG183/55

Introduction

1. You have asked for my advice on the scope of the appropriation Vote Parliamentary Service, under which the Parliamentary Service reimburses Members of Parliament and parliamentary parties for various costs incurred by them. In particular, you have asked whether the appropriation covers expenditure on advertising or publicity the purpose of which (whether wholly or in part) is to promote the re-election of an MP or the return of a parliamentary party to Parliament. You have also asked a number of specific questions, which I will address at paragraphs 34 to 48 of this advice.

Summary

2. I summarise my advice as follows:
 - 2.1 The appropriations provide for expenses incurred by members of Parliament *in their capacity as members*. The appropriations do not cover activities by members in their capacity as candidates for election;
 - 2.2 The Parliamentary Services Act reinforces this view. The Parliamentary Service administers funding to meet the costs of some advertising and publicity by MPs and parties under the Vote Parliamentary Service appropriation. Under the Parliamentary Services Act, this funding is administered for “parliamentary purposes” and in accordance with any directions given by the Speaker. The Speaker’s Directions issued on 1 November 2003 contain a definition of “parliamentary business”. Under the Speaker’s Directions, “producing or distributing promotional or electioneering material by mail or other means of communication for the purpose of supporting the election of any person or the casting of a party vote for any political party” is specifically excluded from activities that may be funded under the appropriation. These activities are also excluded under other relevant guidelines;

- 2.3 Case law under the Electoral Act 1993 is relevant to the question of what qualifies as electioneering material or communications that support the election of any person or party. Electioneering material is something that is intended to persuade a voter to favour a candidate or party in an election, and it is not necessary for advertising or publicity to expressly solicit a vote for it to fall into this category;
- 2.4 Where a publication from a member contains material that relates to parliamentary business and material that relates to electioneering activities the Auditor-General is entitled to treat that publication as falling outside the appropriations in its entirety.

Background

3. Certain expenses incurred by MPs and parliamentary parties may be legitimately reimbursed from public funds. As David McGee notes in *Parliamentary Practice in New Zealand* (3rd ed, 2005) at p 453, authority to spend public money can only be obtained by Parliament making an appropriation for the particular activity or otherwise authorising the payment. He says:
- “An appropriation is a legislative provision which permits amounts of expenses or capital expenditure to be incurred for activities that fall within the scope of that provision.”
4. The legislative framework for the Vote Parliamentary Service appropriation is provided by the Public Finance Act 1989, the Appropriations (Estimates) Act for the applicable year, and the Parliamentary Service Act 2000. I deal briefly with each in turn.

Public Finance Act 1989

5. Section 5 of the Public Finance Act provides that the Crown or an Office of Parliament must not spend public money except as expressly authorised by the Public Finance Act or any other Act. Section 6 of the Act provides that public money may be spent for the purpose of meeting expenses incurred in accordance with an appropriation or other authority by or under an Act. Section 7 provides that separate appropriations must be made in respect of different categories of expenses, and sets out a list of those categories. The appropriations that apply to advertising and publicity by MPs and parliamentary parties fall under s 7(1)(d) and are what is known as “other expense” appropriations. Finally, s 9(1) provides that the authority to incur expenses under an appropriation is limited to the scope of the appropriation and may not be used for any other purpose.
6. The statutory provisions dealing with the Auditor-General’s role as Controller are also important. The Public Audit Act 2001 sets out the Auditor-General’s obligation to act independently (s 9) and his audit responsibilities in terms of public entities such as the Parliamentary Service (e.g. ss 15 and 16). The Public Finance Act also bears upon the Auditor-General’s responsibilities in this context. For example, where the Auditor-General believes that expenses have been incurred for a purpose that is not lawful or not within the scope of the relevant appropriation he or she may direct the responsible Minister to report to the House (s 65Z). Section 65ZA empowers the Auditor-General to stop payments from a Crown or departmental bank account in such circumstances.

Appropriations (Estimates) Act

7. The appropriations themselves are found in the schedules to the relevant year's Appropriations (Estimates) Act. Section 4 of the Appropriations (2005/06 Estimates) Act 2005 states that the purpose of the Act is in part to:

“authorise the Crown and Offices of Parliament to incur expenses and capital expenditure during the financial year ending with 30 June 2006 by appropriating expenses and capital expenditure for that financial year”

Section 6(1)(d) of the Act provides that:

“Expenses may be incurred by the Crown or an Office of Parliament in relation to— ... the categories of other expenses set out in column 3 of Schedule 1.”

8. The relevant categories of expenses (ie those that would encompass advertising and publicity) set out in Schedule 1 under Vote Parliamentary Service are:

8.1 Members' communications; and

8.2 Party and member support in respect of each of the parliamentary parties.

9. Extended descriptions of the appropriations are found in the Budget documents. The relevant descriptions as set out in *Budget 2005: Estimates of Appropriations for the Government of New Zealand for the year ending 30 June 2006* are:

9.1 in relation to members' communications – “funding for members' communications (voice and data) entitlements, and members' use of stationery in Parliament”; and

9.2 in relation to party and member support – “funding for the [named] parliamentary party to support its Leader's office, research operations, Whip's office and members' parliamentary operations.”

10. Although the budget documents do not have legislative authority, they are relevant to an understanding of the scope of the relevant year's Appropriations (Estimates) Act.

Parliamentary Service Act 2000

11. Under the Parliamentary Service Act, the Parliamentary Service is principally responsible for providing administrative and support services to the House and its members, and for administering the payment of funding entitlements (under the appropriations discussed above) provided for parliamentary purposes. The Speaker of the House is the responsible Minister for Vote Parliamentary Service.

12. The emphasis on parliamentary purposes in the Act is clear. Section 4 of the Parliamentary Service Act provides:

“The purposes of this Act are as follows:

(a) to establish mechanisms for providing services and **funding entitlements for parliamentary purposes**;

...

- (d) to provide regular, independent reviews of the amounts of money appropriated for services and **funding entitlements for parliamentary purposes.**” (emphasis added)

This latter purpose is addressed specifically in ss 20-22, where a review mechanism is established.

13. Section 7 sets out the duties of the Parliamentary Service and provides:

“The principal duties of the Parliamentary Service are—

- (a) to provide administrative and support services to the House of Representatives and to members of Parliament; and
- (b) to administer, in accordance with directions given by the Speaker, the payment of **funding entitlements for parliamentary purposes.**” (emphasis added)

14. Under s 8, the Speaker must give directions as to the nature of administrative support services to be provided each year. However, it is also clear from s 7(b) and s 8(3) that the Speaker may also give directions regarding the payment of funding entitlements for parliamentary purposes. Section 14(1)(b) also provides that one of the functions of the Parliamentary Service Commission is to make recommendations to the Speaker regarding the adoption of criteria governing funding entitlements for parliamentary purposes.

Summary

15. MPs and parliamentary parties may be reimbursed from public funds for expenses incurred in connection with advertising and publicity. However, under the Public Finance Act reimbursement from public funds can be made only where the expense has been incurred in accordance with a specific appropriation or authorisation. The applicable appropriations are found in the Schedule to the Appropriations (Estimates) Act and are for “members’ communications” and “party and member support”. Pursuant to the Parliamentary Service Act, the Parliamentary Service administers the funding under the Vote Parliamentary Service appropriation for parliamentary purposes and in accordance with any directions given by the Speaker. The *Members Handbook of Services* notes that in the event that Vote funded advertising material is determined as being in breach of the rules, the Speaker can require a member to reimburse the Vote for the costs incurred.

Scope of the appropriations

16. The scope of the appropriations is determined in the first instance by the Appropriations (Estimates) Act. As noted, Schedule 1 to the Appropriations (Estimates) Act refers to “Members’ communications” and “Party and member support”. The Act provides for expenses incurred by members of Parliament *in their capacity as members*. Expenditure incurred by an individual as a member of Parliament is different from expenditure incurred by that individual in his or her capacity as a candidate seeking election. Accordingly, the appropriations exclude expenses for activities which fall outside a person’s duties as a member, such as election activities.
17. In addition, the appropriations can be read together with the Parliamentary Service Act, which provides the framework within which the Parliamentary Service administers the funding under the applicable appropriations, and with any directions given by the Speaker in accordance with s 7(b) of that Act.

18. The Parliamentary Service Act is clear that the Parliamentary Service provides services and funding for “parliamentary purposes”. This means that the appropriations for members’ communications and party and member support are to be applied for parliamentary purposes. Although the Act does not define “parliamentary purposes” it seems clear from the statutory content that the term does not include electioneering activities. For example, at least once in the term of each Parliament the Speaker must establish a review committee to consider the appropriations to the Parliamentary Service (s 20). The committee must have regard to certain specified matters (s 21). The specified matters clearly relate to parliamentary functions, not electioneering activities. This casts light on the true purpose and scope of the appropriations.
19. The Speaker’s Directions issued on 1 November 2003 provide further assistance. These Directions were based on recommendations in a report of the Parliamentary Service Commission (dated 28 August 2003) made in accordance with s 14(1) of the Parliamentary Service Act. As noted above, these directions are made by the Speaker as responsible Minister pursuant to the Parliamentary Service Act, and consequently have the status of tertiary or subordinate legislation. Clause 4 of the 2003 Speaker’s Directions notes that the directions are made pursuant to both ss 7(a) and 7(b), which means that they provide guidance in relation to both services and funding entitlements.
20. The Speaker’s Directions do not include a definition of “parliamentary purposes”, but do include a definition of “parliamentary business”. This definition refers to “any task or function that a member could reasonably be expected to carry out in his or her capacity as a member of Parliament and that complements the business of the House...” Clearly this does not cover activities as a candidate for election to Parliament. The definition specifically includes a number of activities, some of which relate to party matters (e.g. attending party meetings), but none relates to electioneering activities.
21. Clause 46 of the Speaker’s Directions further elaborates the definition of parliamentary business by providing that a member is entitled to use “operational resources” for the purpose of undertaking parliamentary business. “Operational resources” are (in effect) defined by indicating what they do and do not include. “Operational resources” may be used for developing, researching, critiquing and communicating policy (cl 46(2)(b)) and for communicating with constituents and other communities of interest (cl 46(2)(c)) but may not be used for producing or distributing electioneering material (cl 46(3)(d)). What these provisions concerning “operational resources” illustrate is that although much parliamentary business is “political” in nature, electioneering activity falls into a different, and for funding purposes distinct, category.
22. This position is further reinforced by principles adopted by the Parliamentary Service Commission on 16 December 2003, in relation to advertising funded from Vote Parliamentary Service. Those guidelines provide:
- “Appropriateness** – members and parliamentary political parties must only incur expenditure on “parliamentary business” unless explicit authorisation to the contrary exists.”
- “Parliamentary business” must have the same meaning here as under the Speaker’s Directions.
23. There are also other, non-legislative, sources of guidance as to the extent of activities that may be funded by the Parliamentary Service. The Members’ Handbook of Services does not have the same authority as the Speaker’s Directions, but is intended to provide

guidelines for funding entitlements. The Select Committee Report on the Parliamentary Service Bill noted that:

“funding entitlements [under the appropriations] are subject to policies and formula decided by the Commission and incorporated into the “Handbook of Members Services”. This will not change under the bill.”

24. Not surprisingly the Handbook expresses the limits of activities that may be funded in much the same terms as the Speaker’s Directions. Section 1.3 of the Members’ Handbook provides guidelines as to what advertising may be funded from the members’ support allocation and, as with the Speaker’s Directions, uses the phrase “parliamentary business” to limit permissible activities (see ss 1.3.1 and 1.3.3, where party political, promotional, or electioneering material are excluded, in much the same terms as in the Speaker’s Directions).
25. In my view, then, it is clear that the Vote Parliamentary Service appropriation is to be used for parliamentary purposes only, and not for electioneering advertising and publicity. Accordingly, there is an issue as to what kinds of advertising or publicity are defined as being “electioneering”. A further difficulty (addressed later) is how to deal with material that may have both a parliamentary and an electioneering purpose.
26. The Speaker’s Directions (and the Members’ Handbook) both use the formulation “for the purpose of supporting the election of any person” in the relevant exclusionary provisions. This is similar to the definitions used in the Electoral Act 1993 for the purposes of calculating members’ and parties’ electoral expenses, so that some assistance may be gained from considering the Electoral Act provisions.
27. Sections 213 and 214B of the Electoral Act impose limits on what candidates and parties may spend by way of election advertising. There are two features of the definition of “election activity” that are significant in the present context:
 - 27.1 As it relates to candidates, the definition draws a distinction between activities which relate to the election of a person as a constituency member (which are caught) and activities which are undertaken by a person as a member of Parliament (which are excluded).
 - 27.2 As it relates to parties, the definition covers activities that are directed at encouraging or persuading voters to vote for a particular party, or not to vote for any other party (the latter also falls within the definition as it relates to candidates).
28. In *Re Wairarapa Election Petition* [1988] 2 NZLR 74, the High Court said (in relation to the predecessor section to the current Electoral Act provisions) that election expenses were “confined to that part of the campaign which by words or sounds is intended to persuade the voter generally or in particular to favour the candidate” (at p 116).
29. The High Court has recently confirmed the application of this decision to the meaning of “election activity” under s 213. In *Peters v Clarkson* (HC, Tauranga, 15 December 2005, Randerson, Goddard and Panckhurst JJ, CIV-2005-470-719) the Court said:

“the essence of these requirements [under s 213] remains, we think, aptly captured in the passage in the *Wairarapa* case where the Court spoke of “words or sounds (perhaps images should be added) intended to persuade the voter ...” (at para [51]).

30. The Court also noted that to qualify as an election activity, the activity must occur in the three months before polling day and must have as its purpose the promotion of a person in his or her capacity as an electorate candidate. Promotion of that person as a sitting member of Parliament, as the holder of other office or in any other capacity does not qualify.
31. Under the Electoral Act, therefore, the test is whether a communication is intended to persuade a voter to vote in a particular way. In my view this is equally applicable to the wording used in the Speaker's Directions, which refers to a communication that "supports" the election of a person or a party. In fact, "supports" is arguably even wider than "persuades".
32. A finding that a communication as a whole is an "election activity" for the purposes of the Electoral Act would, in my view, preclude a finding that the communication was for "parliamentary purposes" in terms of the appropriations. However, it would not necessarily follow that a communication that fell outside the scope of the appropriation would be an election expense. First, if the communication was outside the three month time period under the Electoral Act, it would not qualify as an election expense. Second, it is possible that a communication is for neither a parliamentary purpose nor an electioneering purpose, for example it may be for the purpose of soliciting subscriptions or for personal purposes.

Conclusion as to Scope

33. The appropriations for members' communications and party and member support are administered by the Parliamentary Service for parliamentary purposes. Parliamentary purposes are elaborated through the Speaker's Directions and reinforced by the Parliamentary Service Commission Guidelines and the Members' Handbook. Advertising for parliamentary purposes clearly excludes advertising for electioneering purposes. Electioneering advertising is something that is intended to persuade a voter to favour a candidate or party in an election.

Specific Questions

Whether a communication must be for a valid "parliamentary" purpose to be within the scope of the appropriations

34. A communication must be for a parliamentary purpose in order to be funded from the Vote Parliamentary Service appropriations. It is clear that under the Parliamentary Service Act the members' communications and party and member support appropriations are administered for "parliamentary purposes". Indications of what qualifies as a parliamentary purpose are found in the Speaker's Directions.

Whether the definition of "parliamentary business" used in the Members' Handbook is applicable

35. The most authoritative formulation of "parliamentary business" is that found in the Speaker's Directions (which are based on the recommendations of the Parliamentary Service Commission). As noted above at paragraph 23, however, it was intended that the Members' Handbook would continue to reflect the policies and guidelines developed by the Parliamentary Service Commission (and adopted by the Speaker's Directions). I note that both the Speaker's Directions and the Members' Handbook exclude party political, promotional or electioneering material from the definition of "parliamentary business".

Whether an express solicitation of a vote for a party or candidate is needed to activate the exclusion, or whether an overall assessment of the purpose of the communication should be considered

36. In my view, an express solicitation of a vote for a party or candidate is not required in order to activate the exclusion. Rather, the question is whether the communication as a whole would be likely to persuade a voter to vote in a particular way. The formulation used in the *Wairarapa* case was whether the communication was “intended to persuade the voter generally or in particular to favour the candidate.” This approach has been recently confirmed in *Peters v Clarkson*. In that case, the Court found that material contained in an article about Mr Clarkson in the Bay of Plenty Times (in the context of a large advertising feature on Mr Clarkson’s business) was an election activity, even though the article did not expressly solicit votes for Mr Clarkson. The Court noted that:

“While accepting that the substantial majority of the advertising material contained in the feature related to Mr Clarkson’s successes as a commercial property developer in the area, it must have been readily apparent to Mr Clarkson that the feature would be extremely helpful to his election campaign and would be likely to persuade at least some voters to support him” (at para [133]).

Whether there is any particular period within which the electioneering exclusion applies (eg within three months of an election)

37. I agree with your view that no particular date is determinative of whether, in terms of the appropriations, material is to be considered as electioneering. Communications that are intended to persuade voters to vote for a particular member or party will communicate that intention regardless of their proximity to an election, and should not be funded from the appropriations. However, the question of proximity to an election is likely to be a relevant factor in relation to particular instances of advertising or publicity. This point was noted by the Court in *Peters v Clarkson*, where it was partly the timing of the advertising feature that led the Court to conclude that it was an election activity, despite the lack of any express solicitation for votes. It seems likely that it will be in cases where there is no express solicitation for votes that proximity to an election or other contextual factors will be most relevant.

Other factors that might be taken into account in determining whether a communication is for a parliamentary purpose

38. In your request for advice, you identified a number of factors which may be relevant in determining whether a communication is for a non-parliamentary purpose. Factors you thought might indicate a parliamentary purpose included references to:
- 38.1 particular services to the public;
 - 38.2 the MP’s role as an MP in making the communication, for example, a constituency MP reporting on his or her activities as an MP; and
 - 38.3 actual or proposed legislation or existing government policies or actions.
39. Factors indicating an electioneering purpose might have included:
- 39.1 references in the communication to the election itself;
 - 39.2 references to an MP’s or party’s policy platform for the election, or what they will do after the election if elected or re-elected;

- 39.3 references to a candidate who is not an existing MP;
 - 39.4 formatting or branding of a communication in a manner similar to the party's own election campaign material;
 - 39.5 the nature and breadth of distribution or the accessibility of the communication to voters at large; and
 - 39.6 the timing of the communication in relation to the party's election policy announcements.
40. I have not commented in this advice on the specific examples of advertising and publicity that are attached to your letter of 5 January 2006. However, in relation to your question about other factors that might be relevant to whether a communication is for a parliamentary purpose, I make two comments:
- 40.1 The factors that you have identified as indicating a parliamentary purpose are in keeping with the definitions in the Speaker's Directions and I agree that they may be useful in assessing whether communications should be funded from the appropriation.
 - 40.2 In relation to the factors you have identified as indicating an electioneering purpose, I agree that the suggestions that you have made go to the issue of whether a communication is intended to persuade voters to vote in a particular way. However, I do not think it is possible to establish an exhaustive set of determinative factors, as the issue will always be highly context-specific.

What is the test for determining whether a communication that is partly for a parliamentary purpose and partly for an electioneering purpose falls within or outside of the relevant appropriation


41. As noted above at paragraph 25, it is possible to have material which contains both a parliamentary and an electioneering purpose. An example is a monthly newsletter from an MP to his or her constituents, which features election material but also purports to inform constituents about matters of parliamentary business (e.g. a policy debate). In such a situation, the issue arises as to whether any payment out of Vote Parliamentary Services to fund that newsletter would be lawful.
42. The issue of mixed-purpose communications is not dealt with by the Speaker's Directions or the Members' Handbook. In my view, there are three possible approaches:
- 42.1 a simple "in or out" test;
 - 42.2 a "dominant purpose" test, where the communication is treated as a whole and is categorised according to its dominant purpose; or
 - 42.3 an apportionment approach, where that portion of the communication that is for a parliamentary purpose may be funded from parliamentary funding.
43. The electoral statutory provisions and case law provide little assistance on how to determine this issue in relation to the appropriations. All three tests have been applied in different situations:

- 43.1 In *Peters v Clarkson*, the Court found that s 214A of the Electoral Act did not allow apportionment of expenses as between a constituency candidate and his or her party, where the advertisement contained more than 10% coverage for the constituency candidate who was also supporting the party. In such a case, the court held that the candidate must bear the full costs of advertising as an election expense. This provides some support for the “in or out” approach.
- 43.2 However, both the Electoral Act and the Court in *Peters v Clarkson* also recognise the validity of the apportionment approach. Section 214 of the Act expressly permits apportionment between candidates. In addition, in *Peters*, the Court found that although the three page feature in the Bay of Plenty Times would be likely to persuade voters to support Mr Clarkson, only a portion of it was held to be an election activity. The Court fixed the percentage at 25% to be attributed to election expenses.
- 43.3 Finally, under previous electoral law, the Court in *Re Wairarapa Election Petition* [1988] 2 NZLR 74 appeared to consider the dominant purpose approach when it assessed whether the costs of dual candidate advertising were election expenses. Under the previous legislation, only expenses relating exclusively to a candidate’s campaign were caught. The Court held that to escape the exclusivity test, the advertisement need not give equal prominence to each candidate, but was required to feature in a substantial way a candidate other than the candidate whose expenses were in question. The Court found in that particular case that the overriding purpose of the advertising was to support Mr Boorman’s campaign and accordingly, its costs should have been declared as an election expense.
44. However, these examples are concerned with whether or not candidates or political parties should bear the costs of advertising as election expenses. They are arguably not relevant when determining whether public expenditure has been incurred for a lawful purpose, in accordance with the relevant appropriation.
45. The appropriation context is, in my view, critical. As noted above, under s 9 of the Public Finance Act 1989, the authority to incur expenses provided by an appropriation is limited to the scope of the appropriation and “may not be used for any other purpose.” The Auditor-General has a range of supervisory powers in relation to expenditure under appropriation (see, for example, ss 65Z and 65ZA of the Public Finance Act).
46. Under these statutory provisions, the relevant question for the Auditor-General is whether the expenses at issue have been incurred for a purpose that is not lawful, or are otherwise beyond or outside Parliamentary appropriation or authority. The issue is not whether there is in addition some element of the expenditure which is for a purpose within the appropriation.
47. In the present context, I consider that the Auditor-General is entitled to take the view that expenses incurred for an electioneering purpose and reimbursed from appropriations are outside the scope of the appropriations, and are accordingly unlawful, even though some part of the expense-incurring activity may fall within the appropriation (i.e. have a legitimate parliamentary purpose). In essence, this requires the Auditor-General to apply the simple “in or out” test. Unlike apportionment, this test provides a “bright line”, it has the advantage of being administratively workable, it limits opportunities for abuse and it provides a clear framework for audit purposes. It recognises that any significant reference

to electioneering is likely to “taint” the remainder of a publication or other communication (i.e. infect it with an electioneering purpose).

48. For the avoidance of doubt, I should note that there may be instances of mixed purpose expenditures in other contexts where justification for the adoption of the “in or out” approach is less compelling.
49. Tania Warburton, Associate Crown Counsel, assisted in the preparation of this advice. If you have any queries, please do not hesitate to contact me on ph 494 5505.

Yours sincerely



Terence Arnold QC
Solicitor-General

