



Human Rights
Commission

Te Kaitiaki Take Kōwhiri

31 October 2007

Lynne Pillay
Chair
Justice and Electoral Committee
Parliament Buildings
WELLINGTON

Dear Ms Pillay

**COMMENTS ON PROCEEDINGS & RECOMMENDED AMENDMENTS TO
ELECTORAL FINANCE BILL**

[1] Last Thursday, 25 October 2007, the Justice and Electoral Committee authorised advisers to speak to the Human Rights Commission about amendments being recommended to the Electoral Finance Bill and invited the Commission to provide comment on the Committee's proceedings.

[2] Since then the Commission has reviewed the Committee's proceedings and yesterday, Tuesday, 30 October, the Commission discussed the proposed amendments with the Committee's advisers.

[3] We offer the following comments for the Committee's consideration. In keeping with the Commission's statutory mandate – to advocate and promote respect for human rights in New Zealand society – the Commission's initial submission focused on the extent to which the Electoral Finance Bill reflected or impacted on the relevant human rights standards. These comments are similarly limited to human rights considerations.

[4] To recap briefly the Commission's initial submission: the Commission supports the policy objectives of the Bill. It recognises the importance of regulating to provide for "transparency and accountability in the democratic process, [to] prevent the undue influence of wealth and [to] promote participation in the parliamentary democracy". The Commission acknowledges that this is not easy to achieve. The Commission's principal concern with the proposed legislation relates to the cumulative effect of a number of provisions which have the potential to undermine the right to freedom of expression and, consequently, the ability of New Zealanders to participate in the election process in an informed manner.

[5] The Commission strongly supports the following recommended changes which it believes better enhance freedom of expression and the right to participate in electoral processes:

- deletion of clause 5(1)(a)(iii)
- clarification of the term "periodical"
- proposed amendments to clause 14 in relation to persons eligible to be third parties
- proposed amendments to clause 53 to remove the need for a statutory declaration
- increases in total threshold for expenditure on election advertising before listing as a third party in line with the additional recommendations made by the Electoral Commission in relation to clauses 53(3)(a) and 53(3)(b)
- increases in the total limit for expenditure on election advertising for third parties in line with the recommendations of the Electoral Commission (clauses 103(1)(a) and 103(1)(b)).

[8] The Commission requests further consideration of clause 17, **Times when listing is prohibited**. In its original submission the Commission proposed its deletion. Following discussions with the Committee's advisers, the Commission accepts that there are legitimate administrative reasons that necessitate the provision of a close off date for listing as a third party. The Commission's preference is that it be as close as administratively practical to polling day. We defer to the Electoral Commission's expertise and experience in so determining.

Regulated period

[9] The Commission was among those opposed to the extension of the regulatory period. Especially when coupled with the overly broad definition of election advertisement, it would have the effect of limiting freedom of expression for a significant period.

[10] The Commission considered that Associate Professor Andrew Geddis' proposal to limit issue advertising from the time of the issue of writ had some merit, as it would have allowed wide ranging discussions on policy issues to continue while Parliament was still sitting while, at the same time, restricting advertising by third parties in the run up to an election.

[11] The Committee appears to have decided against adopting Associate Professor Geddis' suggestion because it would be too difficult for the public to understand. It proposes retaining the regulatory period in the Bill. For the Commission, therefore, the question is whether this is acceptable given the other amendments that are suggested.

[12] Much of the Commission's concern related to the fact that the nebulous nature of the definition of election advertisement gave rise to the possibility that publication of a wide range of material could be restricted for much of the year in the run up to the election. It was not convinced that this proposed limitation on political expression and restriction on freedom of expression could be justified.

[13] The change to the definition that is recommended goes some way to addressing the Commission's concerns in this regard.

Definition of election advertisement.

[14] Although "election advertising" is not defined in the present Electoral Act, the definition proposed in the Bill is too wide and has the potential to be interpreted in a way that could have unintended consequences. This is most obvious in relation to clause 5(1)(a)(iii) which refers to material that involves "a position on a proposition with which one or more parties or one or more candidates was associated".

[15] The Commission understands that the purpose of clause 5(1)(a)(iii) is to address so-called "issue advertising". It accepts that there is a need for some regulation in this area but considers nonetheless that the wording in the Bill is too broad – particularly when taken in conjunction with the proposed regulation period; is likely to be difficult to apply; and could catch material even if the person responsible for it has no intention of influencing the outcome of an election. The Commission recommended that clause 5(1)(a)(iii) be deleted or the wording be amended to ensure that the definition only applied to matters relating to the election.

[16] The suggestion that the clause 5(1)(a)(iii) is deleted is therefore consistent with the Commission's position. The report notes – and the Commission agrees – that deleting clause 5(1)(a)(iii) would place "a premium on freedom of expression" while not undermining the ability to regulate issue advertising which would be caught by clause 5(1)(a)(ii).

[17] The Commission also has a concern about clause 5(2)(c) which creates an exception for newspapers and periodicals given the lack of definition of a "periodical" and the possibility that all manner of publications may need to be registered if they overstepped the line of what was considered appropriate. The Commission did not suggest a way of resolving this but rather sought to alert the Committee to the potential for abuse.

[18] The Proceedings report suggests that the term "periodical" is clarified to make it clear that media activities, including bona fide journalism and editorial selection are exempted from the scope of election advertising. The Commission considers this would address the issue it identified.

Persons eligible to be a third party

[19] Under clause 14(1)(a) only registered electors can be third parties. The Bill therefore effectively excludes young people under the age of 18 from the process. The Commission considers this is inappropriate as it unfairly excludes young people from the electoral process and seems premised on the assumption that they are unable to participate in a meaningful way.

[20] The age discrimination is compounded by clause 14(1)(c) which renders unincorporated bodies with even one member who is under 18 ineligible for registration as a third party.

[21] Amending clause 14(1)(a) to allow that any New Zealand citizen or person ordinarily resident in New Zealand to be eligible to be a third party – and clause 14(1)(c) in a similar fashion - would deal with this matter and avoid the potential exclusion of young people from electoral processes.

Regulation of third parties

[22] As currently drafted the limitations placed on third parties create significant barriers for minor parties and individuals wishing to engage in the political process by, for example, capping permissible expenditure, requiring compliance with a complicated list of regulatory requirements and imposing penalties for non-compliance. The Commission considers that the proposed regulation is too draconian and could limit participation of minor players in the electoral process. Why this is of importance is well expressed in the submission by Associate Professor Andrew Geddis [at paras 41 et seq].

[23] A number of the changes suggested appear to go some way towards ameliorating the situation. For example, increasing the limit of expenditure permissible on election advertising and deleting the need for a statutory declaration where more than \$5000/\$500 is spent on election advertising is recommended in the report and supported by the Commission.

Times when listing prohibited

[24] Under the Bill the Chief Electoral Officer will not be able to register third parties once the writ for a general election has been issued. It would follow that if a political party makes negative comments, for example, about a lobby group or a particular ethnic group, after the writ has been issued, the group would be unable to respond to the criticism if it was not listed as a third party.

[25] The report suggests that this provision should be retained in order to ensure that all the campaign participants are known in advance and there are no surprises late in the campaign. The Commission continues to have concerns about this aspect of the Bill. It considers that the issue is less about personalities and more about issues that might develop for public discussion in the volatile environment of an election period.

[26] The Electoral Commission initially recommended deleting the clause to allow groups to react to comments made in the later stages of the election campaign as it would otherwise prevent them from entering into a debate about matters that affect them during a critical part of the campaign. The Commission understands that further consideration of administrative matters has caused the Electoral Commission to recommend a final listing date closer to polling day.

[27] The Commission defers to the Electoral Commission assessment of what is administratively feasible, while urging the latest possible time.

Public Confidence in the redrafted bill

[28] The Commission has stressed the importance of an open and transparent public submission process given the proposed fundamental changes to New Zealand's electoral law. The high number of submitters, 575 written submissions and 101 oral submissions, is testament to strong interest from political groups, academics, civil society and individuals.

[29] The Commission recognises that the Committee is working under some time constraints. The Commission also appreciates the considerable work by the Committee's advisers from the Ministry of Justice and the Electoral Commission, and the detailed consideration and analysis of submissions evident in the Proceedings report.

[30] Many of the substantial concerns of submitters are likely to be addressed in redrafting. The Committee now faces the challenge of how the rationale for recommended changes and the opportunity for further improvement is incorporated into its processes. The Commission considers that public concerns would be best addressed by a further round of public consultation on a redrafted version of the Bill.

[31] If that suggestion is rejected the Commission recommends that, at the very least, an executive summary of the report is prepared, as an adjunct to the redrafted Bill, which indicates the extent to which the submissions have been taken into account. This should be circulated by email to those who made submissions. This will enable submitters to assess the proposed changes and make their views known to Committee members and other Members of Parliament in time for the parliamentary debates on the reported back Bill.

The Commission appreciates having had an opportunity to comment on the changes suggested.

Yours sincerely



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CHIEF COMMISSIONER
Te Amokapua