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Report of the

## **ATTORNEY-GENERAL**

under the New Zealand Bill of Rights Act  
1990 on the Electoral Amendment Bill (No. 2)

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990 and  
Standing Order 260(2) of the Standing Orders of the House  
of Representatives

1. I have undertaken an examination of the Electoral Amendment Bill (PCO 3737/11) ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). I conclude that the new 228A proposed by clause 54 of the Bill, which would insert limitations upon the publication or discussion of opinion polls, appears to be inconsistent with the right of free expression affirmed by section 14 of the Bill of Rights Act and does not appear to be justifiable in terms of section 5 of that Act. I do not consider there to be any objection to any other provision of the Bill.
2. As required by section 7 of the Bill of Rights Act and Standing Order 260, I draw this inconsistency to the attention of the House.

### **The Bill**

3. The Bill proposes a wide range of amendments to electoral administration, principally in the areas of administrative structure and procedures, enrolment, aspects of voting by electors registered in the Maori electoral districts and the manner in which votes are counted. These provisions, together with consequential amendments to the Citizens Initiated Referenda Act 1993, are concerned with the refinement and, in some instances, the updating of the Electoral Act 1993. I do not consider that any of these provisions give rise to any objection in respect of the Bill of Rights Act.
4. However, clause 54 of the Bill would insert a new section 228A that would make it an offence to publish opinion poll results during a 28-day period prior to polling day. The term "publish" is defined by the proposed section 228A(3) to include making results known or commenting upon those results by a variety of means including print and broadcast media and the internet. I note that in these respects, clause 54 reproduces clause 4 of the Electoral (Public Opinion Polls) Amendment Bill, which I drew to the attention of the House under section 7 of the Bill of Rights Act in 2000.<sup>1</sup>

### **The Bill of Rights Issue**

5. The proposed restriction upon publication of opinion poll results constitutes a *prima facie* limit upon the right to freedom of expression, including the right to receive information and opinion, affirmed by section 14 of the Bill of Rights Act. Opinion poll results clearly fall within the scope of information and opinion as protected by section 14. It remains to consider whether the *prima facie* limit is reasonable and demonstrably justifiable in a free and democratic society in terms of section 5 of the Bill of Rights Act.
6. The Court of Appeal has proposed the following approach to section 5, most recently in its decision in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16. First, it is necessary to assess the importance and significance of the objective that the limit upon a protected right seeks to achieve. Secondly, it is necessary to consider whether the limit is rationally connected to, and reasonably proportionate to, that objective. Thirdly, it is necessary to consider whether the

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<sup>1</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Public Opinion Polls) Amendment Bill (2000) AJHR E.63.

limit interferes with a protected right to the least possible degree necessary to achieve the objective in question.

### Assessment

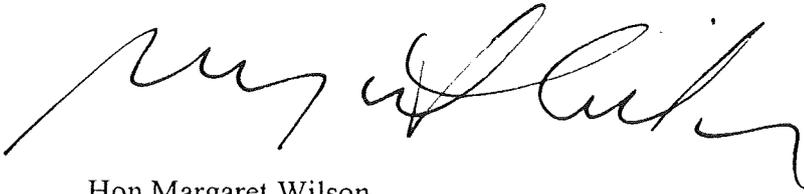
7. Unlike the Electoral (Public Opinion Polls) Amendment Bill, the Bill does not give an indication of the objective of the proposed section 228A in the explanatory note. It is, however, reasonable to presume that the objective is concerned with the avoidance of potential adverse effects upon the electoral process arising from opinion poll results and, possibly, with the suppression of potentially misleading polling information.
8. Turning to the first objective I note that in *Thomson Newspapers v Canada (Attorney-General)* [1998] 1 SCR 877, the Supreme Court of Canada held that a prohibition on the publication of opinion poll results within three days of an election was an unjustifiable infringement of the freedom of expression protected by the Canadian Charter of Rights and Freedoms. The Court in that case was able to consider extensive factual material concerning the effects of opinion polling upon electoral behaviour.
9. In *Thomson*, above, there was no indication of adverse effects of the publication of opinion poll results sufficient to warrant its prohibition. I am, moreover, not aware of any further material, and particularly of any material relating to the New Zealand electoral process, that would serve to overturn that conclusion. In addition, I note that the United Nations Human Rights Committee has also criticised restrictions upon the publication of opinion polls.<sup>2</sup> In the absence of factual material to the contrary, I do not accept that the possible adverse effects of polling information give rise to an important or significant objective.
10. Turning to the second objective, I accept that the suppression of potentially inaccurate opinion poll results could constitute such an objective. However, I am unable to accept that the blanket restriction imposed by the Bill is rationally or proportionately connected to that objective, as it does not seek to differentiate between accurate and inaccurate opinion poll results.
11. In any event, I am mindful that the results of opinion polls currently form a significant component of the electoral process in New Zealand. Political discourse lies at the core of the right to express and receive information that is affirmed by section 14 of the Bill of Rights Act. I note that the Electoral Act currently contains a similar but much more specific constraint in section 197(1)(c), which places a limit upon advertising on polling day. In light of the breadth of the limit proposed by the Bill, strong justification would be required. There does not appear to be any such justification here.
12. In summary, I conclude that the proposed section 228A does not appear to be justified in the terms of section 5 of the Bill of Rights Act.

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<sup>2</sup> See, for example, *Third periodic reports of States parties due in 1994: Belgium*, UN Doc. CCPR/C/94/Add.3, paras. 270 – 271.

**Conclusion**

13. I conclude that clause 54 of the Bill appears to be inconsistent with section 14 of the Bill of Rights Act and does not appear to be justified under section 5 of that Act.

A handwritten signature in black ink, appearing to read 'Margaret Wilson', written in a cursive style.

Hon Margaret Wilson

Attorney-General