Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Electoral (Strengthening Democracy) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 269 of the Standing Orders of the House of Representatives

1. I have considered whether the Electoral (Strengthening Democracy) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. I have concluded that the provisions of the Bill that cap a donor's donations and loans, to a candidate or a party, at $35,000 appear to be inconsistent with the right to freedom from expression affirmed in s 14 of the Bill of Rights Act. I consider that a donation cap is certainly capable of being a justified limit on the s 14 right, but I have insufficient policy information at present to conclude that the proposed cap is such a justified limit.

3. As required by section 7 of the Bill of Rights Act, I draw this apparent inconsistency to the attention of the House of Representatives.

The Bill

4. The Bill is a Member's Bill proposing several amendments to the Electoral Act 1993 ('the Act') covering a broad range of electoral issues. The explanatory note states that it seeks to "ensure fair and transparent electoral processes, giving disenfranchised people their right to vote, and increased participation and confidence in our democracy". The proposed amendments are either the result of recommendations from the Electoral Commission or respond to "recently highlighted shortcomings in the Act".

Donations

5. The Electoral Act establishes a comprehensive regime for donations to political candidates and parties. The Bill proposes a number of changes to the regime:

    5.1 A donation to a candidate that, either on its own or when aggregated with all other donations made by or on behalf of the same donor, is capped at $35,000 (in sum or value) per campaign; and capped at $35,000 per calendar year for a donation to a party. The amount received over $35,000 must be returned to the donor or if this is not possible paid to the Electoral Commission. (The receipt of any donation in excess of $35,000 must be detailed in the candidate or party returns).

    5.2 All references to $1500 are amended to $1000, and parties must disclose the details of donors who donate over $1000 (reduced from $15,000) in their return. As such, anonymous donations (where the party/candidate does not know the donor's identity) can only be made up to $1000; and for other donations (where the party/candidate knows the donor's identity), candidates and parties must record the details of every person donating over $1000 (in sum or value) and report those details in their returns, which are publicly available.[1]

    5.3 Candidates and parties must disclose the details of all overseas donors in their returns (not just where the donation exceeded $50).

---

[1] Clause 33 of the Bill says that any donation that, on its own, exceeds $1000, must be reported; and any donation that, when aggregated with other donations made by the same donor within a month, exceeds $1000, must be reported.

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives - 2021

5.4 The process by which the identities of donors donating over $1500 to a party may be protected from disclosure to both the party and the public is repealed.

5.5 Parties may not enter into loans over $35,000, or any loan with an overseas person.

Capping a donor's donations and loans at $35,000

6. The Bill would cap the sum or value (or aggregate sum or value) that can be donated by or on behalf of a donor, to a candidate or party, at $35,000. Any excess amount would be either returned to the donor or paid to the Electoral Commission. It provides that agreements, arrangements, or understandings that circumvent this requirement may be a corrupt practice or an illegal practice.

7. It would also prevent parties from being able to enter into loans over $35,000, or any loan with an overseas person. Contraventions of these provisions may be a corrupt practice or an illegal practice, and agreements, arrangements or understandings for the purpose of circumventing these provisions may be an illegal practice.

8. It is useful to note that a candidate or party donation can either be monetary, the equivalent of money, goods or services, or a combination of those things. Free personal labour is not a donation for the purposes of the Electoral Act.[2]

Is the s 14 right to freedom of expression engaged?

9. I consider any non-anonymous political donation is an expressive act for the purposes of s 14 of the Bill of Rights Act (the "right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form"). Where the donor and the party or candidate know each other's identities, a political donation of any size impliedly expresses the donor's support for the donee party or candidate. Giving free personal labour to a party or candidate, while not a donation under the Electoral Act, is also an expressive act for the same reasons.

10. While the fact of a donation *per se* has an implied expressive quality of support or alignment between donor and donee, the nature of the donation communicates something about the strength of that support or alignment, depending on the resources of the donor. Giving a large sum of money therefore is likely to indicate a greater level of support or alignment than giving a small sum of money. To a similar effect, giving a large amount of free personal labour has a different implied expressive quality from giving a small amount of free personal labour.

11. In other words, all donations convey the same implied expressive message of support or alignment between donor and donee, but larger donations are likely to indicate a more intense or heightened level of support for the party or candidate. A donation cap largely leaves intact the ability of donors to express their support or alignment through the making of a political donation. This means, in my view, that donation caps infringing s 14 are certainly well capable of being justified.

---

2 Electoral Act 1993, s 207(2).

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives - 2021

12. In my view, then, the cap on a donor's donations places a limit on the s 14 right to freedom of expression, because it limits the extent to which donors can fully express their political support by making large political donations. The cap on a lender's loans may also limit s 14 for the same reasons. For present purposes I am prepared to accept that individuals can express heightened political support through a loan, not only a donation.

Is the limit on the s 14 right a reasonable and demonstrably justified one?

13. The question is whether this limit can be justified in terms of s 5. This requires examination of (1) whether the limit serves a purpose sufficiently important to justify curtailment of the right; and (2) whether the limit is rationally connected to that objective, impairs the right no more than is reasonably necessary, and is in due proportion to the importance of the objective.

14. I emphasise at the outset that as there is no agency responsible for developing the policy behind the Bill, I do not have access to information which explains or provides a robust justification for the donation caps.

15. Nonetheless, I entirely accept that the objective behind the cap is likely to be to increase confidence in our democracy in the sense of preventing political donations from having an outsized or improper influence on Members' decisions/agendas/priorities or party policies. Preventing such outcomes is undoubtedly an important goal to justify limiting s 14, and a donation cap is as a matter of logic rationally connected to the goal of preventing donors from having an outsized or improper influence on the political process.

16. I also acknowledge that a preventative approach may be appropriate, i.e. enacting the Bill now will avoid problems of undue influence from developing or arising. However, in the absence of policy analysis behind the amount of the cap and the nature of the problem to be addressed, I do not currently have enough information to assess the remainder of the s 5 test, namely whether the proposal is minimally infringing of rights, and whether its benefits are proportionate to its impacts on s 14. It is for example unclear why a $35,000 cap has been proposed; what the scope of the outsized or improper influence problem is said to be in New Zealand; how donations from related corporates and other entities might best be handled (albeit I am not expressing the view that they necessarily have the same right to freedom of expression as individuals); and how the position of bodies representing wide membership like non-governmental organisations, including trade unions, business groups and social advocacy groups, have or should be accommodated (if different). These sorts of matters need further exploration.

17. It should be clear, then, that my strong view is that a cap on the amount of a donation only amounts to a minor limitation on s 14 as explained above (because expression by way of a donation is still permitted), and is certainly capable of being justified. But in the absence of information before me at present to address whether the cap is proportionate to the objective, I am of the view that the proposed donation cap (and loan cap) is apparently inconsistent with s 14, and on the information available to me, that inconsistency has not been justified under s 5.

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives - 2021

Overseas persons and s 19 right to freedom from discrimination

18. As noted above, the Bill provides that a party may not enter any loan with overseas persons – defined as persons who reside outside of New Zealand and are not New Zealand citizens or registered electors, and overseas entities. Conversely, overseas persons may not enter loans with parties and so cannot express political support in this way at all.

19. For present purposes, I will assume that the Bill of Rights Act applies to overseas persons in this context. Their right to free expression and right be free from discrimination on the grounds of nationality or citizenship may be engaged.[3] Even if this was the case, however, my assessment is that limits on the expression of overseas non-citizens and non-electors, and differential treatment of overseas non-citizens and non-electors, are clearly justifiable. Overseas non-citizens and non-electors do not have a genuine stake in New Zealand's electoral process. Restricting their ability to give loans, in the absence of that nexus, is justified.

Capping anonymous donations

20. The Bill would lower the threshold for anonymous donations (where the identity of the donor is not known to the party or candidate) from $1500 to $1,000. The necessary first question is whether the donor's s 14 right to freedom of expression is engaged, given that the reduction is in relation to their making of a totally anonymous donation. On the current state of the law, I do not consider this right is engaged. With fully-anonymous donations, there is no attempt by the donor to convey meaning to another. The necessary mind-to-mind communicative element is missing, which is an essential part of freedom of expression. If the right *were* engaged, then I consider the objective of greater public transparency in the making of political donations, leading to increased public trust in our electoral system, is sufficiently important to justify the limit. The reduction from $1500 to $1000 for anonymous donations would appear to remain a proportionate measure.

Amending disclosure requirements

21. The Bill would lower various disclosure and reporting thresholds in the Act to $1000, from $1500. Most notably, it would also reduce the amount of a donor's donation to a party, the details of which a party would be required to disclose in its return, from $15,000 to $1000. People who do not wish it to be publicly known that they have donated money to a candidate or a political party would not be able to donate more than $1000 (in sum or value). Candidates must also disclose details of all donations from overseas persons, rather than just donations over $50.

22. The provisions place a practical limit on political expression by subjecting these forms of political support to public discourse and so potentially "chilling" such support. The issue is whether these limitations on the s 14 right are justifiable in terms of s 5.

23. In my view, an objective of increased transparency in the making of political donations, so the public can understand the potential financial influences on political

---

[3] This would be indirect discrimination, given that citizenship is not a prerequisite for registration as an elector: Section 74(1)(a)(ii) of the Electoral Act permits registration as an elector by permanent residents.

parties and candidates, is clearly important. It leads to public trust in the integrity of our electoral system.

24. The disclosure requirements add transparency to the process, and are rationally connected to providing information to the public. Disclosure requirements already exist: the Bill just lowers the general threshold for details of disclosure from $1500 to $1000, albeit the threshold for disclosing details of a donor's party donation is lowered from $15,000 to $1000 (to align the candidate and party requirements). I do acknowledge the significance of that. Still, while increased disclosure and reporting on donations is potentially a disincentive for such activity, I consider they can be seen as reasonable and proportionate measures to promote transparency and public trust.

Repealing the 'protected disclosure' process

25. The Bill also proposes to repeal those provisions that set out a process by which larger donations (over $1500) can be made anonymously to a party, without the party knowing their origins. For the reasons set out above, I do not consider the donor's s 14 right to freedom of expression is engaged, given that what is being removed is their ability to make a larger donation *totally* anonymously (other than being known by the Electoral Commission). If it were, however, I consider the transparency and public trust objectives would mean that the limit on the right, i.e., the inability to make an anonymous donation over $1500, was justified.

Amendments to Māori electoral option

26. The Bill proposes removing restrictions on when, and how frequently, Māori voters can elect to exercise the Māori electoral option. The key aspect of this is that the Bill will replace the current four-month period prescribed in the *Gazette* notice with the ability to exercise the Māori electoral option "at any time", in a form and manner approved by the Electoral Commission.

27. The amendments to the Māori electoral option overcome the current restrictions on the timing and frequency of exercising the option, and so heighten Māori rights to political representation. This can be seen as supporting the right to equal suffrage under s 12 of the Bill of Rights Act. I considered whether the amendments could be considered to discriminate against people of non-Māori descent, contrary to s 19(1) of the Bill of Rights Act, but I do not consider they do so. I refer to previous vetting advice on the Electoral (Māori Electoral Option) Legislation Bill, dated 2 May 2022, on this issue.

Extending the voting age

28. The Bill would lower the voting age from 18 to 16 years. It does so primarily by amending the meaning of "adult" to mean persons of or over the age of 16 years, as s 74 of the Act provides that every adult person is qualified to be registered as an elector. There are other consequential amendments.

29. Section 12 of the Bill of Rights Act affirms the right to vote for "every New Zealand citizen who is of or over the age of 18 years". No inconsistency with the Bill of Rights Act arises from extending the right to vote to more people than those whose right is guaranteed in s 12.

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives - 2021

Removal of absence limits for citizens who are overseas

30. The Bill seeks to remove the requirement for New Zealand citizens living overseas to have visited New Zealand within the last 3 years to maintain their voting rights. It does so primarily by repealing s 80(1)(a) and making other minor amendments.

31. As above, s 12 of the Bill of Rights Act provides that every New Zealand citizen over the age of 18 has the right to vote. It is not an absolute right, as s 80 of the Act sets out several reasons why people who may otherwise be eligible to register to vote are disqualified from doing so, including by being overseas for more than three years. The Bill proposes the removal of one of those reasons for disqualification. I see no Bill of Rights Act inconsistencies with this proposal.

Repeal of prohibition on prisoner voting

32. At present, people detained in a prison under sentences of life imprisonment, preventive detention, or imprisonment for a term of three or more years are disqualified for registration as electors under s 80(d) of the Act. The Bill would repeal s 80(d) to allow all those serving prison sentences to register to vote, if they fulfil the other eligibility requirements.

33. Again approaching the matter as a question of consistency with the Bill of Rights Act, I consider that removing one of the reasons for disqualification from voting is not inconsistent with the Bill of Rights Act.

Expanding the reserved provisions

34. Section 268 of the Act provides that certain provisions of the Act cannot be amended or repealed without the support of 75% of all the members of the House of Representatives, or a successful referendum. The Bill expands the list of reserved provisions to include all those provisions of the Act that relate to who is qualified/disqualified to register as an elector and vote in an election. (However, those provisions are not reserved provisions to the extent that their amendment or repeal would *extend* qualification to register to vote.)

35. From a Bill of Rights Act perspective, I see no inconsistencies with this proposal.

Party rules

36. The Bill would amend s 71B to provide that, in any dispute relating to the selection or ranking of candidates to represent a party as members of Parliament, the rules that were submitted to the Electoral Commission at the time of the dispute are the rules applicable to the dispute. I do not consider this raises issues of inconsistency with the Bill of Rights Act.

List seats

37. The Bill amends the rules around list seats in a number of significant ways. I see no issues of Bill of Rights Act compliance in this proposal.

Conclusion

38. I have concluded that the Bill appears to be inconsistent with the right to freedom of expression, affirmed in s 14 of the Bill of Rights Act, to the extent that the Bill caps a

donor's donations and loans, to a candidate or a party, at $35,000. I consider that the limit on the right is certainly capable of being justified, but have insufficient information at present to conclude this is the case.

Hon David Parker
Attorney-General

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives - 2021