

2 December 2019

Attorney-General

**Electoral Amendment Bill (No 2) (PCO22502/10.0) — Consistency with the New Zealand Bill of Rights Act 1990**

**Our Ref: ATT395/304**

1. We have examined this Bill for consistency with the New Zealand Bill of Rights Act 1990. We have concluded that, while the Bill raises freedom of expression issues under s 14 and presumption of innocence questions under s 25 of the Bill of Rights Act, it appears to be consistent with that Act in terms of s 7.

**Outline of the Bill and issues raised**

2. The Electoral Act 1993 currently provides that if goods or services are provided to a candidate or party at a value less than their reasonable market value (being a value that exceeds \$300 in the context of a candidate donation, or \$1,500 in the context of a party donation) the difference between the 2 values is treated as a donation.
3. Under the Bill, the current position will continue to apply to goods and services provided by a New Zealand person, but for goods and services provided by an overseas person, the reasonable market value threshold decreases to \$50. The Bill's definition of overseas person is the same as the current Electoral Act definition; namely a person who resides outside New Zealand and is not a New Zealand citizen or registered as an elector, a body corporate incorporated outside New Zealand or an unincorporated body that has its head office or principal place of business outside New Zealand.
4. The Bill also provides that goods or services provided by a New Zealand person to a candidate or party free of charge are not a donation if their reasonable market value is not greater than \$300 and \$1,500, respectively, but in the case of goods or services provided by an overseas person free of charge to a candidate or party the threshold decreases to \$50.
5. The Bill will require that, in the case of a donation funded from contributions, the donor identify all contributors who are overseas persons and who are contributing more than \$50 in sum or value. Contributors who are New Zealand persons need only be identified if they contribute more than \$1,500 in sum or value.
6. The Bill further provides that, if a candidate or party receives an anonymous donation, that donation or its value must be paid to the Electoral Commission less \$50 if there are reasonable grounds to suspect the donation was received from an overseas person, or less \$1,500 in any other case.

7. The Bill also amends the principal Act to provide that donations from an overseas person may not exceed \$50. Amounts above this threshold must be returned by a candidate or party to the donor or, if this is not possible, paid to the Electoral Commission.
8. The Bill proposes a new duty on candidates and party secretaries receiving a donation to take all reasonable steps in the circumstances to ascertain whether the donation was made by or on behalf of an overseas person; or whether any contribution to a donation was made by or on behalf of an overseas person (new s 207JA (cl 8 of the Bill)). If a candidate or party secretary ascertains that a donation or contribution to a donation was made by an overseas person, or that there are reasonable grounds to suspect that the donation or contribution was made by an overseas person, the candidate or party secretary must comply with section 207K.
9. A failure to perform the duty in new s 207JA will mean that the candidate or secretary will not be able to establish the proposed defence in s 207L(3) of having taken reasonable steps to ascertain whether the donation was made by an overseas person.
10. Conversely, persons charged under s 207L will have a defence if they can establish that they complied with the duty in s 207JA(1).
11. The Bill provides that an overseas person may not make a donation that is protected from disclosure under subpart 4 of Part 6A of the principal Act (an anonymous donation).
12. Under the Bill a party secretary will now be required to reside in New Zealand.
13. New s 221A (cl 16 of the Bill) expands the definition of electoral advertisement to include such advertisements in all media, not just print and broadcast media. (Electoral advertisements are any advertisement relating to an election (not being an election advertisement, which is an advertisement encouraging a vote for or against a particular candidate or party)). The proposed amendment is consistent with the current definition of election advertisement, which applies to advertisements in any medium, and will exclude from its scope any news or comments relating to an election made by a broadcaster, personal political views published in an electronic medium by an individual who does not make or receive a payment in respect of a publication, and the editorial content of a publication on a news media Internet site.
14. Clause 16 will permit the publication of election-related advertisements in any medium, provided that such advertisements give the true name and address of the person or body at whose direction the advertisement is published

#### *Regulation of expression in respect of elections*

15. The Bill restricts free expression in relation to election campaigns in both direct and indirect ways:
  - 15.1 Donations made in support of election campaigns by overseas persons are subject to financial restrictions, reporting and other regulatory requirements. As campaign donations are the principal means by which person and bodies other than candidates and parties may advocate for a



candidate or party, these requirements do constrain this avenue for expression;

15.2 Electoral advertising is subject to certain regulatory requirements.

16. It is necessary to consider whether these various limitations are justifiable in terms of s 5 of the Bill of Rights Act: that is, whether the restrictions are rationally connected to an important objective and are proportionate to that objective.<sup>1</sup>
17. The explanatory note to the Bill records that it is intended to “send a clear signal that only those who are part of New Zealand’s democracy, and who reside in, or have a strong connection to, this country should participate in our electoral system”.
18. The limitations provided by the Bill can also be seen to advance two principles:
  - 18.1 electoral advertising should, for reasons of equity, be subject to expenditure limits; and
  - 18.2 electoral activity, including advertising by persons and bodies other than candidates and parties and the making of political donations, should take place in a robustly transparent way.
19. These principles have been widely accepted as consistent with human rights standards, including by the United Nations Human Rights Committee,<sup>2</sup> the European Court of Human Rights<sup>3</sup> and the Supreme Court of Canada.<sup>4</sup> The United States Supreme Court has, however, rejected the first principle, in keeping with the much less readily qualified character of the right of free expression in that jurisdiction<sup>5</sup>, although it has supported the second.<sup>6</sup>

### *Analysis*

20. The imposition of regulatory requirements on the reporting of donations, while both potentially a disincentive for such activity, can be seen as reasonable measures to promote transparency and public trust.<sup>7</sup>
21. The imposition of a different limit on donations from overseas persons who are not a New Zealand citizen or registered voter is consistent with the limitation on such

<sup>1</sup> See *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

<sup>2</sup> *General Comment on the right to participate in public affairs, voting rights and the right of equal access to public service* CCPR/C/21/Rev.1/Add.7, paras. 19 & 25.

<sup>3</sup> *Bonman v United Kingdom* (1998) 26 EHRR 1, [43]; *TV Vest As & Rogaland Pensjonistparti v Norway* (2009) 48 EHRR 51, [78].

<sup>4</sup> See, notably, *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569, [47]-[50] & [52] and *Harper v Canada (Attorney-General)*, [2004] 1 SCR 827, [87].

<sup>5</sup> See, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *McCutcheon v Federal Election Commission* 572 US 185 (2014). The right to freedom of expression under the United States Constitution is expressed in unqualified terms, unlike the position under art 19 of the International Covenant on Civil and Political Rights, ss 1 and 2 of the Canadian Charter, art 10 of the European Convention and ss 14 and 5 of the Bill of Rights Act. For that reason, and also noting that, *Citizens United* and *McCutcheon* are strongly polarised decisions of 5 members of the 9-member court, the United States position is not followed here.

<sup>6</sup> *Buckley v Valeo* 424 US 1 (1974), 25-26 (avoidance of corrupt influence a permissible objective).

<sup>7</sup> See, *Harper*, above n 4, at [48] and [144].

donations in cognate jurisdictions. Such measures can also be seen to support public confidence in the electoral system.<sup>8</sup>

22. The proposed amendment to broaden the current definition of election advertisement to advertisements in any medium, and the imposition of regulatory requirements on all such advertising, can also be seen as reasonable measures to promote transparency and public trust.
23. It follows that no apparent inconsistency arises.

*Limitation on presumption of innocence – s 25(c) of the Bill of Rights Act*

24. The Bill amends s 207L to provide a statutory defence. New s 207L(3) (cl 10 of the Bill) provides that to get the defence, a candidate must prove that:
  - 24.1 he or she took all reasonable steps to ascertain that:
    - 24.2 there are no reasonable grounds to suspect that a donation exceeding \$50 was made by an overseas person.
25. The Bill proposes therefore a reverse onus for an accused to establish their defence. The defence reflects an apparent assumption that the duties in s 207K (and offences in s 207L) are broadened so as to be triggered when there are reasonable grounds to suspect that a person is an overseas person. That is, broadened by the new 207JA(2). A person must “comply with s 207K” both when the person ascertains the donation *was* from an overseas person and when the person ascertains that there are *reasonable grounds to suspect* it was.
26. The new s 207L(3) will be available if one proves one took all reasonable steps to ascertain there were no reasonable grounds to suspect the donation was from an overseas person. Taking all reasonable steps to ascertain that a person is not an overseas person does not appear to be materially different from, and perhaps even encompasses, taking all reasonable steps to ascertain there are no reasonable grounds to suspect that he or she was not.
27. We consider the scope of the defence matches the scope of the offence. The new offence provision provides a means to enforce the requirement that a candidate or party secretary file a return of donations from overseas persons, and is therefore directed towards the objective of ensuring transparency and maintaining public trust in the electoral process.
28. The information that is necessary to establish the defence will be in the possession of the defendant, and it may be argued the detection and prosecution of such offences would be unreasonably constrained if it were necessary for the prosecuting agency to disprove the taking of reasonable steps in every case.
29. Furthermore, it is arguable that placing such an onus onto a defendant is justifiable where the defendant is voluntarily involved in a regulated activity.<sup>9</sup> Parties,

<sup>8</sup> Clause 16 and s 207K of the Electoral Act 1993. Such restrictions are readily upheld: see, for example, *Harper v Canada (Attorney-General)* (2002) 22 DLR (4th) 275, [193] & [289] (British Columbia Court of Appeal; reversed, but not on this point, by *Harper*, above n 4) and *Citizens United*, above n 5, 46-47. The exclusion of non-residents does not engage any ground of discrimination under s 19(1) of the Bill of Rights Act and s 21 of the Human Rights Act 1993.

candidates and their party secretaries are voluntarily involved in the donation process, which is a regulated activity. Candidates and party secretaries are or should be aware of the regulatory framework and are expected to act in accordance with the framework and with due diligence. Therefore, we consider the limitation is proportionate to the objective of ensuring transparency.

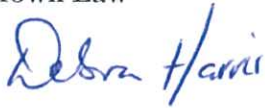
30. Consequently, no inconsistency with s 25(c) of the Bill of Rights Act arises in respect of cl 10.

### Conclusion

31. We conclude that the limitations on s 14 freedom of expression rights and s 25(c) rights to be presumed innocent posed by the Bill are reasonable limitations imposed as a means of ensuring fair, transparent and orderly elections, and are justifiable in terms of s 5 of the Bill of Rights Act.

Yours sincerely

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<sup>9</sup> See, for example, *R v Wholesale Travel Group* [1991] 3 SCR 154 (Supreme Court of Canada) and *AG v Malta* (ECtHR, App 1664/90). The point was noted with possible approval but not decided in *Hansen* at [43], [66] and [227].