



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Broadcasting (Election Programmes and Election Advertising) Amendment Bill

18/11/2016

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1 Introduction

- 1.1 The New Zealand Law Society welcomes the opportunity to submit on the Broadcasting (Election Programmes and Election Advertising) Amendment Bill (Bill).
- 1.2 The Bill implements the recommendation of the Justice and Electoral Select Committee's April 2016 report on the Inquiry into the 2014 General Election, that parties be given choice and flexibility in how they place their broadcasting allocations. The Bill will enable political parties to communicate with voters through digital media more flexibly and cost-effectively; parties will now be able to use the funding allocated to them under the Broadcasting Act 1989 for Internet advertising.¹
- 1.3 In the course of preparing this submission the Law Society has considered:
 - 1.3.1 the Report of the Electoral Commission on the 2014 General Election: March 2015;
 - 1.3.2 the Inquiry into the 2014 General Election, Report of the Justice and Electoral Select Committee: April 2016;
 - 1.3.3 the Government response to that Report: 4 July 2016;
 - 1.3.4 the Ministry of Justice's Departmental Disclosure Statement: 13 October 2016;
 - 1.3.5 the Bill introduced 27 October 2016; and
 - 1.3.6 the Hansard first reading debate: 3 November 2016.
- 1.4 The Law Society has not been able to consider the section 7 New Zealand Bill of Rights Act 1990 (Bill of Rights Act) advice to the Attorney General on the Bill. That advice has presumably been given, but it has not yet been made publicly available.

2 Inadequate public consultation

- 2.1 The Law Society has recently expressed concern about the minimal time (9 working days) allowed for public consultation on the Electoral Amendment Bill.² It reiterates that concern in relation to the current Bill, for which only 10 working days have been given for public input. This is insufficient time for those affected or interested to participate in the process.
- 2.2 In the limited time available it has not been possible for the Law Society to do a thorough analysis of the Bill and supporting materials, identify potential defects and provide detailed recommendations. However, the Law Society has identified some potential drafting issues in the Bill and brings these to the Justice and Electoral select committee's attention.

3 Drafting issues

- 3.1 Clause 4 of the Bill inserts a new Part 6: Electoral Broadcasting (new sections 69 – 80G) in the Broadcasting Act 1989. The Law Society has identified three issues of potential concern, discussed below.

¹ Explanatory Note to the Bill, p1.

² http://www.lawsociety.org.nz/data/assets/pdf_file/0014/106313/Electoral-Amendment-Bill-27-10-16.pdf.

Broadcasting "election programmes": new sections 69 and 70(3)

- 3.2 There appears to be an anomaly in the relationship between the definition of "election programme" in new section 69 and permitted election programmes at the candidate level under new section 70(3).
- 3.3 "Election programmes" as defined can be either positive or negative. They can encourage or advocate voting for or against parties or for or against particular constituency candidates.
- 3.4 Under new section 70(3), at the constituency candidate level the programme must relate solely to that candidate and encourage or persuade voters to vote for that candidate.
- 3.5 The Law Society suggests that may be too narrow in one or more respects. For example:
 - 3.5.1 It does not seem to allow a candidate to broadcast a "Two Tick" election programme, because that does not relate solely to the candidate (proposed section 70(3)(b)) and is broader than paragraph (c) because it encourages or attempts to persuade voters to vote for a party as well as the candidate.
 - 3.5.2 It does not seem to allow a candidate to broadcast an election programme encouraging voters not to vote for a competing candidate.
 - 3.5.3 It does not seem to allow a candidate to encourage a vote for another candidate while encouraging a vote for the broadcasting candidate's party. That may seem counter-intuitive, but it could be entirely logical. For example, in the current Mt Roskill by-election some parties are not standing candidates, perhaps to avoid splitting the vote. In a general election, a party may stand candidates in every seat (perhaps to increase funding) but a candidate with no realistic prospect of election in the electorate but well placed on the party list might logically say "Give your party vote to my party, but give your candidate vote to another named candidate".
- 3.6 The Law Society suggests that the select committee should consider the three situations described above (all of which are prohibited candidate programmes under new section 70(3)), and recommend changes if it considers that all or any of them should be allowed as candidate election programmes. They all fit the definition of "party election programme", and so are not absolutely prohibited.
- 3.7 It may be relevant to that analysis that, unlike party broadcasts under new section 70(2), there are no funding constraints under new section 70(3).
- 3.8 Candidates may use funding allocated by the Electoral Commission under new section 79, but are not confined to that source. A well-resourced candidate does not have any financial limits under the broadcasting provisions (although the broader electoral financing provisions in the Electoral Act 1993 would apply).

Unlimited Funding?

- 3.9 New section 70(3)(c) (in respect of candidates) and new section 80A(2) (in respect of parties and groups of parties) give the impression that there are no limits on what may be spent on various aspects of election programmes.
- 3.10 Since there are limits imposed under the Electoral Act, it may be appropriate to include cross-references to the electoral expenses provision there. That may reduce the risk of misunderstandings, particularly at candidate level.

News and Current Affairs Programmes

- 3.11 Generally, the Bill does not address news and current affairs programmes specifically, except in new section 70(4)(a) which says that the rest of section 70 does not restrict them.
- 3.12 The proposed section 72 raises an interesting issue. It says that broadcasters have to be even-handed in offering broadcasting time for purchase by parties or candidates.
- 3.13 The Bill does not address even-handedness in current affairs programming. Select committee members will be aware that this is a contentious and litigious area. There has been recent litigation – *Dunne v Canwest TV Works Ltd* (2005) and *Craig v Mediaworks Ltd* (2014)³ – concerning the inclusion of smaller party leaders in leaders' debates.⁴ The matters arose at short notice and had to be dealt with by injunction within a day or so.
- 3.14 It may be that these matters are best left for judges to decide. And it is likely, in the heat of political campaigns, that matters may end up before the courts regardless of what the legislation provides. But the select committee may wish to consider whether it should recommend inclusion of guidance to broadcasters in this amendment to the Broadcasting Act. Such provisions may well be outside the powers of the select committee because they were not in the Bill as introduced (see SO292(1)); but if the select committee thought guidance was warranted it could recommend amendment occur at a later stage by SOP. If it takes this course, the committee may want to recommend that the SOP be referred back to the committee so that television broadcasters can be given an opportunity to be heard on this point.

4 Other Issues

- 4.1 The committee made three other recommendations in relation to the broadcasting regime in its April 2016 report on the Inquiry into the 2014 General Election, that the Government should:⁵
- 4.1.1 consider providing clarification or exemptions to the restrictions on broadcasting election programmes to address satirical, humorous, and creative programmes;⁶
- 4.1.2 consider aligning the statutory tests of “election programme” in the Broadcasting Act 1989 with “election advertising” in the Electoral Act 1993 (the committee suggested that this alignment take into account the current work by the Ministry of Culture and Heritage on broadcasting and digital media convergence); and
- 4.1.3 align liability for breaching Part 6 of the Broadcasting Act to apply to the broadcaster and any person who arranged for the broadcast of an election programme, whether within or outside an election period.

³ The Dunne decision forced TV3 to include Dunne and Anderton in a debate being screened on the day of the Court decision. The Craig decision prohibited a televised debate, if it excluded Craig.

⁴ Earlier litigation (in 1969) was *Mitchell v New Zealand Broadcasting Corporation*, concerning a single candidate party and the right to a leader's address.

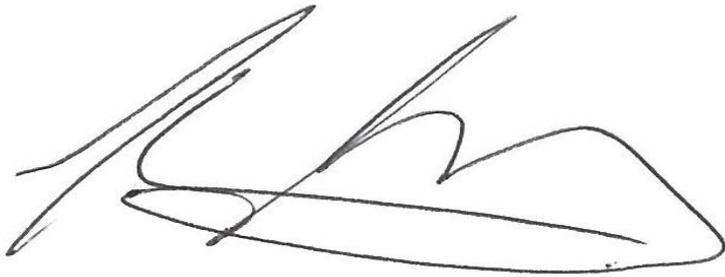
⁵ *Inquiry into the 2014 general election: report of the Justice and Electoral Committee, April 2016*, at pp 32 – 33.

⁶ The *Report of the Electoral Commission on the 2014 General Election: March 2015* makes a similar recommendation, at [242]: “The Commission considers it may be timely for policy makers to consider whether any clarification of, or additional exemptions to, the restrictions on the broadcasting of ‘election programmes’ in section 70 of the Broadcasting Act are needed to address satirical, humorous, and creative programmes.”

- 4.2 These recommendations have not been included in the Bill. The Departmental Disclosure Statement to the Bill provides no explanation for their omission. It is apparent however from the Government's July 2016 response to the committee's report that the recommendations will be considered for inclusion in the impending Digital Convergence Bill. What is less clear is when that legislation will be introduced and enacted.
- 4.3 It is also not clear why the amendments have been progressed in piecemeal fashion via three bills – the Electoral Amendment Bill and the current Bill (both currently before the committee), and the proposed Digital Convergence Bill – in short succession. This adds weight to the view expressed in the Law Society's recent submission on the Electoral Amendment Bill that a complete review of the Electoral Act 1993 is needed.⁷

5 Conclusion

- 5.1 The Law Society asks the select committee to consider the particular points raised, and again urges a more appropriate and timely process for future electoral legislation. It does not seek to be heard on this submission.

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

Kathryn Beck
President
18 November 2016

⁷ Submission 27.10.16 http://www.lawsociety.org.nz/_data/assets/pdf_file/0014/106313/Electoral-Amendment-Bill-27-10-16.pdf at paragraph 2.6.