



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Election Access Fund Bill

24/07/2018

Submission on the Election Access Fund Bill

Introduction

1. The Law Society welcomes the opportunity to submit on the Election Access Fund Bill (the Bill).

Executive summary

2. The Law Society's submission focuses on the clarity and workability of the Bill, and recommends drafting improvements to help realise the Bill's intention of giving effect to New Zealand's obligations under Article 29 of the United Nations Convention on the Rights of Persons with Disabilities (the Convention).
3. The Bill might better:
 - (a) acknowledge what New Zealand's priorities ought to be, with regard to improving compliance with Article 29 of the Convention;
 - (b) provide a definition of "disability";
 - (c) set out processes in relation to payments from the Fund: the application process, decision-making process and distribution process, as well as the uses to which payments from the Fund may be put; and
 - (d) address some ambiguities surrounding electoral education events and "not-for-profits".
4. The submission also addresses some practical issues around implementation of the measures.
5. Some of the issues require so much analysis and refinement that it might be preferable to proceed in stages. If the Bill is to proceed, the Law Society recommends that it be confined to the participation of the disabled community as candidates (and perhaps candidates for selection), and that the other aspects be deferred while the policy and practical concerns are addressed by officials.
6. In the alternative, if the Bill does not proceed, consideration could be given to incorporating the reforms, to the extent they are considered appropriate, in the government bill that almost invariably follows from the Electoral Commission's statutory report after each election, and this select committee's consideration of that report. That would enable the legislation to be developed in a coherent and comprehensive way, informed by policy analysis from officials and supported by experienced parliamentary drafters.

New Zealand's obligations under Article 29

7. The Bill is intended to give effect to New Zealand's obligations under Article 29 of the United Nations Convention on the Rights of Persons with Disabilities (Article 29).
8. Article 29 requires States to guarantee political rights to persons with disabilities and to ensure that these rights are enjoyed on an equal basis with others in a number of ways, including:
 - (a) ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; and

- (b) protecting the right of persons with disabilities to perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate.
9. As the purpose of the Bill is to give effect to New Zealand’s obligations under Article 29, the observations of the UN Committee on the Rights of Persons with Disabilities on New Zealand’s compliance with Article 29 are relevant to what should be prioritised (either in a bill or through Electoral Commission initiatives).
10. New Zealand’s compliance with the Convention was last assessed by the Committee on the Rights of Persons with Disabilities (the Committee) in a report dated 31 October 2014. Interestingly, the Committee did not make any comments on the matters addressed by this Bill.¹

Providing a definition for disability

11. The essential purpose of the Bill is to improve the opportunities for political participation by persons with disabilities, so the Bill could usefully provide a definition of disability for the purposes of providing access to the Fund.
12. One example of a definition of *disability* can be found in section 21(1)(h) of the Human Rights Act 1993:
- (i) physical disability or impairment:
 - (ii) physical illness:
 - (iii) psychiatric illness:
 - (iv) intellectual or psychological disability or impairment:
 - (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:
 - (vi) reliance on a guide dog, wheelchair, or other remedial means:
 - (vii) the presence in the body of organisms capable of causing illness.
13. The inclusion of “physical illness” and “psychiatric illness” make this an extremely broad definition. In the context of preventing discrimination, this is appropriate. However, in the context of provision of a Fund to be used to improve access to political participation,² it is only disabilities that hinder such access that are relevant.

¹ The only observation the Committee made on improvements in New Zealand related to electronic voting. More specifically, the Committee noted that under the Electoral Act 1992, persons who are blind or visually impaired could receive the assistance of an official to cast their vote in an election (see s 170 of the Electoral Act). The Committee recommended that New Zealand consider the introduction of accessible electronic voting to enable persons with disabilities to cast their votes in a truly secret manner.

For the 2017 general election, a system of secret voting using 2 telephone calls was in place, and voters can be assisted at polling booths by a person of their choosing.

One of the objectives of the Electoral Commission is online voting by 2020. It is currently continuing to monitor the results of overseas electronic voting initiatives, particularly work being undertaken by Australian electoral authorities, and has published a disability strategy called “Access 2020”. The emphasis is on actual voting rather than wider participation in the electoral process.

² Clause 6(1).

Accordingly, the Human Rights Act definition is probably too wide. The definition in the Bill should be confined to disabilities, the effects of which on political participation may be alleviated by financial grant.

14. The Law Society recommends that disability be defined in the Bill (to prevent a definition such as the one from the Human Rights Act 1993 being read-in).
15. A more suitable definition might be found in the Disabled Persons Community Welfare Act 1975, where the definition of “disabled person” is:

“disabled person means any person who suffers from physical or mental disablement to such a degree that he [or she] is seriously limited in the extent to which he [or she] can engage in the activities, pursuits, and processes of everyday life”
16. While the Explanatory Note makes mention of deaf candidates, there have been several New Zealand MPs with other disabilities, including one blind MP and at least four amputee MPs.³ The incidence of less obvious disabilities ranging from chronic arthritis to dyslexia is unsurprisingly much more difficult to identify and does not seem to have been quantified.
17. Australia has MPs at Federal and State level with cerebral palsy, and the UK has a current member of the House of Lords with spina bifida; all having to use wheelchairs. The UK has had a Home Secretary who was blind from birth (David Blunkett (2001-2004) in Tony Blair’s Labour government).
18. Unsuccessful candidates who may have had disabilities would be much harder to identify.
19. A possible definition for qualification under the Bill as a candidate entitled to assistance would probably need several elements:
 - (a) a permanent physical or intellectual disability or impairment;
 - (b) an application by the candidate for assistance with additional electioneering costs arising from the disability (some candidates with unquestionable disabilities may choose not to apply);
 - (c) acceptance by the Electoral Commission that the disability or impairment was likely to materially disadvantage the candidate in his or her electoral campaigning.

Payments from the Election Access Fund

- (i) *Confirmed candidates*
20. The Bill provides that the Electoral Commission must establish the Election Access Fund (Fund) to facilitate the participation of persons with disabilities in general elections (clause 6(1)).
21. Once accepted as a qualifying disabled candidate, there would need to be a funding allocation process.

³ Incidentally, the blind MP defeated an amputee candidate in a by election, and the position was reversed at the next general election.

22. The Bill does not specifically address who would be allocating the funds, but that role most likely sits with the Electoral Commission. The Commission also seems to have to divide the Fund among the three classes of qualifying recipients (as discussed below, at [33] – [35]).
23. While advance applications could be made, the Commission could not logically make allocations as between competing claims until nominations closed. Early nominations might well be withdrawn (section 146, Electoral Act).
24. There is a fairly short period between nomination and election day;⁴ and, of course, a much shorter period between nomination day and the opening of advance voting.
25. There might be early applications to the Electoral Commission, but as the Fund is a finite sum, it could not be allocated before all applications had been assessed.
26. Practically, the law probably would have to state that decisions of the Electoral Commission are final.
27. There is little time for a challenge, although it could be provided that the initial allocations are not affected by the outcome of any appeal and if a District Court awarded funding (or increased funding) to a candidate, the Fund must be increased accordingly.
28. The above analysis is directed to the confirmed candidate level. The position relating to candidates for selection is discussed below.

(ii) Candidates for selection

29. The Bill (clause 7(3)(a)) envisages that persons seeking selection as a candidate could qualify for funding.
30. This presents obvious issues with spreading the Fund thinly, and logically, these will likely be the first calls on the Fund.
31. Parties choose when and how they select electorate and list candidates.
32. If the Electoral Commission divided the Fund into sections, and allocated some to those seeking selection to become a candidate, there would still have to be some cut-off date so that the Electoral Commission could allocate the part of the Fund available to those seeking selection as candidates. If selected, they might qualify for further funding as a candidate.

Setting out the application and distribution processes

33. There are specific persons who will be eligible for payment out of the Fund (clause 7(3)):
 - (a) a person with a disability who is standing as a candidate in, or seeking selection as a candidate in, a general election;
 - (b) a not-for-profit entity that is organising an *election education event*;
 - (c) a party.

⁴ Under section 139 of the Electoral Act, the gap between nomination day and polling day is between 20 and 27 days.

34. The Electoral Commission must set out the basis on which such people might be eligible for payments out of the Fund (by notice in the *Gazette*). That seems to provide the Electoral Commission with discretion to formulate further criteria that will be used to determine eligible recipients of funding. No guidance is given by the Bill.
35. We anticipate that in respect of candidate applications the Electoral Commission would probably:
- (a) create rules for applying (in advance of nomination day);
 - (b) specify the level of medical or vocational assessment evidence needed;
 - (c) make it clear whether an applicant can apply for a specified sum, or simply for more general assistance;
 - (d) specify the purposes for which the funding can be spent (travel, use of interpreters etc.), and whether proof of expenditure is required (would the Fund pay a grant, or operate on a reimbursement basis?);
 - (e) specify any limitations; for example, that payments cannot be made to family members, or the circumstances in which they can be made.
36. We also note that clause 6(3) envisages the Minister determining the amount of the grant (effectively, the amount in the Fund) having regard to various factors.
37. That really is a role with no purpose. Parliament appropriates money for the grant (clause 6(2)). The Minister could not determine a greater amount. It is inappropriate that the Minister could reduce the Parliamentary appropriation.
38. It might be intended that the Minister determine the division of the Fund as between the three categories in clause 7(3).
39. However, we suggest such allocations are more properly done by the Electoral Commission.

Not-for-profit entities organising "election education events": clause 7(3)(b)

40. There are several problems with the concept of a not-for-profit entity organising an "election education event" – defined in clause 4 as an event in relation to a general election with the purpose of engaging and educating voters but which does not seek or discourage support for the election of a particular candidate or party.
41. That would be an unusual event, and if it strayed into expressions (perhaps even from the floor) that Party A had a more sympathetic policy than Party B, the event would cease to qualify. Assuming funding was provided in advance, would it have to be returned? Would there have to be a complaint to the Electoral Commission?
42. The Bill does not define *not-for-profit entities*. The term non-profit organisation is defined by the IRD as:
- Any society, association or organisation (incorporated or not):
- that is not carried on for the profit or gain of any member, and
 - whose rules do not allow money, property or any other benefit to be distributed to any of its members.

43. This definition is wider than the IRD’s definition of *charitable organisation* (which is one type of *not-for-profit entity*):
- An organisation (incorporated or not) that carries on charitable activities or exists exclusively for charitable purposes.
- Charitable purposes include:
- the relief of poverty;
 - the advancement of education;
 - the advancement of religion; and
 - activities for the benefit of the community.
- An organisation's purposes must fall within one of these categories to be charitable.
44. The Electoral Commission would need guidance as to which not-for-profit organisations would qualify for funding.
45. The largest not-for-profit organisations in New Zealand are generally believed to be the Automobile Association and the Southern Cross Medical Society. They could well organise an “election education event” to engage with and educate voters in areas such as transport or health policy.
46. Notably, charities may support the policies of a political party where they are consistent with its charitable purposes; however, they must ensure that they are independent and do not provide support or funding to a political party.⁵ There is no such restriction on other not-for-profit entities.
47. The restriction, if any, is found in the definition of “election education event”.
48. The event is held “in relation to a general election which has the purpose of engaging and educating voters”.
49. That is perhaps reasonably capable of being defined, but there is a difficulty with the words that follow:
- “and which does not seek or discourage support for the election of a particular person, party, or people”.
50. The event need not be a public event; it might just be for the members of the not-for-profit organisation. To take a likely neutral, but perhaps realistic example, consider an event organised by the Cancer Society which wants increased Pharmac funding for new cancer drugs. It organises, in relation to the general election, an event to engage with and educate voters about the cost and effectiveness of the drugs and the desirability of their being state funded. So, clinicians speak about the advantages of the new expensive drugs and the cost. Some may even speak about the shortcomings and side effects.
51. Even if no candidates or party representatives are present, as soon as any speaker says “*support Party A they will increase the Pharmac vote*”, the event is disqualified from funding.

⁵ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

52. If the meeting is being held “in relation to a general election” and with “the purpose of engaging and educating voters” it seems most unlikely that nothing will be said about the relevant policies of parties or candidates. Why else is the event being held?
53. Further, at an event such as this, there may be few disabled people actually present. On what basis would funding be provided?
54. Monitoring the neutrality of election education events held by not-for-profits will surely prove difficult. Will there be any monitoring or enforcement to ensure that election education events do not seek or discourage election of particular persons or parties? If candidates from all parties are invited to speak, does that mean that the event is or is not an election education event? The “event” or its organisers may seek to be balanced, but each party candidate obviously seeks to use his or her allocated time to seek support.
55. As a final point, “event” may need definition, and may not be an appropriate term. It seems to assume that communication with voters (disabled or otherwise) must be by physical presence; but it may be more appropriately done by distribution of printed material, sound recordings for the blind, or sign language on video and TV items. This appears to have been anticipated by the member promoting the Bill, since the Explanatory Note states that the Fund may:⁶

... be used by any not-for-profit body running an election education event *or producing an election publication* to cover costs of making election education events *and materials* accessible.

Party: clause 7(3)(c)

56. The Explanatory Note explains that “the Fund may be used by any registered political party to support the access needs of any of their members to allow them to participate internally within the party”.⁷ However, all the Bill says (clause 7(3)(c)) is that “a party” may be eligible for payments from the Fund.
57. Perhaps the Electoral Commission is expected to impose conditions and audit performance, but the Bill itself gives no guidance as to whether:
- (a) parties can spend their allocations assisting disabled candidates in addition to any funding the candidate may receive direct under clause 7(3)(a);
 - (b) parties can only spend their allocations on events targeted at disabled people, or issues they believe will particularly interest disabled people of one or more categories;
 - (c) parties can use their allocations generally to appeal to or inform disabled people about any of their policies; for example, by putting a sign interpreter on television commercials, or transporting disabled people to meetings of any kind.
58. The apparently unrestricted use of allocations from the Fund by political parties is in stark contrast to the election-related events staged by not-for-profits that engage

⁶ At p2, emphasis added.

⁷ Ibid.

with and educate voters but must not seek or discourage support for any party or candidate.

Electoral Commission's role

59. An obvious incongruity in the Bill is the detailed prescription around what not-for-profits can do and the apparent freedom for parties to spend allocations on whatever they wish.
60. These might not even be "events"; for example, if a party did a nationwide mailbox drop of key policies, and 10% of the publication addressed "disabled persons' issues" could 10% of the cost of the mailbox drop be claimed?
61. Conditions imposed by the Electoral Commission might set rules, but the Bill gives the Commission no guidance on:
 - (a) how to divide the Fund among the three purposes (clause 7(3)); or
 - (b) what the basis of eligibility (clause 7(1)) might be for each category.

Evaluation by Minister

62. The Law Society suggests that the clause 9 review, three years after the Act commences, is unnecessary.
63. The Electoral Commission is required to report on the administration of each general election within 6 months of the return of the writ.
64. That is a requirement (section 8, Electoral Act) after every general election and seems a more appropriate vehicle for a review of this Bill/Act than a separate Ministerial review.
65. If necessary, reference to the Fund and its operation and effectiveness could be included in section 8(1) of the Electoral Act; but it is probably wide enough already to include that.

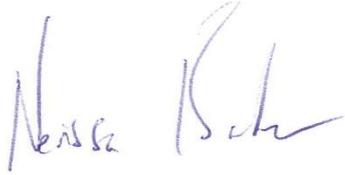
Further questions

66. The Bill gives rise to a number of other questions, including:
 - Should the same provisions apply to local authority and DHB elections, and would the funding be from taxpayers or ratepayers?
 - There is no provision in the Bill for any funding for its purposes for any by-election; but it is not clear why that should be so.
 - The current health system discriminates in favour of accident victims ahead of others. Of two candidates, one in a wheelchair after an accident, and one as a result of multiple sclerosis, the accident victim will already be getting much more assistance from the system. Would they qualify for equal assistance from the Fund?
 - Should recipients and amounts of funding in all or any of the three categories received be published?
 - Should allocations take account of whether a candidate is a list candidate or an electorate candidate? If so, should candidates in all electorates be treated

equally? Travel expenses to candidate meetings in Clutha-Southland might be costlier than in Auckland Central or Wellington Central.

- Would unspent allocations be returned to the Fund?
- Would funding from the Election Access Fund be “last resort” i.e. not in substitution for assistance such as discounted mobility taxis or paid care already available to the person?

67. The Law Society would appreciate the opportunity to be heard in support of this submission.

A handwritten signature in blue ink, appearing to read "Nerissa Barber". The signature is written in a cursive style with a large initial 'N'.

Nerissa Barber
Vice President

24 July 2018