



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Electoral Amendment Bill

27/10/2016

Electoral Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society welcomes the opportunity to submit on the Electoral Amendment Bill 2013 (Bill). The Law Society is the statutory body established in 1869 that regulates New Zealand's 12,000 lawyers. One of its statutory functions is to "*assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law*".¹
- 1.2 In the course of preparing this submission the Law Society has considered:
 - 1.2.1 the Report of the Electoral Commission on the 2014 General Election: March 2015;
 - 1.2.2 the Inquiry into the 2014 General Election, Report of the Justice and Electoral Select Committee: April 2016;
 - 1.2.3 the Government response to that Report: 4 July 2016;
 - 1.2.4 the Ministry of Justice's Regulatory Impact Statement: 22 June 2016;
 - 1.2.5 the Ministry of Justice's Departmental Disclosure Statement: 31 August 2016;
 - 1.2.6 the Bill introduced 22 September; and
 - 1.2.7 the Hansard First Reading Debate: 11 October 2016.
- 1.3 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, because it has not been made publicly available.
- 1.4 The Law Society wishes to be heard.

2 Key points

- 2.1 The Law Society expresses concern with the process by which this Bill has reached the House and the minimal time allowed for public consultation. A timeline with commentary is attached to this submission (see Attachment). It shows a lengthy development process followed by a very tight timeframe for pushing this important legislation through the House, which has allowed minimal opportunity (9 working days) for public input. This is insufficient time to properly analyse a 107 clause Bill plus schedules and has limited the opportunity to identify potential defects. This is particularly unsatisfactory given the constitutional nature of the Bill.
- 2.2 Key matters of concern in the Bill are:
 - 2.2.1 the apparent advantage given to Members of Parliament (MPs) over other candidates in respect of signage on vehicles: clause 6, new section 3A(2A);
 - 2.2.2 issues around the buffer zone for advance voting places including enforcement and definitions: clause 95, new section 197A; and
 - 2.2.3 publication of false statements and the reversal of the *Peters v Electoral Commission* High Court 2015 decision: clause 97, new section 199A.
- 2.3 There may well be other matters requiring attention, but in the very limited time available it has not been possible to give this Bill the analysis it deserves.

¹ Lawyers and Conveyancers Act 2006, section 65(e).

- 2.4 The Bill is also significant for what it does not include. The Electoral Commission has identified several other significant issues to which Government has not adequately responded. These include:
- 2.4.1 A repeat of its concern raised in 2012 and again in 2015 relating to the adequacy of the provisions for dealing with emergencies. The 2015 Electoral Commission Report noted that some preliminary work has been undertaken by the Ministry of Justice.
 - 2.4.2 Technology – the Election Management System is described as "a legacy system that is increasingly vulnerable to security and maintenance risks". There is no doubt that New Zealand is increasingly subject to cyber-attack and no reason to assume that the electoral system would be immune. While this is not a matter that needs legislative action, the Law Society considers that in reporting on the Bill, the Committee should note with concern the absence of any Government response to the warning issued by the Commission and ask the Electoral Commission to confirm to the House and the people of New Zealand that the replacement system will be in place for the 2017 election. The only comfort provided at present is a statement at page 9 of the Commission's March 2015 Report that development of a replacement system is underway.
 - 2.4.3 Replacing the Māori Electoral Option with the right for a voter of Māori descent to change roll types once in each cycle. The Committee recommended this change in its Inquiry (page 29) but it is not in the Bill.
 - 2.4.4 Automatic registration of special voters as recommended by the Electoral Commission to avoid repeat special voting by those who assume that having given all the information needed to cast a special vote, that information will be captured for the roll for future elections.
 - 2.4.5 Review of long standing and often now archaic provisions that affect matters as diverse as broadcasting, treating, social media and websites, "selfies" and voters photographing their marked voting papers,² and, of course, the broad issue of what electioneering conduct is and is not appropriate on polling day.
- 2.5 There appears to be an unfortunate narrowing of issues since the Electoral Commission's Report on the General Election. At the same time, a few matters appear for the first time in the Bill, with no apparent cause or origin.
- 2.6 The Electoral Act 1993 is now over 20 years old. The reprint as at 1 July 2016 (just short of its 23rd birthday) incorporates amendments made by 55 Acts of various degrees of significance. The Law Society submits that a complete review of the Act is needed.

3 Specific Issues

- 3.1 The three issues identified in paragraph 2.2 are discussed below.

Clause 6, new section 3A(2A) – MPs' office and vehicle signage as election advertisements

- 3.2 This provision does not have its origin in any Electoral Commission recommendation and is not mentioned in the Committee's Inquiry of April 2016, the Regulatory Impact Statement, or the Departmental Disclosure Statement.

² The Justice and Broadcasting Minister Amy Adams announced on 20.10.16 that a Broadcasting (Election Programmes and Election Advertising) Amendment Bill is to be introduced to Parliament shortly: <https://www.beehive.govt.nz/release/changes-modernise-election-broadcasting>

- 3.3 The amendment inserts section 3A(2A), which says that in determining what "contact information" is, and therefore what is not an "election advertisement", all the signage on an MP's office or vehicle must be treated as a single sign.
- 3.4 The intended effect of the amendment appears to be that so long as signage is predominantly contact information, which is very widely defined in section 3A(3), then the signage will not be an election advertisement.
- 3.5 This amendment removes the need to separate (and paint out or cover up) parts of signage at times when election advertising is prohibited.
- 3.6 However, the provision appears to confer a significant advantage for MPs over other candidates.
- 3.7 It is not clear why a non-MP candidate who wants to provide contact information to intending voters should be discriminated against in this way.
- 3.8 In the absence of any demonstrable justification, allowing MP contact details to be displayed on offices and vehicles so that they are not election advertisements, while limiting the ability of other candidates to do the same, could be a breach of the freedom of expression provided for in the Bill of Rights. The Law Society encourages the Committee to seek a Bill of Rights analysis on this aspect of the Bill from the Crown Law Office.
- 3.9 Excluding the election advertising component of contact information (by treating them as one) would also mean that in the event that Parliamentary Services do not provide the funding it still would not count as election spending. That would be a further advantage to sitting MPs over other candidates.
- 3.10 The Law Society also has two comments concerning the wording used in proposed new section 3A(2A).
- 3.11 As mentioned above, the intended effect of clause 6 appears to be that so long as signage is predominantly contact information, then the signage will not be an election advertisement. The Law Society queries whether this effect would in fact be achieved by the current wording in new section 3A(2A). New section 3A(2A) provides for a 'holistic' approach to apply only when determining whether signage is contact information (a fairly straight-forward analysis involving application of the definition of "contact information" in section 3A(3)). To achieve the intended effect, new section 3A(2A) should also apply the 'holistic' approach to determining whether contact information is exempt from being an election advertisement, i.e. in applying the requirements set out in section 3A(2)(b).
- 3.12 The Committee should consider and clarify the following questions, in respect of the reference to "vehicle of a member of Parliament" in new section 3A(2A)(b):
 - 3.12.1 How many vehicles may an MP have for this purpose? There are, on average, about 4 advance voting places for each electorate. Can an MP have a vehicle parked outside each one?
 - 3.12.2 Must the vehicle strictly be owned by the MP, or can the signage be on vehicles owned by partners, children, or family trusts?
 - 3.12.3 Is a Ministerial self-drive vehicle a "vehicle of a member of Parliament" for these purposes?

- 3.13 It may be that there are already clear rules about qualifying vehicles in the Speaker's Directions and guidance concerning use of Vote Parliamentary Services funding, which the Bill could utilise or refer to. The Committee may wish to check this.
- 3.14 In short, the Law Society questions:
- 3.14.1 whether it is appropriate to apply the provision to MPs only, and not all candidates;
 - 3.14.2 whether the current wording used in new section 3A(2A), which focuses only on whether signage is "contact information" rather than whether it is exempt from being an "election advertisement", will necessarily achieve its intended effect; and
 - 3.14.3 whether it is appropriate to use a term as vague as "vehicle of a member of Parliament".

Clause 95, new section 197A – Interfering with or influencing advance voters

- 3.15 Advance voting doubled between 2011 and 2014 (to 30% of the total votes) and is expected to increase.
- 3.16 The key to the proposed section 197A is the advance voting place and its 10 metre (or less) buffer zone around entrances.
- 3.17 The Law Society questions whether the proposed section 197A is necessary, and suggests that there would be significant practical difficulties in applying and enforcing it.
- 3.18 Section 197A is not appropriate for hasty enactment for the following reasons:
- 3.18.1 The assumption that the existing section 197 is inadequate is untested. Section 197 prohibits interfering with an elector in or on the way to a polling place with the intention of influencing the elector's vote or advising the elector how to vote. It would be helpful to explore how many prosecutions have been brought under this section, and whether they were successful. Without a demonstrated mischief to which section 197A is directed, it is difficult to analyse why and how the current section 197 is inadequate.
 - 3.18.2 New section 197A is not likely to address any inadequacies. If voters are going to be influenced in how they vote by passive signage in the 10 metres around an advance voting place or in the advance voting place itself then there are so many exceptions that the provision will not be effective. The exceptions include anything worn by anyone who is not an election official. So the voter herself or himself, or the person in front or alongside them can wear ribbons, streamers, rosettes, party lapel badges etc in party colours; section 197A(2)(c)(iv)(A) and (C). The same items can be displayed on a vehicle parked within the buffer zone (say outside a public library); section 197A(2)(c)(iv)(B). There would be nothing to prevent a person from displaying election signs that can be seen from a window of an advance voting place, provided the sign was further than 10 metres from the entrance. It is difficult to see just what material might be covered by the proposed section 197A, but it could include signs or hoardings on buildings or on the lawn within the buffer zone.
 - 3.18.3 There are likely to be difficulties with the enforcement of section 197A. The Electoral Commission or the manager of the polling place is responsible for enforcement. For example, if the hoarding is on a wall within the buffer zone that is private property, it is not clear whether it is intended that the Electoral Commission can enter on the private property and remove or obliterate the offending statement or thing. There is no explicit power of entry. In 2013 the Committee recommended that a provision which involved amendments to sections 197 and 198 to limit the wearing or display of rosettes and party

colours, streamers etc not proceed, out of a concern about workability and enforceability.³

- 3.18.4 Section 199 refers only to expenses incurred by Returning Officers. Clause 96 is intended to provide for the recovery of expenses of removing or obliterating material from an advance voting place or its buffer zone by the Electoral Commission. Clause 96 requires amendment to refer to the Electoral Commission as well as Returning Officers.
- 3.19 The Law Society submits that the proposed section 197A should be omitted, and the matter deferred for consideration in the wider context of a thorough analysis of what is and is not appropriate on polling day or in relation to the advance voting place. In the meantime, section 197(1)(a) is sufficient to deal with any interference with an elector in the buffer zone.
- 3.20 If the issue is people physically disturbing potential voters in the buffer zone in a way that is not "interference" in terms of the existing section 197(1)(a), then the legislation should address that particular issue with a view to ensuring limitation on freedom of expression is kept to a minimum.

Clause 97, new section 199A – Publishing false statements to influence voters

- 3.21 This clause reverses the decision in *Peters v Electoral Commission*.
- 3.22 Timing issues (see Attachment) meant that the matter could not be considered by the Electoral Commission in its 2015 Report. The decision was available to and no doubt influenced the Ministry of Justice in producing its Regulatory Impact Statement dated 22 June 2016. But the Ministry of Justice only consulted the Electoral Commission and the Regulatory Impact Statement was not made public until months later.
- 3.23 Presumably the Electoral Commission considered the High Court decision was correct, because it did not appeal.
- 3.24 The rationale for new section 199A appears to be sound. However, overturning High Court decisions is best done in a considered manner.
- 3.25 The proposed section 199A requires an intent to influence a vote of an elector and that the publisher knows the statement is false in a material particular. The rationale is that deliberately false statements are damaging because the victim has little or no opportunity to correct, rebut, or explain before the poll starts. The penalties for a corrupt practice are appropriately severe.
- 3.26 The Law Society has identified the following issues with proposed section 199A:
- 3.26.1 Section 199A has no application in respect of false statements made just before and during the advance polling period (unless within the last 2 days). It seems likely that at least 30% of votes may be cast during that period. According to the Electoral Commission Report (at page 83) about 400,000 votes had been cast before the 2-day period started. False statements influencing these advance voters would be outside the new regime.
- 3.26.2 The relationship of section 199A with section 197(1)(g) and the defence provided in section 197(2A) is unclear. Section 197(1)(g) and the proposed section 199A overlap in some respects. Essentially, a person could make a statement on polling day that may influence voters, which then constitutes an offence under both provisions. (The offences in both provisions apply on polling day until the close of polling, with section 119A also applying to

³ Justice and Electoral Committee report 18.12.2013 on the Electoral Amendment Bill 149-2 <http://legislation.govt.nz/bill/government/2013/0149/latest/DLM5559706.html>. The Committee accepted the New Zealand Law Society submission 17.10.2013 that the provision in that Bill relating to rosettes and party colours, streamers etc was seriously flawed and unworkable in practice: http://www.lawsociety.org.nz/_data/assets/pdf_file/0003/73227/Electoral-Amendment-Bill-17-10-13.pdf.

the two days prior. Section 197(1)(g) only requires a likelihood to influence a voter, though it can cover intent as well, which is the requirement in section 199A.) The defences to the two offences are similar but not identical. The potential penalties differ, but in both cases can be substantial. This overlap is undesirable and could cause uncertainty.

3.27 If section 199A proceeds, it would be desirable for sections 197(1)(g) and 199A to be reconciled and aligned.

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

Kathryn Beck
President
27 October 2016

ATTACHMENT:
Timeline of the process since the last election.

ATTACHMENT: TIMELINE

		Date	Comment
1.	2014 General Election	20 September 2014	
2.	Justice and Electoral Select Committee Inquiry	30 October 2014 to 21 April 2016	18 months, though probably not much happened until the Electoral Commission Report in March 2015. No record of hours or days spent released, but 211 submissions received, and 33 heard.
3.	Electoral Commission Report on Election	March 2015	
4.	Peters v Electoral Commission	12 October 2015 9 March 2016	Hearing Decision released
5.	RIS from MOJ	22 June 2016	Dated, but not released until Bill introduced. Analyses AVP buffer zone and Peters Case issues and options in detail. Consultation with Electoral Commission only.
6.	Government Response to J&E Committee Inquiry Report	4 July 2016	Less than 2 pages. Does not mention the two issues analysed in the RIS, so the proposals or analysis have not been shared with the Select Committee or the public generally.
7.	Departmental Disclosure Statement	31 August 2016	Dated, but not released until Bill introduced. Contains very detailed commentary. Consultation confined to Electoral Commission, which is described as "comfortable".
8.	Bill introduced	22 September 2016	
9.	First Reading	11 October 2016	Referral to Select Committee.
10.	Select Committee	13 October 2016	Select Committee calls for submissions and allows 9 working days for public submissions, closing 27 October.
11.	Report back due	13 February 2017	Select Committee has 3 ½ months from closing of submissions to consider and report back to House.