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# Electoral Amendment Bill

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*31/08/2022*

## Electoral Amendment Bill

### 1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Electoral Amendment Bill (the **Bill**).
- 1.2 The Law Society considers that the reduction of the threshold at which the names and addresses of donors to political parties are required to be published risks limiting those individuals' right to freedom of expression and imposes on their privacy interests. These limitations are arguably disproportionate to the influence such donors could have on the electoral process, and therefore the public interest in having their identities made public. In regard to the proposed expansion of eligibility for overseas-based New Zealand citizens and permanent residents to vote in the upcoming 2023 election, the Law Society submits that the Committee should consider whether the justification for restricting overseas voting still applies.
- 1.3 This submission has been prepared with input from the Law Society's Human Rights & Privacy Committee.<sup>1</sup>
- 1.4 The Law Society does not wish to be heard.

### 2 The NZBORA and privacy dimensions to proposed changes to donation disclosure regime

- 2.1 The Bill proposes to lower the threshold at which the name and address of a donor is required to be reported and published from \$15,000 in a year to \$5,000.<sup>2</sup>
- 2.2 Section 14 of the New Zealand Bill of Rights Act 1990 (**NZBORA**) protects an individual's right to freedom of expression. The Law Society agrees with the consistency advice produced by Crown Law that donation to a political party is an expressive act for the purposes of section 14 of NZBORA, as it conveys a person's political views.<sup>3</sup>
- 2.3 The Bill does not directly restrict a person from holding a particular political view or expressing this view via donations. However, in the Law Society's view there is a risk that a reduction in the threshold would have a chilling effect on the exercise of those rights. For obvious reasons, a person may wish to express their political views anonymously and may be less inclined to do so if disclosure of their name and address in connection with a donation is required to be reported and made publicly available. With that in mind, any requirement that donations be made public risks undermining the right to freedom of expression inherent in political donations.
- 2.4 New Zealand's electoral laws have included donation disclosure requirements for some years. The public disclosure of significant donors can be seen as a justified limit on the right to freedom of expression, to achieve transparency and confidence in electoral processes. The Law Society considers that the publication of significant donors can act as a safeguard against the risk of individuals or groups obtaining inappropriate political influence,

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<sup>1</sup> More information regarding this committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>2</sup> Clause 4(1).

<sup>3</sup> <https://www.justice.govt.nz/assets/Documents/Publications/20220628-NZ-BORA-Advice-Electoral-Amendment-Bill.pdf>

preferential treatment, or benefits in return for donations. The question becomes at what point the public interest in transparency justifiably limits the individual's rights of expression and their personal privacy interests.

- 2.5 The reasonableness of the limitation may be best assessed by the number of people that the proposed changes are expected to affect. By way of example, in reviewing the 2020 and 2021 returns for the five biggest parties by share of party vote at the 2020 election:<sup>4</sup>
- (a) For the 2020 year, there were 249 individuals who donated between \$5,000 and \$15,000 (i.e., who under the proposed amendments would have their name and address published in the annual returns of the party that they had donated to);
  - (b) For the 2021 year, there were 95 individuals who donated between \$5,000 and \$15,000.
- 2.6 While the reform may not impose on a significant number of individuals, it should be viewed in the context of the relatively small number of political donors in New Zealand. For example, in 2020 there were 954 donations of between \$1,500 and \$15,000 made to the five parties referred to above. Accordingly, those that donated between \$5,000 and \$15,000 account for around 26 percent of those 'minor' donors, which is a relatively significant amount.
- 2.7 The disclosure regime also imposes on the individual donor's privacy interests. While NZBORA contains no privacy right, the Privacy Act 2020 gives effect to the principles recognised in the International Covenant on Civil and Political Rights, which includes protections against arbitrary or unlawful interference with an individual's privacy.<sup>5</sup>
- 2.8 Disclosing identifying information about donors gives rise to privacy concerns. Section 210 of the Electoral Act 1993 requires both names and addresses of donors be disclosed. The Law Society has previously expressed concern about disclosure of addresses and maintains that view. Lowering the threshold to \$5,000 means that relatively minor donors, who are unlikely to obtain significant political influence via this donation, will have their addresses published. In the Law Society's view, there is little genuine public interest in personal information of that nature being disclosed.
- 2.9 Should the proposed changes be maintained, the Law Society suggests the Committee provide reasons for why the infringement on freedom of expression and privacy interests is justified and, in particular, why the threshold for disclosure should be set at \$5,000 rather than \$15,000.
- 2.10 For completeness, the Law Society notes that the approaches taken by two of our closest international legal jurisdictions, Australia, and Canada, are at either end of the spectrum:

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<sup>4</sup> Labour, National, Green Party, ACT and New Zealand First

<sup>5</sup> International Covenant on Civil and Political Rights, Article 17.

- (a) In Canada, the names and addresses of donors who have contributed \$200 or more in a year are published.<sup>6</sup> However, it should be noted that Canada also has relatively restrictive and complex controls on the maximum donations allowed.<sup>7</sup>
- (b) In Australia, the names and addresses of any donation above the “disclosure threshold” are published.<sup>8</sup> The disclosure threshold is indexed each year based on the Consumer Price Index, and is currently \$15,200 for the year ending 30 June 2023.<sup>9</sup>

2.11 The Law Society does not have concerns about the other changes to the political donations regime proposed in the Bill.

### 3 **Overseas voter eligibility**

3.1 The Bill also proposes changes to the ability of New Zealand citizens and permanent residents who are overseas to vote in the upcoming 2023 election.<sup>10</sup>

3.2 At present, people living overseas and seeking to vote must have been in New Zealand at any time within the previous three years (citizens) or twelve months (permanent residents).<sup>11</sup> Due to COVID-19 travel restrictions, the Bill would extend those time frames to six years and four years respectively, but only for the 2023 General Election. The Law Society agrees that is a sensible measure.

3.3 The Committee may also wish to consider whether the limitations on overseas voting should be repealed in their entirety or expressed differently. At the very least, the Law Society suggests the Committee considers whether there is a contemporary justification for the overseas voting restrictions.

3.4 The limitation in respect of citizens is a prima facie breach of section 12 of the NZBORA, which guarantees the right to vote in general elections to all New Zealand citizens regardless of where they live or when they were last in the country.<sup>12</sup>

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<sup>6</sup> Canada Elections Act 2000, ss 432, 475.4, 476.5, 477.59 and 478.8

<sup>7</sup> In 2021, individuals can contribute a maximum of \$1,650 per calendar year to each of the following categories:

- (a) To each registered political party and independent candidate;
- (b) In total to registered associations, nomination contestants and candidates of each registered party; and
- (c) In total to all contestants in a particular party’s leadership contest.

<sup>8</sup> Commonwealth Electoral Act 1918 (Cth), ss 304-306.

<sup>9</sup> Commonwealth Electoral Act 1918 (Cth), ss 321-321A.

<sup>10</sup> Clauses 19 and 20.

<sup>11</sup> Electoral Act 1993, s 80(1)(a) and (b).

<sup>12</sup> Section 12 provides a guarantee only in respect of citizens, not permanent residents. However, given permanent residents also have the right to vote and enjoy freedom of movement in and out of New Zealand, any difference in voting rights between citizens and permanent residents would likely be prima facie discrimination on the ground of ethnic or national origins, which includes nationality and citizenship: Human Rights Act 1993, s 21(1)(g).

- 3.5 The limitations on overseas voting were introduced in 1980<sup>13</sup> and retained in the 1993 Act.<sup>14</sup> They are a product of a time when information was slower and international mobility was less fluid. Now that information – including political information – is regularly consumed over the internet and where people may have professional or personal interests in more than one country, the limitations may no longer be justified.
- 3.6 New Zealand is an outlier in respect of overseas voting by its citizens:
- (a) Australian citizens living overseas may vote regardless of the length of absence, provided they intend to resume residing in Australia within the next six years.<sup>15</sup>
  - (b) United States citizens living overseas may vote in federal elections,<sup>16</sup> with each State determining eligibility to vote in state and local elections.
  - (c) Canadian citizens living overseas may vote regardless of the length of absence.<sup>17</sup> A provision requiring presence in the country within the previous five years was struck down by the Supreme Court in 2019.<sup>18</sup>
  - (d) The United Kingdom currently permits voting by overseas citizens if they have lived in the country within the last 15 years. Legislation has passed which would remove that requirement (meaning any overseas citizen may vote, regardless of the length of absence)<sup>19</sup> subject to the passage of secondary legislation which is expected in 2023.
  - (e) South African citizens living overseas may vote regardless of the length of absence, on production of a valid passport.<sup>20</sup>
- 3.7 New Zealand’s limitations are restrictive by comparison. They are also a poor proxy for a meaningful connection to the country: a visit of one day (or less) would circumvent the limitations. The act of voting itself (including from overseas) is itself an indication of connection to a country. It is a de facto declaration that the person wishes to make an informed decision about matters affecting their citizenship or permanent residency.
- 3.8 The Law Society would support the repeal of section 80(1)(a) and (b) and section 80(3). Alternatively, the Law Society would support a self-declaration similar to that in Australia,

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<sup>13</sup> Electoral Amendment Act 1980, s 13(1).

<sup>14</sup> In 1986 the Royal Commission on the Electoral System described the requirement of residence in the country as “entirely justified” as it provides “some connection between the voter and the country additional to citizenship or permanent residence alone”: Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at 233. The Royal Commission’s analysis of the limitations is brief and is partly concerned with the (now repealed) requirement that a potential voter must have resided continuously in New Zealand for a year.

<sup>15</sup> Commonwealth Electoral Act 1918 (Cth), s 94(1).

<sup>16</sup> Uniformed and Overseas Citizens Absentee Voting Act 42 USC §§ 1973ff-1973ff-6, 39 USC § 3406, 18 USC §§ 608-609.

<sup>17</sup> Canada Elections Act 2000, ss 3, 6 and 8

<sup>18</sup> *Frank v Canada (Attorney-General)* [2019] 1 SCR 3.

<sup>19</sup> Elections Act 2022 (UK).

<sup>20</sup> Electoral Act 73 of 1998,s 6(1).

requiring an overseas voter to declare that they intend to resume residence in New Zealand within a period of time.<sup>21</sup>

- 3.9 Should the limitations be retained, the Law Society recommends the Committee articulates any contemporary reasons it identifies for the restriction in light of the prima facie breach of the NZBORA and the less restrictive measures taken by other countries.

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive style with a large initial 'D'.

David Campbell  
**Vice-President**

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<sup>21</sup> Given the uncertainty of future events, those declarations should not be scrutinised and there should be no consequences for non-compliance.