

***Submission of the
Human Rights Commission on***

ELECTORAL FINANCE BILL

***To the Justice and Electoral
Committee***

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1. Introduction

- 1.1 This submission on the Electoral Finance Bill is made by the Human Rights Commission (the Commission). The Commission is an independent Crown Entity mandated by the Human Rights Act 1993 (HRA). The Commission's primary functions include advocating and promoting respect for, and an understanding of, human rights in New Zealand society; encouraging harmonious relationships between individuals and the diverse groups in New Zealand; receiving complaints of discrimination; and leading, monitoring and advising on Equal Employment Opportunities (EEO).
- 1.2 Section 5(2)(m) of the HRA requires the Commission to develop a National Action Plan for the promotion and protection of human rights in New Zealand. *Mana ki te Tangata: the New Zealand Action Plan for Human Rights* was published in 2005.¹
- 1.3 The Action Plan is based on an extensive consultation that the Commission had carried out the previous year to identify how well New Zealanders thought their human rights were protected and where there was room for improvement. The consultation revealed that while New Zealand generally complies with international standards in relation to democratic rights, confidence in the benefits of democratic participation appeared to be waning. The Action Plan notes [at 27] that
- “addressing disparities in participation is as important as increasing participation levels overall, because political equality is the cornerstone of democracy”.*
- 1.3 Although the main purpose of the Electoral Finance Bill is to ensure greater transparency and accountability in the political process, democratic values also include respect for other civil and political rights such as freedom of expression, assembly and association². As currently drafted the Bill will

¹ Human Rights Commission *Mana ki te Tangata: the New Zealand Action Plan for Human Rights* (2005) Wellington

² A Langlois, *Human Rights without Democracy? A Critique of the Separatist Thesis* 25 Hum. Rts. Q 990 (2003).

infringe certain human rights - most obviously freedom of expression but also the right of all citizens to participate in the election process.

1.4 The submission addresses the human rights implications of the Bill. In particular it focuses on:

- the effect of extending the regulatory period [para 6.1 et seq];
- the definition of election advertising [para 7 et seq];
- the implications of the scheme applying to third parties [para 8 et seq];
- the exclusion of young people [para 9].

1.5 The Commission considers that a principled approach to electoral funding needs to ensure genuine public and political consultation. Given the significance of the changes to the electoral funding regime, there is a need for an extended public participation in a more neutral environment to allow for discussion, debate and contestation of core principles. This has not happened with the proposed legislation, and the opportunity for informed authorisation has been lost. The Commission therefore recommends that the Bill is either withdrawn or substantially redrafted to reflect a better balance between political participation and freedom of speech and controls on electoral financing.

2. International background

2.1 *Democracy implies far more than the mere act of periodically casting a vote... it covers the entire process of participation by citizens in the political life of their country*³.

2.2 A human rights approach to democracy is critical because:

- It is acknowledged to be one of the best ways of fulfilling the right to political participation
- A country with a strong democracy is better equipped to protect all human rights, including personal integrity and socio-economic rights⁴.

³ Secretary General of the United Nations A/46/609 and Corr.1, para.76

2.3 To ensure human rights are reflected in the democratic process people should be treated with respect and as of equal worth (political equality) and should be able to have an influence over public decisions and decision makers (empowerment and popular control). This requires:

- guaranteed rights (including freedom of expression, assembly and association, together with economic, social and cultural rights);
- a system of representative and accountable political institutions subject to popular authorisation; and
- an active civil society (people working together who can channel popular opinion and engage with government)⁵

2.4 Article 25 of the International Covenant on Civil and Political Rights (the ICCPR)⁶ provides for the right of all citizens to take part in the conduct of public affairs on a non-discriminatory basis without unreasonable restrictions -

- i. directly or through freely chosen representatives;
- i. by being able to vote and to be elected at genuine periodic elections which are universal and held by secret ballot,
- ii. by guaranteeing the right to free expression and will of the electors, and
- iii. by providing equal access to the public service

2.5 The preparatory notes to the ICCPR provide an indication of the drafters' intent. The notes indicate that the drafters saw article 25 as consisting of two parts. The first is procedural and requires guarantees that elections will be held regularly, ensuring equality, universal suffrage and a secret ballot. The second is outcome oriented and requires the free expression of the will of the electors.

2.6 It follows that genuine elections should offer a choice that reflects real popular input and provision and ensures political parties are able to function

⁴ United Nations Development Programme, *Human Development Report 2000* Human Rights and Human Development 59 (2000)

⁵ D Beetham, *Democracy and Human Rights: Contrast and Convergence* (2002) cited in *Human Rights in New Zealand Today: Nga Tika Tangata O te Motu*: Human Rights Commission, Wellington (2004) at 91.

⁶ New Zealand ratified the ICCPR in 1978. There are no reservations registered against the articles discussed in this submission.

effectively and that there is electoral legislation that provides for fair and transparent funding of political campaigns⁷.

- 2.7 Genuine choice also needs to be an informed choice. Informed choice requires voters to have information about the parties and people they are voting for⁸. Clearly this will be affected by both the financing of publicity surrounding elections and the form the publicity takes. The UN Human Rights Committee has noted that,

Voters should be able to form opinions independently, free of ... inducement or manipulative interference of any kind

At the same time it acknowledges that,

... reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party⁹.

- 2.8 Restrictions on expenditure that apply during an election period indirectly limit freedom of expression since money is needed to buy advertising time in the media, print material and publicise party views during an election period¹⁰. Legislation such as the Electoral Finance Bill therefore needs to balance the right of voters to be informed against the need to limit electoral funding to ensure some groups are not advantaged financially.

- 2.9 Article 19 of the ICCPR requires ratifying states to guarantee their citizens the right to:

- i. Hold opinions without interference;

⁷ Centre for Human Rights, *Professional Training Series 2: Human Rights and Elections* United Nations Geneva (1994) at paras 76 et seq.

⁸ Human Rights Committee, *General comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)* 12/7/96 UNDOC CCPR/C/21/Rev 1/Add 7.

⁹ *Supra* fn 5 at para [19]

¹⁰ A & P Butler, *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis (2005) at 13.23.16

- ii. Freedom of expression including the right to seek, receive and impart information and ideas of all kinds ... either orally, in writing or in print, in the form of art or through other media of his choice;

These rights can be subject to certain restrictions but only if they are imposed by law and necessary to respect the reputations of others or for the protection of national security, public order or public health or morals.

2.9 Article 19 therefore recognises the dual aspect of freedom of expression - an individual right not to have one's expression arbitrarily restricted and a collective right to receive any information whatsoever and have access to the thoughts expressed by others¹¹.

2.10 In a General Comment on Article 19, the UN Human Rights Committee has said that when a State imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself¹². The necessity for any restrictions must be convincingly established and narrowly interpreted.

3. Selected jurisprudence

3.1 New Zealand is not alone in struggling with the issues raised by the Bill. There is a significant body of jurisprudence in comparable jurisdictions in which Courts have been called on to decide where the appropriate balance lies between a State's right to legislate to ensure free elections and the electorate's right to freedom of political opinion.

3.2 **Australia** does not have a Bill of Rights but it does have a written Constitution. It is also subject to the ICCPR. In 1992 the High Court - referring to the obligations in ICCPR - held that the Constitution contained an implied guarantee of freedom of political communication. *Australian Television Pty Ltd & Ors v Commonwealth of Australia*¹³ involved a challenge to the Political Broadcast and Political Disclosure Act 1991 (PBPD Act) that prohibited broadcasters from broadcasting a political advertisement during the election

¹¹ *Human Rights in New Zealand Today: Nga tika Tangata O Te Motu* (supra fn 4) at 130

¹² General comment No.10: Freedom of expression (Art.19): 29/06/83 at

www.unhrc.ch/tbs/doc.nsf

¹³ (1992) 108 ALR 577

period. The court held that the scheme in the PBPD Act infringed the implied right to freedom of political communication, the Chief Justice commenting that “in a representative democracy, public participation in political discussion is a central element of the political process” [at para 595].

- 3.3 The Court was prepared to accept that in compelling circumstances some restrictions on the broadcasting of political advertisements and messages might be justified in order to balance the public interest in freedom of communication about public affairs and political discussion against the public interest in the integrity of the political process [at 599].
- 3.4 However the restriction should not impose a burden which is disproportionate to the attainment of the competing public interest [at 598]. While accepting the legitimacy of the government’s objectives, the Court found no compelling justification for the “sweeping prohibitions” in the legislation [597-601]. In the Court’s view the legislature had gone further than necessary to realise the objectives it was seeking to promote.
- 3.5 In **Canada** the Canadian Charter of Rights and Freedoms lists a number of fundamental freedoms including

... freedom of thought belief, opinion and expression, including freedom of the press and other media communications: s.2(b).

The rights and freedoms in the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”: s.1. In *Libman v Attorney-General of Quebec* ¹⁴Libman argued that his right to freedom of expression under s.2(b) was infringed by provisions of the Referendum Act (Quebec) which limited the expenses a person or group could lawfully incur in pursuing a referendum campaign without being a member of, or affiliated with, a “national committee.”

- 3.6 The Supreme Court of Canada held that Libman’s freedom of expression was infringed. It began by noting that “[P]olitical expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed

¹⁴ [1977] 3 S.C.R 569, 151 D.L.R (4th) 385

by s.2(b) of the Charter.” Having found a prima facie infringement of the freedom of expression it then went on to consider whether the restriction could be justified in terms of s.1. This required deciding whether the reason for the restriction amounted to a substantial and pressing concern in a democratic society and whether the means were proportional to what was sought to be achieved.

3.7 The objective of the Referendum Act was “to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting”. Effectively the Act was designed to prevent wealthy individuals from exerting a disproportionate influence and promote a sense of equal participation among the proponents of each option. It was also intended to promote informed choice by ensuring that some views were not buried by others and “preserve the confidence of the electorate in the democratic process that it knows will not be dominated by the power of money”[at 19]. The Court described these objectives as “highly laudable”.

3.8 The Court then turned to the proportionality test which it described as follows:

The restrictive measures chosen must be rationally connected to the objective, they must constitute a minimum impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those decisions [at 18].

The measures were considered out of proportion with the objectives they sought to advance, not because they were not rationally connected with what they sought to achieve. The Court accepted that it was rational to try and ensure a fair process by preventing unequal distribution of financial resources. But what the Court did not accept was that the measure impaired the right to freedom of expression as little as possible.

3.9 A year before the Supreme Court decided *Libman*, the Alberta Court of Appeal considered the case of *Somerville v Canada (A.G.)*¹⁵. *Somerville*

¹⁵ (1996) 136 D.L.R (4th) 205

involved the restrictions on political advertising in the lead up to an election and limitations on third party spending under the Canada Elections Act 1985. The government conceded that the restrictions infringed freedom of expression but the Court found that the objectives advanced in support were “not of sufficient importance to meet a pressing need that justify[d] infringement of these important rights”.

- 3.10 The significance of *Somerville* is that it recognises that the right to vote implies a right to receive information about candidates and issues and for third parties to communicate information to the electorate. It also highlights the danger of establishing regulatory systems without making a genuine attempt to assess the implications¹⁶.
- 3.11 More recently in *Figuroa v Canada (A.G.)*¹⁷ the Supreme Court considered whether the requirement in the Canada Elections Act that political parties must nominate candidates in at least 50 electoral districts to qualify for certain benefits infringed s. 3 of the Charter. Section 3 states that *[e]very citizen of Canada has the right to vote in an election of membership of the House of Commons or of a legislative assembly and to be qualified for membership therein*.
- 3.12 Rather than interpreting s.3 narrowly and restricting it to the right to vote, the Court accepted that it referred to the right of each citizen to play a meaningful role in the electoral process. “The right is participatory and adverts only to a right to participate in the electoral process ... in a democracy, sovereign power resides in the people as a whole and each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives.”¹⁸ The Court considered that the 50 candidate rule effectively limited the ability of smaller parties to participate in elections. Although the Court accepted that there may be pressing legislative objectives for the rule, the electoral process was the primary

¹⁶ I Clyde *Political Funding, Human Rights and Freedom of Expression*, Treasury Solicitor's Department for the Committee on Standards in Public Life available at www.public-standards.govt.nz/publications/pdf at 25

¹⁷ [2003] 1 S.C.R 912

¹⁸ Per McLachlin C.J and Iacobucci, Major, Bastarache, Binnie and Arbour JJ

means by which “the average citizen participates in the open debate that animates the determination of social policy”.¹⁹

3.13 Article 10 of the **European Convention on Human Rights** (ECHR) deals with freedom of expression. “Expression” is construed very broadly and includes the freedom to “receive and impart information and ideas”: The reference to both information and ideas indicates that Art.10 protects opinion, criticism and speculation. The importance of freedom of expression in Article 10 as it relates to political opinion has been described by the European Court of Human Rights (ECtHR) as having “the highest importance and ... requiring the strongest reasons to justify impediments on the exercise of political speech. States therefore argue for the narrowness of this category but, at a level of general principle, it is an argument which has been lost.”²⁰

3.14 Among the jurisprudence of the ECtHR the case that is most often cited in relation to freedom of political opinion is *Lingens v Austria*²¹. In *Lingens* the Court noted that Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment”[at para 41]. The Court also noted that freedom of political debate which prevails throughout the Convention is at the very core of the concept of a democratic society [para 42] a point that was reinforced in *Bowman v. the United Kingdom*²².

3.15 *Bowman* noted the close link between the right to free elections and freedom of expression which in combination form “the bedrock of any democratic system”²³. As with the previous cases, whether a measure infringes the right to freedom of expression will depend on whether it can be justified. The test in the ECtHR is very similar to the Canadian (and New Zealand) test. That is, the restriction must be prescribed by law, pursue a legitimate aim and necessary in a democratic society.

¹⁹ Iacobucci J at para 29

²⁰ Harris, O’Boyle and Warbrick, **Law of the European Convention on Human Rights**, Butterworths, London (1995) at 281

²¹ (1986) 103 series A 14

²² [1998] E.C.H.R 24839/94 (1998) 4 B.H.R.C.25

²³ *Ibid*, at para 42

- 3.16 *Bowen* involved an abortion campaigner who had distributed leaflets identifying the views of different candidates on abortion before an election. The Representation of the People Act 1983 restricted third party spending to ensure that candidates remained independent of the influence of powerful lobby groups. Mrs Bowen had exceeded this amount and was prosecuted. She claimed that the effect was to restrict freedom of expression and that it was important in the run up to an election that people were fully informed about the candidates they were voting for.
- 3.17 The ECtHR recognised that there was conflict between the two rights but also accepted that at times such as this freedom of expression may need to be restricted. Although the ECtHR accepted that Contracting States are accorded a margin of appreciation in organising their electoral systems, in Mrs Bowen's case the restriction was disproportionate to the aim pursued. The Court noted that it was not satisfied that "it was necessary to limit her expenditure in order to achieve the legitimate aim of securing equality between candidates" [at 47].
- 3.18 While these cases all recognise that governments have a margin of appreciation in how they go about regulating elections, any restrictions need to be carefully considered to ensure that they do not unduly limit freedom of expression and the electorate's right to be fully informed.

4. New Zealand Bill of Rights Act 1990

- 4.1 The rights in the ICCPR are reflected in the New Zealand Bill of Rights Act 1990 (BoRA). Section 12 imports aspects of the electoral rights found in Article 25 of the Covenant, particularly Art.25(2)(b). The Commission accepts that the procedural aspects of Article 25 are fulfilled in New Zealand by s.12. However, should the proposed Bill be enacted in its present form the second limb of Article 25 (identified earlier in para 2.2) - namely the importance of elections reflecting the free will of the electors – could be undermined.
- 4.2 Section 14 of the BoRA states that "everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form". As the Bill seeks to limit election advertising and electoral activity it clearly infringes s.14.

- 4.3 The BoRA permits a right to be limited in certain circumstances²⁴. The test has certain similarities to those used by the ECtHR and in Canada. It involves considering whether the limit or restriction pursues a sufficiently important goal to warrant overriding the right and then whether the means chosen to achieve this is proportional. In deciding whether this the case a Court must assess whether:
- (a.) there is rational connection between the restriction and the goal being pursued
 - (b.) the right is impaired as little as possible
 - (c.) the limit is proportional overall to the objective being pursued²⁵.
- 4.4 The Commission has no difficulty with the idea that a government should be able to regulate the conduct of elections to ensure that they are fair and equitable. That is, there is a sufficiently important reason to warrant controls on election funding but it also considers that this could be done in a way that does not infringe the right to freedom of expression to the extent proposed in the Bill. An informed electorate is in the public interest and the inroads on freedom of expression which will result from the Bill are disproportionate and, in the Commission's opinion, do not amount to a reasonable justification under s.5 of the BoRA.

ELECTORAL FINANCE BILL

5. Purpose of the Bill

- 5.1 The principal purpose of the Bill is to provide greater transparency and accountability in the political process by addressing disparities in electoral financing and preventing wealthy third party donors exerting undue influence on the political process.
- 5.2 While ensuring a transparent and accountable electoral system is integral to enhancing confidence in the electoral system and ensuring meaningful voter participation, it is generally accepted that participation includes a citizen's

²⁴ Section 5 BoRA

²⁵ *R v Hansen* [2007] NZSC 7

right to exercise their vote in an informed manner. The Commission recognises that by pooling their resources affluent people or groups can dominate political discourse at the expense of the views of individuals or groups who are less able to promote their opinions for financial reasons. However, as the cases indicate, imposing restrictions on spending can also undermine the dissemination of information.

- 5.3 The limitations that the Bill places on third parties are likely to create barriers for minor parties wishing to engage in the political process - a clear contravention of the right to participation. It will also limit lobby groups, for example, to expenditure under \$5000 in promoting a particular cause (if not registered as third parties). It is difficult to see how this will promote the ability of civil society to participate in the political process and makes a mockery of clause 3(b) which refers to promoting participation by the public in parliamentary democracy.
- 5.4 A further purpose of the Bill is to ensure that the controls imposed on electoral campaigns are complied with and enforced: clause 3(e). The Bill sets out a complicated list of regulatory requirements for qualification as a third party. Non-compliance can attract a penalty on conviction that would be substantial for many individuals and lobby groups but could be disregarded with impunity by those who are wealthy²⁶. Coupled with the complexity of the legislation, this is likely to dissuade individuals from participation.

SPECIFIC ASPECTS OF THE BILL

6. Regulated period

- 6.1 "Regulated period" is defined in clause 4 as any period that commences on 1 January of the year in which an election is to be held or 3 months before polling day whichever is the longer. Given that elections in New Zealand are usually held in November, the effect of the Bill will be to limit comment on any position advanced by a candidate for almost a year in the run up to an election. The combination of "election advertisement" in clause 5 and

²⁶ One lobby group (the Kyoto Forestry Association) has already indicated that it will consider breaching the spending caps set out in the Bill: *New Zealand Herald* 11/8/07

“regulated period” defined in clause 4 will have a chilling effect²⁷ on the expression of political opinion during an election year.

- 6.2 Currently the Electoral Act 1993 limits the regulation period during the run up to an election to 3 months. The Commission does not accept that extending the period to almost a year is justified. The Attorney-General’s opinion on compliance with the Bill of Rights Act concedes that the time “may be at the outer edge of acceptable limits” but states that it is acceptable because political expression is “limited rather prohibited”.
- 6.3 Given the high level of protection that freedom of speech attracts in a democracy, the distinction is not an adequate justification for the extension of time. Consideration should be given to retaining the present regulatory period.

7. Election advertisements

- 7.1 Election advertisement” is defined in clause 5. It includes any form of words or graphics that can reasonably be regarded as *taking a position on a proposition with which 1 or more parties or 1 or more candidates is associated*: cl.5(1)(a)(iii). This is likely to catch almost any comment that has any connection with a position adopted by a political party.
- 7.2 The suggested wording is modelled on the Canadian legislation which defines election advertising as,

... advertising during an election period that promotes or opposes a registered party or the election of a candidate, including taking a position on an issue with which the registered party or candidate is associated.

The definition proposed in the Bill goes even further as it refers to “a proposition” rather than “an issue”. The Oxford Reference Dictionary defines proposition as “a statement, an assertion” which is much wider.

²⁷ Chilling effect refers to the stifling effect that vague or overbroad laws may have on legitimate speech and activity. The term had been in use in the United States for several years by 1965 when William J Brennan in *Lamont v Postmaster General* 381 U.S. 301, 85 S.Ct. 1493 (1965) referred to the chilling effect [a particular law might have] on the exercise of First Amendment rights. *Lamont* invalidated a Federal law that required people receiving “communist political propaganda” through the mail to specifically authorize the delivery of each piece.

7.3 The Australian definition is more clearly linked to material likely to affect the outcome of an election. Section 1 of Broadcasting Services Act 1992 defines “election advertisement” as an advertisement that contains election matter that relates to that election. “Election matter” is any matter:

- *commenting on, or soliciting votes for, a candidate at the election;*
- *commenting on, or advocating support of, a political party*
- *commenting on, stating or indicating any of the matters being submitted to the electors at the election or any part of the policy of a candidate at the election or of the political party to which the candidate at an election belongs*
- *referring to a meeting held or to be held in connection with the election.*

7.4 The suggested definition in the New Zealand legislation is justified by the Attorney-General on the grounds that the courts will interpret the provision consistently with the purpose of the legislation and the right to freedom of expression in the Bill of Rights Act, thus limiting it to matters relating to electoral purposes. The Commission is not convinced that this will be the case and suggests that cl.5(1)(a)(iii) is deleted.

7.5 Clause 5(2)(c) creates an exception for newspapers or periodicals where the content is selected by an editor for the purpose of informing or entertaining its readership. There is no further definition of what is meant by a “periodical” which could result in political parties developing and using their own periodicals for election purposes. This could in turn result in a call to register publications which are classified as periodicals or even newspapers if they overstep the line. The implications of this in a country such as New Zealand with a strong democratic tradition would be significant.

8. Effect of requiring registration as third party

8.1 The Bill is designed to regulate the influence of third parties in the electoral process. Unless a group is registered as a third party it is unlawful to publish election advertisements unless the regulatory framework set out in the Bill is complied with.

- 8.2 Third parties will need to register with the Electoral Commission, appoint a financial agent who will be accountable for any advertising and make a statutory declaration that they do not intend to spend more than \$5000 on advertising to the media outlet concerned. They must also disclose all donations over \$500 and cannot spend more than \$60,000 promoting or criticising a party, candidate or policy. The Bill requires a degree of electoral finance literacy and sophistication that some candidates might not have which would again limit their participation.
- 8.3 The Chief Electoral Officer cannot register third parties once the writ for a general election is issued: cl.17. As a result of how election advertisement is defined in cl.5, if a political party makes negative comments about a lobby group or particular ethnic group, the group itself would be unable to respond to the criticism during the writ period if it was not registered as a third party.
- 8.4 It is difficult to conceive of a greater limitation on freedom of speech than this and it cannot be imagined that the degree of restriction was intended. The effect of the Bill is to muzzle a person or group which finds itself in this situation.
- 8.5 As was noted recently²⁸,

By requiring people to register with the Chief Electoral Officer, the bill effectively creates a licensing regime for political speech. No New Zealand legislation has required this of private citizens before. There is a substantial risk that requiring people to apply to the Chief Electoral Officer before publishing their ideas, and file statutory declaration and auditors reports after the election, will have a chilling effect on their willingness to contribute to the political debate.

9. Definition of third party and age discrimination

- 9.1 For the purposes of the Bill a third party must be a registered elector; a body corporate that is not based overseas or an unincorporated body whose

²⁸ R Partridge & J Wilson *Electoral Finance Bill undermines basic liberties protected by the New Zealand Bill of Rights Act 1990*, NZLawyer 31 August 2007 at 16

members are all registered electors. Incorporated bodies are not be caught by the rules although a company is, as would a group of concerned citizens. The definition limits the ability to register as a third party to people over the age of 18 - unless they rely on the mechanism of a body corporate.

- 9.2 Section 19 of the BoRA provides that everyone has the right to freedom from discrimination on the grounds listed in s.21 of the Human Rights Act 1993 (HRA). One of the grounds of prohibited discrimination is age. The definition applies to anyone over the age of 16. A breach of section 19 BoRA is also a breach of Part 1A of the HRA unless the infringement can be justified under s.5.
- 9.3 Consultation with children and young people was an important part of the background work undertaken as part of the Commission's analysis of the state of human rights in New Zealand. The consultation highlighted the importance of ensuring that children and young people are listened to, that their opinions are respected and taken seriously and their right to participation recognised²⁹. Both the *Agenda For Children*³⁰ and the *Youth Development Strategy*³¹ recognise the right to participation.
- 9.4 The importance of ensuring young people are able to participate is a fundamental premise of the United Nations Convention on the Rights of the Child³². Article 12(1) requires that appropriate weight be given to the views of the child on matters affecting them where he or she is capable of forming their own views and expressly requires that they should be able to "express those views freely". Article 13(1) states that a child should have the right to freedom of expression including the freedom to impart information and ideas of all kinds.
- 9.5 Simply because they cannot vote until they are 18, it does not follow that young people do not have opinions on issues – particularly those that affect them - that may be raised in the course of an election, or that they should be

²⁹ *Human Rights in New Zealand Today: Nga Tika Tangata O Te Motu* Human Rights Commission, Wellington (2004) at 55

³⁰ Ministry of Social Development & Ministry of Youth Affairs, Wellington (2002)

³¹ Ministry of Youth Affairs, Wellington (2002)

³² New Zealand ratified the United Nations Convention on the Rights of the Child in 1993. There are no reservations registered against Articles 12 and 13.

prevented from expressing them. The effect of the Bill is that young people aged 17 could claim that they were being discriminated against under the HRA as they are unable to register as third parties which limits their ability to participate in the election process.

- 9.6 There will not be a breach of Part 1A HRA if justification for a restriction can be established under s.5 of the BoRA. The age restriction is unlikely to be justified given the emphasis on participation and the right to freedom of expression in both the international instruments and the Government's own policy positions.

10. Conclusion

- 10.1 The Commission accepts the need for a principled approach to elections and the importance of ensuring some groups and parties are not privileged financially. While it recognises that Courts accord governments a margin of deference in how they chose to go about this, the current Bill is a disproportionate way of achieving what it sets out to do.

- 10.2 A human rights approach to democratic government requires genuine participation. Genuine participation, in turn, requires an informed electorate. By limiting freedom of expression and creating a complex regulatory framework in the way it does, the Electoral Finance Bill unduly limits the rights of all New Zealanders to participate in the electoral process. The Commission therefore considers that the Bill is inherently flawed and should be withdrawn.

- 10.3 If it is not withdrawn, the Bill requires substantial redrafting to ensure that it does not have a chilling effect on the right to freedom of expression during and in the run up to an election. The Commission suggests at the very least that:

- the present regulatory period is retained;
- the definition of "election advertisement" is reworded - and cl.5(1)(a)(iii) deleted -so it is more clearly focused on advertising relating to the election;

- greater thought is given to the implications of scheme regulating the position of third parties including the excessive restrictions on comment during the regulatory period, capped funding and what constitutes a third party; and
- the definition of a third party is amended to ensure that young people are not excluded from political debate.

10.4 The Commission does not underestimate the difficulty in balancing the need to protect the integrity of the political process by ensuring that some groups do not have an unfair financial advantage against genuine public participation. The Electoral Finance Bill achieves at least some of what it purports to do – for example, by requiring disclosure of election donations throughout the year of an election and addressing the implications of the decision in *Peters v Clarkson*.³³ although the provisions relating to disclosure of donations to political parties should be strengthened to ensure the highest level of transparency.

10.5 The bill in its current form represents a dramatic assault on two fundamental human rights that New Zealanders cherish, freedom of expression and the right of informed citizens to participate in the election process. The proposed legislation lacks public authorisation and as a consequence will undermine the legitimacy of political processes. It requires radical change.

³³ HC, Tauranga CIV 2005-470-719