

New Zealand Law Society

SUBMISSION ON THE ELECTORAL FINANCE BILL

Introduction

- 1 The bill makes significant changes to the regulation of general election campaigns. The purpose of the bill is to provide more transparency and accountability in the democratic process, prevent the undue influence of wealth, and promote participation in parliamentary democracy. Unfortunately it detracts from, rather than enhances, that purpose.

General Approach

- 2 While some of the purposes of the bill may be admirable, the detailed response to them lacks any principled approach. Some reform in the area may be desirable, but this particular bill should be returned to the House with the recommendation that it not proceed. The bill has serious defects, which mean it will not achieve its stated aims. Moreover, it is likely to curtail the legitimate expression of opinions while failing to curb (and potentially even incentivising) clandestine conduct in relation to the electoral process. The bill as a whole represents a backward step in the integrity of democracy in New Zealand.
- 3 The bill seems to be inconsistent with the New Zealand Bill of Rights Act 1990 as it limits freedom of expression in a way that cannot be demonstrably justified in a free and democratic society.
- 4 The fact that redrafting and brokering is going on amongst political parties as to changes that will be promoted by the Government at the same time as submissions are being sought, excludes public participation and is an anathema to the Select Committee process.
- 5 It would be inappropriate to repair such a measure with a complex, negotiated Supplementary Order Paper even if this were referred to a Select Committee. A Supplementary Order Paper would not usually be subject to Bill of Rights Act certification by the Attorney-General. This is particularly important given that the opinion on Bill of Rights Act consistency given by the Crown Law Office in relation to the present bill does not seem to engage with the points raised in this submission.

- 6 In a matter as integral to our system of government as regulation of the democratic process, it is highly desirable that reform receives a high level of support and is subject to debate and comment by the public and interest groups as well as politicians.
- 7 Withdrawing the bill and starting again would enable a Regulatory Impact Statement and a list of those consulted to be added to the Explanatory Note. Both are notably absent from this bill.
- 8 Accordingly the Society submits that the current Bill should be abandoned and a process embarked upon whereby:
- 8.1 the principles to which New Zealand aspires in terms of its democratic process are identified (clause 3(a) to (e) may indeed identify these);
 - 8.2 the areas where current law fails to embody and protect these principles are determined; and
 - 8.3 fair and practical solutions to these problems are formulated.
- 9 It appears that the current bill is a set of ad hoc solutions to only some of the issues and because of that it is, in fact, likely to create more problems than it solves.
- 10 The remainder of this submission highlights a number of areas where the bill is deficient or lacking a coherent approach. Additionally, an appendix attached to this submission outlines technical defects in the bill that will need to be addressed if it is to be passed into law.

Spending limits and restricted period

- 11 The current electoral regulations impose electoral advertising spending limits on parties and candidates in the 3 months prior to polling day. The Bill seeks to:
- 11.1 extend advertising spending restrictions to all persons; and
 - 11.1 increase the period of restriction to the entire year in which the election is held (if the election is in a designated election year).
- 12 The quantum of spending limits for parties and candidates has not changed. Given the historical tendency in New Zealand to hold elections late in the year, the period of regulation will in most cases be extended, resulting in an effective increase in restrictions.

13 For reasons described in this and the next two paragraphs, the bill creates an unjustifiable electoral advantage for incumbents. It may at first appear that the bill creates an incentive for a government to call an election in the first 3 months of the year if it is confident that it has a sufficient war chest to campaign on a significant level for a period of greater than 3 months. This is because a governing party or grouping of parties with financial superiority over their opponents gains an advantage by having a period of unrestricted campaigning (until three months before the election) where it can expend the excess resources it has prior to the limits coming into force. Moreover, the fact that an election is held in the first months of a particular year, effectively locks in a maximum 3 month regulated period for the next election as well because:

13.1 in the next election year Parliament will expire in the first 3 months; and

13.2 if the next government chooses to call the election in the year preceding the next election year the restricted period will be 3 months regardless.

14 However, this ignores the fact that the incumbent government gains a substantial advantage from a longer restricted period. During a restricted period a government is able to advertise and promote government services and initiatives outside advertising restrictions. Many of these initiatives will be creatures of party policy and the dissemination of such information to the electorate realistically encourages the re-election of the incumbent government.

15 Informing people about the services available to them from their government is a necessary, important and proper function of government. However, when a restricted period (during which any criticism of government initiatives is a regulated election advertisement) is too long and spending limits are too low, the dissemination of information about government services provides an unacceptable advantage to the incumbent government. This is so even if used in good faith, though the advantage is easily amenable to abuse.

16 The problem is compounded by the fact that ‘publications that relate to a member of parliament in their capacity as a member of parliament’ are specifically exempted from being party election expenses but not from being candidate or third party election expenses. This will have the effect of:

16.1 allowing a party with incumbent MPs to campaign significantly outside the spending restrictions (e.g. a flyer stating “James Smith of Party X championed the Carbon Emissions Reduction Bill during its passage through the House” would likely not be an election expense); and

16.2 putting at a substantial disadvantage any person (but arguably not another party) opposing an incumbent MP as any expense incurred in commenting on their actions as an MP will count as an election expense.

That the parties represented in the House should be able to comment on their member's performance while the people they govern are restricted in doing so is a proposition difficult to reconcile with democratic principles.

- 17 Any spending restrictions on electoral advertising limit the right to freedom of expression in s14 the Bill of Rights Act 1990, albeit that the shorter the period in which the restrictions operate the lesser the overall degree of restriction – and (depending on all other circumstances) the more readily justifiable as “reasonable” (in terms of s5) the restriction may be.
- 18 In answering the question what is “reasonable”, New Zealand can be guided by the approach taken in other similar democracies. Though Canada imposes tight restrictions on the quantum of election spending, it restricts such spending only for a period of 36 to 50 days before an election. While a similar period of restriction exists in the United Kingdom, it is important to note that that is in the context of a 5-year election cycle. In all cases we need to ask: “How are the *means* (the various length of advertising restrictions) connected to the *ends* (of preventing the undue influence of wealth in the electoral system)?”
- 19 A feature of the Bill of Rights Act advice given by the Crown Law Office is that it has been influenced by particular aspects of the regimes in other jurisdictions without considering the full context in each of those jurisdictions. It would be a mistake to import the more strict aspects from overseas jurisdictions and then conclude the whole is reasonable simply because each part is present elsewhere. The impact of election spending restrictions on freedom of expression is measured by the overall combination of restrictions, and this includes questions of quantum and duration, as well as key definitions of terms.
- 20 The Society submits that by:
- 20.1 extending regulation of election advertising to all persons;
 - 20.2 significantly extending the potential restricted period;
 - 20.3 failing to increase the financial thresholds for parties and candidates; and
 - 20.4 imposing too low a threshold on third parties,
- the bill unduly restricts free speech. The spending limits and restricted period proposed by the bill will shut down criticism of a government at the time when it is to answer to the electorate

and when such criticism should be most salient. These problems are exacerbated by the third party registration regime and the restrictions on issue advertising (discussed later).

Disclosure requirements

21 Disclosure is an important feature of an electoral regulation regime. Putting limits on the amounts persons may spend attempting to influence electors is far less important than the fact that electors should always know who is attempting to influence them. On the other hand, it must be acknowledged that identifying the participant can result in focus on the messenger at the expense of the message.

22 In this regard, the bill fails to make any significant gains and creates an overly complex and problem-ridden regime that is easily evaded and may discourage participation by bona fide concerned people and groups. Many of the mechanical concerns are outlined in the appendix to this submission, but the overly technical nature of the regime can be illustrated by a hypothetical example:

A small residents' group decides to put together a banner and flyers advocating the banning of herbicides in their local community for display and distribution at their local farmers' market. Somewhat aware of electoral regulation and that a local candidate may have taken a position on this issue, they attempt to be cautious and record the name and address of one of their members on the banner and on each flyer. They proceed to display the banner and distribute the flyers at the market.

23 If the bill were enacted, the group above would have breached the law and may have incurred an unauthorised election expense on behalf of a candidate whose name they did not even know. In the first instance, the group member who allowed their name and address to be used on the flyer is apparently deemed both promoter and publisher of an electoral advertisement and has broken the law by failing to issue themselves with a declaration under the Oaths and Declarations Act 1957 to the effect that the cost of the advertisements published during the regulated period will not be more than the maximum amount.

24 Of more concern is the fact that the banner and flyer may be a candidate advertisement. The group was uncertain as to whether a local candidate had taken a position on the issue, but if it turns out he or she had taken such a position and that consequently the banner and flyers could 'reasonably be regarded as encouraging or persuading voters' to vote for that candidate, then,

in addition to further breaching the law by failing to have the material authorised by the candidate's financial agent, they have incurred an unauthorised election expense in respect of that candidate. This is an offence and even though it was not committed 'wilfully' the person who incurred the expense is guilty of an illegal practice and liable for a conviction and fine of up to \$10,000. (If it could be shown to be committed 'wilfully' it would be a corrupt practice carrying potential for a term of imprisonment – consider where the group had intended to promote the candidate in ignorance of the law.)

- 25 This example serves to illustrate the complexity of the disclosure regime. The complexity itself will discourage rather than encourage those who should rightly participate in New Zealand's democratic process.
- 26 This also illustrates one of the ambiguities present in a number of the offences provisions contained in the bill. Clause 61, for example, distinguishes between a corrupt and illegal practice in the contravention of clause 60 by imposing a requirement that the contravention be performed 'wilfully' for the former classification to apply. It is unclear what mental state is required to contravene a provision wilfully. There is a strong argument to be made that one must know of the prohibition to contravene it wilfully. If this is so then it creates an ignorance defence and the frequent employment of 'wilful contravention' offences throughout the bill seems to mean that the best way to limit liability under it is never to read it or be aware of its restrictions.
- 27 Another particular difficulty will arise for minor parties. It is very common for minor parties contesting general elections to campaign for the party vote and urge electors to give their electorate vote to the candidate from the major party with whom they feel they could form a coalition government. Any advertisement that advocates such a voting strategy would have to be authorised by the candidate whom the minor party was supporting. Moreover, any cost incurred by the minor party in advocating voting for a candidate in another party will count as part of that candidate's election expenses (clauses 65 and 66 provide some assistance as to apportionment, but support by one party of another's candidate does not appear to be contemplated). This being so, only the financial agent of the candidate can incur such a cost. The position if minor party X produces a flyer that states "Party vote X! Candidate vote: John Smith (major party A)" is wholly unclear.

- 28 Significant attention in the media has been focussed on the fact that the bill fails to restrict anonymous donations to political parties. It is a concern that:
- 28.1 the disparity between the restriction of anonymous donations to third parties and the non-restriction of those to political parties and candidates is manifestly unfair;
 - 28.2 the severe restrictions on third parties in concert with the non-restriction of donations to political parties significantly increases the risk of influence buying; and
 - 28.3 the offence of knowing the identity of a donor and failing to declare it is vague and amenable to selective enforcement.

Third party regime

- 29 The bill places new registration and disclosure requirements as well as spending limits on parties who wish to participate in elections. The Society has not formed a view on whether or not it is desirable to require those who wish to participate in an election to register or be subject to spending limits. It does, however, believe it is right that the identities of all parties seeking to influence the election should be disclosed. Informed choice is the essence of democracy.
- 30 It was submitted earlier that the spending limits comprised in the bill were too low. The Society reiterates this with regard to third party spending and notes that it is unclear why the limits for third party spending during the restricted period should be so much lower than that for registered parties (\$60,000 v \$1 million).
- 31 However, the major concern rests on the rules regarding registration as a third party. The effect of the bill is such that any person or entity that cannot register as a third party is effectively excluded from the political communications component of the democratic process – such a gravely serious effect warrants careful consideration.
- 32 The first matter is the timing restriction on registration. As of writ day in an election year any person not registered as a third party is effectively silenced. This could have serious effects as illustrated by the following hypothetical example:
- In the 2008 election, election day is set for 13 September and writ day for 13 August. On 14 August a major political party releases a bold new health policy. Buried in the minutiae of the voluminous policy document is a statement that planned funding for new radiology equipment in public oncology units will be deferred. This aspect of the policy is noted by the Cancer Society, which advocated*

strongly for the funding and believes the equipment will significantly increase the success rates for radiotherapy treatment. However, the Cancer Society has not registered as a third party and it is too late for them to do so. As such they are prevented from advocating against this policy with any more than \$5000 while the major party in question has a month to promote its revolutionising of the health system.

33 This example illustrates how the timing restriction on registrations as a third party can lead to undesirable outcomes.

34 The second concern relates to restrictions on who may register as a third party. The restrictions in clause 14(1) on third party registration will exclude a large number of people who should have the right to participate in New Zealand elections.

35 Of particular concern is that unincorporated bodies may not be third parties unless all their members are registered electors. The following hypothetical example illustrates:

One candidate running for an electorate seat in an urban area advocates the conversion of a park in one of the electorate's suburbs into low density retail space and another wants it planted with native flora. A rugby club who uses the park for fixtures and training multiple times every week decides to register as a third party to oppose the election of these candidates. Their application is rejected on the grounds that some of their members are not registered electors. The reason some of its members are not registered is that their under 12 team are club members and one of the club's adult players is a foreign national not entitled to vote. Accordingly, the rugby club is limited to \$500 in opposing either candidate and promoting its own view.

36 There are many reasons why a person may not be a registered elector and not all justify total removal from the democratic process.

37 The third party regime unduly restricts participation in elections. If participation of those not directly standing for election is to be regulated it should be done carefully and to the least degree practicable to achieve the desired outcomes.

38 It is noted that much of the consternation regarding third party conduct in the 2005 general election is assuaged by a simple disclosure regime (provided it is enforced) – the identity of

the person who is advocating something is likely to be more relevant to its persuasive effect than how loudly they are advocating it.

Issue advertising

Clause 5(1)(iii) – Meaning of election advertisement

39 Clause 5(1)(iii) causes particular concern. It deems the taking of a position associated with a candidate or party an ‘election advertisement’. The concept is vague and will likely be difficult to apply. However, this is not the major problem with the issue advertising provision.

40 The primary issue with this restriction is the potential for it to be used as a weapon for shutting down debate. Bizarrely, the regime seems to mean that the best way to take an issue off the table is to take a position on it. By taking a position on an issue a party or candidate ensures that any person or entity wishing to take the opposing view publicly will be required to go through the strict process of registering as a third party and then be limited to \$60,000 in its spending. The net effect is a stifling of debate on important issues. Furthermore, the basic fact that collectively parties and candidates will be found to have “taken positions” on almost everything, entails the financial regulation of speech on almost all relevant issues at election time. The net effect is a stifling of political debate. The general objectives of the bill do not warrant the regulation of such a huge range of possible speech.

41 The regulation of issues may have other unforeseen consequences. The following is a hypothetical example:

A power generation company seeks to build a wind farm in an area of New Zealand and commences the resource consent process. A party issues a statement to the effect that it opposes the development of new wind farms anywhere. As a result, if the power generation company wishes to continue to advocate the benefits of the wind farm to the local community (and having no interest in influencing the outcome of the election) it is arguably required to register as a third party and even then will be limited to \$60,000 in its spending merely because a party took a view on wind farm development generally.

42 This illustrates how regulation of issue advertising has far reaching consequences. Moreover, in the above example there is an argument to be made that preparation for and advocacy at a resource consent hearing could be an election advertisement where a candidate or party has taken a position on the development in question – the Society notes that there is no exemption

for official proceedings in what may amount to election advertising that could be a problem if issues are to be regulated.

43 Accordingly, regulation of issues for debate is highly unorthodox and not supported by principle.

44 A related point on the definition of 'election advertisement' is that it expressly excludes a document published directly by a body corporate to its members. This grants significant political power to large groups who are unrestricted in their advocating support for candidates or parties to their membership. Arguably it makes the Automobile Association, with around one third of the country's population as members, the most politically powerful organisation in New Zealand. It can communicate with its members on contentious issues such as toll roads, fuel tax rates, or public transport but those wanting to influence its 1.5 million or more members with other points of view are restricted.

Enforcement

45 The Society submits that many of the events of the 2005 election that attracted media attention and prompted this reform were unlawful under the contemporary regulations and that such events would not recur if the current electoral law were properly enforced.

46 The bill proposes a more severe penalties regime that, in concert with vague prohibitions, is amenable to selective enforcement.

47 The vague nature of the prohibitions can be illustrated by the following hypothetical example:
Some parents at a childcare centre decide to lobby for a particular policy that is advocated by a political party. The group spends a little less than \$5,000 on flyers and advertisements in local papers. Parents at another childcare centre in another area hear about the lobbying and decide to do the same. They, too, spend a little less than \$5,000 lobbying for the same policy, using the same words, in much the same manner in their area and in local papers.

48 At this stage there is no issue. Two groups have spent an amount of money under the limit where each would be required to register as a third party. The situation becomes complicated if a member of the second group contacted the first before embarking on the campaign for advice on language, printers, distributors etc. The question is – how far must they act in

concert before they are 'avoiding the limit' as set out in clause 54(1) and breaching the law? What would be the effect if the national body of childcare centres, with or without telling either of these two centres, included a report on their campaigns in its newsletter to all childcare centres? Uncertainty such as this is likely to have the effect of discouraging responsible participation in the election process by genuinely concerned New Zealanders.

Conclusion

- 49 The broad purposes of the bill may well be admirable. However, it appears that its operative provisions have been formulated in a manner so divorced from these purposes that the bill will have the opposite effect to that which is intended. In this case a political compromise has resulted in a compromise of principles and this cannot be accepted in an area as important as regulation of the democratic process.
- 50 The Society considers that the bill goes no way towards increasing transparency or accountability in the democratic process. Conversely, it risks encouraging large anonymous donations to political parties and candidates in preference to open participation in public debate. In this way it promotes rather than prevents the undue influence of wealth.
- 51 The rules regarding registration, disclosure, spending limits and related offences are so complex, vague and uncertain as to make participation in our parliamentary democracy an arduous and perhaps even legally dangerous undertaking for ordinary New Zealanders.
- 52 These considerations are additional to the fact that an overly long restricted period, unduly low spending limits and unfair third party regime, all place an unacceptable restriction on free speech. Overall, the bill would limit freedom of expression protected by s14 of the Bill of Rights Act, in a manner that is not justified as a "reasonable limit" under s 5. It is recognised that the Crown Law Office has advised otherwise, but the Society submits that the cumulative effect of the detail of the bill, as illustrated in this submission, is such that the Bill of Rights Act guarantee would be infringed by some margin, and beyond the "margin of appreciation" to Parliament upon which the Crown Law Office opinion relies. (The Society has reservations as to whether it is appropriate, in advice given to the Attorney-General on the consistency of a proposed law with the Bill of Rights Act, to deploy the concept of "margin of appreciation". That term is best reserved to describe the practice of courts in other jurisdictions who, acting under supreme-law constitutions and faced with legal challenges made *after* legislation has been enacted, choose to respect legislative choices that, while perhaps limiting rights a little

more than necessary, do not seriously infringe them. The Society is inclined to see the concept of a margin of appreciation as being inapt when the issue is whether a proposed law should be enacted in the first place. In any event, this reservation is unimportant in the present context, given the submission that this bill is inconsistent with s14 by a wide margin.)

- 53 In conclusion, there is no one part of the bill that is problematic. Rather, the bill in its current form is a flawed attempt to achieve a legitimate social objective. Its cumulative defects make it irredeemable: the democratic deficit associated with use of the Supplementary Order Paper procedure (even if that were referred to the Select Committee) means that redemption ought not to be attempted in that way. Hence the bill ought not to proceed. Instead, the issue should be approached afresh, as suggested in paragraph 8 above.

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Vice-President
14 September 2007

APPENDIX
Specific issues

The New Zealand Law Society reiterates its submission that the Bill should be returned to the House with the recommendation that it not proceed. However, in the event that the Committee sees fit to recommend otherwise, this table sets out specific drafting that the Society considers will create difficulties.

Clause	Issue	Comment
4 Interpretation (regulated period)	<p>It is unclear why the regulated period should be significantly longer in a year in which Parliament is due to expire.</p> <p>It is unclear why different rules should apply to third parties compared to candidates and parties with regard to regulated periods.</p>	<p>The definition as currently drafted may incentivise the holding of an election in January – March where the Government feels it advantageous for it to campaign for longer than 3 months (see comment at paragraph 13).</p> <p>Where an election were held in January for example it is inevitable that the next election would be held with a 3 month regulated period as the election would have to be in the early months of the year (due to expiry) or in a non-election year.</p>
5(1) Meaning of election advertisement	The definition of “election advertisement” may not cover single issue advertising in some cases.	An example of where single issue advertising might not be covered is where the names of all the members who voted for a bill were listed and invited electors to draw their own conclusions. Whether or not this is an election advertisement may come down to the disclosure statement – if the promoter of the advertisement has an obvious position on the matter the ad is likely an election advertisement. If the promoter has no obvious affiliation then the election advertisement status is arguable.
14(1)(c) Persons eligible to be third party	<i>This provision is totally ill-conceived. It would prevent any unincorporated body from becoming a third party who had amongst its membership New Zealanders under the age of 18 or foreign nationals entitled to be in New Zealand but not entitled to vote.</i>	This provision would prevent, in particular, churches, some unions, many sports clubs and many university and other student groups from participating in elections.
14(1)(b) Persons eligible to be third party	The restriction on participation of overseas persons may be too harsh – there are many overseas-based organisations that have a vested interest in New Zealand and it is not clear why these organisations should be refused third party status especially given the restrictions placed thereon.	<p>It is also arguable that this restriction increases the possibility of overseas corporations making large anonymous donations directly to political parties and increase the risk of the influence buying that is a major issue in overseas jurisdictions.</p> <p>Is it not preferable to have overseas companies openly try to influence the electorate rather than surreptitiously seeking favour with parties and candidates?</p>
22(2) Interpretation	The definition of ‘donation’ means that a homeowner who has allowed a candidate, a party or a third party to put up a poster on their fence is making a donation to that person/party as the advertising space has commercial value.	<p>Accurately calculating the market value of space that has never been used for advertising will be almost impossible. Reasonable market value is a nebulous concept at the best of times.</p> <p>Further definition of donation is desirable when it is considered that there is a gap between ‘donation’ and ‘contract’. Where, for example, an organisation allows a party to hold a function in its meeting</p>

Clause	Issue	Comment
		rooms for free in the hope of increasing the venue's profile in the community, it can neither be said that it has made a donation (in the ordinary sense of the word as it is not defined further) to the party nor has it entered into a contract.
38 Return of party donation received from same donor exceeding \$20,000 53 Election advertisements not to be published in regulated period unless certain conditions met	In these provisions dollar values are stated without reference to whether the amount is GST inclusive.	There is a particular irony here, given that GST inclusion or exclusion was an issue in 2005 general election spending.
38(2) Return of party donation received from same donor exceeding \$20,000	The trigger date in clause 38(2) is not clear. It could be interpreted as 12 months before the date of receipt of the last donation, or it could be interpreted as 12 months from the date the financial agent "knows" the donation is from the same donor. That could be inside or outside the 12-month period. It could even be well after the election.	There is no definition of donor and no provision for aggregation of like donors (that itself would present problems).
56(1) Payments for exhibition of election advertisements	This provision is inconsistent with 59(1)(iii), 59(3)	In concert these provisions mean a person may be banned from paying for advertisements that are bound to count as an election expense.
56 Payments for exhibition of election advertisements	Clause 56 is said to be based on the Electoral Act but there is a subtle difference. The current Electoral Act talks about the ordinary business of the person being to exhibit advertisements. Clause 56(1) refers to the ordinary business of the person being to exhibit <u>election</u> advertisements. Elections are only every 3 years or so. Accordingly, it is difficult to say that anyone can be in the ordinary business of exhibiting election advertisements.	
59(1)(iii) Meaning of election expense 81(1)(iii) Meaning of election expense 100(1)(b)(iii) Meaning of election expense	These provisions arguably encompass a farm or a residential investment property. How is the value of space on land to be determined?	In relation to a rental property, it could be interpreted that an advertisement is an election expense if the landlord puts it up but not if the tenant puts it up.
81(2)(g) Meaning of election expense	This creates a very large exemption and arguably gives a significant opportunity for parties to campaign outside the expense cap by distributing material about an	Seemingly 81(2)(g) also allows the reverse. Arguably a flyer reading "As a Member of Parliament John Doe has contributed only twice to a House debate and has attended less than 10% of

Clause	Issue	Comment
	incumbent Member's conduct, which will almost certainly have the effect of encouraging voting for that Member or that Member's party	House sittings" could be widely distributed by a rival party and would not be required to count as an election expense.
87 Periods for claiming and paying party's election expenses 107 Periods for claiming and paying third party's election expenses	<p>These clauses are flawed in that although they mean that no debt of a party can be legally enforced after the 20 working day period, there is nothing to prevent the party or third party, or indeed any other person, paying the debt voluntarily.</p> <p>The late payment would not be caught by subclause (3) because it would not be a payment in breach of subclause (2). That would be because the claim has never been sent to the agent.</p>	To solve this the words "or may be paid" could be added after "recoverable". However, enforcement of such a restriction would be almost impossible.
119(3) Liability of candidates, party secretaries, and third parties	The knowledge requirement seems difficult to apply. A principal might well know that an offence was committed in the sense that he or she may know that the advertisements exist because they have seen them. He or she would not necessarily have known that the advertisements constituted an offence. The position of that person under clause 119(3)(b) is unclear.	There is a disjunction between the knowledge requirements for the offence set out at clause 119 with that set out at clause 120.
120 Providing money for illegal purposes	The wording "where a person knowingly provides money..." in this clause appears to be very problematic.	<p>The person will always know that they provided the money. What needs to be proved, presumably, is that they knew it was for a purpose contrary to the provisions of the Act. Accordingly the "knowingly" is misplaced. The provision should read "where any person provides money for any purpose that the person knows is contrary to the provisions of this Act." However, that will not catch a large number of people who will have not read this Act in detail.</p> <p>A further problem is that where a person incurs an election expense in excess of the cap, he or she is unlikely to have any idea whether or not the cap has been exceeded.</p>