



# New Zealand Law Society

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## **Opening statement on behalf of the New Zealand Law Society to the Justice and Electoral Committee on the Electoral Finance Bill**

1. The New Zealand Law Society makes submissions on most new legislation. We do so from an independent perspective and in the public interest.
2. It is very rare for the Society to come to the view that a bill is bad and should not proceed further.
3. But the Electoral Finance Bill is one such bill. In our view the objectives of the bill are simply not achieved by the content of the bill. We explain why that is so in our written submission, and will comment in more detail shortly.
4. The rules regarding registration, disclosure, spending limits, and related offences are so complex, vague and uncertain as to make participation in our parliamentary democracy a difficult undertaking for ordinary New Zealanders. It would be too easy for people unwittingly to break the law simply by participating in the debates on election issues.
5. By way of example, clause 5(1)(iii) deems the taking of a position associated with a candidate or party an "election advertisement". By taking a position on an issue a party or candidate ensures that any person wishing to take the opposite view publicly, and wanting to spend more than \$5,000, will have to go through the strict process of registering as a third party and will be limited to spending \$60,000. The effect will be to stifle debate on important issues at election time, which is precisely when debate should be encouraged.
6. In our view the bill should be withdrawn. It is not capable of being patched up. The policy-makers should start again, with clear objectives, and with better regard for the right of free speech, and the right to participate freely and openly in the democratic process, both of which rights are basic to our democratic ideals.

7. We also believe that legislation such as this, which goes to the heart of our democratic system of government, should be broadly accepted both within Parliament and in the wider community. The controversy surrounding this bill shows that it does not have that broad acceptance.
8. We do not want to be seen as entirely negative. We do endorse the objectives in the bill. We accept that internationally there are precedents for restrictions on electoral advertising. There should be transparency as far as donations and third party activity are concerned. However, this bill does not achieve the right balance between these restrictions and requirements, and the objective of the promotion of participation by the public in parliamentary democracy.
9. Attached to this statement is a schedule setting out the objectives in clause 3 of the bill, and showing why these objectives are not achieved.

John Marshall QC

President

27.9.07

# New Zealand Law Society

## SUBMISSION ON THE ELECTORAL FINANCE BILL

### Objectives set out in clause 3

The New Zealand Law Society does not oppose the objectives of the Bill.

This briefing sheet sets out the objectives of the Bill in one column, and alongside, notes why they are not achieved by this Bill.

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|---|---|
| (a) Maintain public and political confidence in administration of elections.  | Demonstrably not the case. This bill is opposed by traditionally neutral groups such as ourselves and the Human Rights Commission.<br>Opposition to the Bill is not along party political lines.  |
| (b) Promote participation by the public in parliamentary democracy.   | Extreme level of uncertainty around restrictions in concert with penalty regime makes participation very risky.<br>See paragraph 12 regarding same financial limits and longer periods.<br>Paragraph 20 lists factors that restrict criticism of Government.<br>Third party registration limits public role (example at para 32) and some cannot ever register (para 25). |
| (c) Prevent undue influence of wealth on electoral outcomes.  | Unlimited anonymous donations to parties in concert with third party spending caps gives rise to a severe risk of covert 'influence buying'.<br>See our paragraph 16 regarding MP related publicity.<br>Allows anonymous donations to political parties but not third parties.  |
| (d) Provide greater transparency and accountability of candidates, parties and others to minimise perception of corruption. | It encourages secret donations to political parties.<br>Accountability rules are so complex that volunteers in political parties face a discouraging degree of complexity and prospects of prosecution.   |

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| (e) | <p>Ensure the controls are:</p> <ul style="list-style-type: none"> <li>• effective</li> <br/> <li>• clear</li> <br/> <li>• can be efficiently administered, complied with and enforced</li> </ul> | <ul style="list-style-type: none"> <li>• cannot be called effective if citizens can breach while behaving blamelessly;</li> <li>• examples at paragraph 47 and 48.</li> <li>• they are open to much subjective interpretation and analysis applied after the event;</li> <br/> <li>• examples at paragraph 22 and 47;</li> <li>• meaning of election expense clause 81(2)(g); parties can use this to campaign against sitting member (can only be a party expense).</li> <li>• cannot be easily understood or complied with, especially by those with single issue interests or not fully involved in the process;</li> <br/> <li>• administration is not simplified, while enforcement beyond the filing of information remains uncertain. Returns have vague rules (clause 38(2);</li> <li>• definition of “donation” and use of “market value” for advertising space (clauses 22, 56, 59 as discussed in Appendix);</li> <li>• paragraph 27. How will minor party encouragement of electorate votes to major parties be enforced?</li> <li>• clause 87 – voluntary payment of debts outside period.</li> </ul> |
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# New Zealand Law Society

## SUBMISSION ON ELECTORAL FINANCE BILL CASE STUDIES

### Unsolicited Campaigning

*(see also paras 22 –25 of the NZLS written submission)*

Mary goes along to a local meeting of candidates standing for election as representatives for her electorate. One of the candidates – Jim Smith - strikes her as the perfect person to represent the local area so, when she gets home from the meeting, she paints “Vote Jim Smith!” on a banner and hangs it on the fence outside her home.

What has Mary done wrong?

- Mary has breached clause 53(1)(a) of the bill by failing to record her name and address on the banner;
- Mary has breached clause 53(1)(b) by failing to issue herself with a declaration under s9 of the Oaths and Declarations Act 1957 to the effect that she will not spend more than \$500 promoting this candidate as required by clause 53(3) of the bill;
- Mary has breached clause 55(2) of the bill by failing to have the banner authorised in writing by Jim Smith’s financial agent;
- Mary has produced a candidate advertisement under clause 4 of the bill as she is encouraging voters to vote for Jim Smith in his capacity as a candidate for the electorate;
- Because Mary’s banner is a candidate advertisement, any costs that Mary incurred in producing her banner would be election expenses for Jim Smith were it not for the fact that the Banner was not authorised by Jim or his financial agent;
- While Jim may not be required to account for the money Mary spent on the banner, Mary has likely incurred an unauthorised election expense on Jim’s behalf in violation of clause 60 of the bill (which requires all expenses to be incurred by the financial agent<sup>1</sup>); and
- Accordingly in creating a banner supporting Jim Smith, and in doing so wilfully, Mary may have committed a corrupt practice under clause 61 and be liable to be imprisoned for a term not exceeding 1 year under clause 124 (note the difficulty in determining ‘wilful contravention’ – para 26 of the written submission).

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<sup>1</sup> This point is wholly unclear – for expenditure to count as an ‘election expense’ it must be authorised by the financial agent (cl 58 & 59). Clauses 60 and 61 then go on to set out that it is an offence for any person other than the financial agent to incur an ‘election expense’. So either the offence at cl 61 is by definition impossible to commit or unauthorised spending for the candidate is prohibited in an overly complex and potentially ineffective manner.

## Issue advertising

*(see also paras 39 – 44 of the NZLS written submission)*

In the 2008 election a major party decides to make domestic violence an election issue. It releases a detailed policy involving increased funding for social services and support groups and more severe criminal penalties for offenders. This policy is supported by significant election advertising on the issue. At around the same time Women's Refuge (National Collective of Independent Women's Refuges) is planning a donation drive. To this end they have commissioned several TV and print advertisements illustrating the harm of domestic violence.

Under the Electoral Finance Bill:

- The TV and print advertisements are very likely election advertisements under clause 5(1)(iii);
- If Women's Refuge intends to spend more than \$5000 dollars on promoting their donation drive they will have to register as a third party (clause 53(3));
- If they do successfully register as a third party there will be a number of consequences:
  - every coin that goes into the collection buckets during the drive is a third party donation.
  - A return of all donations over \$500 must be filed, kept and made available for public inspection (clauses 47-52);
  - any anonymous donations over \$500 will have to be surrendered to the Chief Electoral Officer (clause 42(2));
  - an audited return of 'election expenses' will have to be filed after polling day (clauses 111–112)
- Accordingly, in carrying out their task, Women's Refuge is caught up in the regulation of an election they had no interest in influencing.



### **Registration Timing**

*(this example is a reproduction of the example at paragraph 22 of the NZLS written submission)*

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.

Under the Electoral Finance Bill:

- It is too late for the Cancer Society to register as a third party (clause 17); and
- 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 (clause 53(3)).

### **Loose Associations**

*(this example is largely reproduction of the example at paragraph 47 of the NZLS written submission)*

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. One of the members of the latter group contacts a member of the former for advice on the message, wording, printers, distributors etc. The second group then, spends 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.

- Have these groups conspired to avoid the limits set out at clause 53 and committed the offence at clause 54(1)? – the position is wholly unclear.
- How far must persons act in concert before they are a single entity for the purposes of spending limits? This is totally vague and amenable to selective enforcement.

## Billboards

*(see also submissions on clause 56 in the Appendix to the NZLS written submission).*

Mike is a farmer whose farm borders a main arterial road. In the run up to the 2008 election he is approached by Andrew, a friend of his who is standing for election as a candidate in the local electorate. Andrew asks Mike if he could put up a large billboard on Mike's property near the road in exchange for which he offers him a bottle of scotch whisky. Mike has never had a billboard of any kind on the property before but agrees to help out his mate. The scotch is gratefully accepted and the billboard is erected.

What has happened here?

- Andrew has breached clause 56(1) if the scotch whisky can be said to be 'payment' because he has given payment to a person not ordinarily in the business of exhibiting election advertisements for the display of such an advertisement.
- Despite getting the site for a bottle of scotch, Andrew may be required to count the 'commercial value' of the advertising space as an election expense:
  - The first step is to determine whether the farm is land used 'principally for commercial or industrial purposes' under clause 59(1)(iii). If it does not meet this definition then there is no election expense. Whether or not a farm meets this definition is arguable;
  - If it does meet the definition the next question is whether the space has 'commercial value' of more than \$200. If it does not then, under clause 59(5), the 'commercial value' is not required to be counted as an election expense;
  - If the 'commercial value' is greater than \$200 then Andrew must record that value as an election expense under 59(4) (probably less the cost of the bottle of scotch which Andrew gave Mike (illegally) as 'payment');
  - Just how Andrew and Mike are to determine the 'commercial value' of a billboard on a site never before used for advertising is anybody's guess – but it is important for Andrew and his financial agent to find out because if they get it wrong they may inadvertently breach their \$20,000 spending cap at clause 62(1) and be guilty of an illegal practice under clause 67(1)(b);
  - To get an estimation with anything resembling accuracy Andrew would likely have to employ the services of a person qualified to value advertising space (assuming such people and qualifications exist). The valuer's fees may or may not count as an election expense (unlikely unless they count as part of the 'preparation' of the advertisement -clause 59(1)(b)(i)).
- The level of legal uncertainty surrounding this simple deal between friends is extremely high.