NEW ZEALAND LAW SOCIETY

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Electoral (Integrity) Amendment Bill

15/03/2018

Submission on the Electoral (Integrity) Amendment Bill

A Introduction

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to make a submission to the Justice Committee on the Electoral (Integrity) Amendment Bill (**Bill**).

2. This submission addresses three aspects of the Bill:

   a. Its consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**) (see section B).

   b. The availability of judicial review (see section C).

   c. When the Bill should commence (if it is enacted) (see section D).

B The Bill's consistency with the New Zealand Bill of Rights Act 1990

3. The Attorney-General's advice on the Bill's consistency with the Bill of Rights records that:

   a. By empowering the leader of a political party to cause a member of Parliament (**MP**) to vacate their seat the Bill has the potential to cause a chilling effect on an MP's freedom to express themselves inside and outside the House and also limits their ability to exercise their freedom not to be associated with a political party.[1]

   b. This raises a prime facie inconsistency with the rights to freedom of expression (section 14) and freedom of association (section 17).[2]

   c. The objectives of the Bill are: (i) to enhance public confidence in the integrity of the electoral system; and (ii) to enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors.[3]

   d. Those are manifestly important constitutional objectives and there is a rational connection between the objectives and the proposed measures.[4]

   e. The impairment on the rights is significant,[5] with freedom of expression in the House having a special constitutional value.[6]

   f. There appears to be no alternative way to restore proportionality of political party representation in Parliament other than by removing the member who has distorted it. Accordingly, the impairment is minimal.[7]

   g. The question whether the impairment is proportional to its stated objective is finely balanced but the Attorney was satisfied the limitations are proportionate.[8]

4. The Law Society accepts points (a) to (e) above. It acknowledges that reasonable people may disagree on points (f) and (g) and therefore the ultimate question: whether the limits in the Bill on the rights to

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1 Attorney-General's Bill of Rights advice on the Bill (December 2017) at [2].
2 At [10].
3 At [17].
4 At [18].
5 At [19].
6 At [21].
7 At [19].
8 At [23].

freedom of speech and association can be demonstrably justified in a free and democratic society. The Law Society does not have a view on that question.

5. However, there are certain aspects of the Attorney-General's advice (in particular points (f) and (g) above) where the Law Society considers that further analysis or evidence is desirable.

6. Section 5 of the Bill of Rights provides that the rights contained in it may only be subject to such limits as can be *demonstrably* justified in a free and democratic society. Given the requirement to show that limits are demonstrably justified, a section 5 analysis is likely to involve the assembly of evidence[9] (although the courts have accepted that there are cases where the underlying policy considerations may be capable of evaluation without evidential material).[10] In relation to the right to be free from discrimination, the Ministry of Justice has advised policy-makers that:[11]

> Where a legislative provision, policy, practice, or service appears to be inconsistent with the right to be free from discrimination, it is up to you or your agency to establish how that inconsistency is justified under section 5 of the Bill of Rights. That means *justifying your policy or proposed law with evidence such as research, empirical data, findings from consultation, reports or the results of inquiries or reviews*. As with any good policy development, *it is important not to act on assumptions, but to provide a well-argued case, based on high quality analysis and research*, that clearly establishes why a particular course of action is necessary.

7. Robust analysis and evidential inquiry is particularly important in the present case given (a) it is acknowledged that the rights impairment is significant; (b) the proposal is not the result of any detailed policy work by an expert body (at least so far as the Law Society is aware); and (c) the absence of a Regulatory Impact Statement, which means that the Committee has not been provided with evidence and regulatory analysis that would justify the proposed measures.

8. One of the rationales for the Bill is that it will enhance the maintenance of the proportionality of political party representation in Parliament. Since the adoption of MMP, there have only been a limited number of cases where an MP's conduct would have triggered the provisions of the Bill – as noted at paragraphs 9 – 11 below. Those cases could be analysed to gain a sense of the scale of the problem both in absolute terms and relative to other matters that may distort the proportionality of Parliament, for example by-elections that result in a seat being held by a different party, overhang seats and the effect of the five per cent threshold.

9. In 2013 the Constitutional Advisory Panel considered this issue and recommended no changes. The Panel reported that since the Electoral (Integrity) Amendment Act 2001 expired in 2005 there had been only four cases of an MP leaving their party but remaining in Parliament.[12] The four cases are not identified in the Constitutional Advisory Panel's report but the Law Society understands them (plus an additional case where an MP resigned and forced a by-election) to be:

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9 Paul Rishworth "The Making of Quality Legislation: Some External Constraints and Constitutional Principles" (11 July 2012) at 8 (available at http://www.lac.org.nz/assets/presentations/Rishworth-external-constraints-and-constitutional-principles-2012-07-11.pdf).

10 See, for example, R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1 at [232] (per McGrath J).

11 Ministry of Justice, *The Non-Discrimination Standards for Government and the Public Sector: Guidelines on How to Apply the Standards and Who is Covered* (2002) at 22 (emphasis added).

12 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 66.

a. Taito Phillip Field – In February 2007, Mr Field (a constituency MP) was expelled as a member of the parliamentary Labour Party following allegations he had benefited from helping people with immigration applications. He then resigned as a member of the Labour Party to become an independent MP. The following year Mr Field lost his seat during the 2008 general election. He was later jailed for six years on corruption charges.

b. Gordon Copeland – In May 2007, Mr Copeland (a list MP) resigned from United Future in part over the United Future leader's support for the Crimes (Substituted Section 59) Bill. Mr Copeland said that he would be betraying people who voted for United Future if he had not done so. [13] Mr Copeland remained in Parliament as an independent MP. He was not returned to Parliament in the 2009 general election.

c. Chris Carter – In June 2010, Labour Party leader Phil Goff demoted Mr Carter (a constituency MP) for misusing a ministerial credit card. In July 2010, Mr Carter was suspended from the parliamentary Labour Party after sending anonymous letters to journalists undermining Mr Goff's leadership. Mr Carter remained in Parliament as an independent MP. He did not stand for re-election in the 2011 general election.

d. Hone Harawira – In February 2011, Mr Harawira (a constituency MP) was suspended from the Māori Party caucus after expressing opposition to the Māori Party's support for the Marine and Coastal Area (Takutai Moana) Act 2011 (which repealed the Foreshore and Seabed Act 2004). He briefly served as an independent MP before resigning from Parliament and forcing a by-election in this seat (with a little over six months to run before the general election). He contested and won the by-election for the Mana Party.

e. Brendan Horan – In November 2012, Mr Horan (a list MP) was accused of taking money from his dying mother's bank account and spending it on gambling. In December 2012, New Zealand First expelled Mr Horan from the party in light of the allegations and referred the matter to the authorities. Mr Horan remained in Parliament as an independent MP. Mr Horan was not returned to Parliament in the 2014 election. In 2016, following a two-year investigation, Mr Horan was cleared and no charges were laid.[14]

10. There have not been any subsequent cases. But there were two cases that occurred while the Electoral (Integrity) Amendment Act 2001 was in force:[15]

a. Donna Awatere Huata – In January 2003, the leader of the ACT party referred allegations of financial impropriety regarding Mrs Awatere Huata (a list MP) to the Controller and Auditor-General. In February, she was suspended from the parliamentary party. In November 2003, Mrs Awatere Huata was charged with fraud and the party initiated the process under the Electoral (Integrity) Amendment Act 2001 to remove her from Parliament. Mrs Awatere Huata challenged this process and served as an independent MP between November 2003 and November 2004. For the remainder of the term of Parliament (November 2004 until the 2005 general election), her

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13 Kevin List "UF Lose MP who Played 'Cat and Mouse Game'" (16 May 2007) Scoop <www.scoop.co.nz>.

14 David Fisher "Ex-MP Brendan Horan Cleared by Police over Allegations He Took Money from Late Mother's Account" (19 February 2016) New Zealand Herald <www.nzherald.co.nz>.

15 For a list of earlier cases, see Jack Vowles "Legislative Accountability in a Mixed-Member System: Turnover, Dual Candidacy, and 'Party-Hoping' in New Zealand" (paper presented to the 2013 Annual Meeting of the American Political Science Association, Chicago, 29 August – 1 September 2013).

seat was taken by the next candidate on the ACT list. In 2006, Mrs Awatere Huata was convicted of fraud and sentenced to imprisonment.

b. Tariana Turia – In April 2004, Ms Turia (a constituency MP) resigned from Parliament over the Labour Party's policy of legislating for public ownership of the foreshore and seabed. She successfully contested the resulting by-election, in which no other major political parties stood a candidate, for the Māori Party. Ms Turia remained in Parliament until her retirement in 2014.

11. The following points are noted:

a. In the one case where an MP (Mrs Awatere Huata) declined to resign from Parliament and contested her removal, she served most of the remaining term of Parliament as an independent MP while she challenged the process. The amount of time she served as an independent MP is similar to the amount of time served by other MPs as independents after leaving or being expelled from their parties. This raises questions about the effectiveness of the Electoral (Integrity) Amendment Act 2001 (and the Bill).

b. In the two cases where electorate MPs resigned and caused a by-election (Tariana Turia and Hone Harawira), there was criticism that the by-election was a waste of money.[16] The Committee may like to consider whether such criticisms reflected circumstances unique to those cases or whether they apply more generally.

c. To date the democratic process has addressed proportionality concerns to the extent that no MP who has left or been removed from their party without forcing a by-election has been returned to Parliament at the following general election.

d. In three cases (Tariana Turia, Gordon Copeland and Hone Harawira), the MP left as a result of policy differences where the departing MP claimed to be acting in accordance with the principles upon which the party was elected.[17] These are examples where the Bill would infringe MPs' freedom of expression.

e. In four cases the MPs in question left their parties in circumstances where there were allegations of misconduct (Donna Awatere Huata, Taito Phillip Field, Chris Carter and Brendan Horan). This suggests that in some cases, the Bill may (in substance) provide a "back-door" mechanism for removing MPs subject to misconduct allegations, without due process.

12. Part of the rationale for concluding that the rights limitations in the Bill are justified in a free and democratic society is that MPs have the protection of being able to apply for judicial review. For the reasons given below in section C, it is not clear that protection is available to MPs. If the protection is not available, the Committee should consider whether the limitations can be justified in its absence.

C Availability of judicial review

13. The Attorney-General's conclusion that the limitations the Bill causes to the freedoms of expression and association are proportionate and therefore justified was based, in part, on the view that if MPs were

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16 Kathryn Powley "Mana Party's $500,000 Bill" (30 April 2011) Herald of Sunday www.nzherald.co.nz; "Tariana Turia to Resign and Force Byelection" (30 April 2004) New Zealand Herald <www.nzherald.co.nz>.

17 There are, of course, other historical examples including Jim Anderton justified his departure from the Labour Party on the same basis. For an argument that MPs should be permitted to leave a party in these circumstances see John Wallace "Reflections on Constitutional and Other Issues Concerning our Electoral System: the Past and the Future" [2002] VUWLR 30.

"subject to a capricious or unreasonable exercise of the measures they are not left without remedy" as they could apply to the High Court for judicial review.[18] In support of this view, the Attorney-General cited the litigation in *Awatere Huata v Prebble*.[19]

14. It is not, however, clear that MPs will have the protection of recourse to the High Court for the following reasons:

    a. *Decisions under the Bill may not be amendable to judicial review*: Although the courts heard an application for judicial review in *Awatere Huata v Prebble*, a majority of the Supreme Court noted that case both parties had proceeded on the assumption that the decision by the parliamentary leader (that an MP has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament) was a statutory decision amenable to judicial review.[20] As a consequence, there was no argument about whether the decision was amenable to review. Given the stance adopted by the parties, and the fact that the legislation was shortly due to expire, the Court was prepared to proceed on the basis that the issue was amenable to review. But the Judges left the correctness of this issue open. The Chief Justice expressly noted that it was "at least arguable" that such a decision was not reviewable or only reviewable on limited grounds. [21] Gault J said that it was "difficult to see the content of … [a] notification [under section 55D(b)(i)] as reviewable".[22] Keith J said that he proceeded on the assumption that the proposed actions of Mr Prebble were reviewable "notwithstanding the very unusual wording of s 55D".[23] Accordingly, it would be open to a court in future to conclude that decisions under the Bill were not reviewable. The comments of Elias CJ, Gault and Keith JJ provide strong support for such a conclusion.

    b. *Decisions under the Bill may be protected by parliamentary privilege*: In this respect, the Law Society notes two points:

        i. In *Awatere Huata v Prebble* the parties proceeded on the assumption that the litigation did not give rise to any question of the privileges of Parliament. Again, the majority of the Court declined to endorse that view and left the issue open for future cases. The Chief Justice expressly said that it was not "necessary to express any concluded view" on the proper scope of parliamentary privilege.[24] Gault J observed that it "may be that the structure of ss 55A–55E (directed to statements rather than underlying facts) was adopted as more appropriate for parliamentary rather than curial supervision".[25] Keith J made similar comments.[26] Given those comments, if the Bill is passed and further litigation comes before the courts it is not clear that the courts would find that parliamentary privilege did not apply.

        ii. In addition to the Court leaving the issue of parliamentary privilege open in *Awatere Huata v Prebble*, since that decision the Parliamentary Privilege Act 2014 has come into force. That Act enacts an expansive definition of proceedings in Parliament, meaning "all words

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18 Attorney-General's Bill of Rights advice on the Bill (December 2017) at [22].
19 *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC).
20 At [25] (per Elias CJ), at [57] – [62] (per Gault J), and [72] (per Keith J).
21 At [25].
22 At [59].
23 At [72].
24 At [25].
25 At [61].
26 At [72].

spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the House or a committee".[27] It is at least arguable that decisions made under the Bill come within that definition.

15. Given the uncertainty surrounding whether MPs will have the protection of recourse to the courts, the Law Society submits that:

    a. If the intention is that decisions taken under the Bill will be subject to judicial review, the Bill should expressly provide for that and make it clear that such litigation does not infringe parliamentary privilege, preferably by including a provision to that effect in the Parliamentary Privilege Act 2014.

    b. Before doing that, it would be necessary to be satisfied that allowing judicial review is consistent with the principle of comity, as expressed in the Parliamentary Privilege Act 2014, that "requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges".[28]

    c. If it is determined that it is not appropriate for decisions taken under the Bill to be subject to judicial review, that undermines part of the rationale for the Attorney-General's "finely balanced" conclusion that the limitations in the Bill are proportionate and justified in a free and democratic society.[29] It would involve what the Attorney accepted was a "significant" impairment to MPs rights to freedom of association and freedom of expression (which, in the House, "has a special constitutional value") without giving them any right of recourse to the courts. [30] Doing so would also prima facie be inconsistent with section 27(1) of the New Zealand Bill of Rights Act 1990 which provides that "[e]very person whose rights, obligations, or interests protected or recognised by law have been effected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination".

D Commencement: the Bill should not come into force until after the expiry of the current Parliament

16. If the Bill is enacted, the Law Society submits that it should not come into force until after the expiry of the current Parliament. Clause 2, the commencement clause, should be amended accordingly.

17. Legislation should generally have prospective and not retrospective effect.[31] How strongly the presumption against retrospective legislation applies depends on context. It applies particularly strongly in the context of constitutional provisions.

18. Constitutional provisions, including the Electoral Act 1993, effectively set out the "rules of the game". Changes to the rules should be made prospectively. As a leading rule of law theorist, Jeremy Waldron, has explained in relation to New Zealand's electoral laws:[32]

> Our law works as a system; and it works to the extent that the integrity of the system can be held together. The principle of prospectivity – that we should make law in a

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27 Parliamentary Privileges Act 2014, s 10(1).

28 Parliamentary Privileges Act 2014, s 4(1)(b).

29 Attorney-General's Bill of Rights advice on the Bill (December 2017) at [23].

30 Attorney-General's Bill of Rights advice (December 2017) at [19] and [21].

31 Legislation Advisory Committee *Guidelines – Guidelines on Process and Content of Legislation* (2014 edition), chapter 11 and s 7 of the Interpretation Act 1999.

32 Jeremy Waldron "Retroactive Law" (2004) 10 Otago Law Review 631 at 653.

forward-looking way, not retroactively or retrospectively – along with other Rule-of-Law values is key to that systematic integrity.

19. The Bill amends our constitutional provisions by changing the circumstances in which members of Parliament can, in effect, be removed and, in the process, limits their rights to freedom of association and speech. At the time the members of the 52nd Parliament were elected, the provisions in the Bill relating to removal were not in place. When members stood for election they did so on the basis that in the event of a major disagreement with their political party on an issue, they had the option of crossing the floor, becoming an independent, or defying the whips and abstaining, without losing their seat. The voters knew these options were available when they voted, and should be taken to have voted accordingly. If the provisions of the Bill are to be implemented, they should be introduced only with effect to the 53rd and subsequent parliaments.

20. In addition to protecting the rights and legitimate expectations of members, legislating in this way also serves a wider constitutional objective. By ensuring that constitutional changes only take place after the next election, the precise political effects of the change will not be known at the time the change is made. This protects both against amendments being made for partisan political advantage and from the charge that amendments are being made for that reason.

21. Parliament itself recognises and applies this principle in relation to another part of the constitution, Standing Orders.[33] As the Committee will be aware, the Standing Orders Committee's usual practice is for any amendments to the Standing Orders to be adopted by the House but only come into force from the commencement of the new Parliament.[34] It is appropriate to apply the same approach to the commencement of the Bill.

E Conclusion

22. In conclusion, the Law Society submits that the Committee should require further analysis, as set out in Part A. If the Committee recommends that the Bill proceed, then it should further recommend:

    a. clarification in the statute of the availability of judicial review; and

    b. that the legislation only come into force with the commencement of the next Parliament.

23. The Law Society seeks to be heard on this submission.

Kathryn Beck
President
15 March 2018

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33 The Standing Orders Committee has recognised that the Standing Orders are "akin to constitutional rules": *Review of Standing Orders: Report of the Standing Orders Committee* (50th Parliament, July 2014) at 4.

34 David McGee *Parliamentary Practice in New Zealand* (4th ed) at 14; and *Review of Standing Orders: Report of the Standing Orders Committee* (47th Parliament, December 2003) at 5.