

SUBMISSION

By



To the

MINISTRY OF JUSTICE

On the

ELECTORAL FINANCE REFORM PROPOSAL

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Electoral Finance Reform

1. Guiding principles

While there appears to be considerable support for prefacing new or amended electoral finance legislation with a purpose statement setting out as applicable principles clarity, equity, freedom of expression, participation, transparency, accountability and legitimacy, the proposed words, being open to judicial interpretation, may well cause their own problems. Views of what is equitable will vary among decision makers, real accountability may be hard to sheet home, what constitutes freedom of expression and the extent to which it may be limited will be highly arguable. Rather than making things clearer, those same principles may well undermine the very clarity the legislation seeks to promote; far better to set out a simple, straight forward process encumbered with as few restrictions as possible. In the scheme of things purpose statements are a relatively new development. They may appear to add certainty but in the present context are more likely than not to present an open invitation to challenge the activities of those involved in the electoral process (in whatever capacity). The inclusion of a purpose statement is not supported. Instead, any legislation developed should put in place an uncomplicated and readily understandable procedure capable of ensuring the clarity required.

2. State funding

It is not entirely clear from the proposals set out in Chapter 2 whether or not funding intentions are directed only to those parties currently represented in parliament or whether, if option 2c were adopted, funding would be made available to political parties with no elected representatives as and when these might arise, provided they have at least 500 members. There would appear to be no good reason to fund newly formed parties not represented in parliament since doing so would be liable to encourage the establishment of small, often single-issue, disaffected groups. Allowing for funds to be used over the electoral cycle would inevitably complicate expenditure calculations, even given a requirement for an annual expenditure report and is similarly not supported.

The preference would be to restrict the current state broadcasting allocation to radio and television advertising but with no limit on the amount of radio or TV advertising political parties can purchase for themselves from their own funds. Allowing political parties to spend allocated funds on advertising in whatever media they choose, though not a particularly objectionable proposal, would require funds currently allocated under the Broadcasting Act to be allocated in some other way and would make calculating total expenditure (as with option 2c) just that much harder. And though there seems to be no good reason to place a total expenditure limit on the amount of their own funds parties spend on advertising – the extent to which voters are influenced by advertising is a

moot point – doubtless the general view will be that such a limit should exist. However, if total expenditure limits are imposed, calculating just how much has been spent will inevitably be that much harder, leading, possibly, to inadvertent breaking of the rules.

Rather than choosing one or other of the three options presented, it is recommended that the current broadcasting allocation be retained but with allocated funds able to be used for advertising in the media of choice, with no requirement to itemise how the funds have been spent and no limit on the ability of parties to use their own funds for advertising purposes as well.

3. Parliamentary Service funding

While the distinction between spending for a parliamentary purpose and electioneering spending seems reasonably clear under the current rules, added clarity could be gained by aligning the definition of electioneering in the Parliamentary Service Act 2000 with that of election advertisement in the Electoral Act 1993.

4. Private donations

It is apparent that the majority of submissions on electoral finance reform issues paper supported the retention of limitations on donor funding but it remains the case that the complexity of the 2007 regime, the comparative ease with which, wittingly or unwittingly, donations levels could be exceeded and the consequent likelihood of committing an offence, turn what should be a relatively simple process (party/candidate funding) into an unnecessarily convoluted exercise. (Do late donations that take a candidate or party over the allowable amount have to be returned?) It would be far simpler to allow donations of whatever amount and to whatever extent individuals and organisations choose to give, subject to one or two caveats namely, requirements for all donors to provide their names to the (proposed) electoral agency for release on request, and for public companies to obtain specific shareholder approval for donation policies. Details would then have to be recorded in companies' annual reports (as happens in the United Kingdom). There is little if any evidence that New Zealand election outcomes ever equating to candidate or political party affluence. Voters are capable of making up their own minds and should not be treated as children.

5. Campaign expenditure limits

The preference would be to have no limits on campaign spending since political outcomes tend not to depend on expenditure. On the contrary, excessive expenditure can often prove self-defeating, particularly in a country such as New Zealand where conspicuous consumption (in the form of campaign spending) is more likely than not to be viewed with disapproval. However, as a perceptible paranoia seems to require candidate and party spending to be kept within certain bounds, the most appropriate response appears to be to inflation-adjust the expenditure limits introduced in 1995. This would, of course, mean that the recommendation in 2 regarding the

ability of parties to spend what they like on advertising would be subject to qualification, re-introducing the element of complexity that makes the attempt to control electioneering expenditure so difficult.

6. Regulated campaign period

The need for a regulated campaign period arises solely because of the statutory limits imposed on election spending. Without such limits there is no particular problem, including no problem of retrospectivity.

However, as it appears likely that the idea of unrestricted candidate and party donations will be rejected, the most sensible options are to have any regulated period run either from writ day or from the time the election date is announced. The former date would be preferable, since the length of time involved between learning an election is imminent and the requirement to comply with statutory donation/expenditure limitations would better allow parties and candidates to ensure their funding calculations were properly in order.

7. Election advertising

The wish to impose limits on election advertising is understandable but as the list of proposed exceptions indicates, any such limitations are bound to create grey areas where whether a particular publication (for want of a better word) does or does not constitute an advertisement will be open to question. In the absence of imposed spending limits but with a requirement for total transparency, the difficulty of making distinctions of this kind would not arise. Advertisements would have to be accompanied by a verifiable name or names of the individual, individuals or organisation promoting an advertisement and organisations would also have to include their street address. If an individual were advertising on behalf of an organisation the organisation's street address would also have to be provided. However, for individuals advertising on their own account, street addresses would not need to be published (for security reasons) but would be supplied to the electoral agency for disclosure if disclosure were ought and considered necessary. As some issues paper submitters appear to believe, it may be that election polling constitutes as effective an advertisement as any and yet is not subject to advertising restrictions. (Although the effects of polling results cannot necessarily be predicted; depending upon the political mood a poor result may result in more, or less, support for the candidate/party concerned – the conclusion is not foregone.)

8. Parallel campaigning

The whole thrust of the Electoral Finance Proposal is that advertising per se is more likely than not to be effective and should therefore be controlled. Certainly, advertisers believe that advertising will help their cause but the evidence to support that belief is far from conclusive. Advertising is just as likely to put individuals off voting for a particular candidate or political party as it is to encourage them to do so. As has been previously pointed out, what is

more likely to be effective is requiring advertisers, parallel or otherwise, to identify themselves clearly (either the individual or the organisation responsible) so that the public at large can make up its own mind about the validity of the arguments put forward or statements made. The effect of parallel campaigning by the Brethren Church is a salutary example of what is likely to happen if voters in general disapprove of the campaigner. The anti-MMP campaign is another such.

The notion that parallel campaigners should have to register, even with provision made for a high threshold and overall expenditure limits, opens up the question of at what point this will happen. Thresholds can be unintentionally crossed, leading to the kind of arguments that only lawyers ever win. If all advertisers are required to cite publicly their names and who they represent and to provide an address that can be checked (which if not initially made public can be obtained on request from an the electoral agency), that will be more effective than the complexities involved in policing spending limits, registration requirements and the like. Transparency is a much better safeguard than regulation and would save us from the unedifying spectacle of political opponents looking hard for evidence that one side or the other has been rorting the system. It also removes the problem of definition – i.e. precisely what kind of publication does or does not come under the parallel campaigning heading, as well as the problems that voluntary organisations can experience in trying to differentiate between the purposes for which donations have been given.

Parallel campaigners should be free to advertise in whatever medium they like – radio and television included.

9. Monitoring and compliance

As one of the world's least politically corrupt countries, it is mildly concerning that New Zealand's legislators have been focusing so hard on electoral corruption when what might attract the corruption label is more likely to equate to incompetence than to an intention to deceive. Money does not always talk and there are many examples worldwide of support for parties that are not well-funded and not, officially at least, well-publicised. Rather than trying to impose limits on freedom of speech it is far preferable to allow parties and individuals to advertise and to publicise themselves as and when they choose, free from arbitrary spending limits and subject only to the existing laws of libel, defamation, blackmail, and the like. Anything else is simply an invitation to go on fishing expeditions in the hope of catching parties and candidates out in some form of misfeasance. But in the scheme of things, claims arising from such expeditions, being generally ex post facto, are more in the nature of post-election vengeance than useful exercises.

The above said, however, it makes sense to retain the Electoral Act 1993's existing prohibitions on advertising on polling day and during the two-day period prior to an election, when any such activity at those times will constitute a corrupt offence. Whatever advertising has assailed voters during the pre-

election period needs at least a day or two to settle. Other offences relating to the election process itself should also remain.

It should be noted that the summary of submissions on the issues paper tends to quote only actual recommendations and not the reasons why those recommendations were made. The consequence of this omission is a rather unbalanced view of submitters' proposals.

APPENDIX

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 70 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.