

JUSTICE & ELECTORAL SELECT COMMITTEE

NATIONAL VIEW

Introduction

1. The National Party opposes the Electoral Finance Bill (“the Bill”) for three reasons:
 - (a) Electoral law has traditionally been developed in a cross party manner. The last major rewrite of electoral law was in the early 1990s when both Labour and National had extensive cross party discussions. The advent of MMP means that all parties need to be involved in the development of legislation if it is to be enduring. We do not believe that it is in the public interest for this legislation to be rewritten every three years. For that reason, we think the process is as important as the content;
 - (b) Bill of Rights concerns;
 - (c) Substantive objections to the Bill.

Select Committee procedures

2. National members think the Select Committee process has been flawed. We believe the legislation has been rushed and procedural corners have been cut in order to expedite the hearing of submissions and consideration of the legislation. In our opinion, many witnesses did not receive a fair hearing and officials from both the Ministry of Justice and the Parliamentary Counsel Office did not have adequate time to advise on policy and draft legislation. Examples of where National members thought there were procedural failings are:
 - (a) On 23 August, a majority of the Committee resolved that the Law Commission be invited to act as an adviser on the Bill. National members opposed the motion. A letter was sent to the Law Commission. Sir Geoffrey Palmer responded, however, saying that the Law Commission had not been approached informally about possible appointment as an adviser and that, if he had been, he would have said it was inappropriate for the Commission to act as an adviser on a policy matter like this and, in any event, the Commission’s workload would preclude acceptance of the appointment.
 - (b) On 23 August, again by a majority, the Committee resolved that submissions on the Bill be heard and that the first set of submitters wishing to be heard be booked to be heard on 6 September. This was done before the time for hearing the submissions had expired (11 September). We were also keen to travel to Auckland to hear submissions but this was overruled on cost grounds.

- (c) The Deputy Chairperson was disappointed that there was insufficient consultation between the Chairperson and him, especially after the subcommittee had agreed that such consultation take place. We think that, if ongoing consultation had occurred, many procedural difficulties could have been avoided.
- (d) On 27 September, final oral submissions were heard and the advisers agreed to provide a departmental report covering all issues raised by submissions for consideration by the Committee at its meeting on 11 October.
- (e) At the meeting on 11 October, there was some further discussion about the role of the Human Rights Commission. The Commission had prepared a substantial submission but had not been available to give oral evidence on the two occasions offered to it by the Committee Clerk. Because of the significance of the submission, at the urging of Heather Roy MP, the Committee agreed that the Human Rights Commission be invited to give oral evidence. That evidence was provided to the Committee on Thursday 18 October at the end of which it was resolved that consideration of the Bill be deferred until the Committee received a report from officials that addressed the issues raised by the Human Rights Commission.
- (f) On Thursday 25 October, the Committee agreed that the advisers on the Bill be given the Committee's authority to consult with the Human Rights Commission on recommended amendments. The Commission provided further advice after consultation with the advisers.
- (g) On Monday 29 October, the Committee met from 9.30am until shortly after 1pm. On that day a number of motions were moved by Labour members. These dealt with a variety of issues including increasing the maximum amount of a third parties total election expenses to \$120,000 or 5% of the maximum total party spend, total threshold for expenditure on election advertising before listing as a third party be raised to \$12,000, the threshold under clause 53(3)(a) to be increased to \$1,000, increasing the spending cap for third parties in the case of election advertisements that relate to a candidate to \$4,000 and that the regulated period within the Bill remain twelve months and begin on 1 January 2008. National members believe these motions had clearly been the subject of prior discussions between government members and supporters.
- (h) National members think it is of note that at this meeting, the Green member (Metiria Turei) proposed that the Bill be amended to provide for a donations regime affecting political parties and candidates. Essentially the third party donations regime is to be extended to apply to parties and candidates. No papers were provided, no notice was given and after a lengthy discussion, advisers agreed to provide an outline of the proposal and their comments to the Committee for

consideration by 5 November. No papers were provided by Ms Turei, although she admitted she had prepared an outline of the proposed scheme which she could not provide to the National members of the Committee. The Chairperson instructed the advisers to proceed to draft the proposal. Only after lengthy discussion did the Chairperson and government members agree to the advisers writing up the proposal for the next meeting on 8 November and allowing the advisers to highlight the issues they felt needed to be discussed further.

- (i) On Thursday 1 November, the Committee met from 9.30am – 5pm. A number of papers were tabled including a summary of the donations regime and proposed draft clauses. After a lengthy discussion about a donations regime, advisers agreed to provide further information to the Committee for consideration at its meeting on Monday 5 November, including further information on:
- The disclosure regime and donations;
 - The definition of “ordinarily resident”;
 - Whether double incorporation of corporations was possible.

Because of the changes foreshadowed by the majority, National members were concerned to ensure that an opportunity be given to submitters, particularly the Human Rights Commission, to make further submissions on the Bill. Accordingly it was moved that the Committee circulate a copy of the revision tracked version of the Bill to submitters for consultation in accordance with the recommendations of the Human Rights Commission in paragraph 30 of its submission dated 31 October 2007. This was lost. The majority motion (successful) was that, when the Bill is reported to the House, the Committee is to advise submitters of the report back.

- (j) Given the amount of material, and given the further foreshadowed reports of the advisers, it was suggested that the Committee meeting on Monday 5 November begin at 1pm so that members could have time to consider the report to be presented by advisers that morning at 9am. This motion was defeated. Ongoing concerns had been expressed by National members at the prospect of having to discuss papers received late. For example, on 5 November, members received a paper in the email system at 9.05am for discussion at 9.30am. A paper recording changes to be made in the revision tracked version was received at 9.37am. There was no opportunity to read the document before a discussion took place. As a consequence, there was a largely unfocussed discussion for a number of hours before the issues started to emerge.
- (k) On 5 November, Committee members learned of the case being brought by, among others, the Sensible Sentencing Trust and Rodney Hide MP in the High Court. Apparently the High Court has agreed to

hear an urgent application for judicial review of aspects of the Bill and in particular the failure of the Attorney-General to provide a report under section 7 of the New Zealand Bill of Rights Act. A letter had been received by the Office of the Clerk asking whether it was proposed that the Committee deliberate and report back to the House before the date noted on the Parliamentary website (25 January 2008). The Clerk's advice was sought. She outlined the importance of confidentiality under Standing Orders but that the Committee could authorise the Chairperson to make a statement. National members wanted the Chairperson to be authorised to make a statement about the impending deliberation on 12 November and report back to the House later that week notwithstanding the date provided on the website. The majority, however, successfully moved that the Office of the Clerk reply to the letter by saying that the Committee process is something for the Committee and that the date by which the Committee was to report back was 25 January 2008.

- (l) At the meeting on 8 November, four days before the bill was due to be deliberated on, a new clause 119AA was presented to the committee by Parliamentary Counsel. The committee considered the draft clause on Thursday 8 November. On Monday 12 November, the majority resolved to remove the clause. The majority said the clause had been drafted and inserted by Parliamentary Counsel in response to a general concern raised by the majority.
3. National members do not think these are complaints about minor faults. They think that the Bill has not received proper consideration and that it has been a rushed and thoroughly inadequate job. They do not think that the public interest has been served.
4. National members exempt the advisers (including Ministry of Justice, Parliamentary Counsel, the Electoral Commission and the Office of the Clerk) from any criticism. At all times they have acted with enormous professional integrity notwithstanding the unreasonable time pressures placed on them.
5. National members paid close attention to a senior and respected civil servant who, on 1 November, recounted to the Committee his experience over the Parliamentary stages of the Electoral Act 1993. He indicated that, as a result of cross-party co-operation between the National and Labour parties, legislation was enacted which was enduring. He advised the Committee that its members should endeavour to reach cross-party co-operation on some of these issues. In response, Hon Marian Hobbs MP said "with respect, that's our kaupapa". That is certainly not the view of National members.

Bill of Rights concerns

6. A common theme of many of the submissions has been a concern about the way the legislation potentially breaches the New Zealand Bill of Rights Act. Notable submissions in this regard were those presented by the Human Rights Commission itself and the New Zealand Law Society. National members share their concerns.
7. Many submitters were critical of the failure of the Attorney-General to provide a report under section 7 of the New Zealand Bill of Rights Act. Instead of providing a report, the Attorney-General relied on advice from the Crown Law Office to the effect that electoral legislation was very much a matter for Members of Parliament and a degree of discretion needed to be given to Parliament to determine the workings of the electoral legislation. National members thought that the Crown Law Office advice was flawed and wanted to have an opportunity to discuss that advice with representatives of the Crown Law Office. The Committee resolved to write to the Attorney-General asking that advisers from the Crown Law Office be made available to appear before the Committee to provide advice on the consistency of the Bill with the New Zealand Bill of Rights Act. By letter dated 11 September, the Attorney-General replied, saying he saw little point in having Crown Law Office officials appear to assist the Committee.
8. As noted above (para 2(f)), the Human Rights Commission was asked to work with officials to address their concerns with the legislation. The Commission helpfully responded on 31 October. They presented two options; have a further round of public consultation (para [30]) (the Commission's preferred option) or that a summary be provided to submitters so that they can make their views known prior to the second reading debate. National members preferred another round of consultation; the majority did not.

Substantive matters

9. National members are concerned at the apparent lack of policy to underpin various legislative proposals contained in the Bill. For example:
 - Requirements about the auditing of candidates' expenses. No rationale was given, no evidence was provided, no mischief was outlined to justify this new procedure. Fortunately Hon Peter Dunne MP did not support this requirement and the Committee agreed to remove it from the Bill.
 - Another example is the requirement for candidates to appoint a financial agent. No Ministry of Justice official could answer any question about what mischief this proposal was seeking to address.
 - Most importantly was the issue of the 12 month regulated period. We were concerned about the length of the regulated period and the

chilling effect on freedom of expression. Mr Ryall MP questioned a Ministry of Justice official on this issue extensively seeking an underlying policy. All that could be said in response was that the government wanted “an accurate and fair picture of election expenditure”. Mr Ryall responded that, if this is all that was wanted, that could be achieved by a candidate or party being required to make a declaration of expenditure. Much discussion ensued and the officials admitted that the majority of expenditure will be incurred in the last few weeks of an election campaign “for the same reason that Hallensteins advertises just before a sale”. Try as they might, National MPs simply could not obtain a rationale for the 12 month regulated period.

10. Proper cross party consultation could have resolved some contentious issues, for example, the donations regime. National signalled at an early stage it was willing to discuss this issue. It was apparent from many of the submissions that members of the public wanted the issue of “transparency” addressed. National members think it could have been the subject of sensible and productive cross-party discussions because it was solvable. But the way in which it was introduced, without warning, and without any accompanying papers in the Committee deliberations, was most unsatisfactory. In fact some of the only constructive discussion in the Committee on the Bill took place around this issue. Unfortunately National members think the Committee has been making decisions on a donations regime which has been drafted at the eleventh hour and which will be deliberated on the very day the policy is finalised. Another late change has been made to clause 25C to ensure that New Zealanders who are citizens but not registered voters will still be able to give even when they may not have lived in New Zealand for many years.

11. The key concerns of the National members are:

- (a) First, National is unhappy with the third party regime. It objects to the very name “third party” which suggests that members of the public are observers to a process where political parties and candidates are the principals. It is the other way round. Political parties are participants in the public’s process. There is an implicit suggestion that a “third party” is some kind of interloper and must therefore be controlled. National members object to stigmatising the public in this way. They also consider that the public interest is in transparency, not in shutting down the exchange of ideas which will be the effect of the third party regime. Some improvements have been made to the definition of a third party (see clause 14) but this does not detract from the principled objection to the regime which National members have. We also comment that the listing of third parties will be a recipe for litigation in an election year.
- (b) Secondly, National believes the regulated period is far too long and restricts freedom of expression. No reason has been advanced as to why that period needs to be 12 months.

National members do not think that freedom of speech should be regulated for up to one third of the electoral cycle and think comparisons with parts of a variety of overseas models are misleading.

- (c) Thirdly, National members believe the definition of election advertisement is unsatisfactory (clause 5). As introduced, the Bill provided that an election advertisement could mean any form of words or graphics, or both, as doing one or more of the following:
- (i) encouraging or persuading voters to vote, or not to vote, for 1 or more specified parties or for 1 or more candidates or for any combination of such parties and candidates:
 - (ii) encouraging or persuading voters to vote, or not to vote, for a type of party or for a type of candidate that is described or indicated by reference to views, positions, or policies that are or are not held, taken, or pursued (whether or not the name of a party or the candidate is stated):
 - (iii) taking a position on a proposition with which one or more parties or one or more candidates is associated.

This definition was contested by a huge number of submitters. In particular they said that subclause (1)(a)(iii) would effectively shutdown any political debate. It was so extreme that its chances of retention were negligible. That subclause was deleted, but subclause (1)(a)(ii) is retained. National members consider this is too wide-ranging, especially given the length of the regulated period. It has the potential to give rise to much litigation. The subclause is unsatisfactory and is opposed by the National members.

- (d) Fourthly, this is a heavily regulated regime much of which is unworkable. We think the Committee has ignored much of what the New Zealand Institute of Accountants said about auditing requirements. The Institute has essentially said that the auditing requirements are likely to prove impossible to carry out. It is likely that, in most instances, auditors will have no choice but to qualify their opinions because of the lack of procedures available to an auditor to detect income and expenses deliberately excluded. The Institute says that such an exercise would not improve public confidence in the system. It says the Bill mandates audits which will not serve any useful purpose, will add to electoral costs and will result in a large number of qualified audits. Again this will be a recipe for litigation.

- (e) The fifth major objection to the regime is that there is ongoing protection of incumbents in Parliament. By incumbency we refer to Members of Parliament generally and the government in particular. A number of concerns have been raised about, for example, clause 81 dealing with the meaning of an election expense which term does not include the cost of “any publications that relate to a Member of Parliament in his or her capacity as a Member of Parliament”. A number of submitters raised concerns about the meaning of the term “in his or her capacity as a Member of Parliament”. The Electoral Commission and the Chief Electoral Officer have also expressed concerns about this. No endeavour has been made to clarify the position.

National members emphasise that it is not just the individual items (above) which cause concern. It is their cumulative effect which troubles us, and we agree with what the Human Rights Commission said in that regard.

12. National MPs have felt compelled to write this lengthy report outlining serious defects with the Bill and its progress through the Justice and Electoral Select Committee. The New Zealand public deserves much better than this.