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Regulated speech

Politics is just for politicians. That is the impression created by the Electoral Finance Bill, an example, if there ever were one, of the crooks writing the legislation supposed to control them. If you are not a registered political party, then you can take part in the political process only under strict conditions. It would also be better if politics were left to the two big parties too and all the mavericks and third parties squeezed out. The purpose clause of the Bill includes "the promotion of participation in parliamentary democracy". This is even greater nonsense than most Acts' purpose clauses. This *Journal* offers a year's gratis subscription to any reader who can identify a single provision in the Bill that will promote participation, as opposed to make it expensive, complicated and risky.

The Bill will have two main effects. The first is to continue the process whereby it becomes more and more difficult for someone who does not have the backing of a party machine to stand for parliament. The costs of compliance with electoral law may be a relatively small expense for the two major parties but for an independent candidate will be a huge proportion of total expenditure. Not only that, but the candidate must find someone willing to be a "financial agent" and risk conviction for illegal practices if they trip up over the complex rules. The Bill will strengthen the position of large established parties and erect barriers to entry into the political process.

Its most outrageous effects, however, will be felt by those who do not wish to devote their lives to climbing the greasy pole but who labour under the erroneous impression that politicians are our servants and that engagement in politics is something that we are all entitled to to the extent that we wish. Instead the Bill proposes that political activity become a regulated profession.

Anyone who wishes to take a serious role in political activity, promoting or attacking any particular cause, will have to register in advance with the Electoral Office. This sort of rot was started of course by MMP which requires the registration of political parties. It seems to be forgotten that proportional representation comes to us from countries where tiddlywinks clubs and babysitting circles have to be registered with the police. This is not the way of the common law and English-speaking world. Any form of registration, of course, exposes one to harassment by officials who, if they look hard enough, will always be able to find some regulatory infraction or other.

If one is not a registered "third party" one will not be able to take part in political activity unless one's total expenditure is under a limit, currently \$5000. If one is a registered third party, one will be subject to a host of regulatory requirements, breach of which will expose one to conviction for an illegal practice. The requirements include the submission of

accounts which will be published. Apparently, those who manufacture methamphetamine are entitled to privacy, but those who wish to exercise their right to take part in the political process are not.

If one is not a registered third party one will not be able to engage in election advertising. What is election advertising? Well, election advertising includes anything distributed non-commercially "taking a position on a proposition with which one or more parties or one or more candidates is associated". Since there is probably somewhere a candidate taking a position on just about anything, this means just about all subjects.

This means, in particular, that from 1 January 2008 until the election, any research report distributed by a think tank or university department that is critical of, or even supportive of, government policy will fall within the definition of election advertising, even if it is critical of all parties' policies. Institutions such as the New Zealand Institute of Economic Research, the New Zealand Business Roundtable, Greenpeace, Oxfam, Amnesty International, the Council for Socially Responsible Investment and the New Zealand Institute to name but a few, will be effectively muzzled during election year.

There are, of course, exceptions, but the exceptions create further problems. One exception is for incorporated bodies communicating directly with their members. Most incorporated bodies avoid politics like the plague as being divisive. The exception is trades unions which hence have a form of exemption to campaign for Labour.

Another exception is newspapers and periodicals. But what is a periodical? What for example of *Pro-Life Times*? Or *The Reserve Bank Bulletin*? Or *NZIER Update*? Or the masses of newsletters pumped out by government departments to extol their own achievements? Obviously there is an incentive for anyone who wishes to campaign to dress up their activities as a "periodical". The next step then will be that newspapers and periodicals will have to be registered, as in all good totalitarian states.

The statement made under s 7 of the New Zealand Bill of Rights Act 1990 is the usual nonsense we have come to expect from such statements. It recites the activities of countries overseas while failing to identify the doctrinal differences between the US and other countries and ask which doctrine is preferable.

It is possible that some of the more bizarre provisions are there to be negotiated away so that parties in the House will feel they have achieved something and vote for the amended Bill. That should not happen. This Bill is fundamentally obnoxious and should be scrapped. It will penalise private citizens who have the temerity to interfere in politics, while doing nothing to deal with the major electoral funding issue we face: the misuse of taxpayers' money on a huge scale to ensure the re-election of the incumbent government. □

The law of elections

The Hon Richard Prebble CBE

reviews two books on campaign finance and electoral law

Two new books fill a serious gap in the law library: electoral law. With the debate on state funding and over how most parties, according to the Auditor-General, broke the law on what is permitted election spending, both books are timely. Part of the reason the political parties broke the spending rules is that there is no book on an important part of our constitution, elections. There have been many times in my career when having all the relevant law in one book would have been very useful. I recall at the time of the Muldoon snap election trying to find out at midnight when the rolls would close!

Electoral Law in New Zealand: Practice and Policy by Andrew Geddis (LexisNexis, 2007) is an analysis of the laws and regulations that govern our elections. It will be a valuable reference book for students of elections, lawyers and candidates. In just 271 pages Geddis manages to cover all the statutes, regulations and electoral issues from the timetable, qualifications to vote, boundaries, what is permitted in campaigns, the regulation of broadcasters, counting of votes and how the Courts and Parliament handle electoral disputes.

I have a number of suggestions for the second edition. The index is too short and lacks cross-referencing. On campaign expenditure, Geddis says "there will often be some uncertainty over whether a particular item of campaign-related spending qualifies as an 'election expense'". Candidates and officials would like to have greater analysis in the next edition to guide them.

I was surprised to discover last year that even though I was not a candidate for re-election, an advertisement for a public meeting I held before any election was announced was ruled by the Auditor-General to be campaign spending. Other parties were similarly confused. Geddis opines that expenditure was illegal because it was "outside the purpose that parliament has authorised". This is not the reason given to me. I was told that the Auditor-General had decided that the Electoral Act 1993 overrode the authorisation I had received. The book does not really help MPs decide how they can use their parliamentary funds except that the author agrees "the more general question of how electoral participants currently fund their campaigns requires some closer examination".

Peters v Clarkson (HC, Tauranga CIV 2005-470-719, 15 December 2005, Randerson, Goddard and Panckhurst JJ), in which the Court ruled Clarkson did not overspend is worth greater analysis. The Court ruled that Clarkson was able to receive donated goods at less than the market price because of his commercial relationship with the supplier. In effect, he could lawfully spend more than Peters. Geddis points out that the ruling "gives a potentially significant advantage to candidates with well-established business connections". I think the author believes the decision is wrong and I wish he had taken longer to set out why.

As we have seen, New Zealand's rules over what spending cause candidates, parties and their advisers real difficulty. It would be interesting to know how similar rules are interpreted overseas. Many of the sections in the Electoral Act have parallel provisions in the US. The US being more litigious, such provisions have been examined by Courts as high as the US Supreme Court. Issues our Boundary Commission agonise over, such as "community of interest" have been the subject of important judgments in the US.

Space also means Geddis can only make superficial comments about campaign funding which is the topic of *Party Funding and Campaign Financing in International Perspective* Wing and Issacharoff (eds) (Columbia-Landon Law Series, 2007). The idea behind this book is excellent, to examine how established democracies are tackling the issue. There are articles on New Zealand, UK, Canada, Australia, US and the EU. Again, the timing could not be better. Everyone involved should read the book and it is a tribute to Andrew Geddis that he has the first contribution.

My criticism is that the articles are written by academics who have clearly never raised money for a campaign for a community board let alone a general election. I would have loved to have read a contribution from a political party bagman.

We have massive campaign funding, as the Auditor-General discovered. MPs have free air travel, post, offices, phones, email and electoral agents. In addition we have a handicap system. There is a ban on the purchase of advertising on television apart from the state allocation which is biased in favour of established parties: a system that Canadian, Australian and US Courts have ruled unconstitutional. I would have liked to have seen in Geddis' article some analysis of whether it is right that unelected officials can handicap an election.

It appears that in all democracies there is ever greater state funding. The methods vary greatly but the book shows that no country has worked out how to prevent politicians from gaming the system. None of the authors cite the research by economists on election funding. Economists point out that the lack of interest shown by the electorate in elections is perfectly rational. How many elections has your vote influenced? Similarly the disproportional funding by, say, teachers' unions is also rational; it gives them great influence over politicians. This is the real dilemma of election funding. How do you stop special interest groups buying elections? How do you stop politicians taking both the state funding and the special interest groups' money? Should you even try?

There is not enough attention paid in the book to the idea that we should have no state funding. I believe we should just try to get transparency and then leave it to the voters. If we do not trust the voters, why do we have elections? □