Electoral Finance Bill undermines rights protected by the *New Zealand Bill of Rights Act* 1990

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Freedom of expression, as Justice Anderson of the New Zealand Supreme Court has observed, is "the first and last trench in the protection of liberty". In the political context, this entails the right to criticise public institutions or political candidates and the uninhibited interchange of political and social ideas. The Electoral Finance Bill 2007, which imposes constraints on political advocacy that are arguably unparalleled in modern New Zealand history, is a matter of concern for all New Zealanders.

The Bill, which has now passed its first reading, will regulate political speech in an election year for the stated purposes of maintaining public confidence in the administration of elections, promoting public participation in parliamentary democracy, preventing the undue influence of wealth on electoral outcomes, minimising the perception of corruption, and ensuring that the controls on the conduct of electoral campaigns are clear and effective. The Bill proposes an extensive regime restricting political speech in New Zealand. In our view, the Bill is plainly inconsistent with section 14 of the *New Zealand Bill of Rights Act* 1990, which provides that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

The Bill would regulate any private citizen, or association of citizens, who wishes to spend money during an election year to try to persuade people to vote for or against any candidate or political party or take a position on a proposition which is associated with any party or candidate. Unless the group registers as a "third party", it would be unlawful to publish election advertisements without first making a statutory declaration that during the election year it would not spend more than $500 in relation to a candidate or $5,000 overall. Even a person who wishes to make a placard to hold up at a public rally would need to make a statutory declaration before a solicitor, Justice of the Peace, or notary public.

Private citizens who apply to the Chief Electoral Officer for registration as a "third party" are subject to a spending cap of $60,000, of which no more than $2,000 may be spent on a particular candidate, during the "regulated period" which extends from 1 January of an election year until polling day. Any person who "wilfully" incurs an expense and violates the rules would be guilty of a "corrupt practice" and liable for a maximum sentence of one year's imprisonment or a maximum fine of $15,000, or $40,000 for the group's financial agent.

Search warrants against third parties could be issued where an illegal practice under the Bill is suspected or believed to be intended. After polling day, a third party must file a return with the Chief Electoral Officer, which includes a statutory declaration and, if the third party spent more than 25 per cent of its maximum expenditure, an auditor's report.

The Chief Electoral Officer cannot register third parties once the writ for a general election is issued, which has transparently unfair implications. Suppose, for example, that a political party began to trenchantly criticise a particular church, business association, employee lobby group, or ethnic group, and proposed policies prejudicial to their interests after an election writ had been issued. The impugned group would be forbidden from responding with, for example, a series of newspaper advertisements because it could not register as a third party. Even advertisements that did no more than set out official statistics refuting the premise of the party's policy, together with a statement that the criticisms against them were unfounded, would constitute a "corrupt practice". The same restrictions would apply to any association whose membership includes a foreign citizen or a person under 18 years old, which would be ineligible to register as a third party.

These rules curtail the opportunities for citizens to express their ideas on matters of public importance in an election year, when it matters most. The Bill, on its terms, would be likely to relegate private citizens to a "third party" status in the democratic process. No evidence of the harms said to be caused by third-party advocacy has been provided to justify these heavy-handed proposals.

The Bill raises two serious concerns. First, its conceptual premise is fundamentally inconsistent with the principle that citizens do not require prior authorisation to express their views about the government or political issues of the day. By requiring people to register with the Chief Electoral Officer, the Bill effectively creates a licensing regime for political speech. No New Zealand legislation has required this of private citizens before. There is a substantial risk that requiring people to apply to the Chief Electoral Officer before publishing their ideas, and file statutory declarations and auditor's reports after the election, will have a chilling effect on their willingness to contribute to the political debate.

Secondly, the Bill effectively "rations" the amount of political speech by third parties in an election year. Not only are the caps in the Bill inconsistent in principle with the right to freedom of expression, but the rations are meagre. A spending limit of $60,000 for the entire calendar year before the election could inhibit meaningful participation in political debate for an association such as Business NZ. As Chief Justice McLauchlin of the Supreme Court of Canada has observed in relation to comparable restrictions challenged under Canadian law, "they have a chilling effect on political speech, forcing citizens into a Hobson's choice between not expressing themselves at all or having their voice reduced to a mere whisper".

The rights affirmed by the *New Zealand Bill of Rights Act* are, of course, subject to "reasonable limitations" that are "demonstrably justifiable in a free and democratic society". It is no doubt with an eye to justifying the Bill as a "reasonable limitation" that it proposes to include the objective of "minimising the perception of corruption". But the limitations are far from reasonable, and there is no basis for a suggestion that they are needed to tackle "corruption". Corruption is already a criminal offence in New Zealand. Although there can be no doubt corrupt practices warrant punishment, the open expression of an opinion on a political issue using one's own money is demonstrably *not* a "corrupt practice". Nor is expressing an idea that may influence other citizens or call into question the wisdom behind the policies of a registered political party. The United States Supreme Court has observed that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it". Far from being a "corrupt practice", persuasion through speech is the lifeblood of the democratic process and the hallmark of civilised society.

The suggestion that free speech can "unduly influence" voters is misconceived. The foundation of the democratic system is that voters should be free to judge for themselves which ideas have merit. If an advertisement or placard persuades a voter, that is democracy in action. If it doesn't, then the speaker will have had his or her say and others can have confidence that they heard different views and

came to a contrary view. This uninhibited exercise to form one's own views on ideas and principles is, as John Stuart Mill put it, "the privilege and proper condition of a human being, arrived at the maturity of his faculties".

If a group of private citizens considers the registered parties have failed to give due attention to an issue, and they wish to introduce their own ideas into the political discourse, this should not be constrained. If our purpose, as the Bill states, is to promote public participation in the electoral process, then it is far from clear why citizens must shoehorn their political beliefs to fit the allegiance of a registered political party rather than speak their mind, with their own money and in the manner they wish, on the matters that concern them.

Overseas courts have reached diverse conclusions on whether restrictions on issue advocacy by non-candidates are reasonable limitations on the right to freedom of speech, and have upheld them in some cases. In each case, however, the evidence in support of the concerns has been theoretical and sometimes speculative. It is pertinent to note the dissenting observations of Chief Justice McLauchlin of the Supreme Court of Canada, joined in her judgment by Justice Major, on the absence of evidence presented by the Attorney-General of Canada that similar limitations were necessary in that jurisdiction: "The dangers posited are wholly hypothetical. The Attorney-General presented no evidence that wealthier Canadians – alone or in concert – will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney-General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimises the Attorney-General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem."

Submissions on the Bill are open until 7 September 2007. All New Zealanders with an interest in ensuring that political debate is free and open should oppose this Bill's misguided and chilling proposals.