Free speech in election years

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review the arguments for limiting paid speech

On 18 December 2007, Parliament enacted the Electoral Finance Act 2007, the Broadcasting Amendment Act (No 2) 2007, and the Electoral Amendment Act 2007. Those enactments introduced an extensive regulatory regime governing political advocacy by private citizens during election years. We consider that the Electoral Finance Act's unparalleled restrictions on independent political speech are unjustified and contrary to the New Zealand Bill of Rights Act 1990. We also consider there are serious flaws in the Act which reflect the misconceived premises on which the restrictive regime is based.

Despite the absence of any cogent evidence that independent political speech undermines the integrity of elections, and contrary to the experience and jurisprudence of Australia and the US, the Electoral Finance Act adopts the most restrictive features of the Canadian and UK legislative models. In doing so, the Act is likely to stifle rather than enhance public participation in parliamentary democracy. As Bradley Smith, later the chairman of the Federal Election Commission, observed ("Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform" (1996) 105 Yale L J 1049 at 1084) in the context of electoral regulation in the United States:

> these problems are not the result of a poorly designed regulatory structure, but rather the inevitable result of a regulatory structure built on faulty assumptions.

We discuss those assumptions below and consider their consequences for political speech in election years. We also examine how the flaws in the machinery provisions of the Act are likely to lead to confusion and have a chilling effect on political expression during election years.

OVERVIEW OF THE ELECTORAL FINANCE ACT

The Act regulates the publication of words or graphics during election years that can be reasonably regarded as having the purpose or effect of persuading voters to vote for or against a political party or a type of party (or a candidate or a type of candidate). A person on whose initiative such a publication is made is subject to certain disclosure obligations and spending restrictions. Depending on the amount of expense incurred, it may be necessary for the person or organisation to register with the Chief Electoral Officer and comply with more extensive reporting obligations.

During the "regulated period", which commences on 1 January of an election year and finishes at the end of polling day, "election advertisements" must not be published unless certain conditions are satisfied. In summary, any unregistered person on whose initiative an "election advertisement" is "published" must:

- not incur more than $12,000 expense during the regulated period;
- not incur more than $1000 expense during the regulated period in relation to a candidate;
- ensure that the "election advertisement" contains a statement that sets out the name and address of the residential address of the "promoter"; and
- not publish a statement that appears to encourage or persuade voters to vote for a particular party unless authorised in writing by the financial agent of that party.

If a person registers with the Electoral Commission as a "third party", that person may spend up to $120,000 during the regulated period, which in any case must not include more than $4000 in relation to a candidate for an electoral district.

By virtue of its definition in s 4, "publish" means to:

(a) print or insert in a periodical published or distributed in New Zealand; or
(b) issue, hand out, or display, to the public; or
(c) send to any member of the public by any means; or
(d) deliver to any member of the public, or leave at a place owned or occupied by a member of the public; or
(e) broadcast (for example, in the form of a radio or television broadcast); or
(f) include in a film or video displayed to the public; or
(g) disseminate to the public by means of the Internet or any other electronic medium; or
(h) store electronically in a way that is accessible to the public.

Section 5 defines an "election advertisement" to mean any form or words or graphics, that can reasonably be regarded as either:

(i) encouraging or persuading voters to vote, or not to vote, for one or more specified parties or for one or more candidates or for any combination of such parties and candidates; or
(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 name of a candidate is stated).

The definition of "election advertisement", and therefore the scope of the Act, is subject to a number of specific exemptions, some of which are discussed in detail below.

Section 65 also prohibits "election advertisements" that "appear to encourage or persuade" voters to vote for a candidate or party unless the promoter obtains written authorisation from the candidate or party's financial agent and includes the promoter's name and residential address in the publication.

A person who "wilfully" contravenes the third party restrictions commits a "corrupt practice" under the Act and is liable to a maximum of two years' imprisonment or a fine of up to $100,000. As the New Zealand Law Society has observed, it is unclear what mental state is required to "wilfully" publish a political statement in contravention of the Act. (www.nzls.org.nz/PDFs/Submissions/ElectoralFinanceBill.pdf at para 26) A contravention that is not "wilful" constitutes the criminal offence of committing an "illegal practice" which carries a fine of up to $40,000.

OVERSEAS JURISPRUDENCE

Two of the significant features of the Parliamentary commentary during the passage of the Act included the assertion that independent political speech involved a risk to the integrity of the electoral process and the argument that the Act would "bring New Zealand into line with other comparable democracies, such as Canada and the United Kingdom". (Minister of Justice, 644 NZPD, 14029, 18 December 2007) However, the case law from comparable democratic societies tends to indicate the absence of cogent evidence for the proposition that independent political speech threatens the integrity of the political process.

The sponsors of the Act have placed reliance on the decision of the Supreme Court of Canada in *Harper v Canada (Attorney General)* [2004] 1 SCR 827. That case considered the constitutionality of the Canada Elections Act 2000, which imposed limits on independent political speech between the issuing of an election writ and polling day. The Court held by a majority that the regime was a reasonable limit on the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms. In reaching that view, the majority judgment referred with approval to the findings of a Canadian Royal Commission of Inquiry supporting third party spending limits and concluded that the legislature was entitled a margin of deference in determining the Canadian electoral model. Bastarache J, delivering the majority judgment, concluded at para 88:

> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.

The minority emphasised the absence of any evidence to support the assertion that restrictions were required to preserve the integrity of the electoral process. McLauchlin CJ and Major J concluded at para 34:

> 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.

Accordingly, while the *Harper* decision supports the principle of third party spending limits, it contributes little to the evaluation of whether there is any evidence that independent political speech undermines the electoral process.

Proponents of the Act have also referred to the enactment of the Political Parties, Elections and Referendums Act 2000 in the UK, which imposes restrictions on independent political speech. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, the House of Lords concluded that the general restrictions on political advertising on radio and television contained in the Communications Act 2003 do not infringe the European Convention on Human Rights. The House of Lords concluded that unrestricted political advocacy on the broadcast media could undermine a level playing field of political discourse by virtue of the pervasiveness and potency of those media. In forming that view, the leading judgment of Lord Bingham concluded that the judgement of Parliament that should be accorded "great weight" because "it is reasonable to expect that our-democratically-elected politicians will be particularly sensitive to the measures necessary to safeguard the integrity of our democracy". (para 33) Lord Scott, in a separate judgment, concurred that a declaration of incompatibility ought not to be made but noted that "the width of the statutory prohibition is remarkable" and acknowledged that "there may be respects in which sections 319 and 321 are incompatible with article 10". (para 42) The consistency of the Political Parties, Elections and Referendums Act with the Human Rights Act 1998 has not been tested. However, it appears likely that an English Court would conclude that such restrictions are justifiable in principle based on the reasoning in *Animal Defenders International* notwithstanding that the House of Lords premised its decision on the particular harms said to be associated with broadcast advertising (however, see Jane Marriott, "Alarmist or Relaxed? Election Expenditure Rules and Free Speech" [2005] PL 764; Andrew Scott, "'A Monstrous and Unjustifiable Infringement'?: Political Expression and the Broadcasting Ban on Advocacy Advertising" (2003) 66 MLR 224; Andrew Geddis, "If Thy Right Eye Offend Thee, Pluck it Out" (2003) 66 MLR 885).

The Australian legislative and judicial approach differs significantly from that of Canada and the UK but has not been the subject of discussion in the legislative drafting materials or the advice of the Crown Law Office to the Attorney-General. In *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577, the High Court of Australia considered the constitutional validity of Part IIID of the Broadcasting Act 1942 (Cth). The relevant provisions prohibited political advertising on television and radio after the issuing of the election writ. These prohibitions were subject to a requirement that broadcasters allocate free air time to each of the political parties on a proportional basis. The High Court by a majority concluded that the Commonwealth Constitution contained an implied freedom of political communication, there was no "reasonable justification" for the restrictions imposed by Part IIID, and, therefore, the provisions were invalid.

It is relevant to note that McHugh J rejected the argument that concerns about undue influence and the appearance of corruption could justify a ban on the dissemination of advertising to the electorate, stating at 673:

> Moreover, on this aspect of the justification of the legislation, it needs to be kept in mind that it is not the content of the publications which is the perceived evil; the perceived evil is the conduct of contributors and political officials in colluding to give political preference or favour in return for campaign contributions.

McHugh J also considered there was no evidence to support a "level playing field" rationale for restricting speech, observing at 673:

> Moreover, before legislation such as Pt IIID could be upheld on the "level playing field" theory, it would need to be demonstrated by acceptable evidence, and not merely asserted, that, by reason of their practical control of the electronic media, some individuals and groups so dominate public discussion and debate that it threatens the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives.

Deane and Toohey JJ considered that "level playing field" considerations could arguably support very limited political constraints, giving as an example a blackout on advertisements on polling day. However, they observed at 623:

> [I]t must be remembered that a prohibition is no less antagonistic to and inconsistent with the freedom of political communication which is implicit in the Constitution's doctrine of representative government simply because the Parliament or those in government genuinely apprehend that some persons or groups may make more, or the more effective, use of the freedom than others involved in political processes.

Gaudron J noted that the principles of the general law, including the laws relating to defamation and sedition, "indicate the kind of regulation that is consistent with freedom of political discourse". She contrasted these with the prohibitions in Part IIID at 659:

> [T]he prohibition operates not on account of any criteria by reference to which the spoken or written word has been traditionally regulated, but because the persons concerned wish to make use of radio and television for the broadcasting of political material during an election period — a period when freedom of political discourse is of the greatest importance.

While the legislation considered by the High Court in *Australian Capital Television* is significantly different from the types of prohibitions contained in the Electoral Finance Act, the decision nonetheless provides guidance on the rationales that might reasonably support limits on political speech and the importance of evidence, as opposed to assertion, in support of those rationales. In particular, McHugh J's judgment provides a useful framework for analysing the competing considerations by asking whether there is acceptable evidence that unregulated political advertising by persons who are not seeking political office will "threatens the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives". It is also relevant to note that no campaign expenditure limits apply in Australian federal elections and that — other than donation disclosure requirements and a ban on electronic advertising three days before polling day — the controls on political speech during election campaigns are relatively minimal. Despite taking a different approach from the UK, Canada, and New Zealand, the Commonwealth Parliament's Joint Standing Committee on Electoral Matters concluded in 2005 that past experience did not support the need for restrictions on political advertising (see www.aph.gov.au/house/committee/em/elect04/report/chapter12.pdf at paragraph 12.119).

The US approach to campaign finance regulation also occasioned little commentary during the legislative drafting process in relation to the Act. In the leading case on the subject, *Buckley v Valeo* 424 US 1 (1976) at 48–49, the United States Supreme Court unanimously rejected the proposition that political speech could be regulated in the interests of equalising relative influence:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by 608 (e) (1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people".

Subsequent Supreme Court decisions carved out an exception to *Buckley* under which political speech by corporations could be regulated to prevent "corruption or the appearance of corruption". (*Austin v Michigan State Chamber of Commerce* 494 US 652 (1990) and *McConnell v Federal Election Commission* 540 US 93 (2003)) The future of that exception is now doubtful in view of the recent decision of the Supreme Court in *Federal Election Commission v Wisconsin Right to Life, Inc* 551 US (2007). In that case, the Supreme Court narrowly construed the independent expenditure provisions of the Bipartisan Campaign Reform Act 2002 as not applying to corporate advertising unless it contains clear words — such as "vote for" or "cast your ballot for" — that cannot be reasonably construed as anything other than an exhortation to vote for or against a candidate. Three of the majority justices — Scalia, Kennedy, and Thomas JJ — regarded the independent expenditure provision as inherently unconstitutional. While Roberts CJ and Alito J concluded that it was unnecessary to determine that issue, both justices indicated the possibility that the Supreme Court would be required to determine in the future whether the independent expenditure provision was unconstitutional. Notwithstanding that the Supreme Court did not formally overturn the exception for corporate expenditure accepted in *McConnell*, Souter J, delivering the judgment of the minority, acknowledged that there is "neither a theoretical nor a practical basis to claim that *McConnell's* treatment of §203 survives".

Accordingly, a review of the relevant case law from comparable jurisdictions discloses a divided view of the legitimacy of restricting independent political speech during election campaigns. While the Canadian Supreme Court and the House of Lords have concluded that restrictions on independent political advocacy are justifiable in principle, the Australian and US courts have both taken the view that such restrictions are rarely, if ever, justified limitations on the constitutional guarantees of freedom of expression in those countries. Relevantly, none of these jurisdictions has restrictions as cumulatively restrictive as those now in place in New Zealand.

FREEDOM OF EXPRESSION

Section 14 of the Bill of Rights provides:

> **14. Freedom of expression** — 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 right to freedom of expression entails the absence of state-imposed restrictions on incurring expense in the exercise of that right. However, a contrary view was expressed by the Minister of Justice who asserted, when moving the Bill for its third reading (644 NZPD 14029, 18 December 2007):

> This legislation does not restrict free speech; it simply restricts the right to purchase speech through advertising.

The Minister is incorrect because the Act imposes restrictions on persons who do not spend any money. More importantly, however, the Minister's premise that limiting the ability of citizens to spend their own money expressing themselves is consistent with freedom of expression does not accord with the international jurisprudence and, indeed, is inconsistent with the advice provided to the Attorney-General by the Crown Law Office. ("Electoral Finance Bill: Consistency with the New Zealand Bill of Rights Act 1990", 26 June 2007, para 8)

Restrictions on independent spending expressly limit the use of money for the purpose of political expression. As Gaudron J explained in *Australian Capital Television*, the restrictions are not referable to any civil or criminal wrong recognised by the general law but instead apply because of the politically persuasive effect of the speech. Professor Eugene Volokh explains the fallacy of the argument that "money isn't speech" in this way (Volokh, "Why *Buckley v Valeo* is Basically Right" (2003) 34 Arizona State L J 1095 at 1101):

> Well, of course money isn't speech. But so what? ... After all, money isn't lawyering, but the Sixth Amendment secures criminal defendants' right to hire a lawyer ... Money isn't education, but people have a right to send their children to private schools. Money isn't speech, but people have a right to spend money to publish *The New York Times*.

Professor Volokh's analysis correctly identifies the principle that the right to freedom of expression entails the absence of governmental restraints or burdens on the use of one's resources to express oneself. Just as a filmmaker needs actors and production crew to create a movie, a person who wants to advocate social change may wish to publish a book or write a pamphlet. (Volokh, "Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals" (2000) 24 Harv J of Law and Public Policy 47 at 57) Accordingly, restrictions that target spending on political speech impair political expression and therefore implicate free speech concerns.

Limits demonstrably justified?

Section 5 of the Bill of Rights provides that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The New Zealand courts have held that whether a limitation is demonstrably justified requires an assessment of whether there is a concern or risk that is pressing and substantial in a free and democratic society. If so, the limitations chosen should be "rationally connected" to the risk, impair the right or freedom in question as little as possible, and be proportional to the objective. (see *R v Hansen* [2007] 3 NZLR 1 (SCNZ))

Section 3 of the Act states that its purposes are, relevantly, to "maintain public and political confidence in the administration of elections", "promote participation by the public in parliamentary democracy", "prevent the undue influence of wealth on electoral outcomes", and "provide greater transparency and accountability on the part of candidates, parties, and other persons engaged in election activities in order to minimise the perception of corruption".

Of these purposes, the legislative materials suggest that preventing "the undue influence of wealth on electoral outcomes" is the principal justification for the Act's restrictions on independent political speech. This rationale appears to have two aspects. First, the Select Committee Report states that the purpose of the Act is to create a "level playing field". (p 2) Secondly, the Explanatory Memorandum states that the Act is intended to ensure that "third parties cannot overwhelm the speech of political parties and candidates". (p 5) Both rationales are conceptually obscure and misconceived in principle.

First, rather than creating a "level playing field," the Act imposes an uneven playing field by ensuring that private citizens can only spend a fraction of the spending limits permitted for political parties. By imposing stricter spending limits on civil society than on registered political parties, the Act relegates non-politicians to a "third party" status in the democratic process.

Moreover, the concept of preventing "undue influence" between citizens is conceptually obscure. There is no obvious benchmark for the amount of influence that is "due" to each citizen, not least because one of the purposes of political debate is to acquire influence by persuading other citizens. For example, the editorial staff of a newspaper have influence to the extent that people buy the newspaper and are persuaded by the editorials. It could not be reasonably regarded as "unfair" for newspapers to write editorials unless everyone owned a newspaper, or for think tanks to publish research unless everyone had the resources to engage dedicated researchers. Whether or not one comes to agree with their views, their freedom to contribute to the market place of ideas is beneficial to civil society. Legislative intervention to decide how much influence is "due" to each person is ill-conceived and unjustified. As Scalia J observed in his dissenting judgment in *Austin v Michigan State Chamber of Commerce* 494 US 652 (1990) at 695:

> This is not an argument that our democratic traditions allow — neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive (because they are rich) or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen).

The Act's focus on "wealth" as a source of influence through purchased speech as opposed to other sources of influence — such as political patronage or the advantages of incumbency — is also unexplained. As Professor Lillian BeVier observes, the argument that spending restrictions promote equality of influence does not explain "why the influence of political activists, who by inclination or commitment invest their energy in the pursuit of power and influence in the public sector, is more legitimate than the influence of financial contributors who invest their energy and productive activity in the private sector" ("Campaign Finance Reform: Specious Arguments, Intractable Dilemmas" (1994) 94 Col L R 1258 at 1268). After all, the fact that it costs money to publish books or produce films does not by itself impugn the validity of the ideas expressed in those publications.

The second rationale of ensuring that "third parties cannot overwhelm the speech of political parties and candidates" is also misconceived. The choice of the verb "overwhelm" obscures the fact that influence in a free society is acquired by persuasion. There is nothing inherently objectionable if a third party's ideas "overwhelm" the competing ideas of political parties. Indeed, the reverse is true; civil society is well-served when citizens vigorously participate, as is their right, in the free play of ideas.

Accordingly, none of the stated rationales for limiting independent political speech appears to identify a pressing and substantial risk so as to justify the Act's heavy-handed limitations as being demonstrably justified in a free and democratic society.

RULE OF LAW

Section 132 creates a discretion for the Electoral Commission not to refer breaches of the Act to police if the Electoral Commission considers the offence is "so inconsequential that there is no public interest in reporting those facts to the New Zealand Police". This provision is intended to mitigate the over-reaching provisions of the Act.

However, a fundamental aspect of the rule of law is that people should be able to know in advance what the law prohibits with a reasonable degree of certainty. This allows individuals to plan their affairs in the knowledge that they will not be unexpectedly punished afterwards. It is generally regarded as inimical to the rule of law to proscribe in vague terms a broad range of inoffensive activities subject to the discretion of government officials.

As with the approach taken with the reform of s 59 of the Crimes Act 1961, Parliament's response to the concern that the legislative reform may result in a prohibition that is broader than can reasonably be justified has been to confer a prosecutorial discretion. This is inimical to the rule of law and is an unwelcome course for our legislature to take.

MACHINERY PROVISIONS

In addition to the specific constraints associated with the limits on spending and the requirement to register to engage in spending up to those limits, a number of other features of the Act are likely to create real difficulties in practice. First, the extended definition of "election advertisement" creates considerable uncertainty as to the reach of the Act. Notwithstanding the formal distinction between issue advocacy and political advocacy, a particularly effective critique of a party's major policy may well have the effect of encouraging or persuading voters not to vote for that party, and therefore constitute an "election advertisement" under s 5 of the Act. Likewise, cogent criticism of a minister's performance during the previous parliamentary term could have the same effect and therefore be caught by s 5. The problem was succinctly stated in a judgment of the US Supreme Court that "what separates issue advocacy and political advocacy is a line in the sand drawn on a windy day". (*McConnell*, at 126)

Second, several of the exemptions to the extended definition of "election advertisement" arbitrarily differentiate between different forms of communication. For example, the publication of political views on a blog is only exempted if (among other things), it is operated on a "non-commercial basis". However, the publication of political views in a book is only exempted if (among other things), the book is sold for "no less than its commercial value". We are not aware of any legislative commentary that explains the logic of this distinction.

Third, the exemption for newspapers and periodicals has potentially concerning implications. "Editorial material" is exempt if it is included "solely for the purpose of informing, enlightening, or entertaining readers". It is not clear whether this exempts the practice, common to liberal democratic societies, of newspapers endorsing candidates for public office. The editorial staff of a newspaper presumably endorse a candidate for the purpose of "informing" their readers of their preference and "enlightening" the readers as to the reasons for the endorsement. However, the editorial staff also clearly wish to persuade their readers that their newspaper's endorsement is correct and to vote accordingly. For this reason, there is a risk that newspaper endorsements are caught by the Act, which would constitute a serious — and unparalleled — curtailment of the liberty of the press. Such a provision would be regarded as clearly unconstitutional in the US. In *Mills v Alabama* 284 US 214 (1966) at 218–219, Black J, delivering the unanimous judgment of the US Supreme Court, concluded in relation to the conviction of a newspaper editor for violating an Alabama state law prohibiting election day electioneering:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press ... We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

SUMMARY

The underlying assumption of the Act appears to be that free speech and electoral integrity are competing ideals. The evidence for that proposition is thin and the historical traditions of liberal democratic societies suggest otherwise. The central importance of freedom of speech to the liberal democratic system was accurately expressed by Scalia J in *Austin v Michigan State Chamber of Commerce* at 695:

> The premise of our system is that there is no such thing as too much speech — that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise ... that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not. ❐