LEGISLATION DESIGN AND ADVISORY COMMITTEE

27 October 2016

Jacqui Dean MP, Chairperson
Justice and Electoral Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Ms Dean,

Electoral Amendment Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. The LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.

2. In particular, the LDAC's terms of reference include these dual roles:
    a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
    b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of the LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by the LDAC prior to their introduction.

4. The Electoral Amendment Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Professor Andrew Geddis, David Cochrane, James Wilding, and Megan Richards, with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Electoral Amendment Bill

1. Introduction

1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

1.2. This submission focusses on aspects of the Electoral Amendment Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to increase the quality and transparency of the legislation. In particular, this submission focusses on:

(a) striking an appropriate balance between ensuring protections for advance voters and the right to freedom of expression in new section 197A;
(b) clarifying the distinctions drawn between ordinary people and electoral officials in new section 197A;
(c) the appropriateness of a reverse onus defence in relation to offences under new section 197A;
(d) anomalies between advance voters and polling day voters in new section 199A;
(e) several minor points that require clarification; and
(f) process and timing of the Bill, and design of the Electoral Act 1993.

1.3. We make suggestions where provisions of the Bill could be amended or reconsidered in light of the principles in the Guidelines. We have endeavoured to make suggestions that will result in an accessible and quality piece of legislation that creates certainty for voters and political participants.

2. Interfering with or influencing advance voters – clause 95, new section 197A

2.1. Clause 95 provides that a person is prohibited from doing things listed in new subsection (2) (such as taking part in a demonstration or exhibiting a party name, emblem, slogan or logo) in an advance voting place or in a buffer zone (up to 10 metres from the entrance to an advance voting place). The Subcommittee understands the broad intention is to mirror the protections available to voters on polling day for advance voters.

Advance voters' ability to access advance voting places unimpeded should be balanced against the limitation on campaigners' freedom of expression

2.2. It appears to the Subcommittee that new section 197A attempts to achieve two things:

(a) ensure advance voters can exercise their democratic rights by accessing advance voting places without interference by people campaigning in or immediately outside advance voting places; and
(b) to limit the expressive rights of campaigners and other persons within buffer zones so as to not influence advance voters.

2.3. It thus attempts to strike a balance between important competing interests: the interest in all citizens being able to engage in democratic elections and the interest of citizens in freedom of expression. If that is correct, then it might better be captured by two separate provisions:

(a) a section that provides that no person shall impede or attempt to impede or interfere with the right of access of advance voters to advance voting places at times when those places are open for voting;
(b) a section that provides that no person shall, in a buffer zone or advance voting place at times when that place is open for voting, conduct any demonstration or procession, or exhibit material or engage in publishing, distributing or broadcasting material, that refers to the poll or is intended to or is likely to influence a voter.

2.4. The Subcommittee suggests separating out these objectives to allow a more measured analysis of the extent freedom of expression should be impeded, as weighed against voters' rights.

The provision should be as clear and certain as possible so as not to deter people from engaging in campaigning or demonstrations

2.5. The Subcommittee suggests that because new section 197A attempts to strike a balance between two important rights and interests, the provision should be as certain and clear as possible so as not to deter demonstrators and campaigners from exercising their expressive rights.

2.6. Specifically, the Subcommittee suggests it might be appropriate to include a provision that requires electoral officials at an advance voting place to clearly mark out the buffer zone. This would ensure the access route for voters to have unimpeded access, and the areas outside of which campaigners and demonstrators may engage in freedom of political expression, are clear. That in turn would help achieve the objective of ensuring sufficient certainty for candidates and other political participants regarding where they can be, what behaviour is permitted, and how to avoid activity reaching the threshold of interfering with advance voters.[1]

The provisions should be clear that the prohibitions relating to displaying party coloured rosettes, streamers, etc and displaying party lapels or badges only apply to electoral officials

2.7. New subsection (2) lists the things that are prohibited in advance polling places and buffer zones. The conduct listed applies to all persons, except paragraphs (c)(iv)(A) and (C) apply only to electoral officials. So people who are not electoral officials are allowed to exhibit (by wearing or displaying) any ribbons, streamers, rosettes, or items of similar nature in party colours,[2] and may wear a party lapel or badge.[3]

2.8. At present, the provision contains a double exception in respect of electoral officials. Assuming that is the intention, prohibited conduct for electoral officials might be the subject of a separate subsection. This would make the provision more easily understandable and its intent more accessible. The Guidelines provide that "Legislation must be easy to use, understandable, and accessible to those who are required to use it."[4]

It is not clear why the exception allowing vehicles to display ribbons, streamers, etc in party colours does not exclude electoral officials

2.9. Subsection (2)(c)(iv)(B) provides that ribbons, streamers, rosettes, or items of a similar nature in party colours are excepted from the prohibition if they are displayed or worn on a vehicle. Unlike (c)(iv)(A) and (C), this applies to all persons' vehicles, and does not treat electoral officials' vehicles differently. It is unclear to the Subcommittee why a distinction is drawn between

[1] Ministry of Justice, Regulatory Impact Statement, Electoral Amendment Bill: Advance voting 'buffer zones' & prohibition on false statements to influence voters (22 August 2016) at [18].
[2] Clause 197A(2)(c)(iv)(A).
[3] Clause 197A(2)(c)(iv)(C).
[4] LAC Guidelines (2014 edition) at p 4.

ordinary persons and electoral officials in subparagraphs (A) and (C), but not (B). The Committee should ask officials about the basis for this distinction, and ensure it sufficiently captures the policy objective.

3. Defence to prosecution for an offence relating to interfering with or influencing advance voters – clause 94, new section 197(1)(k) and (2B)

The reverse onus defence is not justified when it applies to ordinary people

3.1. Clause 94 provides that every person commits an offence who at an election, in respect of an advance voting place or a buffer zone, does any of the things prohibited in new section 197A. A person is liable on conviction to a fine note exceeding $20,000.[5] New section 197(2B) provides it is a defence to this prosecution if the defendant proves that the exhibition was inadvertent and the defendant caused the exhibition to cease as soon as the defendant was notified by the Electoral Commission or a manager of the advance voting place that the exhibition was taking place.

3.2. The Guidelines provide that "Legislation that imposes a burden on a defendant to prove or establish any element of a defence in criminal proceedings will constitute a limitation on the presumption of innocence (NZBORA 25(c)). Cogent reasons will therefore be required to justify shifting the burden."[6]

3.3. The departmental disclosure statement states:[7]

> [T]he Ministry of Justice believes that generally … reverse onus offences are appropriate as placing such an onus onto the defendant is justifiable where the defendant is voluntarily involved in a regulated activity. Generally, candidates, parties and party activists are voluntary participants in the electoral process, which is a regulated activity. Upon entering into an election, candidates, parties and party activists are, or should be, aware of the regulatory framework and are expected to act with due diligence. In addition, in each case the Ministry believes the candidate parties and party activists are best placed to establish absence of fault.

3.4. The Subcommittee acknowledges that in some cases a reverse onus defence is acceptable in relation to regulated activities. We also note the provision mirrors existing offences/defences in section 197. However, the Subcommittee points out that new section 197A not only regulates candidates, parties, and party activists who might be expected to be aware of the regulatory framework, but also ordinary persons who should not be subject to the same expectations. For example, an ordinary group of people might be protesting an act of a current government, and are not associated with any political party. If their actions contravened new section 197A, they

[5] Electoral Act 1993, s 197(1).
[6] LAC Guidelines (2014 edition) at 21.2.
[7] Ministry of Justice, Departmental Disclosure Statement: Electoral Amendment Bill (31 August 2016) at 4.4.

would be required to prove their innocence in the same way that a regulated person who is expected to know their obligations and regulatory framework would. The Subcommittee suggests that the justification in the regulatory impact statement does not cogently justify the limitation on the presumption of innocence for ordinary people who are not candidates, parties or party activists. We submit that the reverse onus should be removed and that any prosecution be required to prove intention to violate the buffer zone.

Is the reverse onus defence appropriate for candidates, parties, and party activists?

3.5. The Subcommittee also suggests the Committee should be satisfied that a reverse onus defence is appropriate even in the case of regulated persons such as candidates, parties, and party activists. Arguably, a reverse onus defence is not appropriate because the regulated activity is in the context of elections and involves a prima facie limitation on freedom of expression, freedom of peaceful assembly and freedom of movement. In the case of these fundamental rights, it might be more appropriate to place the onus of proof on the prosecution.

3.6. If the Committee retains the reverse onus in this provision, we suggest the provision is amended to expressly state the standard of proof that applies (usually the balance of probabilities).[8]

4. Publishing false statements to influence voters – clause 97, new section 199A

The Subcommittee supports new section 199A

4.1. Clause 97, new section 199A, prohibits a person from publishing or republishing, or arranging to publish or republish, a false statement during the specified period (two days before, and including, polling day). In taking such action, the person must intend to influence the vote of an elector. New subsection (2) provides that a person does not commit a corrupt practice if the statement was published before the specified period and remains available, but the person did not advertise or draw attention to the statement or promote or encourage any person to access the statement.

4.2. The Subcommittee supports the inclusion of new subsection (2) and its departure from the position in *Peters v Electoral Commission*.[9] In that case, the High Court held that statements first published more than two days prior to election day will be subject to section 199A if they simply remained where they were earlier published. Amending section 199A to expressly exclude false statements published before the specified period but which remain available and are not advertised or drawn attention to is an important protection for freedom of expression. Further, it will mitigate the potentially chilling effect of the decision in *Peters v Electoral Commission*.

[8] LAC Guidelines (2014 edition) at 21.2.
[9] [2016] 2 NZLR 690.

4.3. The inclusion of new subsection (2) is consistent with the Guidelines, which provide that legislation should respect the basic constitutional principles of New Zealand law, including free and fair elections.[10] The Guidelines also provide that "new legislation should … be consistent with the rights and freedoms contained in [the New Zealand Bill of Rights Act 1990]",[11] including freedom of expression.[12]

The provision should be clear about when knowledge is required

4.4. The Subcommittee makes two suggestions as to how new section 199A could be clarified. Firstly, it is not clear in new subsection (1) when the person publishing the statement must know it is false. For example, it is not clear if the subsection captures statements which the publisher believes are true at the time of publication but later discovers are false. We assume the intention is that knowledge is required at the time of publication or republication, and suggest this is clarified in the provision.

Anomalies between advanced voting and polling day voting should be addressed

4.5. Secondly, the Subcommittee notes that new section 199A does not protect from false statements being made during advanced voting. We do not suggest the length of the specified period is extended, as we consider this would interfere disproportionately with freedom of expression. However, we note that the inconsistencies between advanced voting and voting on polling day require addressing more broadly throughout the Act. It seems on the one hand, there has been a concerted effort to bring advanced voting conditions more into line with that on polling day (e.g. new section 197A). On the other hand, anomalies still exist. As noted below, we suggest the Electoral Act 1993 would benefit from full review and reform, to address anomalies and ensure policy is coherent and legislative design is consistent.

5. Electoral Commission's objection – clause 41, new section 96

Only attorneys whose enduring power of attorney has been activated should be notified

5.1. New section 96 provides for the Electoral Commission to object to a person's name being on the roll for a district. Where the Commission objects, it must give notice in writing to one of the persons identified in new subsection (2), which includes "the attorney appointed by the person objected to under an enduring power of attorney."[13] The Subcommittee assumes this provision is intended to capture only attorneys whose enduring power of attorney has been activated. In the interests of clarity and accessibility, the Subcommittee suggests this should be clarified in the provision.

[10] LAC Guidelines (2014 edition) at p 13.
[11] LAC Guidelines (2014 edition) at 5.
[12] New Zealand Bill of Rights Act 1990, s 14.
[13] Clause 41, new section 96(2)(c).

6. Withdrawal of nomination – clause 72, new section 146(1)

6.1. Clause 72 replaces section 146(1) to amend the process for a constituent candidate to withdraw his or her nomination. The Subcommittee suggests that section 146J(1) (the process for a constituency candidate nominated in a "bulk nomination" to withdraw his or her nomination) should also be similarly amended.

7. Design of the Electoral Act, and process and timing of the Bill

The Electoral Act is ripe for full-scale review

7.1. The Subcommittee submits that the Electoral Act 1993 is ripe for full-scale review and reform. The challenges this Bill highlights around inconsistencies between advance voting and voting on polling day is one example of why the Act would benefit from a complete overhaul to reflect changes in the ways New Zealanders vote. The Act is heavily amended each parliamentary term, and is inaccessible as a result.

A rushed legislative process may detrimentally impact the quality and design of this legislation

7.2. The Subcommittee notes that this Bill was subject to a truncated timeframe. Allowing only two weeks for the public to prepare submissions on the Bill is far from best practice for proposed constitutional legislation of this nature. While we understand there are a number of reasons for this process, including ensuring the Bill is enacted in time for the Electoral Commission to implement it in advance of the election, it risks detrimentally affecting the quality and legislative design of a constitutionally significant Bill. Further, the process for preparing this Bill means that some issues are not addressed.

8. Conclusion

8.1. Thank you for taking the time to consider the Subcommittee's submission. We wish to be heard on this submission.

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee