

Electoral (Integrity) Amendment Bill

3 November 2005

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

ELECTORAL (INTEGRITY) AMENDMENT BILL PCO 6781/1 Our Ref: ATT114/1371

1. I have reviewed the Electoral (Integrity) Amendment Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). A copy of the Bill is **attached** for ease of reference.

SUMMARY

2. I summarise my views as follows:

2.1 Prima facie the Bill infringes s 14 (freedom of expression) and s 17 (freedom of association) of BORA.

2.2 Accordingly, the question is whether the limitations are justified under s 5 BORA as "reasonable limits ... [that] can be demonstrably justified in a free and democratic society".

2.3 While it can be argued that the Bill does not sufficiently protect "legitimate dissent" by members in relation to the parties and so is BORA inconsistent, the better view, based on the Supreme Court's decision in *Awatere Huata v Prebble* [2005] 1 NZLR 289, is that the Bill is BORA consistent.

BACKGROUND

3. The purpose of the Bill is indicated in cl 3 and the explanatory note to the Bill, which state that the amendment to the Electoral Act 2001 is proposed "in order to enhance public confidence in the electoral system" and "to enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors".
4. The Bill amends the Electoral Act to provide that the seat of a member of Parliament becomes vacant if (s 55A):

4.1 He or she gives notice to the Speaker of the House of Representatives under proposed s 55B that he or she has resigned from the political party for which he or she was elected or that he or she wishes to be recognised as an independent member or a member of another party; or

4.2 The parliamentary leader of a political party gives notice to the Speaker of the House of Representatives under proposed ss 55C and 55D in respect of a member elected for that party that:

4.2.1 The parliamentary leader reasonably believes that the member (proposed s 55D(a)):

"... has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election";

4.2.2 The parliamentary leader has informed the member that he or she considers that proposed s 55D(a) applies to that member and of the reasons for that opinion and had advised that member that he or she has 21 days in which to respond (proposed s 55D(b)); and

4.2.3 That, after consideration of the conduct of the member and any response under proposed s 55D(b), at least two-thirds of the members of the parliamentary party agree that notice should be given to the Speaker (proposed s 55D(c)).

5. As the explanatory note to the Bill records, the Bill largely reinstates the provisions of the Electoral (Integrity) Amendment Act 2001 (repealed) ("EIAA"), which expired in accordance with s 3 of that Act at the end of the previous electoral term and which was considered by the courts in *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC & CA); [2005] 1 NZLR 289 (SC). The Bill does not include any provision for its own expiry equivalent to s 3 EIAA.
6. I note that the operative provisions of the now expired EIAA, as reinstated by the Bill, were not present upon introduction of the EIAA to Parliament. For that reason, the operative provisions of the EIAA were not considered for consistency with BORA for the purpose of considering whether it was necessary to report any inconsistency to Parliament under s 7 of that Act.[\[1\]](#)

ANALYSIS

7. The Bill is in substance "anti-defection" legislation under which the seat of a member of Parliament who resigns from his or her party or who acts to distort the proportionality of that party's representation can be vacated. The result of such vacation is, in terms of ss 129 and 134 of the Electoral Act, a by-election in the case of a constituency member or, in the case of a list member, the election to Parliament of the next candidate on the party list.
8. Anti-defection legislation exists in other jurisdictions, and the question whether such legislation is consistent with protected rights has been considered in several, notably India, Malaysia and South Africa.[\[2\]](#) Further, anti-defection provisions are included in the Singaporean Constitution and in the Constitution of South Africa in respect of the National Council of Provinces, the upper house of the South African Parliament.[\[3\]](#)
9. The caselaw in respect of anti-defection legislation has not reached consistent conclusions, with such legislation upheld in India and South Africa and struck down in Malaysia. The approach of the courts has varied according both to the precise scope and effect of the legislation and to the wider electoral, parliamentary and constitutional framework within which the legislation operates.

Interpretation of the Electoral (Integrity) Act 2001 (repealed) in Awatere Huata

10. The equivalent provisions of the EIAA were considered by the High Court, the Court of Appeal and the Supreme Court in *Awatere Huata*. These proceedings were an application by a member of Parliament for judicial review of the decision of the parliamentary leader of that member's party to give notice to the Speaker under the then in force s 55C, which is identical to the proposed s 55C.
11. The decision of the Supreme Court emphasised that the concern of the EIAA was to allow members and parliamentary parties to "restore" the proportionality of representation of a party in Parliament.^[4] On the facts in the case, the Court indicated that the failure of Ms Awatere Huata to renew her membership of the party for which she was elected, which in turn permitted the party to regard her as an independent member for parliamentary purposes, was itself distorting to that party's representation. While members of the Court did note various conduct by Ms Awatere Huata that was said to be inconsistent with her membership of the party, the Court as a whole essentially undertook a narrow assessment that Ms Awatere Huata's independent status was sufficient to engage s 55D(a).
12. Two further points should be noted from the decision of the Supreme Court:

12.1 First, while the Court of Appeal had sought to interpret the EIAA consistently with BORA and arrived at an interpretation of the EIAA that was more accommodating to Ms Awatere Huata,^[5] the members of the Supreme Court made no material reference to BORA. I develop this point further below.

12.2 Second, three members of the Court noted that there was doubt as to whether the party leader's notice was in fact reviewable, not least because it might fall within the scope of the compositional privilege of the House. As the point was not pressed by either party before the Supreme Court, the three members proceeded for the purposes of the case on the assumption that privilege did not preclude review.^[6] The question must, however, remain open.

Rights Potentially Engaged

13. The effect of the Bill is that the scope for members of Parliament to leave or dissent from the parties for which they are elected can be significantly restricted or halted altogether. The Bill may, accordingly, be seen to raise issues of consistency with the right to qualification for membership of Parliament, as affirmed by s 12(b) BORA, freedom of expression, as affirmed by s 14, and the right to freedom of association, as affirmed by s 17.

Qualification for Membership of Parliament

14. Section 12(b) BORA provides:

"Every New Zealand citizen who is of or over the age of 18 years-

...

(b) Is qualified for membership of the House of Representatives."

15. It may be suggested that the effect of the procedure provided by the Bill is to interfere with the right of the affected person to hold membership of Parliament. However, vacation of a member's seat under the Bill does not disqualify that person from membership of the House but rather reverses the election of that person as a Member in the particular case. The person affected remains free to seek membership of the House, whether in any by-election or at the next general election. It follows that s 12(b) is not engaged.

Freedom of Expression

16. Section 14 BORA provides:

"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."

17. The term "expression" in s 14 has been given a very broad meaning to encompass conduct that has an expressive component.^[7] Moreover, the right of free expression is regularly described in terms of the role of free debate as a basic element of democratic government.^[8]
18. As is apparent from the decision of the Supreme Court in *Awatere Huata* concerning the equivalent provisions of the EIAA, the procedure provided by proposed ss 55A and 55D of the Bill may be invoked in relation to a range of conduct by members of Parliament, including but not limited to voting and continued party membership.
19. Both of these examples and most, if not all, conduct that might fall within the scope of proposed s 55D, are expressive in terms of s 14. The Bill operates both directly to prevent the member concerned from continuing to vote and otherwise act as a member of Parliament and indirectly by constraining or "chilling" expression by members by placing their continuing membership at risk.^[9] It follows that the Bill limits members' freedom of expression and so engages the protection of s 14.

Freedom of Association

20. Section 17 BORA provides:

"Everyone has the right to freedom of association."

21. The right to freedom of association is generally interpreted to include not only a right to establish and enter into association with others, but also a right to refuse or cease doing so.^[10]
22. The procedure provided under proposed s 55D of the Bill may be seen to engage members' freedom of association in several respects. First, and most directly, engagement of the procedure results in the expulsion of the member concerned from the parliamentary party and from Parliament. Second, the procedure sanctions members who seek to associate with another party.
23. In respect of the first point, I note the decision of the Malaysian Supreme Court in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, which held that a law requiring a Member who resigns from his or her political party to leave the House is contrary to the right to freedom of association. It is doubtful whether this view is correct in relation

to voluntary resignation from a party: as has been noted, for example in *Air New Zealand Ltd v Kippenberger*, the fact that withdrawal from or refusal to join an association carries with it a loss of associated benefits may not be seen to engage the right.

24. More widely, the right to associate with others does not entail a right to compel association. As Elias CJ observed in *Awatere Huata*, above, "[r]eciprocity in freedom of association is of the nature of voluntary groups".^[11] The decision of a political party to expel an MP thus does not engage s 17, even if s 55C permits significant detriment to attach to that MP in virtue of the expulsion.
25. However, the scope under the Bill to sanction members' association with another party does engage s 17.

Whether Justified Limitation

26. As the effect of the Bill is to limit expression and association by members of Parliament, it is necessary to consider whether that limitation is nonetheless consistent with BORA by reason of s 5, which provides:

"Subject to section 4 of this Bill of Rights, 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."

27. The Court of Appeal has discussed the application of s 5 on several occasions.^[12] Broadly, the Court's approach requires consideration of three questions:

27.1 What objective is Parliament endeavouring to achieve by the provision limiting the right, and how important is that objective?

27.2 Is the provision rationally connected to the objective?

27.3 Is the means chosen to achieve the objective "proportionate" given the nature of the right being limited and the importance of the objective sought to be achieved by the limitation?

28. In respect of the first question, the objectives of the limitation on free expression imposed by the Bill are those of enhancing public confidence in the electoral system and enhancing the maintenance of proportionality of party representation, as set out in cl. 3 and the explanatory note. These are clearly important objectives, going both to the operation of the electoral system and more widely to fundamental democratic principle.

29. As to the second question, it seems clear that the limitation is rationally connected to these objectives:

29.1 In terms of the first objective of public confidence in the electoral system, that system places some reliance upon the functioning of political parties and upon the party affiliation of individual members. It follows that the provision under the Bill by which parties may seek to ensure party cohesion and the continuing representation of each party is rationally connected to public confidence; and

29.2 In terms of the second objective of proportionality of party representation, the provision under the Bill for restoration of proportionality is directly connected to that objective.

30. As to the third question (proportionality), it is necessary first to note that the rights of political expression and association are regarded as rights of fundamental importance. Freedom of political debate lies at the very core of both the rights themselves and the underlying concept of a democratic society.^[13] As the Supreme Court of Canada has observed:^[14]

"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."

31. In order to complete the proportionality analysis it is necessary to determine whether, under the Bill, the maintenance of proportionality is an absolute value, or whether the reasons that give rise to the member's difficulty with his/her party could as a matter of law be relevant to the legislation's operation. To answer this question, it is necessary to consider the Supreme Court's judgments in *Awatere Huata*.

Whether Maintenance of Party Proportionality is an Absolute Value

32. As the Supreme Court noted in *Awatere Huata*, parties fulfil a central role in both the operation of the electoral system, particularly since the advent of MMP, and in the functioning of Parliament.^[15] There was, moreover, a clear perception at the time of the report of the Privileges Committee inquiry into the then member Alamein Kopu that the representation of political parties through the election of party list members under MMP was vulnerable to subsequent defection on the part of such members.^[16] Further, and as with the EIAA before it, the Bill itself may, if enacted, also be taken as a further indication by Parliament of the importance of party cohesion and affiliation.

33. Against this, however, it is necessary to note that the purposes of the Bill refer to party proportionality in qualified terms:

33.1 Clause 3(b) refers to "enhancement" of the maintenance of proportionality, rather than to maintenance itself; and

33.2 Clause 3(b) must, moreover, be read together with the parallel purpose in cl. 3(a) of enhancing public confidence in the electoral process.

34. More widely, the importance of political parties in the current electoral and parliamentary system must be considered in light of the established Burkean view of members' independence, under which dissent from members' parties is not only tolerated but accepted as an element of the democratic process.^[17]

35. The balance between party cohesion and affiliation on the one hand and members' independence on the other is a difficult question of political philosophy. It is certainly arguable that party cohesion and affiliation should not take precedence over members'

independence in all circumstances, and that dissent by members will not inevitably undermine public confidence in the electoral system. Indeed, it is arguable that public confidence may in some instances be harmed if dissent could be wholly prevented.

36. In principle, then, it can be argued that there should be scope for "legitimate dissent" in the House by individual members in relation to their parties and that, in order to be proportionate to the stated objectives and so consistent with s 5 BORA, any limitation upon expression under the Bill should not extend to preclude such dissent. If that is accepted, a further question arises, namely whether the Bill does in fact preclude such "legitimate" dissent.

37. Turning to the judgments of the Supreme Court in *Awatere Huata*, there are two interpretations of the words "[distort] the proportionality of political party representation in Parliament as determined at the last general election" in proposed s 55D(a). They are:

37.1 The phrase can be given a literal interpretation, such that any conduct by a member contrary to his or her parliamentary party deprives that party of that member's representation so far as that conduct is concerned and thereby distorts proportionality. So, a member who resigns from the party but in all other respects provides full support to the party in the House distorts proportionality simply as a consequence of resignation; or

37.2 The phrase can be given a functional interpretation, such that conduct distorts proportionality only where, for example, it prevents the party from proceeding with its policies or otherwise operating effectively in Parliament. So a mere change in the number of party members would not be sufficient to distort proportionality; there must be some substantive change - in voting patterns, for example.

38. The decisions of the Supreme Court and of the Court of Appeal in *Awatere Huata* in respect of the identical provisions of the EIAA broadly reflect these two interpretations. The majority of the Court of Appeal considered that distortion required substantial adverse conduct by the member concerned,^[18] thereby adopting the second interpretation (paragraph 37.2 above).

39. The Supreme Court, by contrast, took a much broader view of the scope of conduct concerned and, consequently, of the discretion afforded to parliamentary parties to require vacation of members' seats. In particular, the Supreme Court stressed that distortion did not depend upon a member voting against his or her party and, in the instant case, the Court held that a member's departure from the party, and consequent independent status, did amount to distortion. In short, the Court upheld the first interpretation (paragraph 37.1 above).

40. It therefore appears that expulsion from membership of the party on whatever ground could engage the EIAA provided that such expulsion was consistent with party rules and followed from some conduct on the member's part. While the Court was not directly confronted with the question of "legitimate dissent", its reasoning suggests that s 55D(a) would extend to such dissent.

41. I have considered whether there are other means of protecting "legitimate dissent" under the Bill (e.g., through the operation of the processes provided for in cl 55D) but have concluded that there are none.

42. In summary, the Bill does not protect what I have described as "legitimate dissent" in the House by an individual member concerning his/her party or its policies. Rather, it accords to the party and its leader a very wide discretion. The question is whether that means that the limitation on rights contained in the Bill is not "proportionate", and therefore that the Bill is not BORA consistent. To answer that it is necessary to turn again to the Supreme Court's judgments in *Awatere Huata*.
43. There is a preliminary point to be made, however. It should not be forgotten that a member who does not agree with his/her party in an important respect is free to pursue that disagreement within the party caucus and through other party processes, as was noted by Keith J in *Awatere Huata* (at p 320 // 2-5). If the member leaves, or is expelled from, the party, and so loses his/her Parliamentary seat, the member can pursue the disagreement outside Parliament, and can stand for re-election,^[19] if necessary as an independent or member of another party. In short, the member's rights are limited; they are not removed. Legitimate avenues for expression and association remain.
44. As already noted, the majority in the Court of Appeal in *Awatere Huata* interpreted the concept of "proportionality" in s 55D(a) of the Electoral Act in accordance with the second of the two interpretations referred to in paragraph 37 above. The majority found some support for its approach in ss 14 and 17 BORA.^[20]
45. However, in the Supreme Court, their Honours did not discuss BORA or the rights engaged by the Bill, although the matter was raised. In oral submissions counsel for Ms Awatere Huata referred, albeit briefly, to the chilling effect on members' freedom of expression if the interpretation argued for by the ACT Party, and ultimately accepted by the Court, prevailed.^[21] In her judgment, the Chief Justice noted that the majority of the Court of Appeal had relied on s 14 BORA as supporting its interpretation of "distorting proportionality".^[22] Despite that, the only substantive reference to freedom of expression in the Supreme Court is found in Keith J's brief reference to the party processes through which a member can exercise his/her rights (see paragraph 43 above).
46. The Supreme Court interpreted the legislation in a way that does not leave room for "legitimate dissent". This suggests that the Supreme Court:
- 46.1 Did not see the legislation as engaging any BORA interests at all; or
- 46.2 Considered that the legislation was justified in terms of s 5 BORA given the importance of the party system in the New Zealand MMP environment and the availability of other means of dissent for a member who disagrees with his/her party; or
- 46.3 Believed that the meaning of the Act was so clear that, in terms of s 4 BORA, the Court had no scope to follow some other interpretation.
47. It is unfortunate that the Supreme Court did not address the BORA issues, particularly given the reference to BORA in the judgment of the majority in the Court of Appeal and counsel's reference to freedom of expression in oral submissions. I assume from the nature of the Supreme Court's analysis that had the Court addressed the point it would have taken the second alternative referred to in paragraph 46 above. In any event, what does seem clear is that the Supreme Court did not see the EIAA as infringing BORA.

48. In the result, then, while I consider that it can be argued that the Bill should protect "legitimate dissent" by members in respect of their parties and, to the extent that it does not, it is BORA inconsistent, on the basis of *Awatere Huata*, the better view is that the Bill is consistent with, and does not breach, BORA.

49. I was assisted by Ben Keith, Associate Crown Counsel, in the preparation of this advice.

Terence Arnold QC
Solicitor-General

Footnotes

1 Section 7 provides:

"Where any Bill is introduced into the House of Representatives, the Attorney-General shall,-

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,-

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights."

2 *Ex parte Chairperson of the Constitutional Assembly: In re Certificate of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (CC); *Mian Bashir Ahmad v State* (1982) AIR Jammu & Kashmir 26; *Kihota Hollohon v Zachilhu* (1993) AIR SC 412, *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697.

3 Constitution of the Republic of Singapore, art. 46(2)(b); Constitution of the Republic of South Africa, s 62(4)(d). See, for discussion, the decision of the Constitutional Court of South Africa in *United Democratic Movement v President of the Republic of South Africa & ors* CCT 23/02. The 1996 decision of the Court (above n.2) concerned a separate antidefection provision of the interim Constitution: see Transitional Provisions sch. 6, annexure A, clause 13.

4 *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC), 313 per Elias CJ.

5 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA), 405 per McGrath, Glazebrook and O'Regan JJ.

6 *Awatere Huata v Prebble* (SC), above n.4, at 305-6 per Elias CJ; 314-5 per Gault J; 316 per Keith J.

7 See, for example, the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, 968.

8 See, for example, *Hosking v Runting* [2005] 1 NZLR 1, para. 178; *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 SCR 1326, 1336; *Incal v Turkey* (1998) 29 EHRR 449, para 46.

9 See, for example, *Hosking*, above n. 8, 54 & 62; *Lange v Atkinson* [2000] 3 NZLR 385, 399.

10 *Air New Zealand Ltd v Kippenberger* [1999] 1 ERNZ 390; *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211; *Young, James & Webster v the United Kingdom* (1981) HRLJ 185; M Nowak *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (1993) 388

11 Above n.6, para. 50.

12 *Noort v MOT* [1992] 3 NZLR 260; *Moonen v Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Literature Board of Review (No 2)* [2002] 2 NZLR 754.

13 See above n.8; *Rekvenyi v Hungary* (1999) 30 EHRR 519, para 26.

14 *Libman v Attorney-General (Quebec)* [1997] 3 SCR 569, 581 per curiam, citing *Edmonton Journal v. Alberta*, above n.8.

15 *Awatere Huata v Prebble* (SC), above n.6, at 316-20 per Keith J.

16 "Report of the Privileges Committee on the question of privilege referred on 22 July 1997 relating to the status of Manu Alamein Kopu as a Member of Parliament" [1997] AJHR 1.15B, at 4.

17 See, for example, *Awatere Huata v Prebble* (CA), above n.5, 404-5 per McGrath, Glazebrook and O'Regan JJ, citing *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, 114-5.

18 The conduct had to amount to altering, in substance, the relative voting strength of that member's party in the House: *Awatere Huata v Prebble* (CA), above n.5, at 405-7 per McGrath, Glazebrook and O'Regan JJ.

19 Depending on whether the member was an electorate or list MP, standing for re-election would be at a by-election or a general election.

20 See *Awatere Huata v Prebble* (CA), above n.5, at para [96].

21 See *Awatere Huata v Prebble* (SC), above n.4, at p 296.

22 See *Awatere Huata v Prebble* (SC), above n.4, at para [18].

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Electoral (Integrity) Amendment Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.