

What does it cost to win an election?

The Minister of Justice has recently introduced the Electoral Finance Bill. The objectives of the Bill are stated to be to increase transparency and accountability in the electoral process, prevent the undue influence of wealth, and promote participation in Parliamentary democracy.

The impetus for the Bill has come from several areas, including from the Government's concerns about the high level of funding received by some parties before the 2005 election, criticism of anonymous attacks on political parties in the same year (later shown to be by the Exclusive Brethren), and the Auditor-General's 2006 report into 2005 pre-election spending.

Since introducing the Bill, the Government has received heavy criticism from interested parties. One commentator dubbed the Bill a "loud-sounding nothing". Others are forecasting a rough ride as the Bill progresses through the legislative phases. So what's all the fuss about?

What the Bill does - key changes

The key proposed changes are in five areas:

- election expenses
- third party campaigning
- political donations
- compliance and enforcement, and
- broadcasting of election programmes

Significant aspects of the current law will remain unchanged if the Bill passes in its present form. These omissions are the major source of dissatisfaction with the Government's attempt to remedy some (but not all) long-standing difficulties with election campaigning in New Zealand.

Election expenses

Election expenses are a primary area for reform and consolidation. Under the Bill:

- Parties that contest the party vote in a general election can spend up to \$1 million plus \$20,000 for each electoral district contested by a candidate for the party. This is the same as currently. The Electoral Commission will call parties to account if they go over the limit.
- All registered parties must appoint a "financial agent" to receive and account for its income and expenses.
- Specific definitions of "election expenses" incurred by candidates, parties, and third parties.
- The regulated period for election spending in an election year will be from 1 January of that year until polling day. This is an extension of the present period which runs from 3 months prior to polling day until polling day.
- A specific definition of "reasonable market value" of materials and advertising space to ensure parties with existing trade relationships cannot gain an unfair advantage.
- Where campaign advertisements include information about a candidate and a party, the cost will be apportioned between the two.
- A more rigid disclosure regime for election expenditure.

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“Third parties ranging from religious groups to unions and major NGOs will have plenty to say about the Bill’s limitations on their right to advocate policies in election year.”

Third party campaigning

The Bill proposes a much stricter regime for electoral advertising or campaigning by third parties in the lead up to an election than under the present law. The key features are as follows:

- A broad definition of third parties encompassing promoters who are persons and entities other than candidates, parties and financial agents of candidates or parties.
- A requirement that all third parties notify the Chief Electoral Officer of their involvement in election activities.
- Expenditure limits are to be imposed on third parties, including a \$60,000 cap on third party’s total election expenses.
- Third parties will be required to appoint a financial agent to accept and report on donations, as well as incur, pay and report on election expenses.
- A \$500 limit on anonymous donations to third parties to fund their election activities.
- Anonymous donations to third parties that exceed \$500 in sum or value will be confiscated by the Chief Electoral Office.
- Disclosure rules will require the disclosure of the name and address of donors who give more than \$500 to a third party. Where multiple parties contribute to a single donation, the names and addresses of all contributors must be disclosed.

Political donations

The primary change in this area is that all donations, whether to candidates, parties or third parties will be required to go through a financial agent who will be responsible for filing returns.

The Bill extends the definition of “donation” to include the provision of under-valued goods or services to a party, candidate or third party and the provision of over-valued goods and services by a party, candidate, or third party. For example, an agreement to produce signage for a candidate at a cost that is lower than the reasonable market value of the signage might be considered a donation to the candidate.

Money lent to a party candidate or third party other than on commercial terms will also fall within the definition of “donation”.

Additional disclosure to the Electoral Commission will be required for all political donations over \$20,000. This will include donations where the sum of all donations given by a person in a 12 month period exceeds \$20,000.

Compliance and enforcement

The Bill increases the penalties for corrupt and illegal practices, and introduces a new penalty providing for payment to the Crown of the value of any financial benefit derived from the offending. The Bill also extends the current 6 month limit for the prosecution of electoral finance offences.

Broadcasting of election programmes

The Bill will remove the requirement for political representatives to be appointed to the Electoral Commission for the purposes of the Commission’s functions in relation to election programmes. Independent officials alone will decide upon the rules and allocation of funding for election programmes.

What the Bill does not do

Media attention has focused as much on what the Bill does not do, as what it does do. There are two main objections:

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This newsletter has been prepared by Minter Ellison Rudd Watts. Professional advice should be sought before applying the information to particular circumstances.

The threshold for anonymous donations to parties

The Bill does not significantly alter the regime for anonymous donations to parties. The present system enabling donors to conceal their identity by channelling money to parties through trusts will remain the same if the Bill is passed. All that is required is disclosure of the fact of donations over \$10,000.

The Government is proposing an independent review of this issue and other aspects of election reform that cannot be implemented in time for the next general election, or that require further independent consideration. Matters to be considered include the structure of general electoral agencies and, the broader question of political party funding, including the controversial issue of whether political parties should be state-funded.

Parliamentary expenditure

The Bill deals primarily with the financial regime that applies to political parties, candidates, and third parties in the run-up to the election but does not canvas Parliamentary spending.

At present, the Government is reviewing the rules relating to Parliamentary expenditure. Legislation flowing from this review is expected to be introduced later this year.

The Bill's next steps

The Bill will now be considered by the Justice and Electoral Select Committee where the public will have the opportunity to make submissions on the Bill. Submissions close on **7 September 2007**.

As the initial response to the Bill suggests, the Select Committee is likely to receive numerous submissions on a variety of issues with the Bill. Third parties ranging from religious groups to unions and major NGOs will have plenty to say about the Bill's limitations on their right to advocate policies in election year. The Bill's consistency with the New Zealand Bill of Rights Act 1990 is bound to form the basis of a number of submissions.

Under s7 of the Bill of Rights, when a Bill is introduced, the Attorney-General must bring to the attention of Parliament any provision in the Bill that appears to be inconsistent with any of the rights or freedoms contained in the Bill of Rights. In legal advice given to the Attorney-General for this purpose, Crown Law identified the following key issues raised by the Bill in respect of rights affirmed by the Bill of Rights.

- the various constraints on electoral advertising and related activity limit the right to freedom of expression, and
- the Bill sets out offences where, in the case of snap elections, conduct could become unlawful in circumstances where it was lawful at the time the conduct occurred. This raises an issue as to consistency with the rights against retrospective criminal laws.

Crown Law eventually concluded that no provision in the Bill unjustifiably limited a right or freedom contained in the Bill of Rights. However, in relation to the key issues identified above, this was a finely balanced judgement. Crown Law's opinion is sure to give some angles for challenges to the Bill through submissions to the Select Committee.

How we can help

Please feel free to contact us if you have any questions about the Bill, or if you would like our assistance in preparing a submission to the Select Committee.