

Broadcasting (Election Programmes and Election Advertising) Amendment Bill

Government Bill

As reported from the Justice and Electoral Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Broadcasting (Election Programmes and Election Advertising) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Broadcasting (Election Programmes and Election Advertising) Amendment Bill rewrites Part 6 of the Broadcasting Act 1989 to increase flexibility in the use of funding allocations provided to political parties for election programmes.

Following the Justice and Electoral Committee’s Inquiry into the 2014 general election, the committee recommended that the Government consider “greater flexibility for opening and closing addresses and give parties the choice around how they want to use their allocation to buy broadcasting time and money”.¹ The bill would implement this recommendation by removing the requirement for opening and closing addresses, and removing the requirement for TVNZ and Radio NZ to provide time for these addresses. The bill would also allow parties to use their funding allocation to publish election advertisements on the internet, in addition to broadcasting election programmes on television and radio.

Given that this bill primarily implements a relatively straightforward recommendation from the Inquiry, we decided to condense its timeframe. This will allow those affected to fully understand the amendments before the 2017 general election, and give the

¹ The report on the Inquiry into the 2014 general election can be found here: <http://bit.ly/2hmxln8>

Electoral Commission maximum time to implement the changes. We note the comments from submitters who felt that the two-week submission period was too short; however we consider that the timeframe given was sufficient to allow robust consideration of the bill.

The Government response to the Inquiry noted that the Government would consider the other recommendations relating to Part 6 of the Broadcasting Act 1989 as part of the Government's intended Digital Convergence Bill.² The other recommended changes to electoral broadcasting rules are still being considered for progressing in a later bill, applying to elections after 2017.

This commentary covers the key amendments that we recommend to the bill. It does not cover minor or technical amendments.

Expenditure limits and allocations on broadcasting

The bill would retain existing provisions whereby parties can be allocated different amounts of public funding, which will be the limit they can spend on broadcasting election programmes on television and radio. Under section 206(1) of the Electoral Act 1993, expenses paid from a party's allocation are not included by the party in its return of election expenses.

The purpose of this bill is not to change existing rules around how monetary allocations are made, or how they relate to election expense limits. Therefore, we recommend that new section 80A(2) be amended to confirm that expenditure limits in the Electoral Act still apply.

We also recommend that new section 80CA be inserted to confirm the existing links between Part 6 of the Broadcasting Act and the Electoral Act. For example, if a party uses all or part of its allocation to fund an election programme or election advertisement, to the extent that programme or advertisement is a candidate advertisement, that funding will be a candidate donation, and the expense a candidate election expense. Accordingly, the candidate will need to include that donation in their return of donations under section 209 of the Electoral Act and the expense in their return of election expenses under section 205K of the Electoral Act.

Broadcasting allocation expense returns

The bill would remove the current requirement for broadcasters to submit returns of all election programmes broadcast. As the bill would allow the allocation to be used for internet advertising, it would not be practical to extend the existing broadcaster return model to anyone who hosts or could host an online advertisement.

Instead of amending this bill to include a requirement for parties to file a return of expenses funded from their allocation, we believe this requirement should be included

² The Government response to the Inquiry into the 2014 general election can be found here: <http://bit.ly/2hsxZ5n>

in the Electoral Amendment Bill. This would allow the return to be made in parallel with the returns that parties already file under the Electoral Act, minimising any additional burden created by the new requirement.

We recommend that new section 80CB be inserted to note that a party's return of allocation expenses is to be filed under the Electoral Act.

Offences under Part 6 of the Broadcasting Act

Existing section 80A in the Broadcasting Act requires the Electoral Commission to report to the Police when it believes an offence has been committed under Part 6 of the Act. We note that this provision is not currently in the bill and therefore recommend that new section 80H be inserted to retain this existing requirement.

We also note that the wording in proposed new section 80G(b) differs from the wording in existing section 80(b)(ii). This means that in this bill, the offence of arranging the broadcast of an election programme contrary to section 70 would not be limited to doing so "for or on behalf of a political party". In order to avoid broadening the existing offence, we recommend that new section 80G(b) be amended to replicate the existing provision, limiting the offence to actions for or on behalf of political parties.

Publication of information concerning the bill

We note that the advice on the consistency of this bill with the New Zealand Bill of Rights Act 1990 was not published online until after submissions had closed. We are disappointed that this advice was not available to inform submitters, and encourage that it be published in a more timely manner in future.

Appendix

Committee process

The Broadcasting (Election Programmes and Election Advertising) Amendment Bill was referred to the committee on 3 November 2016. The closing date for submissions was 18 November 2016. We received and considered seven submissions from interested groups and individuals. We heard oral evidence from three submitters.

We received advice from the Ministry of Justice and the Parliamentary Counsel Office.

Committee membership

Jacqui Dean (Chairperson)

Jacinda Ardern

Chris Bishop

Marama Fox

Denis O'Rourke

Maureen Pugh

Jono Naylor

Metiria Turei

Hon Louise Upston

Louisa Wall

**Broadcasting (Election Programmes and Election
Advertising) Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Amy Adams

Broadcasting (Election Programmes and Election Advertising) Amendment Bill

Government Bill

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Part 2

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Broadcasting (Election Programmes and Election Advertising) Amendment Act **2016**.

2 Commencement

5

This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Amendments to Broadcasting Act 1989

3 Principal Act

10

This Part amends the Broadcasting Act 1989 (the **principal Act**).

4 **Part 6 replaced**

Replace Part 6 with:

Part 6	
Electoral broadcasting	
69 Interpretation	5
(1) In this Part, unless the context otherwise requires,—	
broadcaster means—	
(a) a television broadcaster:	
(b) a radio broadcaster	
broadcasting costs , in relation to an election programme,—	10
(a) means the costs incurred in broadcasting the election programme; but	
(b) does not include any production costs incurred in respect of that programme	
candidate election programme means an election programme referred to in section 70(3)	15
constituency candidate has the meaning given to it by section 3(1) of the Electoral Act 1993, and includes a person who has declared his or her intention of becoming a constituency candidate	
election means—	
(a) a general election:	20
(b) a by-election	
election period , in relation to an election, means the period—	
(a) beginning with writ day; and	
(b) ending with the close of the day preceding polling day	
election programme means a programme that—	25
(a) encourages or persuades, or appears to encourage or persuade, voters to vote for a party or the election of a constituency candidate; or	
(b) encourages or persuades, or appears to encourage or persuade, voters not to vote for a party or the election of a constituency candidate; or	
(c) advocates support for a constituency candidate or for a party; or	30
(d) opposes a constituency candidate or a political party; or	
(e) notifies meetings held or to be held in connection with an election	
party means a political party	
party election programme means an election programme that is not a candidate election programme	35

	production costs , in relation to an election programme or election advertisement, means the costs incurred in the preparation, design, composition, and creation of the programme or advertisement (as the case may be)	
	programme includes visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text	5
	publishing costs , in relation to an election advertisement,—	
	(a) means the costs incurred in publishing an election advertisement; but	
	(b) does not include any production costs incurred in respect of that advertisement	
	Register of Political Parties means the Register of Political Parties established under section 62(2) of the Electoral Act 1993.	10
(2)	In this Part the following terms have the meanings given to them by section 3(1) of the Electoral Act 1993:	
	(a) by-election:	
	(ab) candidate advertisement:	15
	(b) election advertisement:	
	(c) Electoral Commission:	
	(d) general election:	
	(e) polling day:	
	(f) writ day.	20
	Compare: 1989 No 25 s 69	
	<i>Provisions applying to broadcasters</i>	
70	Broadcasting election programmes	
(1)	Except as provided in subsections (2) and (3) , a broadcaster may not, at any time, broadcast an election programme.	25
(2)	A broadcaster may, for the purpose of a general election, broadcast an election programme if—	
	(a) the programme is promoted by a party or group of related parties; and	
	(b) the programme is broadcast during the election period; and	
	(c) the broadcasting costs are paid from money allocated to the party or group of related parties under section 79 .	30
(3)	A broadcaster may, for the purposes of a general election or by-election, broadcast an election programme if that programme—	
	(a) is promoted by—	
	(i) a constituency candidate; or	35
	(ii) a party with the authority of a constituency candidate; and	

(b) relates solely to the constituency candidate at the election; and (c) encourages or persuades, or appears to encourage or persuade, voters to vote for that candidate; and (d) is broadcast during the election period for the election; and (e) is broadcast for a fee that may, but need not, be paid from money allocated to a party or group of related parties <u>under section 79</u>.	5
(4) Nothing in this section restricts— (a) the broadcasting, in relation to an election, of news or comments or current affairs programmes; or (b) the broadcasting of any non-partisan advertisement, as a community service, by a broadcaster.	10
Compare: 1989 No 25 s 70	
71 Hours during which broadcast of election programmes prohibited	
(1) A television broadcaster may not broadcast election programmes— (a) during the hours between 6 am and noon on— (i) Sunday; or (ii) Anzac Day; or (b) on— (i) Christmas Day; or (ii) Good Friday; or (iii) Easter Sunday.	15
(2) A radio broadcaster may not broadcast election programmes on— (a) Christmas Day; or (b) Good Friday; or (c) Easter Sunday.	20
Compare: 1989 No 25 s 79A	
72 Obligation to give identical terms to each party or constituency candidate	
(1) A broadcaster may not offer or give to any party terms for broadcasting time that are more favourable than those offered or given to any other party that buys, or expresses an interest in buying, comparable time from that broadcaster.	30
(2) A broadcaster may not offer or give to any constituency candidate terms for broadcasting time that are more favourable than those offered or given to any other constituency candidate who buys, or expresses an interest in buying, comparable time from that broadcaster.	35
Compare: 1989 No 25 s 79B	

73	Programme standards in relation to election programmes	
	Section 4(1)(d) does not apply in relation to an election programme broadcast under this Part.	
	Compare: 1989 No 25 s 79	
	<i>Funding for election programmes and election advertisements in relation to general election</i>	5
74	Public money to be appropriated for funding election programmes and election advertising in relation to general election	
(1)	In relation to each general election, the Minister of Justice must give notice to the Electoral Commission of the amount of money appropriated by Parliament for the purpose of enabling parties to fund—	10
(a)	all of the broadcasting costs incurred in relation to the broadcast of party election programmes; and	
(b)	all or part of the broadcasting costs incurred in relation to the broadcast of candidate election programmes; and	15
(c)	all or part of the production costs, whenever incurred, in relation to—	
(i)	party election programmes; and	
(ii)	candidate election programmes; and	
(d)	all or part of the publishing costs incurred in relation to the publication of election advertisements on the Internet during the election period; and	20
(e)	all or part of production costs, whenever incurred, in relation to election advertisements published on the Internet—	
(i)	during the election period; or	
(ii)	before and during the election period.	
(2)	The Electoral Commission must decide, <u>under section 79</u> , how the amount in subsection (1) is to be allocated to parties.	25
(3)	For a general election that takes place after 2017 (a subsequent general election), an amount of money equal to the amount of public money allocated under section 79 at the immediately preceding general election must, unless an Act of Parliament expressly provides otherwise, be deemed to have been appropriated by Parliament for the purposes of enabling parties to fund the costs specified in subsection (1) incurred in relation to the subsequent general election.	30
(4)	An amount of money deemed by subsection (3) to have been appropriated by Parliament for the purposes specified in that subsection is payable out of public money for those purposes without further appropriation than this section.	35
	Compare: 1989 No 25 ss 74, 74A(1)	

75	Electoral Commission to set date for parties to notify qualification for allocation	
(1)	In every year in which Parliament is due to expire, the Electoral Commission must specify, by notice in the <i>Gazette</i> , a date by which a party must notify the Electoral Commission that it considers itself qualified to receive an allocation of the money referred to in section 74 .	5
(2)	The date specified under subsection (1) may be a date before the beginning of the election period that will apply in relation to the general election to be held in that year.	
	Compare: 1989 No 25 s 70A(1), (2)	10
76	Parties to give notice of qualification	
(1)	A party that considers it will be qualified under section 78(1)(b) to receive an allocation of the money referred to in section 74 must provide to the Electoral Commission a notice of qualification.	
(2)	A notice must—	15
(a)	be in writing; and	
(b)	be provided to the Electoral Commission no later than the date specified under section 75(1) .	
(3)	A notice must include—	
(a)	the full name of the party; and	20
(b)	the contact details of the person providing the notice and the capacity in which he or she provides the notice; and	
(c)	the contact details of the secretary of the party, if the secretary is not providing the notice; and	
(d)	a statement that—	25
(i)	the party is registered on the Register of Political Parties; or	
(ii)	the party has applied for registration on the Register of Political Parties; or	
(iii)	the party intends to apply for registration on the Register of Political Parties so as to be registered on that register at the date of dissolution or expiry of Parliament; and	30
(e)	details of any relationships that may exist between the party and any other party in New Zealand that the Electoral Commission may need to take into account in allocating money to political parties; and	
(f)	whether the party intends to submit a list under section 127 of the Electoral Act 1993 for the general election to be held in that year.	35
	Compare: 1989 No 25 ss 70A(3), 70B, 70C	

77 Consultation with parties

- (1) Before making any allocation of the money referred to in **section 74**, the Electoral Commission must give to every party that has provided a notice under **section 76** the opportunity to—
- (a) meet with the Electoral Commission; and 5
 - (b) be heard by the Electoral Commission.
- (2) The failure of a party to make use of an opportunity afforded under **subsection (1)**, or to comply with any request of the Electoral Commission, does not—
- (a) prevent the Electoral Commission from making an allocation of money; 10
 - or
 - (b) affect the validity of any allocation of money made, or not made, to a party.
- Compare: 1989 No 25 s 76

78 Criteria for allocating money to party

- (1) A party may only receive an allocation of the money referred to in **section 74** if the party—
- (a) has provided to the Electoral Commission a notice in accordance with **section 76**; and
 - (b) was registered on the Register of Political Parties at the time of the dissolution or expiry of Parliament. 20
- (2) In allocating money to a party, the Electoral Commission must have regard to—
- (a) the number of persons who voted at the immediately preceding general election for that party and for candidates belonging to that party; and 25
 - (b) the number of persons who voted at any by-election held since the immediately preceding general election for any candidate belonging to that party; and
 - (c) the number of members of Parliament who were members of that party immediately before the dissolution or expiration of Parliament; and 30
 - (d) any relationships that exist between a party and any other party; and
 - (e) any other indications of public support for that party, such as the results of public opinion polls and the number of persons who are members of that party; and
 - (f) the need to provide a fair opportunity for each party to which **subsection (1)** applies to convey its policies to the public by the broadcasting of election programmes on television. 35
- Compare: 1989 No 25 s 75(1), (2)

79 Allocation decision

- (1) The Electoral Commission's decision on how the money referred to in **section 74** is to be allocated to parties—
 - (a) must set out the allocations (which must be in any proportions that the Electoral Commission thinks fit); and 5
 - (b) may include conditions as to the manner in which a party is to spend its allocation.
 - (2) An allocation may be made to a group of related parties.
 - (3) An allocation may not be made to an individual party if that party is to receive an allocation as part of a group of related parties. 10
 - (4) A condition included in a decision under **subsection (1)(b)** may require a party to advise the Electoral Commission of the value of election programme bookings made by the party.
 - (5) If the Electoral Commission decides to allocate money to a party, the Electoral Commission must give a copy of its decision to— 15
 - (a) the party secretary; and
 - (b) the Secretary for Justice.
 - (6) A decision under this section may be made—
 - (a) before the beginning of the relevant election period; or
 - (b) during the relevant election period. 20
- Compare: 1989 No 25 ss 74A(2)–(5), 75(3)

80 Electoral Commission may vary allocation

- (1) The Electoral Commission may vary a decision made under **section 79** if a party to which an amount of money is allocated—
 - (a) does not accept that allocation; or 25
 - (b) ceases to be registered; or
 - (c) fails to submit a list of candidates for election under section 127 of the Electoral Act 1993; or
 - (d) fails to comply with any conditions imposed by the Electoral Commission under **section 79(1)(b)**. 30
- (2) The Electoral Commission may also vary a decision made under **section 79** if there has been a significant change in the relationship between a party that has received an allocation of money and any other party.
- (3) The Electoral Commission may vary a decision made under **section 79** without affording to any party the opportunity to— 35
 - (a) meet with the Electoral Commission; or
 - (b) comment on the proposed variation.

- (4) In varying a decision made under **section 79**, the Electoral Commission must have regard to—
- (a) the views of parties received in the course of consultations undertaken in accordance with **section 77**; and
 - (b) the matters specified in **sections 78 and 79(3)**. 5
- (5) If an allocation of money made to a party has been spent (in whole or in part), the Electoral Commission must not vary that allocation unless—
- (a) the registration of the party is cancelled under section 70 of the Electoral Act 1993; or
 - (b) the party secretary has failed to submit a list of candidates for election under section 127 of the Electoral Act 1993. 10

Compare: 1989 No 25 s 76A

80A How allocation may be used

- (1) A party or group of related parties that receives an allocation under **section 79(1)(a)**— 15
- (a) may only use that money for the purposes specified in **section 74(1)**; and
 - (b) must comply with any conditions imposed under **section 79(1)(b)**.
- (2) Nothing in this Part restricts the amount of money that a party or group of related parties may spend, subject to the expenditure limitations prescribed by or under the Electoral Act 1993, on— 20
- (a) broadcasting costs in relation to candidate election programmes; or
 - (b) publication costs in relation to election advertisements; or
 - (c) production costs in relation to—
 - (i) party election programmes; or 25
 - (ii) candidate election programmes; or
 - (iii) election advertisements.

Compare: 1989 No 25 ss 70(2A), 74B(1)

80B Payment of allocation

- (1) A party to which an amount of money is allocated under **section 79** must ensure that the Electoral Commission receives, no later than 50 working days after the end of the month in which the election was held,— 30
- (a) all accounts issued to the party in respect of the expenditure by that party of its allocation; and
 - (b) any information in relation to those accounts that the Electoral Commission requires. 35

- (2) No account that the Electoral Commission receives from a party after the end of the period specified in **subsection (1)** may be paid by the Electoral Commission, either in part or in full, from the amount of money allocated to that party under **section 79**.
- (3) When the Electoral Commission is satisfied that any account or a part of any account should be paid, the Electoral Commission must, from the money it received under **section 74(1)**, pay to the person who issued the account the amount approved by the Electoral Commission for payment. 5
- (4) An amount of money that has been allocated to a party under **section 79** and that is not paid out under **subsection (3)** must be repaid by the Electoral Commission to the Crown. 10

Compare: 1989 No 25 s 74B(2)–(5)

80C Apportionment of publishing costs incurred in relation to election advertisements published both before and during election period

- (1) This section applies if an election advertisement is published for a party or a candidate on the Internet both before the commencement of the election period and during the election period. 15
- (2) If this section applies, only the publishing costs attributable to the publication of the election advertisement during the election period are payable from money allocated under **section 79**. 20

80CA Cost funded from party allocation not party election expense

- (1) Any cost specified in **section 74(1)** that is paid by the Electoral Commission from the amount of money allocated to a party under **section 79** is not an election expense of the party that must be included by the party in its return of election expenses under section 206I of the Electoral Act 1993. 25
- (2) However, any cost specified in **section 74(1)** incurred in relation to an election programme or election advertisement that is paid by the Electoral Commission from the amount of money allocated to a party under **section 79** is,—
 - (a) to the extent that programme or advertisement is a candidate election programme or candidate advertisement, a candidate donation that must be included by the candidate in his or her return of donations under section 209 of the Electoral Act 1993; and 30
 - (b) to the extent that programme or advertisement is a candidate advertisement, an election expense of a candidate that must be included by the candidate in his or her return of election expenses under section 205K of the Electoral Act 1993. 35

80CB Return of party's allocation expenses

A party secretary must file with the Electoral Commission under **section 206IA** of the Electoral Act 1993 a return of expenses incurred by the party that have been funded from the party's allocation. 40

80D Recovery of money from party

- (1) Where effect has been given in whole or in part to an allocation made under **section 79** and the Electoral Commission, acting under **section 80**, varies that allocation, the Electoral Commission may determine that all or part of the money paid on behalf of a party as a result of that allocation be repaid to the Crown by the party. 5
- (2) Where the Electoral Commission makes a determination under **subsection (1)**,—
- (a) the Electoral Commission must give a copy of that determination to both the party secretary and the Secretary for Justice; and 10
 - (b) the Secretary for Justice may recover from the party as a debt due to the Crown the amount specified in the determination as being repayable to the Crown by the party.

Compare: 1989 No 25 s 76B

80E Procedure in relation to early elections

- (1) This section applies if, at the time Parliament is dissolved or expires,— 15
- (a) the Electoral Commission has not specified a date under **section 75** in respect of the election period that will apply in relation to the next general election; or
 - (b) the Electoral Commission has specified such a date, but that date has not yet passed. 20
- (2) If this section applies, this Part applies subject to the modifications specified in **section 80F**.

Compare: 1989 No 25 s 76C

80F Modification to application of this Part if section-80E 80E applies

If **section 80E** applies,—

- (a) **section 75(1)** applies as if the words “In every year in which Parliament is due to expire” were replaced with “At the earliest available opportunity”; and
- (b) **section 76(3)** applies as if **paragraph (d)** were replaced with the words “a statement that the party was registered on the Register of Political Parties at the time of the dissolution or expiry of Parliament (as the case may be); and”; and 30
- (c) the Electoral Commission may set, for the consultation required under **section 77**, any time that is reasonable in the circumstances. 35

Compare: 1989 No 25 s 76D

Offences

80G Offences relating to broadcasting

A person commits an offence and is liable on conviction to a fine not exceeding \$100,000 if the person—

- (a) fails to comply with—
 - (i) **section 70**; or
 - (ii) **section 71**; or
 - (iii) **section 72**; or
- (b) in an election period, arranges for the broadcasting of an election programme for or on behalf of a political party that is contrary to **section 70**. 10

Compare: 1989 No 25 s 80

80H Duty to report suspected offences

If the Electoral Commission believes that any person has committed an offence against **section 80G**, the Electoral Commission must report to the New Zealand Police the facts upon which that belief is based. 15

Compare: 1989 No 25 s 80A

Part 2

Consequential amendments to Electoral Act 1993

5 Principal Act 20

This Part amends the Electoral Act 1993 (the **principal Act**).

6 Section 5 amended (Functions)

In section 5(b), replace “parliamentary election programmes” with “electoral broadcasting”.

7 Section 206 amended (Interpretation) 25

In section 206(1), definition of **election expenses**, replace paragraph (c) with:

- (c) excludes the costs referred to in **section 74(1)** of the Broadcasting Act 1989 that are paid by the Electoral Commission out of money allocated to the party under **section 79** of that Act.

**Broadcasting (Election Programmes and Election
Advertising) Amendment Bill**

Legislative history

27 October 2016

3 November 2016

Introduction (Bill 199–1)

First reading and referral to Justice and Electoral Committee

Wellington, New Zealand:

Published under the authority of the House of Representatives—2016