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Dear Committee Members

Electoral Amendment Bill

Introduction

1. The Legislation Advisory Committee (LAC) was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.
2. The terms of reference of the LAC include scrutinising and submitting on aspects of Bills that raise public law issues or issues of inconsistency with the Guidelines, and helping improve the quality of law-making and the clarity of legislation.
3. This submission relates to clauses 35 and 36 of the Electoral Amendment Bill (the Bill), which will amend the Electoral Act 1993 (the Act). The LAC does not wish to be heard in support of this submission.
4. The LAC Guidelines address the following matters of relevance to the amendments proposed by clause 35 of the Bill:
 - Chapter 1 – means of achieving the policy objective;
 - Chapter 3 – basic principles of New Zealand’s legal and constitutional system;
 - Chapter 3A – statutory interpretation;

- Chapter 4 – New Zealand Bill of Rights Act 1990 and Human Rights Act 1993; and
 - Chapter 12 – criminal offences.
5. LAC also notes that clause 36 and existing section 197(2) both raise issues in light of clause 35, and suggests that the Select Committee consider how these might be appropriately redrafted.

Effect of clause 35

6. Section 197 of the Act currently contains significant restrictions on election day advertising. There are a number of provisos to this section, effectively providing exemptions to the restrictions. One of these provisos allows individuals other than electoral officials to wear or display “ribbons, streamers, rosettes, or items of a similar nature” either on the person, or on a personal vehicle. Clause 35 would remove this exemption. The effect of this clause would be to criminalise the act of wearing a rosette or similar on one’s person on election day, or displaying the same on one’s vehicle.
7. New section 197(1A)(b) will provide an exemption for rosettes worn by scrutineers within polling booths.

Adequate policy rationale?

8. This amendment appears to be a response to a recommendation contained in the Electoral Commission’s report on the 2011 election, and repeated in the Select Committee report on the 2011 election. The Electoral Commission stated:

The exemption to the general prohibition on electioneering on election day permitting the display of party lapel badges and rosettes, ribbons and streamers in party colours continued to cause problems. It would be simpler and less confusing, and remove a source of considerable annoyance to many voters, if the exemption was removed and this is what the Commission recommends.

9. The nature and extent of the problems caused was not discussed. The report goes on to say:

The biggest source of complaint on election day was scrutineers wearing party rosettes in polling places – something the law currently allows them to do. The Commission received 77 complaints and polling place managers had over 187 complaints from voters about scrutineers wearing rosettes.

10. We have obtained further information from the Electoral Commission to assess the policy rationale for this amendment. The Electoral Commission has provided a breakdown of the 280 complaints about election day advertising. This is attached to this submission.
11. The breakdown shows that there were six complaints about face to face canvassing (i.e. door knocking) in which the person complaining mentioned that the canvasser was wearing a party lapel badge or rosette. There were

three additional complaints about canvassers wearing or holding other items in party colours or displaying party logos. However, the Electoral Commission stated that "the primary complaint appeared to be about canvassing on election day, not the fact the person was wearing an item in a party colour". There were no complaints about people wearing rosettes outside of polling booths other than while canvassing. There were nine complaints about ribbons, balloons, streamers, or flags attached to personal vehicles. There were two complaints about caps, one displaying a voting message and one displaying a party logo. These figures provide questionable support for the contention that the display of party lapel badges, rosettes, ribbons and streamers in party colours is a "source of considerable annoyance to many voters" such that the current exemption should be removed.

12. The LAC is of the view that the Act already imposes significant restrictions on election day advertising, and it is therefore difficult to justify further restrictions that limit the way in which individuals express their political views and party allegiances on election day. Similarly, LAC Guidelines state that the principle in favour of liberty of the subject is a basic principle of common law and should only be constrained where there is a compelling reason.
13. The documents and supplementary materials obtained from the Electoral Commission do not provide evidence of a pressing problem that would justify further restrictions on election day electioneering. As mentioned above, the largest source of complaints concerned scrutineers wearing rosettes in polling booths, but the Bill will not prevent this.
14. It is also unclear that the amendments contained in clause 35 will make elections more efficient or improve their integrity. In particular, it is questionable whether it is an efficient use of time for Returning Officers to monitor ribbon-wearing by members of the public.

Statutory interpretation

15. The amendments proposed by clause 35 raise significant issues of statutory interpretation. The interaction of this clause with clause 36 and existing section 197(2) also raises interpretation problems.
16. Section 197(1)(g)(i) prohibits the display of "any party name, emblem, slogan, or logo". Section 197(1)(g)(ii) prohibits the display of "any ribbons, streamers, rosettes, or items of a similar nature in party colours". An existing proviso states that "this paragraph shall not apply to ribbons, streamers, rosettes, or items of a similar nature, which are worn or displayed by any person". Removing this exemption creates an interpretation problem around the scope of the phrase "items of a similar nature in party colours". For example, would a blue silk brooch, green tie or red Samoan lei be captured?
17. These issues are particularly significant given the likelihood that party supporters will attempt to get around the explicit restrictions and wear items that are arguably dissimilar to ribbons and rosettes. It is notable that this interpretation problem does not arise with the current sections, as the

restriction and the exemption both contain the phrase "items of a similar nature."

18. The phrase "exhibits in or in view of any public place" may also cause interpretation problems. For example, taking coloured balloons into a party headquarters in preparation for an election night event could constitute an offence if it involved carrying the balloons along a public street, or in view of any public street.
19. An additional interpretation problem arises under clause 36, which repeals and replaces section 198. Current section 198(1) provides that the Returning Officer may "cause to be removed or obliterated" any item of party advertising exhibited in or in view of a public place. Section 198(2) provides that this power does not apply to items worn on the person. The proposed amendments would remove section 198(2). It is not clear how a Returning Officer would cause rosettes worn on the person to be removed or obliterated. It is also not clear whether this section allows a power of entry to remove items displayed in private property when these are able to be viewed by the public. It would be concerning if Returning Officers interpreted this section as a permission to enter private property without usual safeguards, and/or to use physical contact to remove items worn on the person.

Criminal offences

20. Some of the offences within section 197(1) require the element of intention, but existing section 197(1)(g) creates strict liability offences. Section 197(2) contains a reverse onus defence for a breach of the restrictions contained in section 197(1)(g). This defence requires the defendant to demonstrate that the display was inadvertent, and that the item was removed when requested by a Returning Officer. LAC makes no comment on the appropriateness of strict liability combined with a reverse onus defence for practices already restricted. However, we are concerned with how this might be applied to the display of ribbons and other items worn on the person.
21. Given the scope of the restriction, the lack of an intention requirement is problematic. It is conceivable that someone could wear a ribbon or similar item in a party colour without any desire to influence voters in favour of a particular political party and in complete ignorance of the law: this behaviour would be a criminal offence under the proposed amendments. Further, while it might be reasonable for Returning Officers, police and the courts to have regard to the wearer's intention when assessing whether something is an "item of a similar nature", this would appear to be an irrelevant consideration as a matter of law.
22. The existing defence applies somewhat awkwardly to the new restrictions against wearing items on one's person. The defence is only available if a Returning Officer requests removal - preventing people from using the defence unless they have been warned. It is also unclear how "inadvertent" should be interpreted. For example, if someone wears a red hat, but does not think of it as an item of a similar nature, does this count as "inadvertent"?

23. Finally, it is unclear how the new restrictions will be enforced, given the proposed scope of the section. The disclosure statement for the Bill did not record consultation with the police to assess how they might be expected to use their prosecutorial discretion with respect to the expanded offence.

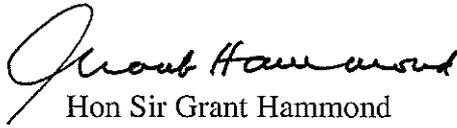
International comparisons

24. Finally, it is noted that no comparable democracy has restrictions on individuals wearing rosettes outside polling booths. However, Australia prohibits officials and scrutineers from wearing party emblems within polling booths.¹ Scrutineers must instead wear standardised identification badges in neutral colours. If the Electoral Commission is concerned that the display of party rosettes within polling places is damaging the integrity of New Zealand elections, we suggest that this could be addressed through a more narrowly tailored provision as in Australia. Conversely, it can be argued that if the display of rosettes by scrutineers within polling booths is not a sufficient problem to warrant reform, the display of rosettes or similar items by individuals outside polling booths is even less of an issue.

Conclusion

25. While it is not within the scope of the LAC terms of reference to comment on substantive policy issues, the changes proposed by clause 35 raise material inconsistencies with several areas contained in the LAC Guidelines.
26. As mentioned above, the LAC does not wish to be heard on this submission.

Yours sincerely


Hon Sir Grant Hammond
Chair

¹ Commonwealth Electoral Act 1918 (Australia), section 341(1). The maximum fine for breach of this section is \$1000.

ANNEXURE TO SUBMISSION

Information received from the Electoral Commission regarding election day complaints

The following information was received from the Electoral Commission in response to a request for further detail about the 280 election day complaints mentioned in para 253 of the *Report of the Electoral Commission on the 2011 General Election*.

The Electoral Commission provided a table displaying the number of complaints by subject matter:

Subject matter of complaint	Number of complaints
Canvassing	35
Materials delivered on election day	10
Signage	47
Rosettes/scrutineers	77
Admin/voting	37
Electioneering	43
Broadcasting	13
Other	18
Total	280

The Electoral Commission also provided the following additional information about three of the subject matter categories included in the table.

Electioneering

Includes election advertising displayed or published on election day that does not fall within any of the other categories.

Seven complaints related to materials attached to vehicles. This included three complaints about flags on cars, two complaints about ribbons, balloons, or streamers on cars, one complaint about party bumper stickers on cars, and one complaint about graffiti on an abandoned car telling people not to vote for a particular party.

Two complaints related to caps being worn: one with a party logo and one with a voting message.

Canvassing

Includes both telephone canvassing and face to face canvassing. Of the 35 complaints, 17 related to face to face canvassing (i.e. door knocking).

Of the 17 complaints about face to face canvassing:

- Six made reference to the canvasser wearing a party lapel badge or rosette
- Two made reference to the canvasser wearing a t-shirt in party colours
- One made reference to the canvasser carrying a folder in a party colour

The Electoral Commission noted that the primary complaint appeared to be about canvassing on election day, not the fact the person was wearing an item in a party colour.

ANNEXURE TO SUBMISSION

Rosettes / Scrutineers

In addition to complaints about scrutineers, this category also included four complaints about items displayed on vehicles outside polling places. Two complaints related to flags attached to cars, one related to balloons in party colours, and one related to streamers.