



1. I considered the Electoral (Integrity) Amendment Bill for its consistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) and concluded that while it clearly limits the rights guaranteed by ss 14 (freedom of expression) and 17 (freedom of association) those limitations are justified in a free and democratic society.

## *Summary*

2. By empowering the leader of a political party to cause an MP to vacate their seat the Bill has the potential to cause a chilling effect on an MP's freedom to express themselves inside and outside the House and also limits their ability to exercise their freedom not to be associated with a political party.
3. The Bill would only be inconsistent with those rights if the limitations are not demonstrably justified in a free and democratic society, applying s 5 of the Bill of Rights Act. To that end I am satisfied the Bill serves a significant constitutional objective of preserving the proportionality of party representation in Parliament as determined by the election that preceded it and the Bill is rationally connected to that purpose. Further if the departure of a member from a political party distorts the proportions of party representation, no other measure would address this other than removal and replacement of the member who caused it, so I am satisfied the rights are impaired to the minimum extent necessary to achieve the constitutional objective.
4. The remainder of the s 5 justification exercise requires an assessment of whether, giving full recognition to the value of the freedoms in question, the limits are a proportionate response to the objective. The issue is finely balanced but I have concluded that the measures are proportionate.

## *Analysis*

5. The Electoral (Integrity) Amendment Bill amends s 55 of the Electoral Act 1993 to allow the seat of an MP to be declared vacant if the member ceases to be a member of the political party for which the member was elected. The Bill inserts new sections 55AA-55E.
6. An MP ceases to be a member of a political party if either:
  - 6.1 the member provides notice to the Speaker of the House that they have resigned membership of the party for which they were elected, or that they wish to be recognised for parliamentary purposes as an independent member or a member of another political party; or
  - 6.2 the parliamentary leader of the party for which the member was elected provides a written notice to the Speaker stating that;

- 6.2.1 the leader reasonably believes the member has acted in way that has distorted, and is likely to continue to distort, the proportionality of party representation in Parliament as determined at the last general election; and
  - 6.2.2 the leader has given the member written notice of this view, and has given the member 21 working days to respond to the leader in writing; and
  - 6.2.3 at least two thirds of the relevant party's caucus agree that the leader should give the written notice to the Speaker.
7. The Bill is intended to reinstate the operative provisions of the Electoral (Integrity) Amendment Act 2001, which expired on 17 September 2005. That Act was introduced following the first Parliament under MMP in which a number of list and electorate MPs left their parties but remained as MPs.
  8. The purpose of these new provisions, as stated in the Bill, is to;
    - 8.1 enhance public confidence in the integrity of the electoral system; and
    - 8.2 enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors.
  9. The current Bill does not include a termination or sunset clause.
  10. The Bill raises a prima facie issue of consistency with the rights to freedom of expression (s 14) and freedom of association (s 17).

### ***Freedom of expression***

11. The only limitation of freedom of expression caused by this Bill concerns expression on subjects where the MP's personal views conflict with those of the party or are perceived to do so. The MP who belongs to a political party will have the capacity within caucus to express personal views contrary to those favoured by the party, and outside it to the extent permitted by the party but the expectation is that they will remain aligned with the party that saw them elected to Parliament. There does not seem to be significant difference in this respect between a party's constituency MPs and its list MPs. Although the former MPs would say they have a personal mandate, they still campaign as a member of a political party and enter the House on an implied promise to the electorate of adherence to the values and policies of that party.
12. A member's seat may become vacant as a result of voluntary resignation, or by a process initiated by the party leader. Following the Supreme Court decision in *Prebble v Awatere Huata* [2005] 1 NZLR 289 it is clear that once a member ceases to be a member of their political party, they cannot remain in Parliament under any circumstances if a measure such as the one this Bill contemplates is enacted.
13. The proposed legislation raises a prima facie limit on a member's right to freedom of expression because the prospect of facing an enforced departure from

Parliament will have a chilling effect on the expression of dissenting views by MPs.

14. Were the Bill to provide only for resignation of an MP, the effect on freedom of expression would be much less. It is the facility for a party leader to initiate a process to have an MP's seat declared vacant that has the potential to discourage an MP from speaking up against the party in a way that might be perceived as distorting the proportionality of party representation in Parliament. The Bill is only intended to affect those MP's who have acted inconsistently with their continued membership of the party under whose banner they entered Parliament but it has the capacity to suppress the expression of dissent by MP's who have not passed that threshold but fear they may be perceived to have done so.

***Freedom of association***

15. The proposed legislation also limits the right to freedom of association, a right which also includes the freedom to disassociate. The right is engaged because the legislation imposes a disincentive to disassociation from a political party and possible association with another party. By ceasing to be a member of the party, the MP also loses his or her seat in the House and thereby their employment and their ability to engage in the democratic processes in the House.

***Are the prima facie limitations nonetheless justified under s 5 of the Bill of Rights Act?***

16. The application of s 5 requires an assessment of whether the limitation is rationally connected to an important objective, causes a minimal infringement of the right and is proportionate to that objective.
17. The objectives of the proposed regime as stated in the Bill are;
  - 17.1 to enhance public confidence in the integrity of the electoral system; and
  - 17.2 to enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors.
18. These are manifestly important constitutional objectives and there is a rational connection between those objectives and the proposed measures.
19. The impairment of the rights is significant but there appears to be no alternative way to restore the proportionality of political party representation in Parliament other than by removing the member who has distorted it. If they remain in the House they will continue to cause the distortion. I am therefore satisfied that the impairment is minimal.
20. The remaining, and key, question in respect of s 5 is that of proportionality. This requires balancing the extent of any limits on rights with the strength of the objectives of the regime.
21. There are strong points on either side of the proportionality assessment. The purpose of the Bill is clearly to enhance democratic government by the retention of the balance of representation that the election produced but this comes at a cost to the exercise of rights of freedom of expression and association by those elected to Parliament. In particular, the suppression of dissenting voices, whether

intended or not and regardless of the circumstances, is a solemn matter for any Parliament. Freedom of expression in the House has a special constitutional value.

22. As important as freedoms of expression and association are, preserving the balance of representation in accordance with the wishes of the electorate is a sufficiently strong democratic purpose to justify the limitation. When an MP comes into the House under a party banner their continued allegiance is not only a matter between them and the party but between them and the voters who put them there. If they are subject to a capricious or unreasonable exercise of the measures they are not left without remedy as *Prebble v Awatere Huata* demonstrates and the party who chooses to remove them must accept the political cost of doing so.
23. The issue is finely balanced but I am satisfied the limitations this Bill causes to the freedoms of expression and association are proportionate and therefore justified in a free and democratic society.
24. For these reasons I considered the Bill to be consistent with the New Zealand Bill of Rights Act 1990.



Hon David Parker  
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