

# Coversheet: Referendum Advertising at the 2020 General Election

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| Advising agencies   | The Ministry of Justice   |
| Decision sought     | This analysis has been prepared for the purposes of supporting decisions to be taken by Cabinet regarding the regulation of referendum advertising for any referendums held with the 2020 General Election. |
| Proposing Ministers | Minister of Justice   |

**Summary: Problem and Proposed Approach**

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| <p><b>Problem Definition</b><br/> <b>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</b></p>  |
| <p>The Government has announced that it will hold at least one referendum (on legalising the recreational use of cannabis) at the 2020 general election. There is also a possibility of an additional referendum on the End of Life Choice Bill being held at this time. Cabinet has agreed to introduce a Referendums Framework Bill, which will provide a single set of rules to govern any referendums held alongside the 2020 General Election.</p> <p>The regulation of referendum advertising is necessary to support the public debate about the issues being put to referendum in the period immediately prior to the referendum. The proposed advertising rules will balance the need to:</p> <ul style="list-style-type: none"> <li>• support campaigners from all sides in having the freedom to express their views</li> <li>• prevent any one campaigner from being able to drown out other perspectives, or exercise undue influence</li> <li>• ensure that voters are informed about who is behind any referendum advertising campaign (transparency).</li> </ul> |

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| <p><b>Proposed Approach</b><br/> <b>How will Government intervention work to bring about the desired change? How is this the best option?</b></p>  |
| <p>The proposal is to regulate referendum advertising during the three-month period immediately prior to the referendums, using a similar regime to that applying to election advertising over this same period.</p> <p>The proposed rules will achieve the balance outlined above by requiring:</p> <ul style="list-style-type: none"> <li>• promoter statements on all referendum advertisement (transparency)</li> <li>• some large promoters having to register and disclose referendum advertising expenses (transparency)</li> <li>• a limit on the amount that can be spent on referendum advertising (balancing freedom of expression with preventing undue influence).</li> </ul> <p>Furthermore, by aligning the referendum advertising rules with existing rules governing the conduct of the general election, there is less implementation risk for the Electoral</p> |

Commission. It will also assist campaigners involved in advertising for both the election and the referendum(s) as they can simply apply one set of rules.

## Section B: Summary Impacts: Benefits and costs

### Who are the main expected beneficiaries and what is the nature of the expected benefit?

The main beneficiaries of the proposal are advocacy groups who wish to campaign about the referendum(s) (promoters), including political parties, the Electoral Commission and the general public. Benefits will primarily be non-monetised and relate to democratic integrity of election and referendum processes. These include transparency in referendum advertising, freedom of expression in public debate of referendum issues and minimal compliance and administrative burdens related to referendum(s) advertising.

### Where do the costs fall?

While minimal, some monetised and non-monetised costs will fall on promoters of referendum advertising, including some political parties, as well as the Electoral Commission. There will be some compliance and administration costs associated with the proposed referendum advertising rules; for example, the need for some large promoters to register, and track and disclose expenditure on referendum advertising (over certain thresholds).

### What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

#### *Integrity and legitimacy*

The electoral process is a fundamental part of any healthy democracy. Upholding the integrity of all aspects of the electoral process is critical to promoting public confidence and trust in government and constitutional arrangements. This is widely recognised as an important component of social infrastructure.<sup>1</sup>

There is a risk that if the referendum process is perceived to lack integrity, this will not only undermine public acceptance of the outcome of that referendum, but also in the outcome of the 2020 General Election.

#### *Voter engagement and understanding*

Voter engagement and participation is a vital part of a healthy democracy. For referendums it is important that voters are aware of the questions that will be asked in the referendum and have access to sufficient information to be able to cast an informed vote.

The referendum on cannabis (and possibly) end-of-life choice will garner intense interest from lobby groups. These groups have a legitimate interest in using advertising to influence voters' views. It is an important part of a fair and healthy democracy that campaigners of all sizes and perspectives have the freedom to express their views, and voters have the freedom to listen to these views.

### Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

The proposed approach is in line with the Government's expectations for the design of regulatory systems and in particular the expectation that any proposed regulatory regime:

- is proportionate, fair and equitable in the way it treats regulated parties

<sup>1</sup> OECD (2017). *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*.

- is aligned with existing requirements in related or supporting regulatory systems (such as, in this case, the election advertising regime), and minimises overlaps and inconsistent or duplicative requirements.

## Section C: Evidence certainty and quality assurance

### Agency rating of evidence certainty?

Our rating of evidence certainty is medium to high. There is no status quo as such for the regulation of referendum advertising, but both government and citizen-initiated referendums have been held previously, both by ballot and by post. We can also draw upon evidence on the advertising rules for the general election, although elections do raise different considerations to single-issue ballots.

*To be completed by quality assurers:*

### Quality Assurance Reviewing Agency:

Ministry of Justice

### Quality Assurance Assessment:

The Ministry of Justice Regulatory Impact Assessment Quality Assurance Panel has reviewed the RIA “Referendum Advertising at the 2020 General Election” and prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA partially meets the Quality Assurance criteria

### Reviewer Comments and Recommendations:

As noted in the agency rating of evidence certainty, previous elections and referendums provide an indication of likely impact, but do not provide hard evidence for new referendums on different subjects. Public expectations and behaviour may also have changed since previous referendums were carried out. Consultation with the Electoral Commission and relevant government agencies provides confidence in the ability to administer the proposed options. There has not been consultation with other stakeholders (eg, potential campaigners) to confirm the feasibility of the options from their perspective. However, using the same legislative and operational infrastructure and similar rules should address many potential concerns.

The QA Panel notes that, to some extent, the lack of consultation can be remedied during select committee consideration of the Bill.

# Impact Statement: Referendum Advertising at the 2020 General Election

## Section 1: General information

| Purpose  |
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| The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing Cabinet’s consideration of the detailed regulatory framework that will apply to any referendum advertising for referendum(s) held with the 2020 General Election. |

| Key Limitations or Constraints on Analysis  |
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| <p><u>Scope of analysis</u></p> <p>Cabinet has agreed to introduce a Referendums Framework Bill, which will provide a single set of rules to govern any referendums held alongside the 2020 General Election. The referendums will be conducted using the legislative and operational infrastructure that is already in place to govern the conduct of a general election. For example, the Bill will provide for the same voting places, vote issuing procedures and voting staff to be used. These matters are not considered further.</p> <p>This RIS summarises our analysis of two areas where decisions are needed on which rules should apply to the referendum(s):</p> <ol style="list-style-type: none"><li>1. the definition of referendum advertising and exemptions</li><li>2. the regulation of referendum advertising</li></ol> <p>A comparative analysis is used for assessing referendum options, using data from previous referendums and elections.</p> <p><u>Limitations of the analysis</u></p> <p>The inability to quantify the impact for campaigners or voters on the different options is a limitation of the comparative analysis. Data from previous referendums and elections show what the rules were and what was spent, but cannot provide insight into what could have happened if the rules were different.</p> <p><u>Limitations to range of options considered</u></p> <p>As the referendums are being held alongside the 2020 General Election, some alignment of the referendum and election rules is highly desirable.</p> <p>Options which would risk the feasibility of implementation within the constrained timeframes set for the referendum(s) have not been considered; for example, regulatory tools that are not or have not been used in New Zealand (even if used overseas) have not been included for these reasons.</p> <p><u>Impact assessment</u></p> <p>Constitutional concepts, such as democratic legitimacy, are intangible in nature. Their impact on issues such as public confidence in the democratic process and public institutions are hard to measure and many costs and benefits are hard to estimate. Also, as these topics have not been the subject of a referendum previously, we do not know what impact this will have on voters. The analysis in this RIS is therefore primarily qualitative.</p> |

Assumptions

The cannabis referendum is currently the only confirmed referendum that will be held at the 2020 General Election. However, preparations for this need to factor in the potential for another referendum to be held at the same time. We have assumed that the chosen regulatory regime will apply to all referendums held in 2020 to ensure regulation is efficient, understandable and treats advertising campaigns equally.

We have also assumed that:

- the referendum(s) will draw interest and participation from many parts of the public – from organised campaigns to widespread small-scale participation by members of the public not usually engaged in political activity and
- the public and media will have an interest in the identities of promoters and/or their motivations for the positions for which they are arguing.

**Responsible Manager (signature and date):**



Chris Hubscher

Policy Manager, Electoral and Constitutional, Ministry of Justice

Date: 13 June 2019

# Section 2: Problem definition and objectives

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| <b>2.1 What is the context within which action is proposed?</b>  |
| <p><u>Previous referendums</u></p> <p>All previous government-initiated referendums, whether held at the general election or not, have had bespoke legislation, expiring after that particular referendum. There is no precedent for a referendum being progressed through a member's bill.</p> <p>The Citizens Initiated Referenda Act 1993 enables indicative citizen-initiated referendums to be held either by post at a standalone poll or with the general election. The last time a citizen's initiated referendum coincided with a general election was in 1999 when two were held with the general election. This placed significant pressure on the delivery of the 1999 election, and the counting of ballots.</p> <p><u>Cannabis referendum</u></p> <p>The Labour-Green Confidence and Supply Agreement commits to a referendum on legalising the personal use of cannabis. The Government has announced its intention to hold this referendum alongside the 2020 General Election.</p> <p><u>Other potential referendum: End of Life Choice Bill</u></p> <p>In recent months the possibility of a referendum on the End of Life Choice Bill has also been raised. If this referendum materialises, it is expected to be held at the 2020 General Election.</p> <p>The End of Life Choice Bill is a member's bill on a conscience issue in the name of David Seymour MP. It is currently awaiting second reading.</p> <p>If a referendum provision is added to this Bill, this would most likely occur via Supplementary Order Paper, should the Bill progress to the Committee of the Whole House. The Bill is assumed likely to reach the Committee stage in mid to late-2019.</p> |

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| <b>2.2 What regulatory system, or systems, are already in place?</b>   |
| <p><u>Previous referendums</u></p> <p>There is no status quo as such for the regulation of referendum advertising.</p> <p>Previous government referendums have been implemented with bespoke legislation expiring after that referendum event. This means there is no standing legislation establishing a regime regulating advertising for the referendums in 2020. However, we can refer to other approaches to the regulation of referendum advertising:</p> <ul style="list-style-type: none"><li>• Citizens Initiated Referenda Act 1993</li><li>• Compulsory Retirement Savings Scheme Referendum Act 1997 – a government-initiated referendum on a non-electoral issue, held by postal ballot</li><li>• Electoral Referendum Act 2010 – an indicative referendum on MMP, and the most recent government-initiated referendum held with a general election, and</li><li>• New Zealand Flag Referendums Act 2015 – a government-initiated referendum on a non-electoral issue, held by postal ballot.</li></ul> <p><u>Election advertising</u></p> <p>The Electoral Act 1993 contains a definition of election advertising as an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote or not to vote for a candidate or party. This definition includes exemptions for:</p> <ul style="list-style-type: none"><li>• advertisements relating to the conduct of the election and authorised by the Electoral Commission or other government agencies</li></ul> |

- editorial content of a periodical, radio or television programme, or news media or internet site
- contact information for members of Parliament
- any transmission of proceedings in the House of Representatives, and
- personal views expressed on the Internet (or other electronic medium) by an individual that did not make or receive payment for that publication.

The 2011 MMP referendum and the 2015/16 Flag referendum legislation noted above drew closely from this election advertising definition to define referendum advertising. The 2015 Flag referendum legislation had additional exclusions including for images of the current or alternative flags.

#### Regulation of election and referendum advertising

The broader electoral system, including the conduct of general elections and by-elections, is governed by the Electoral Act 1993. This includes rules governing election advertising by parties, candidates and “third-party promoters” (anyone other than parties and candidates). The features of the election advertising regime, and the referendum advertising regimes included in the Acts noted above are summarised in the table below.

|   | <b>Advertisement promoter statement</b> | <b>Registration with Electoral Commission</b>           | <b>Disclosure of expenses</b>   | <b>Expenditure limits</b>   |
|---|---|---|---|---|
| <b>Electoral Act 1993</b>                                       | √                                       | √<br>(over certain threshold for third-party promoters) | √<br>(all parties and candidates; over \$100,000 for third-party promoters) | √<br>(set limits for candidates, parties and third-party promoters) |
| <b>Citizens Initiated Referenda Act 1993</b>                    | √                                       |   | √<br>(all advertisers)  | √<br>(\$50,000)   |
| <b>Compulsory Retirement Savings Scheme Referendum Act 1997</b> | √                                       |   |   |   |
| <b>Electoral Referendum Act 2010</b>                            | √                                       | √<br>(if over \$12,000)                                 | √<br>(if over \$100,000)  | √<br>(\$300,000)  |
| <b>New Zealand Flag Referendums Act 2015</b>                    | √                                       |   |   |   |

### 2.3 What is the policy problem or opportunity?

Having no rules on referendum advertising would allow the greatest freedom for interested groups to participate in campaigning to influence public views, but would afford little in safeguarding the integrity of the process or providing transparency for the public. It is important that voters have access to sufficient information to be able to make an informed vote. Providing a regulated environment where campaigners from all sides have the freedom to express their views will help ensure voters are informed on not only referendum issues, but also who is behind any referendum advertising campaign(s). Transparency in such campaigning is important for the integrity of the referendum (as it is for elections generally).

This RIS summarises our analysis of two areas where decisions are needed on which rules should apply to the referendum(s):

1. the definition of referendum advertising and exemptions
2. the regulation of referendum advertising.

### 2.4 Are there any constraints on the scope for decision making?

#### Limitations to range of options considered

The referendum(s) will be held alongside the General Election in 2020. For the Electoral Commission to manage any risks to the smooth delivery of the Election, and for promoters involved in both campaigns, alignment of the referendum and election rules, as far as possible, is highly desirable.

Options in this RIS do not include tools which would risk the feasibility of implementation within the constrained timeframes set for the referendum(s). For example, a donations disclosure requirement for third-party promoters and tools not used in New Zealand have not been included for these reasons. Within these constraints, officials consider the only viable tools are the four used previously in New Zealand to regulate referendum advertising.

#### Limitations in assessment of options

A comparative analysis is used for assessing referendum options, using data from previous referendums and elections.

Constitutional concepts, such as democratic legitimacy, are intangible in nature. Their impact on issues such as public confidence in the democratic process and public institutions are hard to measure and many costs and benefits are hard to estimate. The analysis in this RIS is therefore qualitative. The key assumptions and judgements we have made about the impact of the options to be analysed are included in the relevant sections of this RIS.

### 2.5 What do stakeholders think?

We expect that referendums on cannabis and end-of-life choice will attract a high level of interest and participation from many stakeholders. Both issues have social, moral and economic components which will likely garner significant and polarised interest. For example, the End of Life Choice Bill received 36,700 submissions when considered by the Justice select committee. For this reason, we expect to see coordinated campaigns from interested groups.

Throughout the development of the policy options presented in this RIS, we liaised closely with the Electoral Commission given its expertise on these issues. If referendum advertising is regulated, the Electoral Commission supports the alignment of the referendum and election rules to help manage any risks to the smooth delivery of the 2020 election. We have also had the opportunity to draw on the expertise of experienced advisors at Justice, who worked on the previous government-initiated MMP referendum held with the 2011 General Election. In addition, we have consulted with other government agencies on the options presented in this RIS including DPMC, Treasury, SSC and DIA.

# Section 3: Options identification

## 3.1 What options are available to address the problem?

Not regulating referendum advertising is an option. This would mean that the Advertising Standards Authority (ASA) codes and guidelines would apply to referendum advertisements; these require that all advertising must be legal, decent, honest and truthful and respect the principles of fair competition, so that the public can have confidence in advertising. This option is included as the status quo (do nothing) in the impact analysis section below.

If regulation of referendum advertising is Cabinet’s preferred choice, legislation is needed to put this in place, so we have not considered non-regulatory options.

### Issue 1: Definition of referendum advertisement and exemptions

If regulating referendum advertising, a key decision is determining what will be regulated.

The 2011 MMP referendum legislation used a **broad definition** of ‘referendum advertisement’, based on the definition of election advertising in the Electoral Act 1993 (see 2.2 above). This definition was not medium specific, which ensures that newer forms of advertising (e.g. online and through social media) were covered by the same rules applying to more traditional print and broadcast media.

A **narrower definition** would cover a narrower subset of advertising and exclude other types. For example, the 2015/16 Flag referendum legislation excluded any publication on the internet, creating an exemption by media type. This exemption reflected a Cross-Party Group recommendation to reduce barriers to public participation, particularly noting that the Flag referendum was a postal referendum on an issue that had little commercial benefits.

The advantages and disadvantages of each definition are summarised in the table below.

| Description  | Advantages/Disadvantages   |
|--|--|
| <p><b>Option 1: Broad definition</b></p> <p>An advertisement in any medium that can reasonably be regarded as encouraging or persuading voters to vote, or not to vote, in a particular way in the referendum</p>  | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Greater level of transparency in advertising</li> <li>• Aligns with the Electoral Act</li> <li>• Medium-neutral, so equal treatment across all types of media</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• This definition could capture ‘small scale’ promotion by individuals who did not realise they were engaged in referendum advertising (however, if allowed, the EC could have the discretion to not refer offences so inconsequential there is no public interest in reporting the facts to the New Zealand Police. For comparison see section 204J of the Electoral Act 1993)</li> <li>• Creates some barriers to freedom of expression and participation</li> </ul> |
| <p><b>Option 2: Narrow definition</b></p> <p>An advertisement in any medium, <u>except any publication on the internet</u>, that can reasonably be regarded as encouraging or persuading voters to vote, or not to vote, in a particular way in the referendum</p> | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Less likely to capture small scale campaigners and small interest groups who may not realise they were engaged in referendum advertising online</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• No transparency in online advertising, potentially a foreign interference issue</li> <li>• Does not fully align with the Electoral Act rules, which may create some confusion for campaigners (for the referendums and the elections)</li> <li>• An online campaign with significant spend and reach could be completely unregulated with no transparency about who is behind the advertising</li> </ul>   |

### Exemption for personal views

The proposed definition of advertising should include an exemption for the (unpaid) publication of personal views expressed by an individual on the internet or other social media. This protects individuals' rights to free speech, and to share and trade views on social media where no payment is being made or received. However, this exemption for unpaid personal views could not apply to community or online groups or organisations publishing their views online (even if they do not pay or receive payment for the publication) as these views are, qualitatively speaking, no longer 'personal'.

This means that social interest groups with designated websites or those found exclusively within social media sites like Facebook, YouTube or Twitter could be considered to be promoting a referendum advertisement if creating content (e.g. posts, banners, etc.) that aims to encourage voters to vote a particular way in the referendum.

### Exemption for certain interest groups

The broad definition of advertising means the regulatory regime (see the regulatory tools discussed below) would apply to groups, including charities, not-for profits and online groups, that are already debating issues like drug reform and end-of-life choice. Without an exemption, groups going about what may be their normal activities will face a small compliance cost from including promoter statements on advertising. This could be seen by some of these groups as an undue limitation on their 'normal' activities, in the period when they are most likely to want to be most active. However, a narrower definition exempting only some types of groups risks creating anomalies between campaign groups promoting similar messages, based on their selected operating model rather than their likely influence.

### Exemption for online advertising

The narrower definition in Option 2 above would exclude particular types of advertising, such as online advertising, from the definition of referendum advertising. Such an exemption would allow all campaigners, regardless of their size, to advertise freely online. This creates a risk that well-funded campaigners or those with a significant online presence already could saturate the online market and drown out smaller campaigners. Also, exempting one form of media from regulation arguably unfairly penalises those campaign groups, and voters, who prefer to engage through more traditional forms of media.

## **Issue 2: Referendum advertising regime**

Four regulatory tools used in current or previous New Zealand regulation are considered viable for regulating referendum advertising for any referendums held at the 2020 general election. These tools are as follows:

- **Promoter statements** – a requirement that all referendum advertisements contain a statement identifying the name and address of the promoter.
  - This has been required in recent referendums. (i.e. MMP and Flags)
- **Registration of promoters** – a requirement that promoters intending to spend above a certain threshold are identified and register with the Electoral Commission.
  - There would also need to be a decision as to what this threshold would be. In the Electoral Act 1993 this is set at \$13,200, for third-party promoters at elections. The list of registered promoters is published.
- **Disclosure of registered promoters' expenses** – a requirement that registered promoters spending above a certain threshold file expense returns after the referendum.

- In the Electoral Act 1993 this threshold is \$100,000 for elections. For Citizens Initiated Referenda Act 1993 (CIR) there is no threshold and anyone who publishes a referendum advertisement must disclose expenses.
- **Expenditure limit** – a requirement that promoters of referendum advertising during the regulated period do not spend over a certain limit.
  - In the Electoral Act 1993 this is \$330,000 for registered third-party promoters, currently \$27,500 for candidates and base limit of \$1,169,000 for each party (plus \$27,500 for each electoral district contested by the party)
  - For CIR the limit is \$50,000.<sup>2</sup>

### Options

We have identified three possible approaches for regulating referendums using combinations of these regulatory tools. The options are presented from least regulated to most regulated below.

*Option 1: Low Regulation* – a promoter statement must be included on all referendum advertisements (this was the approach taken for the flag referendums).

*Option 2: Medium Regulation* – a promoter statement be included on all advertisements, promoters spending or intending to spend over a certain threshold must register with the Electoral Commission, and referendum advertising expenditure over a certain limit must be disclosed.

*Option 3: High Regulation* – as with Option 2, but with limits imposed on the amount that can be spent on referendum advertising (this was the approach taken for the 2011 MMP referendum).

The advantages and disadvantages of each advertising regime are summarised in the table below.

| Option                             | Description  | Initial Analysis  |
|------------------------------------|--|---|
| <b>Option 1: Low regulation</b>    | Require promoter statement only<br><br><i>(similar to approach used for 2015/16 flag referendums)</i>                                      | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>● This option minimises barriers and costs to free expression and participation in the public debate</li> <li>● Lowest compliance and administration costs of all regulation options</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>● Low degree of transparency, allowing public scrutiny of only the identity of those promoting the various perspectives</li> <li>● Wealthy interests could sway the referendum outcome</li> <li>● High levels of advertising from large campaigners could drown out smaller campaigners</li> </ul> |
| <b>Option 2: Medium regulation</b> | Requires campaigners to register at a certain threshold and then disclose expenses if spending over a further threshold (TBD) but does not | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>● Some benefits for transparency (public register of promoters and disclosure of expenses enables additional scrutiny)</li> <li>● Small to medium campaigners could be able to advertise without administrative burden of registration and filing expense returns</li> </ul>  |

<sup>2</sup> With the exception of the fixed \$100,000 disclosure threshold for registering promoters' expenses, the thresholds and limits used in this RIS as 'current' are those that will apply from at 1 July 2019 and will apply to a regulated period starting after that date. These thresholds and limits are reviewed and adjusted annually in line with the CPI. They will be reviewed on 1 July 2020.

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|   | <p>otherwise limit how much can be spent</p> <p>This option would include:</p> <ul style="list-style-type: none"> <li>- Promoter statement</li> <li>- Promoter registration</li> <li>- Expense disclosure</li> </ul>   | <ul style="list-style-type: none"> <li>• no financial limits on the scale of advertising/expression by referendum campaigners</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Increased administrative burden with only moderate benefits in transparency (public could see the register of promoters, but would only find out how much promoters spent to influence opinion after the referendum(s) have been completed – no limits while debate is ongoing)</li> <li>• Compliance costs for large promoters and the EC, and added complexity of different sets of rules potentially applying</li> <li>• High levels of advertising from large campaigners could drown out smaller campaigners</li> </ul>   |
| <p><b>Option 3: High regulation</b></p> | <p>This option would rely on the regulation framework set out in the Electoral Act. It would include:</p> <ul style="list-style-type: none"> <li>- Promoter statement</li> <li>- Promoter registration</li> <li>- Expense disclosure</li> <li>- Expense thresholds</li> </ul> <p><i>(similar to approach used for 2011 MMP referendum)</i></p> | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Highest level of transparency</li> <li>• Will help manage perceptions, during and after the public debate, of the influence of expenditure on referendums</li> <li>• Help ensure any official ‘voter information’ campaign (including the EC’s voter registration and awareness campaigns) is not drowned out by other advertising</li> <li>• Equity of access - will moderate the use of expensive broadcasting media</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Concrete restriction on freedom of expression, though depending on how high the expenditure limit is, this may only constrain the promoters who are much larger than others</li> <li>• Limiting expenditure on advertising may curtail an important source of public information</li> <li>• Administration and compliance costs associated with disclosure of expenses (but this facilitates expenditure limits and is in line with the rules of the general election)</li> </ul> |

Additional considerations for greater regulated options

Options 2 and 3 above also require further decisions to address the advantages and disadvantages related to:

- campaigners who may be involved in both election and referendum advertising and will need to manage expenditure on dual advertisements (Options 2 and 3)
- setting the registration and disclosure expenditure thresholds for referendum advertisements (Options 2 and 3), and
- setting expenditure limits on referendums held alongside the 2020 General Election (Option 3 only).

Issue 2a) Managing expenditure on dual advertisements

‘Dual advertisements’ are referendum advertisements which also meet the definition of election advertisements.<sup>3</sup> How this is counted is relevant for determining whether a campaigner has met the threshold for registration and disclosure of expenses, as well as for

<sup>3</sup> An election advertisement is defined as an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote, or not to vote, for an electorate candidate, whether or not the name of the candidate is stated (candidate advertisements) or for a party, whether or not the name of the party is stated (party advertisements).

apportioning expenses against any expenditure limit. If there is more than one referendum in 2020 and a separate limit for each, there might also be 'dual advertisements' involving one advertisement for two referendums.

We have identified two approaches for managing expenditure on dual advertisements during the 2020 election period. The advantages and disadvantages of both options are outlined in the table below.

| Description   | Advantages/Disadvantages   |
|---|--|
| <p><b>Option 1: Double Count the expenditure on dual advertisements</b></p> <p>The full cost of an advertisement is counted towards the promoter's election expense limit and their referendum expense limit(s).</p>            | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Administratively simple</li> <li>• Some transparency of expenditure as both election and referendum advertising expenses would be declared</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Creates some barriers to freedom of expression and participation (see examples below) <ul style="list-style-type: none"> <li>- If referendum expenses are capped, political parties may see this as an unfair limitation on the amount they can allocate to referendum advertising versus election advertising.</li> <li>- In the case of two referendums, a double counting approach could further limit parties and other campaigners who want to advertise for both referendums</li> </ul> </li> </ul>   |
| <p><b>Option 2: Apportion the expenditure on dual advertisements</b></p> <p>Apportion any dual advertisement costs between referendum and election expenses, and between each referendum, on a 'fair and reasonable basis'.</p> | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Aligns with the rules governing dual election advertisements; Apportionment is currently used for election advertisements which are published both before and during the regulated period, as well as election advertisements which promote both the candidate and their party.</li> <li>• Support greater freedom of expression and transparency by detailing the proportions, within a dual advertisement, which relate to each topic</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Potentially less transparent as promoters are less likely to reach the \$100,000 disclosure threshold to file a return to the EC</li> <li>• More complex to comply with and administer (see example below) <ul style="list-style-type: none"> <li>- At the most extreme level, assuming two referendums, this could mean the expense of a single advertisement could be apportioned between five different categories (candidate, party, cannabis, EOLC, and pre- and during-regulated period).</li> </ul> </li> </ul> |

#### Issue 2b) Managing registration and disclosure thresholds

We have identified two approaches to managing the registration and disclosure expenditure thresholds for referendum advertisements. The advantages and disadvantages of both options are outlined in the table below.

| Description   | Advantages/Disadvantages   |
|---|--|
| <p><b>Option 1:</b> Have the same thresholds as those for third-party promoters at the general election (i.e. ~\$12k for registration, \$100k for disclosure)</p> | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Aligns with the rules governing the general election</li> <li>• Minimises risk of confusion for campaigners and parties</li> <li>• More straightforward for the Electoral Commission to administer</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Some loss to transparency related to referendum advertising expenses</li> </ul> |

|  |   |
|--|---|
| <p><b>Option 2:</b> Require all promoters to register and return all expenses.</p> | <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• High level of transparency related to referendum advertising expenses</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• More complex to comply with and administer</li> <li>• could inadvertently catch out small interest groups who do not consider themselves ‘promoters’ who may be unaware of their obligation to register and submit expenditure returns</li> </ul> |
|--|---|

Issue 2c) Setting referendum expenditure limits

For the high regulation approach, there would be a need to determine the advertising expenditure limit for each referendum. The expenditure limit aims to help provide more equitable access for voices from all sides and to ensure public discourse is not (nor is perceived to be) unduly influenced by the expenditure of any one side to the debate.

The preferred approach to address this issue is to mirror thresholds used in elections. Two options are outlined below.

*Option 1:* Align referendum expenditure limit for individual referendums with third-party promoter expenditure limit for the general election (currently \$330,000).

*Option 2:* Align referendum expenditure limit for individual referendums with the political party base expenditure limit (currently \$1,169,000).

We note that, while Option 2 provides a higher referendum expenditure threshold, third-party promoters for a referendum that are not political parties would not be able to spend up to this limit of ~\$1.15m on dual advertisements if the ‘double count expenses’ option is selected. This is because these promoters would be subject to a much lower limit on their election advertising expenses (~\$325k) and would reach this first. They could, however, run referendum advertisements separately from election advertisements to avoid this issue. In either case Option 2 would disadvantage other groups compared with political parties.

### **3.3 What other options have been ruled out of scope, or not considered, and why?**

As the purpose of the referendums bill is to set out the statutory framework for the conduct of any referendums held with the 2020 election, it is important to align the rules governing the conduct of the referendums and elections as far as possible.

For this reason, and due to the tight timeframes for implementation, we have not expanded the options analysis to entirely new regulatory tools not used in New Zealand (even if used overseas). For example, we have not considered a donations disclosure requirement for third-party campaigners in relation to the referendums; this tool has not previously been applied to referendum campaigns, nor does it apply to third-party promoters at general elections. Such a tool would introduce high compliance costs for interest groups, particularly those that receive donations for purposes other than the referendums.

The period over which referendum advertising will be regulated (“the regulated period”) has been aligned with the regulated period for election advertising (i.e. three months before polling day). We have not expanded the options analysis to explore other options for the regulated period for referendum advertising, partially because the specific referendum empowering legislation for any cannabis and end-of-life choice referendums may come in to force at different times. It would be confusing for campaigners, and challenging for the Electoral Commission, to apply different regulated periods to each referendum and the election as well.

Finally, alternative options for penalties and offence provisions for campaigners (e.g. for failure to register or include a promoter statement, or for exceeding any expenditure thresholds) were not examined. We propose simply to extend the existing penalties and offence provisions for election advertisements in the Electoral Act 1993 to the referendums. Similarly, the rules regarding the duty of the Electoral Commission to report suspected referendum advertising offences should be the same as for election advertising. Both sets of rules are aimed at deterring behaviour that might undermine the integrity of the voting process, so it is appropriate that the penalties are consistent whether this behaviour occurs in relation to a referendum or an election.

### **3.4 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?**

To achieve an enduring result, the 2020 referendum process needs to have a high degree of legitimacy, integrity and public confidence. The public debate will be a key aspect of the referendum process impacting on these goals. Therefore, the activities and regulation of participants promoting referendum advertising and campaigning will influence public confidence in the integrity of the process.

With these issues in mind, and to establish a legitimate, accepted and enduring outcome, we have assessed all options against the following criteria:

### Accessibility of Information (Aoi)

- The public should have the right to hear all sides of the public debate
- Campaigners of all sizes and sides should have the right to be heard and express their opinions

### Transparency (T)

The public will:

- know who promoters are, and therefore be able to scrutinise their interests or motives

Campaigners will:

- know who is representing opposing advertising campaigns
- understand the rules

### Alignment with existing system (AES)

- Preferred options will align with existing rules governing the conduct of general elections
- Preferred options will be administratively workable with minimal disruption to the 2020 General Election
- Compliance and administrative costs should be proportional to the goals of regulation
- Rules should be familiar, easily understood and simple for campaigners to comply and get involved in the public debate

The main interrelationships and potential trade-offs are considered to be between accessibility of information and transparency.

## Section 4: Impact Analysis – definition of referendum advertisements and exemptions

|                                       | No action | Option 1: Broad definition<br>An advertisement in any medium that can reasonably be regarded as encouraging or persuading voters to vote, or not to vote, in a particular way in the referendum   | Option 2: Narrow definition<br>An advertisement in any medium, <u>except any publication on the internet or other social media</u> , that can reasonably be regarded as encouraging or persuading voters to vote, or not to vote, in a particular way in the referendum   |
|---------------------------------------|-----------|---|---|
| <b>Accessibility of information</b>   | 0         | <ul style="list-style-type: none"> <li>++ “Medium-neutral’ equitable across all types of media</li> <li>- Creates some barriers for campaigners to express their views</li> <li>+ Supports a wider range of perspectives being heard, by minimising the risk of ‘drown out’ by larger operatives</li> </ul> | <ul style="list-style-type: none"> <li>+ Some regulation to promote equity in some forms of media</li> <li>+ Fewer barriers as no restriction for campaigners to advertise online</li> </ul>  |
| <b>Transparency</b>                   | 0         | <ul style="list-style-type: none"> <li>++ Greater level of transparency in advertising</li> </ul>   | <ul style="list-style-type: none"> <li>+ Some transparency, but not in online advertising; this may create an anomaly exploited by some campaigners or foreign influencers</li> </ul>   |
| <b>Alignment with existing system</b> | 0         | <ul style="list-style-type: none"> <li>++ Aligns with the Electoral Act</li> <li>- Could capture ‘small scale’ promotion by individuals who did not realise they were engaged in referendum advertising</li> </ul>  | <ul style="list-style-type: none"> <li>+ Less likely to capture small scale campaigners and small interest groups who may not realise they were engaged in referendum advertising online</li> <li>- Does not fully align with the Electoral Act rules, which may create some confusion for campaigners</li> </ul> |
| <b>Overall assessment</b>             | 0         | +   | -   |

### Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

## Section 4: Impact Analysis – referendum advertising regime

|                                       | No action | Option 1: Low regulation<br>Require promoter statement only   | Option 2: Medium regulation<br>Requires campaigners to register and disclose expenses if spending over a certain threshold (TBD) but does not otherwise limit spend<br>This option includes:<br>- Promoter statement, Promoter registration, and Expense disclosure  | Option 3: High regulation<br>This option would rely on the regulation framework set out in the Electoral Act.<br>It would include:<br>- Promoter statement, Promoter registration, Expense disclosure, and Expense thresholds   |
|---------------------------------------|-----------|---|--|---|
| <b>Accessibility of information</b>   | 0         | <ul style="list-style-type: none"> <li>++ Minimises barriers and costs to free expression and participation in the public debate</li> <li>-- High levels of advertising from large campaigners could drown out smaller campaigners</li> </ul> | <ul style="list-style-type: none"> <li>++ No limits on expression of views by referendum campaigners</li> <li>-- High levels of advertising from large campaigners could drown out smaller campaigners</li> </ul>  | <ul style="list-style-type: none"> <li>- Concrete restriction on freedom of expression, though only applies to the largest promoters</li> <li>- Limiting expenditure on advertising may curtail an important source of public information</li> <li>+ Equity of access– will moderate the use of expensive broadcasting media</li> </ul> |
| <b>Transparency</b>                   | 0         | <ul style="list-style-type: none"> <li>- Low degree of transparency</li> </ul>  | <ul style="list-style-type: none"> <li>+ Some benefits for transparency (disclosure of expenses enables additional scrutiny)</li> </ul>  | <ul style="list-style-type: none"> <li>++ Highest level of transparency (will help manage perceptions, during and after the public debate, of the influence of spend)</li> <li>+ Help ensure any official ‘voter information’ campaign is not drowned out by other advertising</li> </ul>   |
| <b>Alignment with existing system</b> | 0         | <ul style="list-style-type: none"> <li>+ Lowest compliance and administration costs of all regulation options</li> </ul>  | <ul style="list-style-type: none"> <li>+ Small/medium campaigners could advertise without admin burden of registration and filing expense returns</li> <li>- Increased administrative burden with only moderate benefits in transparency</li> <li>- Compliance costs for large promoters and the EC, and added complexity of different sets of rules potentially applying</li> </ul> | <ul style="list-style-type: none"> <li>- Administration and compliance costs associated with disclosure expenses (but only for larger promoters)</li> <li>++ In line with the rules of the general election</li> </ul>  |
| <b>Overall assessment</b>             | 0         | 0   | 0  | +   |

## Section 4: Impact Analysis – dual advertisements

|                                       | No action | Option 1<br>Double count expenditure on dual advertisements   | Option 2<br>Apportion any dual advertisement costs between referendum and election expenses, and between each referendum   |
|---------------------------------------|-----------|---|--|
| <b>Accessibility of information</b>   | 0         | <ul style="list-style-type: none"> <li>- Some barriers to freedom of expression and participation</li> <li>- Double counting approach could limit parties and other campaigners who want to advertise for both referendums</li> </ul> | + If referendum expense limits are capped, political parties and dual referendum campaigners will be able to advertise for more since total costs for dual advertisements would count less towards individual thresholds (both election and referendum(s)) |
| <b>Transparency</b>                   | 0         | + Some transparency of expenditure as both election and referendum advertising expenses would be declared   | + Greater transparency by knowing exact amounts spent on each type of advertisement (but only if the \$100,000 threshold is triggered which is less likely if apportionment is selected)   |
| <b>Alignment with existing system</b> | 0         | - Not in line with rules governing the general election (but this is administratively simple for the EC and promoters)  | <ul style="list-style-type: none"> <li>+ Aligns with the rules governing dual election advertisements</li> <li>- More complex to comply with and administer</li> </ul>   |
| <b>Overall assessment</b>             | 0         | -   | +  |

### Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

## Section 4: Impact Analysis – managing rules around registration and disclosure expenditure thresholds for referendum advertisements

|                                       | No action | Option 1<br>Have the same thresholds as those for third-party promoters at the general election  | Option 2<br>Require all promoters to register and return all expenses   |
|---------------------------------------|-----------|--|---|
| <b>Accessibility of information</b>   | 0         | + Would not deter or inadvertently catch out small interest groups   | - May deter individuals or smaller promoters who are do not understand compliance duties from participating in campaigning  |
| <b>Transparency</b>                   | 0         | - Some loss to transparency related to referendum advertising expenses   | ++ High level of transparency related to referendum advertising expenses  |
| <b>Alignment with existing system</b> | 0         | + Aligns with the rules governing the general election<br>+ Minimises risk of confusion for campaigners and parties<br>+ More straightforward for the Electoral Commission to administer<br>+ Would not inadvertently catch out small interest groups who do not consider themselves ‘promoters’ and may be unaware of their obligation to register and submit returns | - More complex to comply with and administer, and is very different from the Electoral Act rules.<br>- Could inadvertently catch out small interest groups who do not consider themselves ‘promoters’ who may be unaware of their obligation to register and submit expenditure returns |
| <b>Overall assessment</b>             | 0         | +  | -   |

### Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

## Section 4: Impact Analysis – determining the advertising expenditure limit for each referendum

|                                       | No action | Option 1<br>Align referendum expenditure limit for individual referendums with third-party promoter expenditure limit for the general election (currently \$325,000)   | Option 2<br>Align referendum expenditure limit for individual referendums with the political party expenditure limit (currently \$1,152,000)   |
|---------------------------------------|-----------|--|--|
| <b>Accessibility of information</b>   | 0         | - Lower threshold places greater limit on freedom to campaign (particularly for dual-referendum/election campaigners)<br>+ Equitable– will moderate the use of expensive broadcasting and some online media  | + Higher threshold allows greater freedom to campaign (particularly for dual-referendum/election campaigners)<br>- High levels of advertising from large campaigners could drown out smaller campaigners   |
| <b>Transparency</b>                   | 0         | 0  | 0  |
| <b>Alignment with existing system</b> | 0         | ++ High alignment with expenditure limit rules governing the general election (all campaigners [including parties] who are required to register will be considered third-party promoters)<br>+ Minimises risk of confusion for campaigners and parties | + Some alignment with expenditure limit rules governing the general election (aligns with limits for parties, but others will have two different limits)<br>- Higher risk of confusion for third-party campaigners (different threshold from the general election) |
| <b>Overall assessment</b>             | 0         | +  | 0  |

### Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

# Section 5: Conclusions

## 5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

### Issue 1: Definition of referendum advertisement and exemptions

The preferred approach for choosing a definition for referendum advertisement is the broad definition (an advertisement in any medium that can reasonably be regarded as encouraging or persuading voters to vote, or not to vote, in a particular way in a referendum). This definition would include the internet and ensures higher transparency, more equitable access for campaigners, alignment with the definition of an election advertisement for general elections and follows the precedent set in 2011 – which was the last referendum held alongside a general election.

This approach entails a risk that some groups that are already debating issues online will be subject to referendum advertising rules. This is also an issue in election advertising, however, the Electoral Commission has successfully regulated online advertising over the past three general elections and indicated confidence in its ability to do so for referendum advertising in the run up to the 2020 General Election. This would be achieved through tools and procedures such as having a rights-sensitive approach, the discretion to not report suspected advertising offences to Police if it considers the offence to be so inconsequential that it is not in the public interest to do so, and only responding to complaints about online advertising rather than actively monitoring for illegal activity.

The alternative of excluding online advertising from the definition of referendum advertising could also address this issue. However, excluding online content from any regulation would be highly contentious in the current environment for several reasons. Increasingly across Western democracies, there are calls for more controls of online content and growing concerns about online influence campaigns in both New Zealand elections and overseas. Exempting the internet or other social media would mean that all campaigners, regardless of their size and location, could advertise freely online. Without rules governing transparency or expenditure, this creates a risk that well-resourced campaigners (both domestic and overseas) could saturate the online market and drown out smaller campaigners.

Additionally, exempting one form of media from regulation arguably unfairly penalises those campaign groups, and voters, who prefer to engage through more traditional forms of media. As the use of online advertising in election campaigns is becoming increasingly common, this would be even more evident. Over the past three general elections, while expenditure varied between political parties, total online advertising expenditure for all parties roughly doubled each election. In addition to total expenditure increase, expense returns from the 2017 election show that online advertising accounted for a significant proportion (15%) of the combined election advertising spend of National, Labour, Green, New Zealand First and The Opportunities Party (TOP). We expect that referendum advertising on the internet will be common in the run up to the 2020 General Election.

## **Issue 2: Referendum advertising regime**

The status quo (no regulation) of referendum advertising is not desirable. It would not promote transparency or a balanced public discourse. It would also be significantly misaligned with the election advertising rules, and the rules governing previous referendums too. Some form of regulation is necessary.

Our preferred approach is the 'High Regulation' approach (Option 3). This option would replicate the regulation framework set out in the Electoral Act and would include the use of promoter statements, a promoter registration, expense disclosures, and expense limits. Additionally, expenditure on dual advertisements should be apportioned between election and referendum expenses, and between referendums.

This option provides the most with respect to transparency, promoting balanced political discourse and aligning with the rules for the general election. It goes the furthest to manage perceptions of the influence of expenditure on referendums and enable the public to identify who is promoting the various referendum positions both during (by means of promoter statements and the promoter registration) and after the public debate (expense disclosure requirement). While expenditure thresholds place a concrete limit on campaigners' freedom of expression through advertising, they help create a more equitable access, by ensuring that smaller campaigners are not drowned out by better-funded campaigners.

Aligning referendum advertising rules with those governing the general election also minimises the risk of confusion for campaigners and parties, and is more straightforward for the EC to administer. While this would impose some compliance costs, this burden is likely to be low for most promoters, and especially for promoters who would have engaged with the election anyway (as similar rules would apply to both). Adding an expenditure limit is unlikely to increase compliance costs further.

### *Apportionment versus dual advertisement costs*

If expenditure limits are set, apportioning dual advertisement costs between referendum and election expenses, and between each referendum, on a 'fair and reasonable basis' would offer a high level of transparency and support the availability of information for the public and campaigners. This approach would be significantly more complex to comply with compared to double counting as apportionment could potentially be needed for candidate, party and referendum expenses, as well as between individual referendums, and also before and during the regulated period.

Although apportionment would involve more compliance for some promoters, this is our preferred option as it is arguably a reasonable consequence of participating in several campaigns. It is also not an entirely new requirement, as political parties and candidates are currently subject to similar apportionment rules for election advertisements that are both candidate advertisements and party advertisements.

While a double counting approach would be administratively easier and was used in the last referendum held with a general election in 2011, candidates and political parties may see this as an unfair limitation on the amount they can allocate to referendum advertising versus election advertising. In the case of two referendums, a double counting approach could further limit parties and other campaigners who want to advertise for both referendums. This is because an advertisement that was used to campaign on two referendums would count towards the limits for both. This may place dual-issue campaigners at a disadvantage compared to single-issue campaigners with comparable funds. However, during the 2011 MMP referendum, only two third-party promoters reported any dual-advertisement expenditure costs, accounting for only a fraction of total election/referendum spend.<sup>4</sup> In 2020, campaigners may take a similar approach and prefer to promote election and referendum issues separately and not be overly impacted by double counting dual advertisements.

### *Setting the level of the thresholds for registration, expense disclosure and the expense limit*

The goal of setting registration and requirements and advertising expenditure thresholds is to find a balance between various criteria. Setting dollar values too low may result in stifling key messages in the public debate or could inadvertently catch out small interest groups who did not consider themselves 'promoters'. Setting these values too high and the purposes for regulating (e.g. transparency and equitable access) can become ineffective. Therefore, setting dollar values that achieves this balance is an art rather than a science and is primarily a matter of political judgement. For reference, the table at Appendix 1 outlines total expenditure for major parties and third-party promoters over the last three elections and the 2011 referendum as published on the Electoral Commission's website.<sup>5</sup>

Our preferred option is to have the registration and disclosure expenditure thresholds for referendum promoters be the same as those for third-party promoters at the general election. This minimises the risk of confusion for campaigners and parties, and is more straightforward for the EC to administer. The alternative of requiring all promoters to register and return all expenses would increase transparency, but would considerably increase compliance for interest groups and the EC's administrative burden. It could also catch small interest groups who do not consider themselves 'promoters' and may be unaware of their obligation to register and submit expenditure returns.

Setting an expenditure limit with reference to what promoters are likely to spend will help provide more equitable access for voices from all sides and support voters to determine whether public discourse is (or is perceived to be) unduly influenced by the expenditure of any one side to the debate. Due to its administrative simplicity and clarity for promoters, we prefer that a separate expenditure threshold is set for each referendum held with the 2020 General Election and that it is set at the same level for each referendum. This is preferable to setting different dollar-figure limits for different referendums, or a single limit covering both referendums. However, other than recommending the limit align with an existing limit already established in the Electoral Act in respect of election advertising at the general election, we do not have a preferred approach with respect to which of these two figures should be chosen.

At the 2011 MMP referendum (the last referendum held alongside a general election), the third-party promoter threshold (currently \$330,000) was used to limit referendum advertising expenditure. This may not be appropriate for the referendum advertising regime in 2020 due to the added complexity of holding potentially two referendums and a general election while accounting for expenditure issues outlined above in paragraph four of section 2.5.

As an example, given the potentially high level of public interest in the referendum(s), if double counting expenditure on dual advertisements is selected, the referendum expenditure threshold could be set higher and mirror the base election expenditure limit for parties (currently \$1,169,000) to not unfairly impact multi-issue campaigners. However, as noted previously, third-party referendum promoters that are not political parties would still be disadvantaged compared to political parties as they are subject to tighter election expenditure limits. Dual advertisements would account for a larger proportion toward their expenditure limit for the election (current limit \$330,000) than for political parties. This limitation, however, may not be too impactful if third-party promoter expenditure for the past three general elections and the 2011 referendum at Appendix 1 is an indication of approximate spend in 2020.

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<sup>4</sup> Mana party: \$4,049 of \$60,082 total expenditure, and the Public Service Association: \$3,052 of \$196,101 of total expenditure.

<sup>5</sup> <https://www.elections.org.nz/parties-candidates/registered-political-parties/party-expenses>

Depending on these and other factors, setting an expenditure limit that best accommodates the potentially broad range of third-party campaigners on both sides of any referendum issue will likely be a political exercise.

| <b>5.2 Summary table of costs and benefits of the preferred approach</b>    |   |               |                           |
|---|---|---------------|---------------------------|
| <b>Affected parties)</b>  | <b>Comment:</b>   | <b>Impact</b> | <b>Evidence certainty</b> |
| <b>Additional costs of proposed approach, compared to taking no action</b>  |   |               |                           |
| Referendum campaigners  | Compliance costs associated with registration, record keeping and returning referendum advertising expense reports (only for largest promoters).  | Low           | Medium                    |
| Electoral Commission  | Extending advertising rules to referendums would have marginal implications for the Commission. Added costs would be included in planned baseline spend or that sought as operational funding to deliver the cannabis or end of life choice referendums, as part of the usual Budget processes. | Low           | High                      |
| <b>Total Monetised Cost</b>   | -   | -             | -                         |
| <b>Non-monetised costs</b>  | Minimal.  | Low           | Medium                    |
| <b>Expected benefits of proposed approach, compared to taking no action</b> |   |               |                           |
| Referendum campaigners  | Alignment with general election rules will provide greater clarity for campaigners, smaller campaigners less likely to be drowned out by well-financed campaigners.   | Medium        | Low                       |
| Electoral Commission  | Alignment with general election rules will help the EC prepare for and implement rules before and during the election period.   | High          | High                      |
| General Public  | The public will have greater transparency in how referendum advertising campaigns are sponsored and how much money is involved. More certainty related to information presented by various positions and ability to assess for undue influences.  | High          | Low                       |
| <b>Total Monetised Benefit</b>  | -   | -             | -                         |
| <b>Non-monetised benefits</b>   |   | High          | Medium                    |

**5.3 What other impacts is this approach likely to have?**

None.

**5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?**

The proposed approach is in line with the Government's expectations for the design of regulatory systems and in particular the expectation that any proposed regulatory regime:

- is proportionate, fair and equitable in the way it treats regulated parties
- is aligned with existing requirements in related or supporting regulatory systems (such as, in this case, the election advertising regime), and minimises overlaps and inconsistent or duplicative requirements.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements work in practice?

This proposal will be progressed through the Referendums Framework Bill in 2019. Ideally the Bill will be passed before the end of 2019. This will give the Commission more certainty on the steps it needs to take to manage any referendums in 2020.

The Electoral Commission will be responsible for implementing and regulating referendum advertising regime(s). It is highly experienced in administering the electoral system, including referendums. As the referendum advertising framework will largely align with the processes involved with running the general election, the Commission is well prepared to implement any changes required to facilitate the both referendum advertising during the election period and the smooth delivery of referendums at the 2020 General Election.

### 6.2 What are the implementation risks?

Aligning referendum advertising rules with those governing the general election will help ensure that this aspect of the referendum framework will result in few implementation risks.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

The Electoral Commission will collect and collate data from registered promoters, as well as parties and candidates, about their referendum advertising expenses. It also prepares a survey of voter's experiences after each election, which will include their experience of the referendum process.

### 7.2 When and how will the new arrangements be reviewed?

Aspects of the electoral system are regularly reviewed. The Electoral Commission and the Justice Committee both complete a triennial review after each general election, and in the latter case this would be expected to cover the referendums as well. The public and other stakeholders have an opportunity to submit to the Justice Committee review. The Government's Response to the Justice Committee's recommendations is tabled in the House.

Additionally, if the Referendums Framework Bill works successfully in 2020, the government may wish to consider a more permanent referendum framework bill to cover all future referendums.

## Appendix 1

### Total expenditure by group during the 2011, 2014 and 2017 General Elections and the 2011 MMP Referendum<sup>6</sup>

|  | 2011<br>(* denotes referendum<br>expenditure) | 2014           | 2017           |
|--|---|----------------|----------------|
| <b>Party</b>                                     |   |                |                |
| <b>ACT Party</b>                                 | \$617,035.18                                  | \$293,241.09   | \$601,487.58   |
| <b>Conservative Party</b>                        | \$1,878,486.48                                | \$1,914,072.38 | \$71,764.68    |
| <b>Green Party</b>                               | \$781,292.16                                  | \$1,297,609.58 | \$818,525.46   |
| <b>Māori Party</b>                               | \$72,172.56                                   | \$202,562.12   | \$247,921.79   |
| <b>NZ First</b>                                  | \$144,570.61                                  | \$268,530.23   | \$679,095.38   |
| <b>Labour Party</b>                              | \$1,789,151.95                                | \$1,269,298.91 | \$2,580,523.68 |
| <b>National Party</b>                            | \$2,321,216.06                                | \$2,556,473.30 | \$2,546,742.70 |
| <b>The Opportunities Party</b>                   | -   | -              | \$1,013,714.29 |
| <b>Third-party promoters</b> (see note 1)        |   |                |                |
| <b>Campaign for MMP Incorporated</b>             | \$156,568.61*                                 | -              | -              |
| <b>Hobson's Pledge Trust</b>                     | -   | -              | \$254,114.77   |
| <b>New Zealand Aged Care Association (NZACA)</b> | -   | \$131,896.00   | -              |
| <b>New Zealand Educational Institute (NZEI)</b>  | \$280,100.86                                  | \$164,858.48   | \$40,013.15    |
| <b>Family First NZ</b>                           | -   | \$133,452.78   | -              |
| <b>Public Services Association (PSA)</b>         | \$193,315.94                                  | -              | -              |
| <b>Vote for Change Society Incorporated</b>      | \$79,047.66*                                  | -              | -              |

Note 1: Expenditure returns are only required from registered third-party promoters if their total election expenses in the regulated period exceed \$100,000. Returns were only required from registered promoters if their total referendum expenditure exceeded \$100,000 during the regulated period for the 2011 MMP referendum.

<sup>6</sup> Data retrieved from the Electoral Commission website <https://www.elections.org.nz/parties-candidates/registered-political-parties/party-expenses>