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Parliamentary paper

Advertising
expenditure
incurred by the
Parliamentary
Service in the
three months
before the 2005
General Election

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Presented to the House of Representatives
pursuant to section 20 of the Public Audit
Act 2001

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Hon Margaret Wilson MP
Speaker
House of Representatives
WELLINGTON

Madam Speaker

I forward this report to you for presentation to the House of Representatives pursuant to section 20 of the Public Audit Act 2001.

Yours sincerely

A handwritten signature in black ink, appearing to be 'K B Brady', with a large, stylized loop at the end.

K B Brady
Controller and Auditor-General

6 October 2006

Contents

Summary	5
Part 1 – Introduction	9
Concerns about the administration of parliamentary advertising	9
Why I undertook this inquiry	12
The process this inquiry followed	13
Part 2 – Parliamentary authority for public expenditure	17
Public finance principles	17
Implications for the Parliamentary Service	20
Part 3 – Assessing compliance with Parliament’s authority	23
Legal advice on the scope of the appropriations and the exercise of the Controller function	23
Establishing compliance with appropriations	26
Comments from parliamentary parties and the Parliamentary Service	27
Part 4 – Extent of compliance with the appropriations	33
Compliance with the appropriations	33
General observations	34
Comments from parliamentary parties and the Parliamentary Service	40
Part 5 – Advertising support resources for members of Parliament	43
The Parliamentary Service’s approach to administering parliamentary advertising resources	43
Managing compliance with the appropriations	46
Quality of systems for processing advertising expenditure	47
Financial management decision-making	49
Part 6 – Conclusions and actions to be taken	51
Conclusions	51
Issue of direction to the Minister responsible for Vote: Parliamentary Service	52
Recommendations to the Parliamentary Service	53
Long-term solution	54
Appendix 1 – Party and Member Support appropriations	57
Appendix 2 – Advice of the Solicitor-General	58
Figures	
1 Method used to evaluate the appropriateness of pre-election advertising	28
2 Advertising expenditure incurred under each Party and Member Support appropriation, 16 June to 30 June 2005 (including Goods and Services Tax)	33
3 Advertising expenditure incurred under each Party and Member Support appropriation, 1 July to 16 September 2005 (excluding Goods and Services Tax)	34

Funding of parliamentary advertising

Advertising and publicity play an important role in the dialogue between members of Parliament (MPs), parliamentary parties, and the public that is central to representative democracy. Because of this, taxpayers meet the costs of MPs' and parliamentary parties' advertising. However, while advertising takes place in a political environment, taxpayers do not pay for political parties' activities.

The Parliamentary Service (the Service) provides a range of support services to MPs and parliamentary parties, including meeting the costs of advertising.

Events leading up to my inquiry

On 21 June 2005, I reported to the House of Representatives a range of concerns I had about how parliamentary advertising was managed. I was particularly concerned that the administrative framework for such advertising was weak. My report also drew attention to the need for MPs and parliamentary parties to take care when advertising in the pre-election period.

In the three months before the General Election on 17 September 2005, I became concerned that electioneering material may have been paid for by the Service out of resources appropriated for MPs' and parliamentary parties' advertising.

I have conducted an inquiry into this expenditure. The main focus for my inquiry was whether the expenditure incurred by the Service during those three months was within the legal authority provided by Parliament for such expenditure.

Legal authority for funding

It is a fundamental principle in New Zealand law that public money may be spent only under parliamentary authority. In this case, the authority for the Service to incur advertising expenses on behalf of MPs and parliamentary parties is provided by specific appropriations forming part of Vote: Parliamentary Service, contained within an Appropriation Act.

The scope of those appropriations is limited to expenses that are incurred for a parliamentary purpose. The appropriations cannot be used for an electioneering purpose.

I took advice on the scope of the appropriations from the then Solicitor-General. That advice considered the applicable legislative framework, and confirmed that the appropriations provided for expenses incurred by MPs in their capacity as members but do not cover activities by MPs in their capacity as candidates for election. In particular, the advice relied on the Speaker's Directions issued on

1 November 2003, which explicitly exclude “electioneering material” from the matters that may be funded under the appropriations. “Electioneering material” is something that is intended to persuade a voter to favour a candidate or party in an election, and is not limited to material that expressly solicits votes.

The Solicitor-General advised me that, if an item of expenditure has both a parliamentary purpose and an electioneering purpose, I am entitled to take the view that it falls outside the permitted scope of the appropriation.

As Controller and Auditor-General, I have a responsibility to bring any expenditure that, in my opinion, has been unlawfully incurred to the attention of the responsible Minister and the administering department. I also have certain powers to direct those responsible for the expenditure to account for that expenditure to Parliament. If I have reason to believe that the unlawful expenditure may continue, as Controller and Auditor-General I can prevent any further payments by the administering department.

In conducting this inquiry, I based my view of the law on the Solicitor-General’s advice, and used a method that would enable me to examine particular items of advertising to determine whether they were outside the scope of the appropriations. That method involved following a number of steps and weighing a series of factors that indicated whether a particular item tended to have an electioneering purpose or parliamentary purpose. I took a common-sense approach based on what I considered a reasonable member of the public would think from looking at the advertisement as a whole, in its full context.

Results of my inquiry

My inquiry established that significant breaches of the appropriations administered by the Service occurred in the period 16 June to 16 September 2005. The expenditure that I found to be outside the scope of the appropriations related to a range of types of advertising, and was incurred on behalf of all but one of the parliamentary parties.

The total value of the breaches I identified for the 2004-05 financial year was \$443,462 (including GST), and the total value of the breaches I identified for 2005-06 financial year was \$730,136 (including GST). Overall, \$1,173,598 of unlawful expenditure was incurred.

I am concerned that I found a substantial amount of material that amounted to electioneering. A number of advertisements and newsletters expressly solicited votes. However, even where no express soliciting of votes occurred, a large number of advertisements contained material that could only be described as election

platforms and promises. I was particularly disappointed to find that the Service paid for significant amounts of newspaper advertising by some parties in the last week before the General Election. That advertising was incontrovertibly of an electioneering nature, and I could not discern a legitimate parliamentary purpose for it.

In my view, the Service has not correctly interpreted the scope of the relevant appropriations as they apply to advertising expenditure. I am concerned that the Service does not satisfy itself, before expenditure is incurred, that advertising proposed by MPs and parliamentary parties is for purposes consistent with the relevant appropriations. It is the Service's responsibility to ensure that expenditure is within the authority provided by Parliament. I do not accept that the authorisation of advertising expenditure by an MP or parliamentary party staff member absolves the Service of this responsibility.

It is clear that an incorrect interpretation of the scope of the appropriations administered by the Service coupled with processes for managing advertising expenditure that were designed on the basis of that incorrect understanding were significant factors in allowing the breaches to occur. These factors helped to create an environment in which the Service could not exercise the judgement required to ensure that expenditure was appropriately incurred.

However, the failures on the part of the Service are not the only cause of the breaches in appropriation. The accountability framework for the administration of the Vote – which should involve separate but complementary roles for both the Service and the responsible Minister – has been confused, and lacks transparency. This is unacceptable.

I have found the nature and extent of electioneering advertising expenditure put through the Service by MPs and parliamentary parties disturbing. In this regard, party-generated advertising produced by Leaders' offices was of most concern.

I am aware that inadequate guidance is available to MPs and parliamentary parties about what constitutes appropriate advertising, particularly in the pre-election period. But the guidance clearly prohibits electioneering. I find it hard to accept that, despite my 2005 Report and the message to be careful about advertising expenditure in the pre-election period, behaviour did not change.

Actions to be taken

I have directed the Speaker of the House of Representatives, as Minister responsible for Vote: Parliamentary Service, to report the breaches I identified for the 2005-06 financial year to the House of Representatives. My direction was issued under section 65Z(1) of the Public Finance Act 1989.

It is not my role to comment on what further action, if any, should be taken about the expenditure that was outside the scope of the appropriations.

I note that my findings do not necessarily indicate that any provisions of the Electoral Act 1993 have been breached by any person. Those questions are separate, they are not my responsibility, and my inquiry did not consider them.

In this report I make several recommendations to the Service that should be implemented with urgency. The recommendations will help to reduce the risk that further expenditure may be incurred that breaches the appropriations.

The current framework for administering parliamentary advertising needs to be revised and strengthened, to provide a long-term solution that balances the need for a dialogue between elected representatives and the public with the need for prudent management of public money. This report shows the significant issues that have arisen through the failure of the current framework.

Part 1

Introduction

- 1.1 This report presents the findings of my inquiry into advertising expenditure incurred by the Parliamentary Service (the Service) in the three months before the 2005 General Election (the Election).
- 1.2 The Service provides a range of support services to members of Parliament (MPs) and parliamentary parties to enable them to participate in Parliament. This includes meeting the costs of advertising. Advertising by MPs and parliamentary parties is a sensitive area of expenditure for the Service.
- 1.3 The authority for the Service to incur such expenses is provided by appropriations within Vote: Parliamentary Service. An appropriation is a statutory authority by Parliament for the Crown to incur expenses or capital expenditure. Under the appropriations, the funds administered by the Service that are used for MPs' and parliamentary parties' advertising can be used only for a parliamentary purpose. They cannot legally be used for any other purpose.¹
- 1.4 My inquiry assessed the extent to which the Service had complied with appropriations within Vote: Parliamentary Service, in incurring advertising expenditure on behalf of MPs and parliamentary parties in the three months before the Election.
- 1.5 The rest of this Part discusses:
- concerns I have previously reported to Parliament about how well parliamentary advertising is administered; and
 - the factors that made me decide to conduct this inquiry.

Concerns about the administration of parliamentary advertising

- 1.6 In 2004-05, I reviewed government and parliamentary publicity and advertising.
- 1.7 I undertook the review because I was aware that the nature and extent of publicly paid advertising had changed considerably since the introduction of the mixed-member proportional (MMP) system of representation, and the development of coalition government. It appeared that the systems, policies, and procedures used by government agencies to manage advertising resources could not ensure that the resources were always applied appropriately.
- 1.8 I was also concerned that information communication technology had progressed considerably, further stretching the abilities of administering agencies to monitor and control advertising activities.

¹ See Part 2 for an explanation of the appropriation system.

- 1.9 I began my review in August 2004. In the course of the review, I met the leaders or representatives of six of the eight parliamentary parties to discuss my concerns about this area of public expenditure. In addition, all parliamentary parties were provided with the opportunity to comment on my report of the review, before it was finalised in 2005.
- 1.10 I was aware of the heightened sensitivity surrounding advertising matters in what was an election year. I wanted to make my view on advertising in the pre-election period clear. Some parliamentary parties had expressed a view that I should not present my report to Parliament before the Election, whereas others considered I should. I took advice from a number of quarters (including former senior parliamentarians), and decided the report should be presented before the dissolution of Parliament.
- 1.11 My report *Government and parliamentary publicity and advertising* (my 2005 Report) was presented to the House of Representatives (the House) on 21 June 2005.
- 1.12 I identified certain principles in my 2005 Report, which I had discussed with parliamentary parties and their leaders. These principles are widely accepted in other jurisdictions. The principles of democratic interaction and proper purpose are particularly relevant.

Democratic interaction

Dialogue between elected representatives and the public is a valid and fundamental aspect of democracy. MPs are expected to inform the public of their activities in Parliament, and to seek the public's involvement in parliamentary processes. Publicity and advertising are, therefore, an integral part of representative democracy and accountability.

MPs and parliamentary parties may legitimately use public funds for publicity and advertising, to help them meet these expectations.

Proper purpose

Parliamentary and ministerial communications take place in a political environment. But taxpayers do not pay for political parties' publicity, except to the extent that it derives indirectly from the proper conduct of parliamentary or ministerial business.

This is broadly consistent with the accepted position in New Zealand that the State does not fund political parties.²

2 This position is clearly set out in the *Government response to the Report of the Electoral Law Committee on the Inquiry into the Report of the Royal Commission on the Electoral System*, 1.20, 1989. Broadcasting time allocated during a general election campaign is the only form of State funding available to political – as opposed to parliamentary – parties.

- 1.13 My 2005 Report stated my concerns about the administration of parliamentary advertising expenditure:
- Publicity and advertising are important operational tools for MPs and parliamentary parties. They need to be recognised as such, and to be understood as products in their own right – not just operational expenses.
 - Publicly funded publicity and advertising can be a valuable tool for those engaged in political activity. There is a need for clearly defined principles, rules, and standards to protect the public interest against the potential for public money to be misused.
 - The current administrative framework has serious deficiencies that undermine its effectiveness.
- 1.14 In Part 5 of my 2005 Report, I set out a framework that would improve the administration of government and parliamentary advertising.
- 1.15 Part 6 of my 2005 Report commented specifically on advertising in the three-month pre-election period. Key points in Part 6 were:
- There are “benefits of incumbency” that enable Ministers of the Crown and MPs to achieve indirect party political benefit from publicity or advertising at public expense. That potential increases in the period leading up to a general election.
 - The *Members’ Handbook of Services*,³ which includes guidelines for MPs about the advertising they can undertake, expressly excludes “party political, promotional or electioneering material for the purpose of supporting the election of any person” from the definition of “parliamentary business” in relation to such advertising.
 - The basic expectations of the *Members’ Handbook of Services* are clear about not using parliamentary advertising for electioneering or related purposes. The potential for indirect political benefit requires risk management by Ministers and departmental chief executives.
- 1.16 When I presented my 2005 Report to Parliament, I said –
- Any publicly funded advertising by political parties that does take place between now and the general election must be consistent with the existing rules, and will be subject to the oversight of the Speaker [of the House of Representatives].⁴*

³ The *Members’ Handbook of Services* provides MPs with information about their entitlements to services, and their responsibilities in obtaining and using those services. It is issued by the Service.

⁴ Media Statement, “Auditor-General’s report on government and parliamentary publicity and advertising”, 21 June 2005 (www.oag.govt.nz).

Why I undertook this inquiry

- 1.17 On 25 July 2005, the Prime Minister announced that the Election would take place on 17 September 2005.
- 1.18 In the period between the presentation of my 2005 Report to the House (21 June 2005) and the Election, there was considerable advertising by MPs and parliamentary parties that was paid for out of appropriations administered by the Service. Some of the advertising was completely appropriate and consistent with the appropriations.
- 1.19 However, some of the advertising appeared to promote the re-election of parliamentary parties and their MPs. This advertising took a range of forms, including:
- a pledge card that outlined to the public a parliamentary party's commitments to future actions;
 - pamphlets;
 - newsletters from several parliamentary parties to various communities of interest, outlining the parties' proposed actions if re-elected; and
 - newspaper advertisements extolling the value and contribution of various parliamentary parties and their MPs to Parliament.
- 1.20 I was concerned that the Service, on behalf of the parliamentary parties, may not have appropriately incurred the expenditure associated with this advertising.
- 1.21 The Speaker referred to me for review an advertising complaint that she had received. I also received numerous enquiries from members of the public and some MPs. The correspondents all expressed concern about the political nature and large quantity of advertising produced by certain parliamentary parties. All correspondents asked that my Office inquire into the appropriateness of the expenditure associated with the advertising in question.
- 1.22 I decided to inquire into all spending of public money by MPs and parliamentary parties on advertising in the three-month pre-election period (from 16 June to 16 September 2005), to establish whether it had been appropriately incurred by the Service against the appropriations in Vote: Parliamentary Service.
- 1.23 I selected the three-month period because it:
- provided a discrete period for audit sampling;
 - broadly corresponded with the three-month period under the Electoral Act 1993 during which some special rules apply to election expenses; and
 - is generally understood as a period in which care must be undertaken with publicly paid advertising.

- 1.24 The advertising had also raised the concern of the Chief Electoral Officer. After the Election, the Chief Electoral Officer referred a number of the advertisements in question (including the pledge card noted in paragraph 1.19) to the Police for consideration of possible offences under the Electoral Act 1993. I decided to await the outcome of the Police process.
- 1.25 The Police announced on 17 March 2006 that no prosecution action would be taken under the Electoral Act in relation to the pledge card. I then resumed my inquiry.

The process this inquiry followed

- 1.26 My inquiry team began talking to the Service about our information requirements on 4 April 2006.
- 1.27 The appropriations within Vote: Parliamentary Service under which advertising expenditure can be incurred by MPs and parliamentary parties are:
- the eight **Party and Member Support appropriations**, which allow funding for each parliamentary party to “support its Leader’s office, research operations, Whip’s office and members’ parliamentary operations”; and
 - the **Members’ Communications appropriation**, which allows funding for “members’ communications (voice and data) entitlements, and members’ use of stationery in Parliament”. All MPs are able to access communications services, including laser printers and stationery, funded under this appropriation.
- 1.28 The appropriations are administered by the Service, and give the Service authority to provide certain support services to MPs and parliamentary parties. The MPs and parliamentary parties do not manage the appropriations, and do not receive funding directly.
- 1.29 Because the inquiry focused on the period from 16 June to 16 September 2005, it included expenditure in two financial years – the 2004-05 financial year and the 2005-06 financial year. The total allocated to the Party and Member Support appropriations for 2004-05 was \$14.079 million, and \$14.102 million for 2005-06. The amount allocated to the Members’ Communications appropriation was \$3.516 million for each of these financial years.⁵
- 1.30 My inquiry team established that the focus of the inquiry should be the Party and Member Support appropriations. There was nothing to link expenditure associated with laser printers and stationery under the Members’ Communications appropriation to any examples of advertising. Without such an audit trail, I was unable to draw any conclusions about the appropriateness of the

⁵ Appendix 1 describes the appropriations for the two financial years.

expenditure. The advertising expenditure under the Members' Communications appropriation was not considered in this inquiry.

- 1.31 Some support staff may have spent time designing and arranging advertising for MPs and parliamentary parties. Such support services are funded under separate appropriations within Vote: Parliamentary Service. Support staff time is not separately recorded, and I am not able to quantify and draw conclusions about the appropriateness of associated staff costs.
- 1.32 To conduct the inquiry, I required:
- data from the general ledger relating to all advertising expenditure incurred by the Service under the Party and Member Support appropriations within Vote: Parliamentary Service during the period from 16 June to 16 September 2005;
 - copies of all invoices relating to this expenditure; and
 - where possible, examples of the advertising to which the expenditure related.
- 1.33 The Service agreed to provide this material to my Office. However, as advertising is arranged by the parliamentary parties and MPs themselves, the Service did not hold examples of the advertising and had to ask former and current MPs for the information.
- 1.34 The Service provided collated material to my Office on 2 June 2006. The material consisted of a file for each member of the previous Parliament, and additional files relating to all other cost centres relevant to advertising conducted by the parliamentary parties (for example, Leaders' budgets).
- 1.35 The auditors I appointed to conduct the annual audit of the Service provided me with assurance on the completeness of the financial information compiled for review.
- 1.36 The Service was unable to locate some of the material I required. A number of former MPs did not hold examples of advertisements that could be matched to invoices relevant to the review period. In some cases, party offices were unable to match the advertising to the invoices. The value of the missing examples was not large.
- 1.37 While the three-month pre-election period was the focus of the inquiry, we also asked the Service to review expenditure in the three months after the Election to identify any other expenditure relevant to the review period.
- 1.38 The Service also provided me with electronic files covering the expenditure incurred under all Party and Member Support appropriations for the 2004-05 financial year. The inquiry team extracted electronic records of all advertising expenditure incurred under Party and Member Support appropriations for the

year from 1 July 2004 to 15 June 2005 inclusive. The inquiry team examined this advertising expenditure to identify any items costing more than \$1,000. I took this step to ensure that there were no expenditure items incurred before the period of my inquiry that, because of their size, might require further investigation. I was satisfied that such an investigation was not warranted.

Determining whether advertising was within the scope of the appropriations

- 1.39 We determined whether the advertising expenditure incurred during the period of my inquiry was within the scope of the relevant appropriations. Part 3 of this report discusses in detail the method I used.
- 1.40 In summary:
- The inquiry team conducted a preliminary assessment of all advertising examples. They identified material that was clearly within the scope of the appropriations (there was a clear parliamentary purpose and no electioneering purpose).
 - The inquiry team reviewed the examples considered to be possibly outside the scope of the appropriations again, to ensure that we had taken a consistent approach for all advertising, regardless of the MP or party involved.
 - All examples considered potentially outside the appropriations were grouped by the type or method of advertising involved (for example, newsletters and advertisements for public meetings). These categories were reviewed again to ensure that we had taken a consistent approach for all advertisements of the particular type or method, regardless of the MP or party involved.
- 1.41 The Deputy Controller and Auditor-General and I then reviewed all the examples that were possibly outside the scope of the appropriations, and formed our provisional views.
- 1.42 The inquiry team also examined, for correctness, the general ledger entries and invoices for each of the advertising examples that were considered to be outside the scope of the appropriations. The invoiced amounts were then collated and attributed to the relevant parliamentary parties.

Advising the Service and the Speaker of my provisional findings

- 1.43 I then wrote to the General Manager of the Service, advising him that:
- my provisional findings indicated a breach of appropriation; and
 - he could formally respond either after the Service alone had considered the matters I had raised or after seeking the views of MPs and parliamentary parties.

- 1.44 I also advised the Speaker (as the Minister responsible for Vote: Parliamentary Service) and the Secretary to the Treasury of my provisional findings, and provided them with an aggregate sum of the apparent breach of appropriation.
- 1.45 On 21 July 2006, the General Manager of the Service provided an initial written response to my provisional findings. After considering his response, I was not persuaded that I should change the method I had used or the provisional views I had formed.
- 1.46 I advised the General Manager of the Service of my decision on 26 July 2006. I also recommended that he inform affected MPs and parliamentary parties of my provisional findings, and provide them with an opportunity to:
- confirm the accuracy of the information collated by the Service that had been reviewed in the inquiry; and
 - provide any other relevant information.
- 1.47 I asked the Service to respond to me with the outcomes of the consultation by the week of 21 August 2006. The Service provided me with the responses from MPs and parliamentary parties affected by my provisional findings on 25 August 2006.
- 1.48 In finalising this report, I fully considered the views of the MPs and parliamentary parties as provided to the Service. I also met with the leaders or representatives of five parliamentary parties who asked me to hear their concerns directly.
- 1.49 In a few cases, I changed my provisional view. In others, I did not. This is a normal part of consultation on a draft report. This report is based on the best information that could be provided to me.
- 1.50 The Service was provided with a draft version of my full report on 12 September 2006, and given until 19 September to comment. This deadline for comment was subsequently extended to 28 September 2006.
- 1.51 I note that it was unhelpful to the consultation process that some of my provisional findings found their way into the public domain. Nevertheless, this did not affect the conduct of my inquiry.

Part 2

Parliamentary authority for public expenditure

- 2.1 In New Zealand, Parliament is sovereign. Ultimately, Parliament provides all authority to spend public money. It does this through appropriations.
- 2.2 Under the Public Audit Act 2001, the Controller and Auditor-General must audit the appropriations administered by departments, to establish whether expenditure has been incurred within the authority provided by Parliament.
- 2.3 Unauthorised public expenditure is a serious matter.
- 2.4 In this Part, I discuss:
- the public finance principles that guide me when I consider whether public expenditure has been appropriately incurred;
 - the Controller function, and how it applies to unlawful expenditure; and
 - how the principles and the Controller function affect the Service.

Public finance principles

- 2.5 Public expenditure occurs within a framework dominated by two important principles:
- the principle of appropriation; and
 - the principle of lawfulness of purpose.

The principle of appropriation

- 2.6 The requirement that public money may be expended only under parliamentary authority is a fundamental principle in New Zealand law.¹ The principle arises from the Bill of Rights 1688, and is restated in the Constitution Act 1986 and in the Public Finance Act 1989.
- 2.7 Article 4 of the Bill of Rights 1688 contains the pre-eminent statement of Parliament's sovereignty over the spending of public resources –
- Levying money** — *That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament for longer time or in other manner then the same is or shall be granted is illegall.*
- 2.8 Section 22(c) of the Constitution Act restates the principle –
22. *Parliamentary control of public finance*—
- It shall not be lawful for the Crown, except by or under an Act of Parliament,—...*
- (c) *To spend any public money.*

¹ See McGee, David (2005), *Parliamentary Practice in New Zealand*, third edition, Wellington, page 443.

- 2.9 Sections 4(1) and 5 of the Public Finance Act express the principle in the language of accrual accounting –
- The Crown or an Office of Parliament must not incur expenses or capital expenditure, except as expressly authorised by an appropriation, or other authority, by or under an Act [section 4(1)].*
- The Crown or an Office of Parliament must not spend public money, except as expressly authorised by or under an Act (including this Act) [section 5].*
- 2.10 The system of appropriations is a cornerstone of our Westminster-style parliamentary system. It is the primary means by which Parliament authorises the Executive and the Speaker (for the parliamentary agencies) to use public resources. Its purposes are to ensure:
- that Parliament, on behalf of the electorate, has adequate control over how public resources are used; and
 - that those using the resources are held accountable for how they have applied the resources.
- 2.11 Although the requirements and procedures relating to appropriations are set out in the Public Finance Act, the appropriations themselves are made through Acts of Parliament (usually three each year) that bear the name of an Appropriation Act. Descriptions of the appropriations are listed in the schedules of such Acts. Detailed information about the appropriations is included in the *Estimates of Appropriations* (the Estimates). The Estimates are presented to the House on Budget day in conjunction with the introduction of the main Appropriation Act for that year.
- 2.12 There are three elements to an appropriation. It specifies:
- the maximum amount of expenses or capital expenditure that can be incurred;
 - the scope (that is, what the amount can be used for); and
 - the date on which the appropriation lapses (usually the end of the financial year to which the Appropriation Act relates).
- 2.13 Unappropriated expenditure occurs when expenses or capital expenditure are incurred:
- without an appropriation;
 - in excess of the amount of an appropriation;
 - for a purpose outside the scope of an appropriation; or
 - after an appropriation has lapsed.

The principle of lawfulness of purpose

- 2.14 The principle of lawfulness of purpose includes, but is wider than, the principle of appropriation.
- 2.15 To be lawful, expenses or capital expenditure must be incurred in keeping with an appropriation. They must also be incurred in keeping with the lawful authority provided to the department to engage in the activity concerned. An appropriation by itself is not lawful authority to engage in a particular activity.
- 2.16 The Public Finance Act permits the validation of unappropriated or unlawful expenditure. Section 26C says that the incurring of any expenses without an appropriation or other authority is unlawful, unless it is validated by Parliament in an Appropriation Act.

The Controller function

- 2.17 The two principles discussed above come together in the exercise of a vital constitutional check on public expenditure – the Controller function.
- 2.18 The office of Controller originated centuries ago in the United Kingdom. The original purpose of the office was to receive and hold public revenues until they were issued, under the authority of Parliament, for the service of the State.² The role later evolved into one of verifying that any release of public money to the Executive branch of Parliament was lawful and in keeping with an appropriation by Parliament.
- 2.19 The Controller function was adopted by the New Zealand Parliament in 1865. Changes were made to the Controller function in 2004 to modernise and strengthen it. The changes took effect from 1 July 2005.
- 2.20 The Controller and Auditor-General exercises the Controller function under sections 65Y to 65ZA of the Public Finance Act and section 15(2) of the Public Audit Act.³ The main features of the Controller function are:
- The Treasury must supply monthly statements to the Controller and Auditor-General, to enable the Controller and Auditor-General to examine whether expenses and capital expenditure have been incurred in keeping with appropriations or other authority.
 - The Controller and Auditor-General can direct a Minister to report to the House if the Controller and Auditor-General has reason to believe that any

² See Jennings, Ivor (1961), *Parliament*, second edition, page 323.

³ The joint understanding and expectations of the Treasury and the Office of the Auditor-General of the role and procedures associated with the Controller function are set out in the *Memorandum of Understanding between the Treasury and the Office of the Auditor-General: Controller Function* (known as the Controller Protocol). The Controller Protocol is available on the Treasury website (www.treasury.govt.nz).

expenditure that has been incurred is unlawful or applied for a purpose that is not within the scope, amount, or period of an appropriation (section 65Z).

- The Controller and Auditor-General can stop payments from a Crown bank account or a departmental bank account, to prevent money being paid out of the account that may be applied for a purpose that is not lawful or is inconsistent with any appropriation or other statutory authority (section 65ZA).

- 2.21 Although unappropriated expenditure may be identified through the Treasury's monthly reports, such expenditure may also be identified through the annual audit or through exercise of the Controller and Auditor-General's inquiry function.
- 2.22 The Controller function is concerned with whether the expenditure is lawful. To be able to form an opinion on this matter, the Controller and Auditor-General needs to be clearly aware of both:
- the nature of the expenditure (that is, whether it will be within the amount, scope, and period of the appropriation); and
 - its lawfulness (that is, that the department has the lawful authority to incur the expenditure).
- 2.23 When considering whether expenses or capital expenditure fall within the scope of an appropriation or other authority, as Controller and Auditor-General I must consider the activity against the description of the scope of the appropriation set out in the Estimates and referred to in the relevant schedule of the Appropriation Act. These descriptions are characteristically brief and stated in broad terms. If the scope of an appropriation is unclear on its face, other sources of information – for example, the more detailed descriptions of purpose contained in the commentary in the Estimates – can help to explain it.⁴
- 2.24 However, it is important to note that the Estimates are not part of an Appropriation Act except to the extent that the Appropriation Act expressly incorporates them.
- 2.25 As Controller and Auditor-General, I seek legal advice about the scope of the appropriations, and the legal authority a department is acting under, when establishing whether expenditure has been lawfully incurred.

Implications for the Parliamentary Service

- 2.26 From a public finance administration perspective, the Service is no different from any government department that uses public money.

4 McGee, David (2005), *Parliamentary Practice in New Zealand*, third edition, Wellington, page 480.

- 2.27 Under section 7 of the Parliamentary Service Act 2000, the principal duties of the Service are to:
- provide administrative and support services to the House and to MPs; and
 - administer, in keeping with directions from the Speaker, the payment of funding entitlements for parliamentary purposes.
- 2.28 Although the Service is not part of Executive government, it is deemed to be a department for the purposes of the Public Finance Act. It uses public resources under authority provided by appropriations contained within Vote: Parliamentary Service.
- 2.29 Under the Public Finance Act, the Speaker is the Minister responsible to Parliament for Vote: Parliamentary Service appropriations. This includes responsibility for any breaches of appropriation. The General Manager of the Service is the chief executive of the Service for the purpose of the Public Finance Act, and in this capacity is responsible to the Speaker for the financial management and performance of the Service. This includes the day-to-day administration of payments for advertising by MPs and parliamentary parties.
- 2.30 As the department administering the appropriations and exercising its functions under the Public Finance Act and the Parliamentary Service Act, the Service and its General Manager are responsible for:
- the effective and efficient financial management of the Service, including the appropriations it administers;
 - ensuring that all expenditure against appropriations is within the amount, scope, and period of the appropriations, and is reported in accordance with the Public Finance Act;
 - ensuring that sufficient internal controls exist to provide reasonable assurance about the integrity and reliability of the expenditure authorised by MPs and parliamentary parties and the consequent reporting on it; and
 - complying with any lawful financial directions of the Speaker, including any specific rules or directions about how the appropriations are to be administered or what types of expenses can be incurred on the authority of MPs, consistent with the amount, scope, and period of the appropriations.
- 2.31 Under the Public Audit Act, I am the auditor of the Service. In this role, I am responsible for auditing the compliance of the Service with Vote: Parliamentary Service appropriations, and acting, using the Controller function, should I identify unlawful expenditure.

Part 3

Assessing compliance with Parliament's authority

3.1 As noted in Part 1, I was concerned that some of the advertising expenditure incurred by the Service in the pre-election period may have been inappropriate, in that the advertising was for electioneering purposes. I considered it prudent to confirm my understanding of the parameters set by Parliament for such expenditure before proceeding further with my inquiry.

3.2 In this Part, I discuss:

- the legal advice I received from the then Solicitor-General on the scope of the appropriations for Party and Member Support, and the exercise of the Controller function in specific situations;
- the method that I used to determine whether the expenditure had been appropriately incurred; and
- responses from parliamentary parties and the Service.

Legal advice on the scope of the appropriations and the exercise of the Controller function

3.3 I received the Solicitor-General's advice on 19 April 2006. Appendix 2 contains the advice in full, and the main points of the advice are summarised below.

3.4 The scope of the Party and Member Support appropriations is limited to expenses that are incurred for a parliamentary purpose. The Solicitor-General's advice confirms that the most authoritative indication of what constitutes a parliamentary purpose is the definition of "parliamentary business" in the Speaker's Directions¹ issued on 1 November 2003. These Directions were provided to every MP as an update to the *Members' Handbook of Services*, and were published on the Internet.

3.5 The Solicitor-General also noted –

Clause 46 of the Speaker's Directions ... [provides] that a member is entitled to use "operational resources" for the purpose of undertaking parliamentary business. "Operational resources" are (in effect) defined by indicating what they do and do not include. "Operational resources" may be used for developing, researching, critiquing and communicating policy (cl 46(2)(b)) and for communicating with constituents and other communities of interest (cl 46(2)(c)) but may not be used for producing or distributing electioneering material (cl 46(3)(d)).

1 The Speaker's Directions are issued under section 7(a) and (b) of the Parliamentary Service Act 2000. For the periods discussed in this report, the applicable Speaker's Directions were in the document "Travel, Accommodation, Attendance, and Communications Services Available to Members of Parliament" effective from 1 November 2003. Those Directions have since been replaced by the "Direction and Specifications for Travel, Accommodation, Attendance, and Communications Services Available to Members of Parliament" effective from 1 September 2006.

- 3.6 The distinction between parliamentary business and electioneering, and how the distinction should be understood and applied in practice, has been the central issue in my inquiry. The Solicitor-General points out that the “operational resources” provisions in the Speaker’s Directions illustrate that, although much parliamentary business is “political” in nature, electioneering activity falls into a different and, for funding purposes, distinct category.
- 3.7 The *Members’ Handbook of Services* and other guidelines issued by the Service express this in similar terms. Section 1.3 of the *Members’ Handbook of Services* provides guidance on what advertising may be incurred under the Party and Member Support appropriations and, as with the Speaker’s Directions, uses the phrase “parliamentary business” to list permissible activities. It expressly excludes activities that are:
- soliciting subscriptions or other financial support for a political party or a candidate at an election;
 - party political, promotional, or electioneering material for the purpose of supporting the election of any person; and
 - any work undertaken as a Minister of the Crown and Member of the Executive Council.
- 3.8 How the distinction is applied is critical – in particular, whether an electioneering purpose exists only if there is an explicit soliciting of funds or votes, or whether a broader approach, examining the overall intent of a publication or other activity, should apply.
- 3.9 In the Solicitor-General’s view, case law on the meaning of “election activity” under the Electoral Act 1993 is also relevant when determining the boundary between a parliamentary purpose and a purpose of an electioneering nature. His opinion refers to the following passage from the High Court judgment in *Peters v Clarkson*² –
- The essence of these requirements [under section 213 of the Electoral Act] remains, we think, aptly captured in the passage in the Wairarapa case where the Court spoke of “words or sounds (perhaps images should be added) intended to persuade the voter ...”*
- 3.10 The Solicitor-General summarised his view on the scope of the relevant appropriations –
- The appropriations for members’ communications and party and member support are administered by the Parliamentary Service for parliamentary purposes. Parliamentary purposes are elaborated through the Speaker’s*

2 *Peters v Clarkson* (unreported, High Court, Tauranga, 15 December 2005, CIV-2005-470-719, Randerson, Goddard and Panckhurst JJ). The passage from the “Wairarapa” case that is cited with approval in the Court’s decision comes from *Re Wairarapa Election Petition* [1988] 2 NZLR 74.

Directions and reinforced by the Parliamentary Service Commission Guidelines and the Members' Handbook. Advertising for parliamentary purposes clearly excludes advertising for electioneering purposes. Electioneering advertising is something that is intended to persuade a voter to favour a candidate or party in an election.

3.11 He also expressed the views that:

- It is not necessary for there to be an express soliciting of votes to establish an electioneering purpose. Rather, he said, the question is whether the advertisement as a whole would be likely to persuade a voter to vote in a particular way.
- No particular date determines whether material can be considered to be for an electioneering purpose in terms of the appropriations – although proximity to the Election is likely to be a relevant factor in particular instances (especially where there is no express solicitation of a vote).

3.12 I also sought legal advice on how my Controller responsibilities should be exercised in a case where an advertisement may have been authorised by an MP or party in their parliamentary capacity and/or partly for a parliamentary purpose, but where there was also evidence of a non-parliamentary purpose (such as an intention to persuade voters to vote in a particular way). The Solicitor-General considered three possible approaches but expressed his opinion as follows –

In the present context, I consider that the Auditor-General is entitled to take the view that expenses incurred for an electioneering purpose and reimbursed from appropriations are outside the scope of the appropriations, and are accordingly unlawful, even though some part of the expense-incurring activity may fall within the appropriation (i.e. have a legitimate parliamentary purpose). In essence, this requires the Auditor-General to apply the simple “in or out” test ... this test provides a “bright line”, it has the advantage of being administratively workable, it limits opportunities for abuse and it provides a clear framework for audit purposes. It recognises that any significant reference to electioneering is likely to “taint” the remainder of a publication or other communication (i.e. infect it with an electioneering purpose).

3.13 In my view, the Solicitor-General's interpretation is consistent with the Controller function under the Public Finance Act – namely, to consider whether expenditure has been incurred for a purpose that is within or outside the scope, amount, or period of an appropriation, and form a view on its appropriateness.

Establishing compliance with appropriations

- 3.14 I used a method with five elements to determine whether a particular advertisement was for a non-parliamentary purpose and, therefore, outside the appropriations.
- 3.15 The first element of the method was to consider whether the advertisement, although made in an official capacity, was of a ministerial rather than a parliamentary nature. This was necessary because expenses incurred by MPs in their capacities as Ministers of the Crown, or otherwise for a purpose related to the business of the Executive branch of government, are met not under Vote: Parliamentary Service but under Vote: Ministerial Services.
- 3.16 The second element of the method was to consider whether an advertisement expressly solicited votes, members, or funds for a political party. Such purposes clearly lie outside the scope of the Vote: Parliamentary Service appropriations.
- 3.17 The third element of the method was to consider whether the advertising as a whole had an electioneering purpose. The Solicitor-General's advice emphasised the context-specific nature of this question. Factors that might indicate such a purpose were:
- references in the advertisement to the Election;
 - references to an MP's or party's policy platform for the Election, or what they intend to do after the Election if elected or re-elected;
 - references to a candidate who is not already an MP;
 - formatting or branding of an advertisement in a manner similar to the party's own election campaign material;
 - the amount printed and the extent of its distribution, or the accessibility of the advertisement to voters at large; and
 - the timing of the advertisement in relation to a party's election policy announcements.
- 3.18 Only if an advertisement was incapable of being described as having an electioneering purpose would the fourth element of the method be applied, which was to consider whether there was a parliamentary purpose to the advertisement that would bring it within the scope of the relevant appropriation. Factors that might indicate a parliamentary purpose were:
- particular services to the public – for example, constituency clinics or public meetings for constituents about current issues;
 - the MP's role as an MP in making the advertisement – for example, as a constituency MP reporting on their activities as an MP, or communicating

public issues of interest to the electorate generally or as a party spokesperson on a particular issue; and

- existing or proposed legislation, or existing government policies or actions – particularly legislation still before the House (which had yet to be dissolved), or where the policies or actions discussed were current in the pre-election period.

3.19 Finally, the fifth element of the method was to consider whether an advertisement that was solely for a parliamentary purpose satisfied the administrative requirements for such advertising as outlined in the *Members' Handbook of Services*. The requirements are:

- Any advertising material must display the parliamentary crest or include the MP's contact details.
- Party names must be in keeping with the names approved by the Electoral Commission.
- Where a party logo is displayed in an advertisement that also displays the parliamentary crest, the party logo should not be the dominant feature.

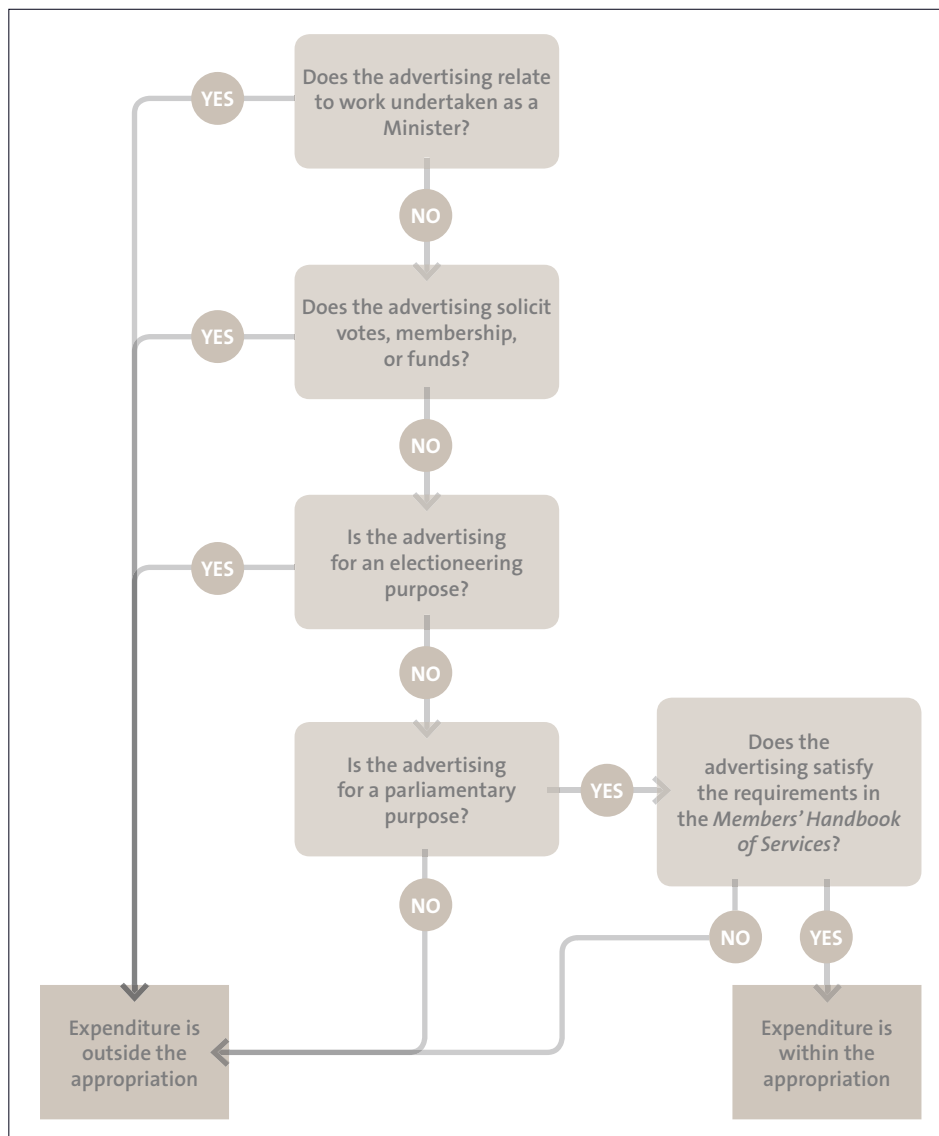
3.20 No single factor dictated whether particular advertising expenditure was within or outside the scope of the appropriations. Rather, I formed a view based on all the above factors, the advertising example itself, and the context in which the advertising occurred. Figure 1 shows the method I used to evaluate the advertising.

Comments from parliamentary parties and the Service

3.21 I received a range of comments from parliamentary parties and the Service about the method I used to establish the appropriateness of expenditure. In summary, the main points were that:

- The method I used was “entirely different” from the approach used by the Service, which focuses not on the overall purpose of an advertisement but on whether the advertisement explicitly solicits votes, funds, or membership.
- I had “changed the rules” after the event.
- I had not clearly warned MPs that I would be watching their advertising expenditure in the lead-up to the Election.
- Legal considerations should not override the “conventions of the day”.
- The method I used appeared to have been chosen for administrative and audit ease.
- Expenditure across a number of years would be affected.

Figure 1
Method used to evaluate the appropriateness of pre-election advertising



Method used “entirely different” from approach of the Service

- 3.22 The Service and some parliamentary parties disagreed with the method I used to establish whether parliamentary parties’ and MPs’ advertising expenditure was appropriately incurred.
- 3.23 The Service took exception to the “bright line” test as described by the Solicitor-General. The Service maintained that it was very difficult, if not impossible, to

draw a line in the sand that separates any sort of promotional activity from what could be construed as business that is strictly parliamentary, except at the extremities.

- 3.24 The Service considers that the *Members' Handbook of Services* excludes only "blatant" electioneering (that is, advertisements that explicitly solicit votes, membership, or funding), and that the approach it uses is more appropriate and workable than the method I used.
- 3.25 The Service and some parliamentary parties also questioned the relevance of the law generated under the Electoral Act to the Speaker's Directions. Their contention was that the term "electioneering" had two different meanings:
- under the Electoral Act case law, electioneering means something that is intended to persuade a voter to favour a candidate or party in an election, and it is not necessary for advertising to explicitly solicit a vote for it to fall in this category; but
 - under the *Members' Handbook of Services*, electioneering means only the explicit soliciting of votes, membership, or funding.
- 3.26 I am not persuaded that the relevant passage of the *Members' Handbook of Services* (see paragraph 3.7) will bear that interpretation of electioneering. Electoral Act case law, on the other hand, recognises that a person's voting decisions can be influenced by information intended to persuade – not just by simple requests from parties for their vote. In my view, the Solicitor-General's advice that the Electoral Act approach is relevant in the appropriation context is both sensible and reasonable.
- 3.27 As noted earlier, advertising for parliamentary purposes clearly excludes advertising for electioneering purposes. The appropriation framework and relevant guidance make this distinction clear. The Party and Member Support appropriations authorise expenditure for parliamentary purposes only. An advertisement paid for on the basis that it is for a parliamentary purpose therefore cannot lawfully have an electioneering purpose as well.
- 3.28 My approach recognises the political context of advertising by MPs and parliamentary parties: parliamentary business is a broad and, in some senses, indeterminate concept that inevitably overlaps with the conduct of party political business. But party political, promotional, or electioneering material designed to support a person's election can be designed in ways other than by making explicit requests for votes. Such material cannot be properly paid for by the Service under the appropriations it administers.

- 3.29 I note too that, although the *Members' Handbook of Services* provides guidance about funding entitlements, it does not have the same authority as the Speaker's Directions and does not set the legal framework for expenditure under the appropriations. The *Members' Handbook of Services* reflects the decisions of the Parliamentary Service Commission and the Speaker related to the funding entitlements available to MPs.
- 3.30 The advice I received from the Solicitor-General about the legal framework that sets the scope of the appropriations was clear:
- The scope is determined in the first instance by the Appropriation Acts of the relevant financial year.
 - In addition, the appropriations can be read together with the Parliamentary Service Act 2000, which provides the framework within which the Service administers the funding under the applicable appropriations, and with any directions given by the Speaker in accordance with section 7(b) of that Act.
 - The Speaker's Directions issued on 1 November 2003 under section 7 of the Parliamentary Service Act provide further assistance, stating that operational resources cannot be used for producing or distributing electioneering material.

“Changing the rules” after the event

- 3.31 Some MPs and parliamentary parties have said that I have acted unfairly by “changing the rules” after the event. I have not changed any rules. They are not my rules. I am simply interpreting and applying the existing law.
- 3.32 In 2005, when I first closely looked at the issue, I thought it was clear that it was not permissible to use public money from the Party and Member Support appropriations for electioneering. When I undertook this inquiry I sought legal advice from the Solicitor-General. He confirmed my view.
- 3.33 I acknowledge that some MPs and parliamentary parties have said that they were unaware of the rules as I interpreted them, and that they relied on the guidance and practices of the Service over a number of years in approving similar expenditure.

Fair warning

- 3.34 Some MPs and parliamentary parties have said that I did not clearly warn them that I might examine their advertising expenditure in the lead-up to the Election, and that they thought nothing needed to change until after the Election.
- 3.35 I certainly considered that the regulatory framework governing government and parliamentary publicity and advertising needed to be reviewed, and that

the right time to do that was after the Election. But regardless of that, MPs and parliamentary parties still needed to comply with the existing framework in the meantime.

- 3.36 I believed my 2005 Report would change the behaviour of MPs and parliamentary parties. My discussions with them during the preparation of that report would have made it clear that past practices in a range of aspects of government and parliamentary publicity and advertising were unsatisfactory.
- 3.37 I deliberately decided to publish my 2005 Report before the Election to provide a clear signal to MPs and parliamentary parties about the need to be careful during the pre-election period. I drew attention to this issue in Part 6 of my 2005 Report, but did not see the need to emphasise the point. I thought it was clear. Although many aspects of government and parliamentary publicity and advertising can fairly be said to be unclear, I thought there was little doubt that it was not permissible to use public money from the Party and Member Support appropriations for electioneering. I expected MPs and parliamentary parties to be especially careful in that area.

“Conventions of the day”

- 3.38 Two parliamentary parties emphasised that their advertising decisions were based on the “conventions of the day”. One said that it had –
- ...made its advertising decisions based on the written rules of the day and accepted convention...*
- 3.39 Another said –
- [The method] does not seem sufficient reason to overturn the current practice and to declare unlawful the communications spending of all parties and members.*
- The issue arises as a technical problem now identified with an established practice, that all involved parties considered was lawful at the time.*
- 3.40 Accepted conventions or practices have no standing when considering whether public money has been spent lawfully. Advertising expenditure incurred under the Party and Member Support appropriations is lawful only if the advertising is for a parliamentary purpose.
- 3.41 If the current conventions and practices allow advertising to take place for electioneering purposes, then those conventions and practices are inappropriate because they have permitted unlawful expenditure to occur.

Method chosen for administrative and audit ease

- 3.42 One parliamentary party took the view that –
[The Solicitor-General] chose this test over other, more flexible options, in part on the basis of its ease of administration as a framework for audit purposes...
- 3.43 The method I used was based on the relevant provisions of the Public Finance Act. In respect of how Party and Member Support resources can be used, “electioneering” and “parliamentary” purposes are mutually exclusive. The appropriation framework and relevant guidance make this distinction clear. The Party and Member Support appropriations authorise expenditure for parliamentary purposes only. An advertisement paid for on the basis that it is for a parliamentary purpose cannot lawfully have an electioneering purpose as well.

Expenditure across a number of years would be affected

- 3.44 One parliamentary party said the method I applied –
...casts into doubt the validity of the spending of many millions of dollars of appropriations over many years.
- 3.45 It is fair to say that I had concerns about a range of government and parliamentary advertising issues before 2005. The issues I identified appeared to indicate systemic problems with the administration of such expenditure. I decided, using my discretionary powers, that I would report my concerns about the systems, policies, and procedures for managing such expenditure to Parliament rather than inquire into the previous expenditure. My 2005 Report describes those concerns.
- 3.46 As noted in paragraph 1.16, I publicly stated my expectation that any publicly funded advertising by political parties that took place between the release of my 2005 Report and the Election had to be consistent with the existing rules. My 2005 Report also made it clear that the potential for indirect political benefit from advertising in the pre-election period required risk management by Ministers and chief executives (such as the Speaker and the General Manager of the Service). My current inquiry has therefore focused on the period between the presentation of my 2005 Report and the Election. At the time of my 2005 Report, I made the decision to focus on future expenditure rather than inquire into what had happened in the past. I have not changed that view.

Part 4

Extent of compliance with the appropriations

- 4.1 In this Part, I present:
- my findings about the Service’s compliance with the Party and Member Support appropriations; and
 - my observations about the various types of advertising expenditure that I reviewed.

Compliance with the appropriations

- 4.2 Figures 2 and 3 show:
- the advertising expenditure incurred under each Party and Member Support appropriation during the period from 16 June to 16 September 2005; and
 - the expenditure I found that was incurred for purposes outside the scope of the appropriations.
- 4.3 The amounts for 2004-05 include Goods and Services Tax (GST). The amounts for 2005-06 exclude GST because, under the Public Finance Act (as amended in 2004), appropriations are now compiled excluding GST.

Figure 2
Advertising expenditure incurred under each Party and Member Support appropriation, 16 June to 30 June 2005 (including Goods and Services Tax)

2004-05 appropriations	Total expenditure (\$) incl. GST	Expenditure outside the scope of the appropriation (\$) incl. GST
Party and Member Support – ACT	92,420	84
Party and Member Support – Green	61,100	30,915
Party and Member Support – Labour	531,710	315,474
Party and Member Support – Māori	2,531	0
Party and Member Support – National	54,750	6,449
Party and Member Support – New Zealand First	112,438	90,540
Party and Member Support – Progressive Coalition	20,200	0
Party and Member Support – United	27,570	0
Total	902,719	443,462

Figure 3
Advertising expenditure incurred under each Party and Member Support appropriation, 1 July to 16 September 2005 (excluding Goods and Services Tax)

2005-06 appropriations	Total expenditure (\$ excl. GST)	Expenditure outside the scope of the appropriation (\$ excl. GST)
Party and Member Support – ACT	90,336	17,805
Party and Member Support – Green	57,060	50,024
Party and Member Support – Labour	635,591	452,489
Party and Member Support – Māori	427	48
Party and Member Support – National	81,520	4,856
Party and Member Support – New Zealand First	110,585	59,906
Party and Member Support – Progressive Coalition	4,523	0
Party and Member Support – United	109,342	63,882
Total	1,089,384	649,010

- 4.4 The GST component of the unlawful expenditure incurred in 2005-06 is not included in Figure 3 because it was authorised not under the Party and Member Support appropriations but under permanent legislative authority under the Public Finance Act. The total GST payable on the unlawful expenditure in 2005-06 was \$81,126. Because the advertising expenditure to which this amount relates was unlawful, so was the payment of GST.
- 4.5 When the GST on the 2005-06 expenditure is added, the total expenditure on advertising that I found to be outside the scope of the appropriation was \$730,136.
- 4.6 In the course of my inquiry, two parliamentary parties repaid the Service the amounts for which their parties were in breach of the appropriations. In addition, a former MP also repaid the costs of advertising that I considered to have been inappropriately incurred. I include these amounts in my findings because the expenditure, when incurred, was in breach of the appropriations, regardless of any remedial action taken later.

General observations

- 4.7 The legal advice I received was clear. If an electioneering purpose could be ascertained from looking at the advertisement as a whole, having regard to its timing, the amount printed, the extent of its distribution, and the other factors discussed in Part 3, then the advertisement as a whole was outside the scope of the appropriation – even if a parliamentary purpose could also be ascertained.

- 4.8 I was particularly aware of the Solicitor-General's statement that each case is "highly context-specific". I had to carefully consider whether any advertising or publicity within the three-month pre-election period had an electioneering purpose – even if, at first glance, the material looked like a routine parliamentary advertisement and would be accepted as such at any other time. The closer the advertising was to the Election, the closer it resembled the party's own electioneering material (for example, by having prominent party logos and election slogans), and the more widely it was distributed, the more likely it was that the true purpose of the advertising was to influence voters to vote for the MP or party.
- 4.9 I took a common-sense approach based on what I considered a reasonable member of the public would think from looking at the advertisement as a whole, in its full context.
- 4.10 I am concerned that I found a substantial amount of material that was contrary to the Speaker's Directions. A number of advertisements and newsletters expressly solicited votes. However, even where no express soliciting of votes occurred, a large number of advertisements contained material that could only be described as election platforms and promises.
- 4.11 That impression was often heightened by context – for example, advertisements for a series of public meetings throughout the country during the period of the election campaign that could only be described as part of an election campaign strategy, or newsletters distributed by MPs containing common policy statements of an aspirational, forward-looking nature. In my view, any reasonable person would conclude that such material was part of the party's election campaign.
- 4.12 The House continued to sit until 11 August 2005, and a number of the advertisements that we reviewed related to matters that were, at the time of their distribution, before the House. I allowed for this, but also had to consider the reality that, in the pre-election period, even matters that are legitimate parliamentary business may also have been important to an MP's or party's re-election prospects.
- 4.13 I also recognised that MPs remained MPs once the House had been dissolved, and that it was important that their availability and their services to the public continued to be advertised. However, I found it difficult to accept that the extensive advertising by some MPs and parties during the six weeks before the Election had a legitimate parliamentary purpose. It is well understood that politicians are focused keenly on the Election during this time. Advertising in the final weeks before the Election almost certainly had an element of electioneering unless it was of the most mundane type.

- 4.14 I was particularly disappointed to find that the Service paid for significant amounts of newspaper advertising by some parties in the last week before the Election. That advertising was incontrovertibly of an electioneering nature, and I could not discern a legitimate parliamentary purpose for it.
- 4.15 I make the following observations about the various categories of advertising that I reviewed:
- constituency clinic advertisements;
 - public meeting advertisements;
 - promotional items;
 - policy documents;
 - “retrospective” messages to constituents; and
 - newsletters.

Constituency clinic advertisements

- 4.16 Routine constituency advertising by an MP had no electioneering purpose if it advertised the MP’s contact details and electorate clinics. Such advertisements may or may not have included:
- a photo;
 - a slogan (such as “working hard for you”) that had no direct bearing on the Election; or
 - a party logo as well as the parliamentary crest.
- 4.17 In some cases, I was able to discern a change in the pattern of the “routine” advertisements as the Election approached – for example, an electioneering slogan may have been included to introduce the advertisement. In such circumstances, I considered the purpose of the advertisement to have become election-focused as well as of a legitimate parliamentary purpose. This took it outside the scope of the appropriation.

Public meeting advertisements

- 4.18 Advertisements for public meetings in the pre-election period formed one of the largest categories of expenditure identified for individual MPs.
- 4.19 The most obvious indicator of the purpose of such advertising would be what was discussed at the meetings. Clearly, gathering such evidence was impractical. Accordingly, I had to discern the purpose from the face of the advertisement, its timing, and other factors, such as whether it formed part of a programme of meetings.

- 4.20 In one case, a parliamentary party undertook more than 70 public meetings in the 93 days to which this inquiry relates. The frequency of the meetings increased as the Election date drew nearer. While 4 meetings occurred in the last two weeks of June 2005, 19 occurred in July, 35 in August, and 15 in the first two weeks of September 2005.
- 4.21 Several advertisements for public meetings involved party leaders or candidates who were not sitting MPs. The motives for organising such meetings, close to the Election and involving the party leader or other candidates (whether sitting or otherwise), had to be presumed to have included a wish to influence voters to attend the meeting and be persuaded to vote for the particular party or candidate.
- 4.22 I understand that meetings held to inform the public of an MP's views on matters of the day can be held at any time, and in general are a part of normal parliamentary business. However, context must be taken into account. A public meeting during the pre-election period is a time when members of the public are encouraged, by a particular party or its MPs, to gather and hear that party's or MP's views on matters of the day. The election-related benefits, both for the party or MP and for the public who attend, are tangible and political. The benefit in parliamentary terms is demonstrably less so, especially (but not exclusively) after the House has been dissolved.
- 4.23 For these advertisements, the factors I considered included:
- whether the subjects proposed to be discussed at the meetings were under active consideration by the House at the time;
 - whether the meetings appeared to be part of an overall campaign of public meetings, from which could be deduced an election strategy;
 - whether party election platforms were identifiable as subjects for discussion at the meetings;
 - the meetings' proximity to the Election; and
 - any printed speeches that were delivered at the meetings, and the nature of the topics raised.

Promotional items

- 4.24 Several promotional items were charged to the Party and Member Support appropriations, including:
- flags;
 - a protest banner;
 - pens;

- signage;
- photographs; and
- carry bags.

- 4.25 In one case, a parliamentary party commissioned 10,000 pens at a cost of \$30,870. The pens featured the parliamentary crest, but also featured an election slogan and a party website address. In another case, 2000 plastic carry bags were produced at a cost of \$990. The bags featured the parliamentary crest and a party logo.
- 4.26 It is unclear what parliamentary purpose some of these items could have, regardless of any electioneering purpose. Promotion is an inherent aspect of political activity, which in turn is inherent to much parliamentary business. However, in my view, some of the examples in this category did not have a clear parliamentary purpose, and so were not within the scope of the appropriations.

Policy documents

- 4.27 Several parliamentary parties used Party and Member Support funding to meet the cost of printing brochures and mail-merge letters containing their election policies and commitments. Only a few referred overtly to the Election. There was a mix of existing policies and policies that could only be described as election platforms (using phrases such as “We will ...”). The common feature was that they had a focus on what the parliamentary party intended to do if elected. While some of these documents had what might be considered a parliamentary purpose, it was also possible to discern, to varying degrees, an intention to influence the voting decisions of the public in the days leading up to the Election.
- 4.28 Two parliamentary parties produced more than 1 million such documents each. In one case, the documents took the form of a pledge card. Others took the form of pamphlets.
- 4.29 In applying the method based on the Solicitor-General’s advice, I first considered whether there was an electioneering purpose. The presence or absence of overt references to the Election was not the determining factor in this regard. Instead, I considered whether the content of the documents, their format, the amount printed, and the timing of their publication and distribution were such that one could discern an intention to persuade the public to vote for the parliamentary party or MP concerned. If that was so, then an unlawful purpose had been established, regardless of whether the publications also served a parliamentary purpose.

“Retrospective” messages to constituents

- 4.30 Several MPs took an opportunity to publish “report card” messages to their constituents just before the Election, reporting on their achievements as an MP during the previous 3-year term. There may well have been a legitimate parliamentary purpose to such messages. However, the question arose as to whether there may also have been an electioneering purpose – even though some of the messages contained no reference to the Election, the MP’s (or party’s) election policies, or whether the MP was standing again.
- 4.31 These “retrospectives” took different forms. In some cases, they involved newspaper advertisements published shortly before the Election.
- 4.32 As in the case of policy documents, the presence or absence of an overt reference to the Election did not, on its own, determine whether there was an electioneering purpose. Instead, I considered whether the content of the retrospective messages, their format, the amount printed, and the timing of their publication were such that one could discern an intention to persuade the public to vote for the MP.
- 4.33 In general, if an MP could be seen to have been campaigning on their record as an MP close to the Election, any claim that a retrospective message was purely for a parliamentary purpose had to be approached with scepticism. References to the Election and election policies reinforced that scepticism.

Newsletters

- 4.34 A large number of newsletters were distributed by MPs or parties in the pre-election period. They appeared to have different purposes:
- Some addressed constituents in general (that is, the public), with an overt focus of reporting on the MP’s or party’s recent official activities, and stated views on issues (national or local) of the day. There was a legitimate parliamentary purpose to such advertising.
 - Others addressed party supporters and had a focus on campaign organisation. This was not a legitimate parliamentary purpose.
- 4.35 Many of the newsletters had both these purposes.
- 4.36 Several members of one parliamentary party produced similar newsletters and distributed them to the public. The newsletters had an individualised front page, but included a common second page – a standard message that included electioneering material.

- 4.37 In all cases with the newsletters, the question arose as to whether there may also have been an electioneering purpose – even though some of the newsletters contained no reference to the Election, the MP's (or party's) election policies, or whether the MP was standing again.
- 4.38 Once again, the presence or absence of an overt reference to the Election did not, on its own, determine whether there was an electioneering purpose. I considered whether the content of the newsletters, their format, the amount printed, and the timing of their publication were such that one could discern an intention to persuade the public to vote for the MP.
- 4.39 In general, if an MP could be seen to have been campaigning on their record as an MP close to the Election, any claim that a newsletter was purely for a parliamentary purpose had to be approached with scepticism. References in those newsletters to election policies or promises reinforced that scepticism.

Comments from parliamentary parties and the Parliamentary Service

- 4.40 I received three main comments from parliamentary parties and the Service about my findings on the extent of compliance with the Party and Member Support appropriations:
- The findings would basically mean that most other expenditure on services provided to MPs and parliamentary parties would be inappropriate.
 - The findings were not equally applied to list and electorate MPs.
 - The findings meant that no parliamentary party or MP could communicate policy to their communities of interest.

Other expenditure may now be inappropriate

- 4.41 A view held by three parliamentary parties and the Service was that my findings about advertising would essentially render inappropriate expenditure on a range of other services provided to parliamentary parties.
- 4.42 The inquiry I undertook specifically examined advertising expenditure that occurred within a three-month period (16 June to 16 September 2005) when political sensitivities were high nationwide. The focus of the inquiry was whether that expenditure was incurred within the scope of the appropriation set by the relevant Appropriation Act, the Parliamentary Service Act 2000, and the Speaker's Directions issued in November 2003.
- 4.43 Clause 46(3)(d) of the Speaker's Directions specifically prohibits electioneering advertising. It is clear that this prohibition does not apply to other activities

undertaken by MPs. In relation to advertising, it states that operational resources may not be used –

... for producing or distributing promotional or electioneering material by mail or other means of communication for the purpose of supporting the election of any person or the casting of a party vote for any political party.

- 4.44 The legal advice I received only addressed what might constitute electioneering in the context of advertising.
- 4.45 However, in a broad sense, the inquiry does pose questions about the appropriateness of other expenditure incurred by the Service.
- 4.46 One former MP said –
- Everything I did, every speech, every public appearance and the image I tried to portray was designed to achieve public acceptance of myself and to enhance my parties [sic] credibility which hopefully translated into votes at some stage.*
- 4.47 This was also reflected in comments from two parliamentary parties –
- It seems to me that most of what we MPs do now falls outside the new funding interpretation. We are politicians! We are always trying to win support for our policies and ourselves.*
- The [Service's] practice properly accommodated the Parliamentary reality that there is at least some voter-influencing purpose to almost everything said and done publicly by MPs, inside and outside Parliament.*
- 4.48 Although my inquiry has examined only advertising expenditure, I would expect the Service to establish a process for reviewing all other expenditure on support services for MPs. Such a process may include seeking appropriate legal advice on the scope of the appropriations, and advice from my Office, to enable the Service to establish the nature of activities that can be funded within the scope of the appropriations it administers.

Consideration of list and electorate MPs

- 4.49 Two of the responses I received questioned whether I had been fair in my consideration of advertising by list MPs – particularly in relation to public meeting expenditure that I had provisionally found to have been inappropriately incurred.
- 4.50 One parliamentary party considered the provisional findings to be “biased toward electorate MPs and a recognised electorate constituency”. It maintained that, in an MMP Parliament, constituencies are not just geographically based but are sectoral and are found throughout the country. A former list MP considered his constituency to have been rural New Zealand.

- 4.51 These views are appropriate, and reflect the realities of an MMP Parliament. However, the difficulty arises in relation to context.
- 4.52 I considered each advertising example on its merits. If, on balance, I considered an advertisement to have an electioneering purpose, then the associated expenditure was inappropriate. In relation to public meetings undertaken by list MPs, the form of the meeting advertised was not the factor that decided appropriateness. It was whether the advertised meeting, based on the facts I had to consider, appeared to have an electioneering purpose. The example in paragraph 4.20 clearly demonstrates such a situation.
- 4.53 I have previously considered the issue of how the administration of parliamentary advertising addresses the challenge posed by advertising in an MMP environment. As I noted in my 2005 Report, any new rules for parliamentary advertising should specifically address this challenge.

The findings make it impossible to communicate policy

- 4.54 Several parliamentary parties expressed concern that my findings would effectively prohibit them from communicating policy to their communities of interest.
- 4.55 I am fully aware that the communication of policy is expressly permitted in the Speaker's Directions, and that such communication is central to parliamentary democracy.
- 4.56 However, communicating policy to large numbers of the local and national voting populace in close proximity to an election must be considered differently from communications that take place at other times of the electoral cycle. The election-related benefits from communicating such information in a pre-election period are much higher than they are at other times.
- 4.57 This element of time sensitivity, coupled with the form and content of the communications themselves, does mean that a policy publication that may be benign at any other time of the electoral cycle takes on an electioneering purpose when considered in its full context in a pre-election period. The Service cannot lawfully meet the costs of such communications under the Party and Member Support appropriations.

Part 5

Advertising support resources for members of Parliament

5.1 Prudent financial management in the state sector relies on a clear understanding of the legal parameters for expenditure, robust processes, and the exercise of informed decision-making.

5.2 In this Part, I:

- outline how the Service administers the requirements relating to advertising by MPs and parliamentary parties; and
- provide my assessment of the Service's performance in this area.

The Parliamentary Service's approach to administering parliamentary advertising resources

5.3 The Service's approach to administering funding applied to advertising resources is guided by the decisions and instructions of the Parliamentary Service Commission and the Speaker, and the Service's understanding of its financial management responsibilities. The Service's approach is given effect through the systems, policies, and procedures that it applies to this area of expenditure.

The Service's interpretation of its financial management responsibilities

5.4 As the department administering the appropriations and exercising its functions under the Public Finance Act and the Parliamentary Service Act (see paragraph 2.30), the Service and its General Manager are responsible to the Speaker for:

- the effective and efficient financial management of the Service, including the appropriations it administers;
- ensuring that all expenditure against appropriations is within the amount, scope, and period of the appropriations, and is reported in accordance with the Public Finance Act;
- ensuring that sufficient internal controls exist to provide reasonable assurance about the integrity and reliability of the expenditure authorised by MPs and parliamentary parties, and the consequent reporting on it; and
- complying with any lawful financial directions of the Speaker, including any specific rules or directions about how the appropriations are to be administered or what types of expenses can be incurred on the authority of MPs, consistent with the amount, scope, and period of the appropriations.

5.5 However, while the Service generally accepts this description of its responsibilities, the Service considers the following factors must be taken into account:

- The accountability framework within which it administers resources has been designed with the intent of transferring primary accountability for expenditure

under the Party and Member Support appropriations from the Service to the parliamentary parties and MPs themselves. This approach, which dates from the introduction of party-specific appropriations in 1996,¹ significantly affects the administrative approaches the Service adopts.

- The Service, while acknowledging the status of the 2003 Speaker's Directions, also operates in accordance with a range of other decisions that have been set by the Parliamentary Service Commission and previous Speakers, and other accountability documents produced by the Parliamentary Service Commission, the Speaker, and the Service.
- Within this environment, the Service does not consider that it has the autonomy to adopt financial management approaches without specific instructions from the Parliamentary Service Commission or the Speaker.

- 5.6 In my view, that interpretation is not in keeping with the legal framework. The framework provided for the Service by the Public Finance Act and the Parliamentary Service Act is not significantly different from that which applies to any public service department.
- 5.7 In addition, the Speaker has told me that she is not able to adequately fulfil her role as Minister responsible for Vote: Parliamentary Service. It seems that, to preserve the Speaker's impartiality, the Service has not in practice involved the Speaker in matters which a responsible Minister might usually consider. Because of this, the Speaker is unable to carry out the role of responsible Minister envisaged by the legislation.

Day-to-day administration of advertising resources

- 5.8 The approach the Service has adopted to administering advertising resources day to day is based on support rather than control. It considers this approach to be consistent with the intent of the appropriations that authorise the provision of services to parliamentary parties, and the directions of the Speaker.
- 5.9 In general, MPs or (in the case of larger circulation items) staff from a Leader's office may initiate the graphic design of advertising or publicity. The design may be done in-house or through external designers. The full production is controlled by the MP or parliamentary party.
- 5.10 The invoices for advertising production (and design if external designers are used) are sent directly to the MP or parliamentary party by the vendor providing the service. These invoices are then authorised for payment and coded to the appropriate account code by either the MP or their support staff.

¹ This occurred with the introduction of the MMP representation system.

- 5.11 These signed invoices are sent directly to the Finance Branch of the Service for payment. The Service does not require an example of the advertising to be attached to the invoice.
- 5.12 Before 12 September 2005, all invoices for payment were:
- scanned for any indication of non-compliance with the rules (if the invoice description indicated that the advertising might not have complied with the rules, then an example of the advertising was requested from the MP or parliamentary party);
 - entered into the “accounts payable” system for payment; and
 - paid at the next available payment run.
- 5.13 After 12 September 2005, any pre-election advertising had to be certified by MPs or parliamentary parties as complying with section 214B(3) of the Electoral Act 1993 before any invoices were released for payment. These certificates are discussed further in paragraphs 5.43-5.46.
- 5.14 In some circumstances, staff from a Leader’s office might ask the Service for advice about whether a design was consistent with the guidance set out in the *Members’ Handbook of Services*.
- 5.15 The Service told me that, during the pre-election period, only two parties commonly sought such assistance on advertising intended for nationwide distribution. In those situations, oral advice was provided by the Service that covered whether:
- the publicity contained the Parliamentary crest and was “not less dominant” than the party logo;
 - the correct party logo was being used (the one currently registered with the Electoral Commission);
 - suitable contact details were included in the publicity; or
 - the language used was explicitly seeking either votes or financial support for a party or MP.
- 5.16 The Service advised my Office that the usual approach a parliamentary party might take when seeking assistance was to arrange a meeting and bring a printed proof of the proposed advertising. In some circumstances, oral advice to the parliamentary party may have been complemented by a handwritten comment. However, the amount printed or the extent of distribution planned were not discussed.
- 5.17 During the pre-election period, the Service considers it would have held such discussions about two or three times each week. At the end of each discussion, the MP or parliamentary party retrieved all advertising examples. This means that

the Service was not able to provide me with any documentation to reflect the advice it had provided.

- 5.18 The Service has stressed that this advisory process was to help the party or MP to comply with the relevant guidance on advertising, and was not considered to be approval. The Service saw the final decision about whether the publicity should proceed as the MP's or parliamentary party's responsibility.
- 5.19 I received differing views on the advice provided by the Service to parliamentary parties. A number of parliamentary parties maintain that they sought and received advice from the Service on proposed advertising in the pre-election period. The Service, on the other hand, told my inquiry team that it had not previously considered most of the advertising reviewed in my inquiry. I have been unable to reconcile the conflicting views. The parties' general approach to advertising has not been questioned by the Service for a number of years.

Managing compliance with the appropriations

- 5.20 As discussed in Part 2, appropriations set the legal parameters for public spending. To effectively control public expenditure, administering departments must correctly interpret and consistently apply appropriations.
- 5.21 The Service considers that it has administered the appropriations completely in accordance with the Speaker's Directions, and the decisions of the Parliamentary Service Commission. However, in my view, the Service has not correctly interpreted the scope of the Party and Member Support appropriations as they apply to advertising expenditure.
- 5.22 In Part 3, I explained how the Party and Member Support appropriations apply to advertising undertaken by MPs and parliamentary parties. The scope includes advertisements for parliamentary purposes but excludes those for electioneering purposes. This message is clearly set out in the Speaker's Directions and the *Members' Handbook of Services*.
- 5.23 However, the Service's approach of excluding only those advertisements that explicitly solicit votes, membership, or funding is not consistent with the scope of the appropriation and the generally expressed limitation on "electioneering". The Service has not recognised that material can have an electioneering effect in other ways than an explicit request for a person's vote.
- 5.24 I note that, in the responses I received from parliamentary parties, one party advised that –

The Service in deference to Parliament applied a narrow definition.

- 5.25 This practice may have evolved over time, but the Service has no authority to accept practices by MPs and parties that allow expenditure inconsistent with the scope of the appropriations. It must act in accordance with the Speakers' Directions, as required by section 7 of the Parliamentary Service Act.
- 5.26 I also note that, after the presentation of my 2005 Report, parliamentary party Office Managers and Chiefs of Staff were asked by the Parliamentary Service Commission to review and report on the rules that should apply to advertising paid for by the Service. The documentation I have reviewed indicated that this group took as a starting point the Service's incorrect understanding of lawful expenditure. Given this, in my view, although such a review was well intended, it would not have addressed the fundamental issue that electioneering materials cannot be produced and distributed using funds administered by the Service.
- 5.27 As I have noted, I received differing views from parliamentary parties and the Service about the nature and extent of advice the Service provided. Regardless of which view should prevail, the advice from the Service would not have effectively mitigated the risk that the Party and Member Support appropriations may have been breached. This is because the Service's advice would have been based on an erroneous interpretation of the scope of the appropriations.

Quality of systems for processing advertising expenditure

- 5.28 Robust processes are an essential aspect of effective financial management.
- 5.29 The Service considers that the processes it has in place for administering advertising expenditure are wholly consistent with its financial management responsibilities, and completely appropriate to the circumstances in which parliamentary parties' and MPs' advertising is arranged, authorised, and paid for. In this regard, the Service is of the view that the systems it employs can only be questioned if my method for establishing the appropriateness of expenditure under the appropriations is accepted.
- 5.30 In my view, it is clear from the process described in paragraphs 5.8-5.19 that the Service's approach to processing advertising expenditure has not included the steps necessary to ensure that the expenditure was incurred for a parliamentary purpose.
- 5.31 I am concerned that the Service does not satisfy itself, before expenditure is incurred, that advertising proposed by MPs and parliamentary parties is for purposes consistent with the Party and Member Support appropriations. This issue was first brought to the attention of the Service in my 2005 Report, and has not yet been addressed.

- 5.32 In the course of my inquiry, the Service reviewed the advertising material I had identified as being paid for inappropriately. The Service advised me that, had it been aware of the nature of some of the material, it would not have allowed the expenditure to be incurred.
- 5.33 The Service considers that it is acting in a manner consistent with the Estimates. The explanation of the Party and Member Support appropriations in the Estimates for Vote: Parliamentary Service for the year ending 30 June 2006 states that the expenditure is incurred “on the direct authority” of the MPs themselves “under rules promulgated by the Speaker”. The Service told me that it does not consider that it could unilaterally change the interpretations or generally understood practices regarding the administration of the payment of funding entitlements for parliamentary purposes.
- 5.34 I do not agree with this approach. The Estimates can be essential aids to understanding the scope of an appropriation. However, as noted in paragraphs 2.23 and 2.24, they do not have the same status as the appropriations themselves, except to the extent they are expressly incorporated into an Appropriation Act. The reference to “direct authority” therefore cannot diminish the responsibility of the Service and the General Manager to administer the appropriations in terms of the Public Finance Act and the Parliamentary Service Act, as set out in paragraph 2.30.
- 5.35 MPs and parliamentary parties choose what sort of advertising they wish to undertake, and how, when, and where that is to occur. The Service does not control those aspects of advertising. However, all Party and Member Support expenditure must be within the scope of the appropriations. It is the Service’s responsibility to ensure that expenditure is within the authority provided by Parliament. I do not accept that the authorisation of advertising expenditure by an MP or parliamentary party staff member absolves the Service of this responsibility.
- 5.36 This position is no different from any other type of “other expense” appropriation under which an administering department makes payments to other organisations under the appropriations. It is incumbent on the administering department in all circumstances to ensure that the payments are consistent with the appropriations and for a lawful purpose.
- 5.37 I am also concerned about the systems applying to advertising undertaken using resources under the Members’ Communications appropriation. As noted in paragraph 1.30, while advertising was undertaken using resources under the appropriation, there was nothing to link expenditure associated with laser printers and stationery under the appropriation to any examples of advertising.

Without such an audit trail, I was unable to draw any conclusions about the appropriateness of such expenditure.

- 5.38 While the compliance of advertising expenditure with the Members' Communications appropriation could not be examined in this inquiry, the lack of systems to track expenditure in this area is of serious concern and should be addressed by the Service.

Financial management decision-making

- 5.39 My inquiry has found that the interpretation of the appropriations by the Service and the processes it uses with advertising expenditure are based on an incorrect understanding of its financial management responsibilities. In such a context, the ability of management to make appropriate financial management decisions about advertising is seriously challenged.
- 5.40 The following example demonstrates my concerns in this area.
- 5.41 The Speaker's Directions recognise that funding can be used to allow each member to develop, research, critique, and communicate policy, and communicate with "constituents or other communities of interest". However, the Speaker's Directions also clearly state that the funding may not be used –
- ...for producing or distributing promotional or electioneering material by mail or other means of communication for the purpose of supporting the election of any person or the casting of a party vote for any political party.*
- 5.42 Advertising that is "electioneering" may be an election expense. Election expenses are capped under the Electoral Act 1993. Under section 214B(3)(b) of the Electoral Act, every person who directly or indirectly pays or knowingly aids or abets any person in paying for, or on account of, any election expenses any sum in excess of the maximum amount prescribed by this section is –
- ...guilty of an illegal practice unless the person proves that he or she took all reasonable steps to ensure that the election expenses did not exceed the maximum amount prescribed by this section.*
- 5.43 Because of the implications of the Electoral Act, the Service took legal advice and introduced a system requiring MPs and parliamentary party staffers submitting advertising invoices to the Service for payment to certify compliance with section 214B(3) of the Electoral Act. The certificate stated –
- The Electoral Commission, in its publication "Election Expenses and Returns" recognises that Vote: Parliamentary Service might fund legitimate "parliamentary business" facilities and services, which may also constitute an "election expense" for the purposes of the Electoral Act 1993.*

Section 214B(3) of the Electoral Act 1993, makes it an offence to pay for or aid or abet a person in paying for election expenses in excess of the maximum amount.

To ensure that this account does not breach section 214B(3) of the Electoral Act 1993, please certify that:

- *Either the attached invoice does not relate to an election expense; or if it is*
- *That the maximum amount, as set out in s 214(2) of the Electoral Act 1993 will not be exceeded.*

- 5.44 I have two comments to make about this certificate.
- 5.45 First, the advice provided in the certificate is factually incorrect and misleading to MPs. I have confirmed with the Electoral Commission that its published guidance on election expenses and returns does not indicate that Vote: Parliamentary Service might fund legitimate “parliamentary business” facilities and services that may also constitute an “election expense” for the purposes of the Electoral Act. I also note that the reference to section 214(2) is incorrect. The section in the Electoral Act setting the maximum amounts for political parties’ election expenses is section 214B(2).
- 5.46 Secondly, and more importantly, it is difficult to believe that the Service could have been aware that electioneering might be taking place using the resources it administered without becoming concerned that the appropriations might be breached. However, that appears to have been the case.
- 5.47 I note that my findings in this report do not necessarily indicate that any provisions of the Electoral Act have been breached by any person. Those questions are separate, they are not my responsibility, and my inquiry did not consider them.

Part 6

Conclusions and actions to be taken

- 6.1 This Part of the report:
- presents my conclusions;
 - states certain actions that I require, under the Controller function, to be undertaken because of the breaches of appropriation that I have identified;
 - recommends certain measures be taken by the Service to ensure that the risk of further breaches of appropriation is addressed; and
 - considers a long-term solution.

Conclusions

- 6.2 My inquiry has established that significant breaches of the Party and Member Support appropriations administered by the Service occurred in the period from 16 June to 16 September 2005. The total value of the breaches I identified for the 2004-05 financial year was \$443,462 (including GST) and the total value of the breaches I identified for the 2005-06 financial year was \$730,136 (including GST). Overall, \$1,173,598 of unlawful expenditure was incurred. The expenditure that I found was outside the scope of the appropriations related to a range of advertising, and was incurred on behalf of all but one of the parliamentary parties.
- 6.3 It is clear that an incorrect interpretation by the Service of the scope of these appropriations it administered coupled with processes for administering advertising expenditure that were designed on the basis of that incorrect understanding were significant factors in allowing such breaches to occur. These factors helped to create an environment in which the Service could not exercise the judgement required to ensure that expenditure was appropriately incurred. Indeed, the Service has acknowledged that some expenditure was incurred that would not have met even its own interpretation of the appropriations.
- 6.4 However, the failures on the part of the Service are not the only cause of the breaches in appropriation. The accountability framework for the administration of the Vote – which should involve separate but complementary roles for both the Service and the responsible Minister – has been confused, and lacks transparency. This is unacceptable.
- 6.5 In addition, I have found the nature and extent of electioneering advertising expenditure put through the Service by MPs and parliamentary parties disturbing. In this regard, party-generated advertising produced by Leaders' offices was of most concern.
- 6.6 I am aware that inadequate guidance is available to MPs and parliamentary parties about what constitutes appropriate advertising, particularly in the pre-

election period. But the guidance clearly prohibits electioneering. I find it hard to accept that, despite my 2005 Report and the message to be careful about advertising expenditure in the pre-election period, behaviour did not change.

6.7 It is in this context that I have issued a direction to the Minister responsible for Vote: Parliamentary Service.

Issue of direction to the Minister responsible for Vote: Parliamentary Service

6.8 I have directed the Speaker, as Minister responsible for Vote: Parliamentary Service, to report the breaches of appropriation identified in this report to the House. I issued the direction under section 65Z(1) of the Public Finance Act on 6 October 2006. The direction was effected by letter.

6.9 The direction applied to expenditure incurred in the 2005-06 financial year only, because under the Public Finance Act (as amended in 2004) the power for the Controller and Auditor-General to direct a responsible Minister to report appropriation breaches to the House took effect only from 1 July 2005.

6.10 The direction:

- stated, consistent with section 65Z(1), that I had identified expenditure that was unlawful, in that it had been incurred for purposes outside the scope of the Party and Member Support appropriations; and
- drew the responsible Minister's attention to the procedural requirements under section 65Z(2) to (4) of the Public Finance Act, which state the required contents of the responsible Minister's report to the House and the number of working days the Minister has to make that report.

6.11 I provided the Speaker with a copy of this report to give details of the expenditure.

6.12 Under section 65Z(2), the Minister's report must set out the following details:

- the nature and extent of any alleged breach of the appropriation or other authority that the Controller and Auditor-General has reason to believe has occurred;
- the events that gave rise to the alleged breach; and
- the remedial action taken or proposed to be taken to correct the breach and prevent its recurrence.

6.13 Under section 65Z(3), if the Minister is of the opinion that there has not been a breach, instead of outlining remedial action, the report must state:

- that the Minister is of that opinion; and
- the Minister's reasons for that opinion.

- 6.14 Under section 65Z(4), where the Controller and Auditor-General's direction is made after the end of the financial year in which the expenditure was incurred, the Minister responsible for Vote: Parliamentary Service must comply with the direction either:
- within 20 working days after receiving it; or
 - by ensuring that the required information is included in the report of expenses or capital expenditure incurred without appropriation that accompanies an Appropriation Bill seeking its validation.
- 6.15 Under section 65ZA of the Public Finance Act, if the Controller and Auditor-General has reason to believe that any money to be paid out of a Crown or departmental bank account may be applied for a purpose that is not lawful or consistent with an appropriation, the Controller and Auditor-General may direct the department concerned to stop payments out of that Crown or departmental bank account.
- 6.16 If measures are immediately introduced to address deficiencies in the Service's practice (as discussed below), I do not think it will be necessary to issue such a direction to the Service.
- 6.17 It is not my role to comment on what further action, if any, should be taken about the expenditure that was outside the scope of the appropriations.

Recommendations to the Parliamentary Service

- 6.18 In my view, greater compliance with the Party and Member Support appropriations can only be achieved through improvements to accountability structures, and the systems, policies, procedures, and practices applying to advertising expenditure.
- 6.19 It is essential that the responsibilities of the Service in relation to the administration of Party and Member Support appropriations are fully supported, and clearly communicated to the parliamentary parties and MPs. The Service must be enabled to effectively fulfil its responsibilities as a department responsible for the prudent management of public resources. I recommend that the Service and the Minister responsible for Vote: Parliamentary Service address this matter.
- 6.20 I also recommend that the Service, in consultation with the Minister responsible for Vote: Parliamentary Service, take urgent measures to ensure that advertising expenditure incurred under the Party and Member Support appropriations is for a purpose within the scope of those appropriations. The measures should include:
- Revising the guidance given to MPs on advertising, to provide clear instruction about what advertising costs can be incurred under the Party and Member

Support appropriations. Such guidance should address all advertising media, and cover such matters as:

- content or branding that would be inconsistent with the purpose of the appropriations; and
 - timing considerations – particularly in relation to the pre-election period.
- Ensuring proposed advertising is checked (either by Service staff or some independent person) before expenditure is incurred to ensure that the proposed advertising is for a purpose within the scope of the Party and Member Support appropriations.
 - Improving systems and controls in relation to resources covered by the Members' Communications appropriation, so that costs are clearly attributed to the parliamentary parties that use those resources.

- 6.21 Such improvements are well within the capability of the Service and should be implemented as a matter of urgency.
- 6.22 One parliamentary party has suggested that improvements could include promulgating examples to show what advertising is legitimate and what is not. It also suggested that information on spending transgressions should be passed on to other MPs and parliamentary parties, so that others can avoid replicating the same mistakes. I agree with these suggestions.
- 6.23 In my 2005 Report, I highlighted in Appendix 5 the practices used in Australia that, if applied here, could improve the administration of advertising expenditure. I recommend that the Service consider these practices as it seeks to improve its management in this area of expenditure.
- 6.24 As discussed in paragraph 4.48, I also expect the Service to establish a process for reviewing other expenditure on support services provided to MPs and parliamentary parties. Such a process may include seeking appropriate legal advice on the scope of the appropriations, and advice from my Office, to enable the Service to establish the nature of activities that can be funded within the scope of the appropriations it administers.

Long-term solution

- 6.25 The current framework for administering parliamentary advertising needs to be revised and strengthened, to provide a long-term solution that balances the need for a dialogue between elected representatives and the public with the need for prudent management of public money. This report has shown the significant issues that have arisen through the failure of the current framework.

- 6.26 In Part 5 of my 2005 Report, I outlined a possible new framework for parliamentary and government advertising and publicity. My 2005 Report proposed that:
- a new framework be based on a single overarching set of principles;
 - complementary rules and standards apply to the Legislative and Executive branches of government;
 - certain office holders set the rules, while specific agencies implement them; and
 - the appropriations under which such activities are funded be clarified.
- 6.27 I strongly recommend that such an approach be considered, to help ensure that the events reflected in this report are avoided in the future.
- 6.28 I also note that a new review of Parliamentary Appropriations, as required under section 20 of the Parliamentary Service Act, has begun. The review, which must be undertaken at least once in the term of each Parliament, considers:
- administrative and support services provided to the House and to MPs; and
 - funding entitlements for parliamentary purposes.
- 6.29 I invite the review team to consider the issues raised in this report, and how they can be addressed for the future.

Appendix 1

Party and Member Support appropriations

The table below includes the descriptions of the Party and Member Support appropriations, and the amounts allocated to them in 2004-05 and 2005-06. The data is from *The Estimates of Appropriations for the Government of New Zealand for the year ending 30 June 2006*.

Appropriation	2004-05 \$000 incl. GST	2005-06 \$000 excl. GST
Party and Member Support – ACT Funding to support its Leader's office, research operations, Whip's office and members' parliamentary operations.	1,039	1,086
Party and Member Support – Green Funding to support its Co-Leaders' office, research operations, Parliamentary musterer's office and members' parliamentary operations.	1,086	1,086
Party and Member Support – Labour Funding to support its Leader's office, research operations, Whip's office and members' parliamentary operations.	5,326	5,326
Party and Member Support – Māori Funding to support its Leader's office, research operations, and members' parliamentary operations.	181	187
Party and Member Support – National Funding to support its Leader's office, research operations, Whip's office and members' parliamentary operations.	3,611	3,611
Party and Member Support – New Zealand First Funding to support its Leader's office, research operations, Whip's office and members' parliamentary operations.	1,568	1,568
Party and Member Support – Progressive Coalition Funding to support its Leader's office, research operations, and members' parliamentary operations.	245	245
Party and Member Support – United Funding to support its Leader's office, research operations, and members' parliamentary operations.	993	993
Member Support – Independent* Funding for the Independent members' parliamentary operations.	29	0
Members' Communications Funding for members' communications (voice and data) entitlements, and members' use of stationery in Parliament.	3,516	3,516

* This appropriation was for support services for the independent MP Donna Awatere-Huata, before her departure from Parliament in November 2004. The appropriation lapsed after 2004-05.

Appendix 2

Advice of the Solicitor-General

19 April 2006

Mr Robert Buchanan
Assistant Auditor-General, Legal
Office of the Auditor-General
Private Bag 3928
WELLINGTON

Dear Mr Buchanan

Scope of Parliamentary Service Appropriation - Advertising and Publicity by Parliamentary Parties
Our Ref: OAG183/55

Introduction

1. You have asked for my advice on the scope of the appropriation Vote Parliamentary Service, under which the Parliamentary Service reimburses Members of Parliament and parliamentary parties for various costs incurred by them. In particular, you have asked whether the appropriation covers expenditure on advertising or publicity the purpose of which (whether wholly or in part) is to promote the re-election of an MP or the return of a parliamentary party to Parliament. You have also asked a number of specific questions, which I will address at paragraphs 34 to 48 of this advice.

Summary

2. I summarise my advice as follows:
 - 2.1 The appropriations provide for expenses incurred by members of Parliament *in their capacity as members*. The appropriations do not cover activities by members in their capacity as candidates for election;
 - 2.2 The Parliamentary Services Act reinforces this view. The Parliamentary Service administers funding to meet the costs of some advertising and publicity by MPs and parties under the Vote Parliamentary Service appropriation. Under the Parliamentary Services Act, this funding is administered for “parliamentary purposes” and in accordance with any directions given by the Speaker. The Speaker’s Directions issued on 1 November 2003 contain a definition of “parliamentary business”. Under the Speaker’s Directions, “producing or distributing promotional or electioneering material by mail or other means of communication for the purpose of supporting the election of any person or the casting of a party vote for any political party” is specifically excluded from activities that may be funded under the appropriation. These activities are also excluded under other relevant guidelines;

- 2.3 Case law under the Electoral Act 1993 is relevant to the question of what qualifies as electioneering material or communications that support the election of any person or party. Electioneering material is something that is intended to persuade a voter to favour a candidate or party in an election, and it is not necessary for advertising or publicity to expressly solicit a vote for it to fall into this category;
- 2.4 Where a publication from a member contains material that relates to parliamentary business and material that relates to electioneering activities the Auditor-General is entitled to treat that publication as falling outside the appropriations in its entirety.

Background

3. Certain expenses incurred by MPs and parliamentary parties may be legitimately reimbursed from public funds. As David McGee notes in *Parliamentary Practice in New Zealand* (3rd ed, 2005) at p 453, authority to spend public money can only be obtained by Parliament making an appropriation for the particular activity or otherwise authorising the payment. He says:

“An appropriation is a legislative provision which permits amounts of expenses or capital expenditure to be incurred for activities that fall within the scope of that provision.”

4. The legislative framework for the Vote Parliamentary Service appropriation is provided by the Public Finance Act 1989, the Appropriations (Estimates) Act for the applicable year, and the Parliamentary Service Act 2000. I deal briefly with each in turn.

Public Finance Act 1989

5. Section 5 of the Public Finance Act provides that the Crown or an Office of Parliament must not spend public money except as expressly authorised by the Public Finance Act or any other Act. Section 6 of the Act provides that public money may be spent for the purpose of meeting expenses incurred in accordance with an appropriation or other authority by or under an Act. Section 7 provides that separate appropriations must be made in respect of different categories of expenses, and sets out a list of those categories. The appropriations that apply to advertising and publicity by MPs and parliamentary parties fall under s 7(1)(d) and are what is known as “other expense” appropriations. Finally, s 9(1) provides that the authority to incur expenses under an appropriation is limited to the scope of the appropriation and may not be used for any other purpose.
6. The statutory provisions dealing with the Auditor-General’s role as Controller are also important. The Public Audit Act 2001 sets out the Auditor-General’s obligation to act independently (s 9) and his audit responsibilities in terms of public entities such as the Parliamentary Service (e.g. ss 15 and 16). The Public Finance Act also bears upon the Auditor-General’s responsibilities in this context. For example, where the Auditor-General believes that expenses have been incurred for a purpose that is not lawful or not within the scope of the relevant appropriation he or she may direct the responsible Minister to report to the House (s 65Z). Section 65ZA empowers the Auditor-General to stop payments from a Crown or departmental bank account in such circumstances.

Appropriations (Estimates) Act

7. The appropriations themselves are found in the schedules to the relevant year's Appropriations (Estimates) Act. Section 4 of the Appropriations (2005/06 Estimates) Act 2005 states that the purpose of the Act is in part to:

“authorise the Crown and Offices of Parliament to incur expenses and capital expenditure during the financial year ending with 30 June 2006 by appropriating expenses and capital expenditure for that financial year”

Section 6(1)(d) of the Act provides that:

“Expenses may be incurred by the Crown or an Office of Parliament in relation to— ... the categories of other expenses set out in column 3 of Schedule 1.”

8. The relevant categories of expenses (ie those that would encompass advertising and publicity) set out in Schedule 1 under Vote Parliamentary Service are:

8.1 Members' communications; and

8.2 Party and member support in respect of each of the parliamentary parties.

9. Extended descriptions of the appropriations are found in the Budget documents. The relevant descriptions as set out in *Budget 2005: Estimates of Appropriations for the Government of New Zealand for the year ending 30 June 2006* are:

9.1 in relation to members' communications – “funding for members' communications (voice and data) entitlements, and members' use of stationery in Parliament”; and

9.2 in relation to party and member support – “funding for the [named] parliamentary party to support its Leader's office, research operations, Whip's office and members' parliamentary operations.”

10. Although the budget documents do not have legislative authority, they are relevant to an understanding of the scope of the relevant year's Appropriations (Estimates) Act.

Parliamentary Service Act 2000

11. Under the Parliamentary Service Act, the Parliamentary Service is principally responsible for providing administrative and support services to the House and its members, and for administering the payment of funding entitlements (under the appropriations discussed above) provided for parliamentary purposes. The Speaker of the House is the responsible Minister for Vote Parliamentary Service.

12. The emphasis on parliamentary purposes in the Act is clear. Section 4 of the Parliamentary Service Act provides:

“The purposes of this Act are as follows:

(a) to establish mechanisms for providing services and **funding entitlements for parliamentary purposes:**

...

- (d) to provide regular, independent reviews of the amounts of money appropriated for services and **funding entitlements for parliamentary purposes**” (emphasis added)

This latter purpose is addressed specifically in ss 20-22, where a review mechanism is established.

13. Section 7 sets out the duties of the Parliamentary Service and provides:

“The principal duties of the Parliamentary Service are—

- (a) to provide administrative and support services to the House of Representatives and to members of Parliament; and
- (b) to administer, in accordance with directions given by the Speaker, the payment of **funding entitlements for parliamentary purposes**.” (emphasis added)

14. Under s 8, the Speaker must give directions as to the nature of administrative support services to be provided each year. However, it is also clear from s 7(b) and s 8(3) that the Speaker may also give directions regarding the payment of funding entitlements for parliamentary purposes. Section 14(1)(b) also provides that one of the functions of the Parliamentary Service Commission is to make recommendations to the Speaker regarding the adoption of criteria governing funding entitlements for parliamentary purposes.

Summary

15. MPs and parliamentary parties may be reimbursed from public funds for expenses incurred in connection with advertising and publicity. However, under the Public Finance Act reimbursement from public funds can be made only where the expense has been incurred in accordance with a specific appropriation or authorisation. The applicable appropriations are found in the Schedule to the Appropriations (Estimates) Act and are for “members’ communications” and “party and member support”. Pursuant to the Parliamentary Service Act, the Parliamentary Service administers the funding under the Vote Parliamentary Service appropriation for parliamentary purposes and in accordance with any directions given by the Speaker. The *Members Handbook of Services* notes that in the event that Vote funded advertising material is determined as being in breach of the rules, the Speaker can require a member to reimburse the Vote for the costs incurred.

Scope of the appropriations

16. The scope of the appropriations is determined in the first instance by the Appropriations (Estimates) Act. As noted, Schedule 1 to the Appropriations (Estimates) Act refers to “Members’ communications” and “Party and member support”. The Act provides for expenses incurred by members of Parliament *in their capacity as members*. Expenditure incurred by an individual as a member of Parliament is different from expenditure incurred by that individual in his or her capacity as a candidate seeking election. Accordingly, the appropriations exclude expenses for activities which fall outside a person’s duties as a member, such as election activities.
17. In addition, the appropriations can be read together with the Parliamentary Service Act, which provides the framework within which the Parliamentary Service administers the funding under the applicable appropriations, and with any directions given by the Speaker in accordance with s 7(b) of that Act.

18. The Parliamentary Service Act is clear that the Parliamentary Service provides services and funding for “parliamentary purposes”. This means that the appropriations for members’ communications and party and member support are to be applied for parliamentary purposes. Although the Act does not define “parliamentary purposes” it seems clear from the statutory content that the term does not include electioneering activities. For example, at least once in the term of each Parliament the Speaker must establish a review committee to consider the appropriations to the Parliamentary Service (s 20). The committee must have regard to certain specified matters (s 21). The specified matters clearly relate to parliamentary functions, not electioneering activities. This casts light on the true purpose and scope of the appropriations.
19. The Speaker’s Directions issued on 1 November 2003 provide further assistance. These Directions were based on recommendations in a report of the Parliamentary Service Commission (dated 28 August 2003) made in accordance with s 14(1) of the Parliamentary Service Act. As noted above, these directions are made by the Speaker as responsible Minister pursuant to the Parliamentary Service Act, and consequently have the status of tertiary or subordinate legislation. Clause 4 of the 2003 Speaker’s Directions notes that the directions are made pursuant to both ss 7(a) and 7(b), which means that they provide guidance in relation to both services and funding entitlements.
20. The Speaker’s Directions do not include a definition of “parliamentary purposes”, but do include a definition of “parliamentary business”. This definition refers to “any task or function that a member could reasonably be expected to carry out in his or her capacity as a member of Parliament and that complements the business of the House....” Clearly this does not cover activities as a candidate for election to Parliament. The definition specifically includes a number of activities, some of which relate to party matters (e.g. attending party meetings), but none relates to electioneering activities.
21. Clause 46 of the Speaker’s Directions further elaborates the definition of parliamentary business by providing that a member is entitled to use “operational resources” for the purpose of undertaking parliamentary business. “Operational resources” are (in effect) defined by indicating what they do and do not include. “Operational resources” may be used for developing, researching, critiquing and communicating policy (cl 46(2)(b)) and for communicating with constituents and other communities of interest (cl 46(2)(c)) but may not be used for producing or distributing electioneering material (cl 46(3)(d)). What these provisions concerning “operational resources” illustrate is that although much parliamentary business is “political” in nature, electioneering activity falls into a different, and for funding purposes distinct, category.
22. This position is further reinforced by principles adopted by the Parliamentary Service Commission on 16 December 2003, in relation to advertising funded from Vote Parliamentary Service. Those guidelines provide:
- “Appropriateness** – members and parliamentary political parties must only incur expenditure on “parliamentary business” unless explicit authorisation to the contrary exists.”
- “Parliamentary business” must have the same meaning here as under the Speaker’s Directions.
23. There are also other, non-legislative, sources of guidance as to the extent of activities that may be funded by the Parliamentary Service. The Members’ Handbook of Services does not have the same authority as the Speaker’s Directions, but is intended to provide

guidelines for funding entitlements. The Select Committee Report on the Parliamentary Service Bill noted that:

“funding entitlements [under the appropriations] are subject to policies and formula decided by the Commission and incorporated into the “Handbook of Members Services”. This will not change under the bill.”

24. Not surprisingly the Handbook expresses the limits of activities that may be funded in much the same terms as the Speaker’s Directions. Section 1.3 of the Members’ Handbook provides guidelines as to what advertising may be funded from the members’ support allocation and, as with the Speaker’s Directions, uses the phrase “parliamentary business” to limit permissible activities (see ss 1.3.1 and 1.3.3, where party political, promotional, or electioneering material are excluded, in much the same terms as in the Speaker’s Directions).
25. In my view, then, it is clear that the Vote Parliamentary Service appropriation is to be used for parliamentary purposes only, and not for electioneering advertising and publicity. Accordingly, there is an issue as to what kinds of advertising or publicity are defined as being “electioneering”. A further difficulty (addressed later) is how to deal with material that may have both a parliamentary and an electioneering purpose.
26. The Speaker’s Directions (and the Members’ Handbook) both use the formulation “for the purpose of supporting the election of any person” in the relevant exclusionary provisions. This is similar to the definitions used in the Electoral Act 1993 for the purposes of calculating members’ and parties’ electoral expenses, so that some assistance may be gained from considering the Electoral Act provisions.
27. Sections 213 and 214B of the Electoral Act impose limits on what candidates and parties may spend by way of election advertising. There are two features of the definition of “election activity” that are significant in the present context:
 - 27.1 As it relates to candidates, the definition draws a distinction between activities which relate to the election of a person as a constituency member (which are caught) and activities which are undertaken by a person as a member of Parliament (which are excluded).
 - 27.2 As it relates to parties, the definition covers activities that are directed at encouraging or persuading voters to vote for a particular party, or not to vote for any other party (the latter also falls within the definition as it relates to candidates).
28. In *Re Wairarapa Election Petition* [1988] 2 NZLR 74, the High Court said (in relation to the predecessor section to the current Electoral Act provisions) that election expenses were “confined to that part of the campaign which by words or sounds is intended to persuade the voter generally or in particular to favour the candidate” (at p 116).
29. The High Court has recently confirmed the application of this decision to the meaning of “election activity” under s 213. In *Peters v Clarkson* (HC, Tauranga, 15 December 2005, Randerson, Goddard and Panckhurst JJ, CIV-2005-470-719) the Court said:

“the essence of these requirements [under s 213] remains, we think, aptly captured in the passage in the *Wairarapa* case where the Court spoke of “words or sounds (perhaps images should be added) intended to persuade the voter ...” (at para [51]).

30. The Court also noted that to qualify as an election activity, the activity must occur in the three months before polling day and must have as its purpose the promotion of a person in his or her capacity as an electorate candidate. Promotion of that person as a sitting member of Parliament, as the holder of other office or in any other capacity does not qualify.
31. Under the Electoral Act, therefore, the test is whether a communication is intended to persuade a voter to vote in a particular way. In my view this is equally applicable to the wording used in the Speaker's Directions, which refers to a communication that "supports" the election of a person or a party. In fact, "supports" is arguably even wider than "persuades".
32. A finding that a communication as a whole is an "election activity" for the purposes of the Electoral Act would, in my view, preclude a finding that the communication was for "parliamentary purposes" in terms of the appropriations. However, it would not necessarily follow that a communication that fell outside the scope of the appropriation would be an election expense. First, if the communication was outside the three month time period under the Electoral Act, it would not qualify as an election expense. Second, it is possible that a communication is for neither a parliamentary purpose nor an electioneering purpose, for example it may be for the purpose of soliciting subscriptions or for personal purposes.

Conclusion as to Scope

33. The appropriations for members' communications and party and member support are administered by the Parliamentary Service for parliamentary purposes. Parliamentary purposes are elaborated through the Speaker's Directions and reinforced by the Parliamentary Service Commission Guidelines and the Members' Handbook. Advertising for parliamentary purposes clearly excludes advertising for electioneering purposes. Electioneering advertising is something that is intended to persuade a voter to favour a candidate or party in an election.

Specific Questions

Whether a communication must be for a valid "parliamentary" purpose to be within the scope of the appropriations

34. A communication must be for a parliamentary purpose in order to be funded from the Vote Parliamentary Service appropriations. It is clear that under the Parliamentary Service Act the members' communications and party and member support appropriations are administered for "parliamentary purposes". Indications of what qualifies as a parliamentary purpose are found in the Speaker's Directions.

Whether the definition of "parliamentary business" used in the Members' Handbook is applicable

35. The most authoritative formulation of "parliamentary business" is that found in the Speaker's Directions (which are based on the recommendations of the Parliamentary Service Commission). As noted above at paragraph 23, however, it was intended that the Members' Handbook would continue to reflect the policies and guidelines developed by the Parliamentary Service Commission (and adopted by the Speaker's Directions). I note that both the Speaker's Directions and the Members' Handbook exclude party political, promotional or electioneering material from the definition of "parliamentary business".

Whether an express solicitation of a vote for a party or candidate is needed to activate the exclusion, or whether an overall assessment of the purpose of the communication should be considered

36. In my view, an express solicitation of a vote for a party or candidate is not required in order to activate the exclusion. Rather, the question is whether the communication as a whole would be likely to persuade a voter to vote in a particular way. The formulation used in the *Wairarapa* case was whether the communication was “intended to persuade the voter generally or in particular to favour the candidate.” This approach has been recently confirmed in *Peters v Clarkson*. In that case, the Court found that material contained in an article about Mr Clarkson in the Bay of Plenty Times (in the context of a large advertising feature on Mr Clarkson’s business) was an election activity, even though the article did not expressly solicit votes for Mr Clarkson. The Court noted that:

“While accepting that the substantial majority of the advertising material contained in the feature related to Mr Clarkson’s successes as a commercial property developer in the area, it must have been readily apparent to Mr Clarkson that the feature would be extremely helpful to his election campaign and would be likely to persuade at least some voters to support him” (at para [133]).

Whether there is any particular period within which the electioneering exclusion applies (eg within three months of an election)

37. I agree with your view that no particular date is determinative of whether, in terms of the appropriations, material is to be considered as electioneering. Communications that are intended to persuade voters to vote for a particular member or party will communicate that intention regardless of their proximity to an election, and should not be funded from the appropriations. However, the question of proximity to an election is likely to be a relevant factor in relation to particular instances of advertising or publicity. This point was noted by the Court in *Peters v Clarkson*, where it was partly the timing of the advertising feature that led the Court to conclude that it was an election activity, despite the lack of any express solicitation for votes. It seems likely that it will be in cases where there is no express solicitation for votes that proximity to an election or other contextual factors will be most relevant.

Other factors that might be taken into account in determining whether a communication is for a parliamentary purpose

38. In your request for advice, you identified a number of factors which may be relevant in determining whether a communication is for a non-parliamentary purpose. Factors you thought might indicate a parliamentary purpose included references to:
- 38.1 particular services to the public;
 - 38.2 the MP’s role as an MP in making the communication, for example, a constituency MP reporting on his or her activities as an MP; and
 - 38.3 actual or proposed legislation or existing government policies or actions.
39. Factors indicating an electioneering purpose might have included:
- 39.1 references in the communication to the election itself;
 - 39.2 references to an MP’s or party’s policy platform for the election, or what they will do after the election if elected or re-elected;

- 39.3 references to a candidate who is not an existing MP;
 - 39.4 formatting or branding of a communication in a manner similar to the party's own election campaign material;
 - 39.5 the nature and breadth of distribution or the accessibility of the communication to voters at large; and
 - 39.6 the timing of the communication in relation to the party's election policy announcements.
40. I have not commented in this advice on the specific examples of advertising and publicity that are attached to your letter of 5 January 2006. However, in relation to your question about other factors that might be relevant to whether a communication is for a parliamentary purpose, I make two comments:
- 40.1 The factors that you have identified as indicating a parliamentary purpose are in keeping with the definitions in the Speaker's Directions and I agree that they may be useful in assessing whether communications should be funded from the appropriation.
 - 40.2 In relation to the factors you have identified as indicating an electioneering purpose, I agree that the suggestions that you have made go to the issue of whether a communication is intended to persuade voters to vote in a particular way. However, I do not think it is possible to establish an exhaustive set of determinative factors, as the issue will always be highly context-specific.

What is the test for determining whether a communication that is partly for a parliamentary purpose and partly for an electioneering purpose falls within or outside of the relevant appropriation

41. As noted above at paragraph 25, it is possible to have material which contains both a parliamentary and an electioneering purpose. An example is a monthly newsletter from an MP to his or her constituents, which features election material but also purports to inform constituents about matters of parliamentary business (e.g. a policy debate). In such a situation, the issue arises as to whether any payment out of Vote Parliamentary Services to fund that newsletter would be lawful.
42. The issue of mixed-purpose communications is not dealt with by the Speaker's Directions or the Members' Handbook. In my view, there are three possible approaches:
- 42.1 a simple "in or out" test;
 - 42.2 a "dominant purpose" test, where the communication is treated as a whole and is categorised according to its dominant purpose; or
 - 42.3 an apportionment approach, where that portion of the communication that is for a parliamentary purpose may be funded from parliamentary funding.
43. The electoral statutory provisions and case law provide little assistance on how to determine this issue in relation to the appropriations. All three tests have been applied in different situations:

- 43.1 In *Peters v Clarkson*, the Court found that s 214A of the Electoral Act did not allow apportionment of expenses as between a constituency candidate and his or her party, where the advertisement contained more than 10% coverage for the constituency candidate who was also supporting the party. In such a case, the court held that the candidate must bear the full costs of advertising as an election expense. This provides some support for the “in or out” approach.
- 43.2 However, both the Electoral Act and the Court in *Peters v Clarkson* also recognise the validity of the apportionment approach. Section 214 of the Act expressly permits apportionment between candidates. In addition, in *Peters*, the Court found that although the three page feature in the Bay of Plenty Times would be likely to persuade voters to support Mr Clarkson, only a portion of it was held to be an election activity. The Court fixed the percentage at 25% to be attributed to election expenses.
- 43.3 Finally, under previous electoral law, the Court in *Re Wairarapa Election Petition* [1988] 2 NZLR 74 appeared to consider the dominant purpose approach when it assessed whether the costs of dual candidate advertising were election expenses. Under the previous legislation, only expenses relating exclusively to a candidate’s campaign were caught. The Court held that to escape the exclusivity test, the advertisement need not give equal prominence to each candidate, but was required to feature in a substantial way a candidate other than the candidate whose expenses were in question. The Court found in that particular case that the overriding purpose of the advertising was to support Mr Boorman’s campaign and accordingly, its costs should have been declared as an election expense.
44. However, these examples are concerned with whether or not candidates or political parties should bear the costs of advertising as election expenses. They are arguably not relevant when determining whether public expenditure has been incurred for a lawful purpose, in accordance with the relevant appropriation.
45. The appropriation context is, in my view, critical. As noted above, under s 9 of the Public Finance Act 1989, the authority to incur expenses provided by an appropriation is limited to the scope of the appropriation and “may not be used for any other purpose.” The Auditor-General has a range of supervisory powers in relation to expenditure under appropriation (see, for example, ss 65Z and 65ZA of the Public Finance Act).
46. Under these statutory provisions, the relevant question for the Auditor-General is whether the expenses at issue have been incurred for a purpose that is not lawful, or are otherwise beyond or outside Parliamentary appropriation or authority. The issue is not whether there is in addition some element of the expenditure which is for a purpose within the appropriation.
47. In the present context, I consider that the Auditor-General is entitled to take the view that expenses incurred for an electioneering purpose and reimbursed from appropriations are outside the scope of the appropriations, and are accordingly unlawful, even though some part of the expense-incurring activity may fall within the appropriation (i.e. have a legitimate parliamentary purpose). In essence, this requires the Auditor-General to apply the simple “in or out” test. Unlike apportionment, this test provides a “bright line”, it has the advantage of being administratively workable, it limits opportunities for abuse and it provides a clear framework for audit purposes. It recognises that any significant reference

to electioneering is likely to “taint” the remainder of a publication or other communication (i.e. infect it with an electioneering purpose).

48. For the avoidance of doubt, I should note that there may be instances of mixed purpose expenditures in other contexts where justification for the adoption of the “in or out” approach is less compelling.
49. Tania Warburton, Associate Crown Counsel, assisted in the preparation of this advice. If you have any queries, please do not hesitate to contact me on ph 494 5505.

Yours sincerely



Terence Arnold QC
Solicitor-General



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