

Terms of Reference: Independent electoral law review

Introduction and context

- 1 Modern and accessible electoral legislation is critical for supporting maximum voter participation in elections, public confidence in election outcomes, and the integrity and effectiveness of our electoral system and wider constitutional framework.
- 2 The rules relating to elections need to be clear, simple, and up to date so voters have confidence in the outcomes of parliamentary elections, no matter their political preferences. Maintaining public confidence in elections underpins the legitimacy of New Zealand's democratic institutions.
- 3 New Zealand has robust electoral laws and our elections are well-run. However, the key piece of governing legislation, the Electoral Act 1993, is outdated and creates a barrier to modern electoral administration. Recent electoral amendments have generally focused on minor and technical fixes needed to be in force in advance of the next general election. More substantive changes, including those recommended by Justice Committee Inquiries and the Electoral Commission, have not been the focus.
- 4 The stability of electoral law is key to a functioning democracy. Electoral law benefits from infrequent change and should be changed only when well-justified to support our democratic processes and better meet the needs of voters, parties and others. Any changes should be based on broad public and cross-party consultation.

Part One: Objectives and Scope

Objective of the review

- 5 The panel's role is to provide advice to the Government on how to ensure that New Zealand continues to have an electoral system that:
 - 5.1 is fair;
 - 5.2 is clear and consistent;
 - 5.3 is practicable and enduring;
 - 5.4 encourages electoral participation;
 - 5.5 upholds Te Tiriti o Waitangi/ the Treaty of Waitangi;
 - 5.6 is open and accountable, with checks and balances to ensure its integrity;
 - 5.7 produces a representative Parliament; and
 - 5.8 produces an effective Parliament and Government.
- 6 These objectives (based on criteria used by the 1986 Royal Commission on the Electoral System) will ensure electoral law is enduring and upholds and promotes the legitimacy and integrity of New Zealand's democratic electoral system.
- 7 Electoral legislation must also remain consistent with the rights and freedoms reflected in the New Zealand Bill of Rights Act 1990.

Scope of the review

- 8 The panel is established by the Minister of Justice (the Minister) to review parliamentary electoral legislation – primarily the Electoral Act 1993 and the Electoral Regulations 1996, but also Part 6 of the Broadcasting Act 1989 and parts 2 and 3 of the Constitution Act 1986. The review is to consider, report and make recommendations on four main areas to the Minister.

Area 1: The overall design of the legislative framework for the electoral system

- 9 The review should consider the overall design of the legislative framework including:
- 9.1 Whether the legislative framework strikes the right balance between certainty and flexibility in its use of primary legislation, secondary legislation, and other instruments. If not, what is the appropriate balance?
 - 9.2 The protection of fundamental electoral rights through reserved provisions
 - 9.3 What other improvements could support the review’s objectives.
- 10 Recommendations on these matters should balance the need for electoral legislation to:
- 10.1 be accessible, transparent, and easily understood by the public, parties, candidates, third party promoters and others involved in electoral process, while providing clear rules for the Electoral Commission to administer;
 - 10.2 be stable and certain;
 - 10.3 have sufficient flexibility so that unforeseen and emerging issues can be managed; and
 - 10.4 maintain parliamentary and public confidence in the integrity of New Zealand’s democracy.

Area 2: Maintaining a fit-for-purpose electoral regime for voters, parties and candidates

- 11 The review should assess whether changes to the rules or practices governing the administration of parliamentary elections in New Zealand are necessary or desirable to meet the review’s objectives. This requires an assessment of the underlying policy settings and rules, such as:
- 11.1 the role of the Electoral Commission, including its functions, powers, governance, and protection of its independence;
 - 11.2 the composition, representativeness and role of the Representation Commission in setting electoral boundaries, and the relationship of the boundary review process to the census;
 - 11.3 voter eligibility, enrolment and disqualification, and the administration of the electoral rolls;
 - 11.4 political party registration, rules, selection and nomination processes, and processes for filling vacancies;
 - 11.5 compliance and enforcement, including the roles of agencies such as the Electoral Commission, New Zealand Police and Serious Fraud Office, and offences and penalties;
 - 11.6 the process and procedures for voting and vote counting, including advance voting, special voting and overseas voting and the use of digital technology to assist with vote counting processes;
 - 11.7 political financing, including the appropriate balance between private and public funding sources, and election expenditure;

- 11.8 election advertising, including the broadcasting allocation, role of third-party promoters, election day rules, and disclosure requirements;
- 11.9 mechanisms for dispute resolution; and
- 11.10 the security and resilience of the electoral system, including flexibility to use emergency powers to conduct an election, and managing the risks of electoral manipulation and foreign interference.

Area 3: Considering previous recommendations

- 12 The review should consider the recommendations made since 2011 by the Justice Committee Inquiries and the Electoral Commission, alongside the matters identified above. This includes the Electoral Commission's 2012 suggested improvements to the MMP voting system (i.e. changes to the party vote threshold, one seat electorate rule, the ratio of electorate seats to list seats, and overhang rules). The review should not, however, look at changes to the voting system more generally, such as alternatives to the MMP voting system.

Area 4: The term of Parliament

- 13 New Zealand is one of the very few representative democracies with a three-year parliamentary term. Some suggest a three-year term of Parliament can be a barrier to governments developing, consulting on, and implementing substantive policy proposals. Others suggest a three-year term to be appropriate as a means of focussing the government on its policy agenda and providing democratic accountability on a more regular basis.
- 14 The review should also therefore consider the length of the parliamentary term, including:
 - 14.1 whether a longer parliamentary term would improve the effectiveness of government, Parliament and MPs;
 - 14.2 if the term of Parliament was longer, whether voters would still have an appropriate level of influence over government and MPs; and
 - 14.3 other related changes (such as the dissolution and expiry of Parliament).

Out of scope

- 15 The review is not a 'first principles' review of electoral law. It does not cover broader constitutional matters.
- 16 Matters specifically out of scope are: online voting, alternatives to the MMP voting system, the retention of Māori electorate seats, re-establishing an Upper House, the role and functions of the Head of State, or the current size of Parliament (except as it relates to the Electoral Commission's 2012 Review recommendation relating to the ratio of electorate seats to list seats).
- 17 The review does not cover local electoral law and associated local government matters. However, the impact of any legislative change arising from the review that affects local electoral law would need to be considered.
- 18 The panel is encouraged to seek direction from the Minister if matters are raised with it that fall outside these terms of reference that it wishes to consider in detail.

Part Two: Approach

Membership

- 19 The panel will consist of four to six members, including the chair.
- 20 Panel members will be appointed by the Minister, following consideration by Cabinet. The Minister may remove a panel member by issuing a written notice stating the date from which the removal of the member is effective. The Minister may, at their discretion, consult with the chair before removing a member.
- 21 Any panel member may tender their resignation at any time by way of a letter addressed to the Minister.

Deliverables and timeframes

- 22 The panel is required to deliver a final written report containing its recommendations to the Minister no later than 30 November 2023, for subsequent public release.
- 23 The panel should develop an engagement strategy to support two phases of engagement with Māori, iwi, hapū, political parties, the public, and other interested parties:
- 23.1 Phase one would involve informing people about the purpose of the review and engaging with them to identify problems, opportunities, and possible solutions through engagement documents; and
- 23.2 Phase two would involve giving people the opportunity to see how their input has been used and to provide feedback on the draft recommendations.
- 24 In making recommendations, the panel must have regard to the Government Expectations for Good Regulatory Practice.¹ The panel's recommendations should ensure:
- 24.1 the underlying problem or opportunity is properly identified, and is supported by available evidence;
- 24.2 all practical options to address the problem or opportunity have been considered;
- 24.3 all material impacts and risks of proposed actions have been identified and assessed in a consistent way, including possible unintended consequences; and
- 24.4 it is clear why a particular option has been recommended over others.
- 25 The chair of the panel will agree an approach with the Minister on how it will carry out its work programme. An indicative approach to the timing of the panel's work is set out in table one.

¹<https://www.treasury.govt.nz/information-and-services/regulation/regulatory-stewardship/good-regulatory-practice>

Table one: Indicative approach and timeframes for the review

Approximate timeframe	Milestone
By end of June 2022	Panel reports to the Minister on its intended work programme and engagement strategy
June 2022 - November 2022	Panel releases a summary of the issues, potential range of options, and engages broadly
December 2022 - May 2023	Panel releases a report with draft recommendations and engages broadly
By end of November 2023	Panel delivers its final report to the Minister, for subsequent public release

Accountability

- 26 The panel is accountable to the Minister for the quality and timeliness of its work programme and its final report. The panel chair will report to the Minister with progress updates on a quarterly basis.
- 27 Panel members must conduct this work as individuals, separate from any concurrent employment or business activities.
- 28 Panel members will be remunerated for their time in line with the Cabinet Fees Framework set out in Cabinet Office Circular CO(19)1 and reimbursed for actual and reasonable expenses (such as travel and accommodation).
- 29 The panel will operate according to principles that include (but are not limited to):
- 29.1 working with iwi and Māori in good faith and in accordance with the Treaty of Waitangi (Cabinet Office Circular CO (19) 5, Te Tiriti o Waitangi/ the Treaty of Waitangi Guidance);
 - 29.2 conducting engagement with political parties and the public (particularly groups with lower participation rates);
 - 29.3 ensuring timely production of documents, ensuring that information received is recorded appropriately and ensuring efficiency, transparency, and accountability in its use of public funds; and
 - 29.4 acting with good faith and integrity, and conducting the review in an independent, impartial, and fair way.

Meeting arrangements

- 30 If the chair is unavailable to attend a meeting, they must nominate the deputy chair (or another panel member if the deputy chair is also unavailable to attend) to act in their place. Members of the panel may not delegate attendance at meetings.
- 31 Meetings of the panel may be in-person or virtual. A meeting quorum will be no less than three panel members, including the chair (or their nominee).

Public communications

- 32 The panel is expected to conduct planned engagements with stakeholders. The chair will approve all such engagements. Members of the panel should seek agreement from the chair before communicating any aspects of the panel's work in public fora. This includes, but is not limited to media engagement, academic work, and social media.

Role of the secretariat

- 33 The panel will be supported by a secretariat. The secretariat's primary role is to provide advisory and analytical support to the panel. The panel may request advice and analysis from the secretariat on any matter within the scope of these terms of reference. The secretariat (as commissioned by the chair) can brief panel members on issues and assessing options for reform and will draft the engagement documents and the final report at the panel's direction.
- 34 The secretariat will also provide advice to the panel on project management and planning, and the panel's public engagement strategy.
- 35 The secretariat will be provided by the Ministry of Justice (the Ministry). However, the advice of the secretariat will be independent of the Ministry.
- 36 Secretariat staff will report to the secretariat manager who in turn is directly accountable to the chair of the panel for meeting the panel's needs consistent with these terms of reference.

Supporting advice

- 37 While the secretariat is the panel's primary advisor, the Ministry will support the panel by providing timely advice and information to the panel and secretariat as needed.
- 38 Limited funding will be made available if the panel requires to commission specific research or analysis. Requests will need to be made to the secretariat manager.
- 39 The panel may also request advice and information from the Electoral Commission on matters that fall within the Commission's expertise.

Information requests and confidentiality

- 40 All correspondence, advice or information produced or received by the panel (or between panel members) and its secretariat will be subject to the provisions of the Official Information Act 1982. The Ministry will be responsible for responding to official information requests, in consultation with the chair of the panel, if appropriate.
- 41 The work of the panel may also involve personal information. Members of the panel will ensure that the collection, use, disclosure, and storage of personal information in connection with their work is consistent with the Privacy Act 2020 and the Public Records Act 2005. These obligations continue, as appropriate, beyond panel members' appointment.
- 42 Members of the panel may be presented with a range of private or confidential information, including on aspects of government agencies' business as well as commercially sensitive information. The expectation is that panel members will act professionally, respecting each other's, third parties' and the Government's interests.

Conflicts of interest

- 43 Members of the panel should identify, disclose, manage, and review situations that might compromise their integrity or otherwise lead to actual or perceived conflicts of interest. The secretariat will put in place appropriate procedures, including a register of interests, to ensure that any potential conflicts of interest are identified and managed effectively.

Intellectual Property

- 44 Any report or work product developed by the panel will be the property of the Crown. Government agencies, at their discretion, may use reports or other work products supplied or developed by the panel.

- 45 Nothing will affect the rights of a panel member or their employer in the intellectual property owned by that member or their employer prior to entering this engagement or developed by the member other than in the performance of this engagement.