

# Regulatory Impact Statement: Timing and frequency of the Māori Electoral Option

## UPDATED with Supplementary Annex: Supplementary Order Paper to the Electoral (Māori Electoral Option) Legislation Bill

Purpose of Supplementary Annex	
Decision sought:	This analysis has been prepared for the purposes of supporting decisions to be taken by Cabinet regarding a potential Supplementary Order Paper (SOP) to the Electoral (Māori Electoral Option) Bill to introduce further exceptions to a continuous option period.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	4 November 2022
Problem Definition	
<p>During select committee consideration of the <i>Electoral (Māori Electoral Option) Legislation Bill</i> (the Bill), several submitters raised concerns about the potential risk of tactical voting. The concern raised by submitters, and also in the National Party's differing view in the Justice Committee's report-back on the Bill,<sup>1</sup> is that allowing Māori voters to switch between the general and Māori rolls up until the close of polls provides them with an electoral advantage, particularly in electorate seats with narrow margins between candidates.</p>	
Executive Summary	
<p>The Bill was introduced into the House on 21 June 2022, and it received its first reading on 30 June 2022. The Bill replaces the current four-month Māori electoral option with a continuous option.</p> <p>Submissions on the Bill raised tactical voting as a concern. As a result, the Minister of Justice has directed officials to consider changes to the Bill to introduce an additional pre-election exception period to the continuous Māori electoral option, for both Parliamentary and local general elections.</p> <p>The Ministry's preferred option is the continuous option set out in the Bill as introduced. Under this option Māori voters are able to change rolls at any time, and up until polling day. This is the option we recommend because it is the most consistent with the objective of maximising participation in the electoral system. If an exception period is to be introduced in order to get the Bill passed, our second preferred option is option 4 – an exception period that aligns with closing of the rolls for Parliamentary and local elections.</p> <p>The Minister's preferred option is to amend the Bill to insert a pre-election exception period of three months prior to polling day for Parliamentary and local general elections.</p>	

<sup>1</sup> [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_125252/electoral-m%C4%81ori-electoral-option-legislation-bill](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_125252/electoral-m%C4%81ori-electoral-option-legislation-bill)

## Limitations and Constraints on Analysis

### *Scope*

The Minister has directed officials to consider changes to the Bill, to be implemented via SOP, to introduce an additional pre-election exception period to the continuous Māori electoral option. This has constrained the analysis in this RIS annex to considering how such an exception period might be incorporated within the broader policy changes in the Bill to implement a continuous option.

We have not considered any alternative options for addressing the potential risk of tactical voting, aside from amendments to the continuous option proposed in the Bill.

### *Tight timeframes have constrained consultation*

The Bill was reported back by the Justice Committee on 1 November 2022. The Bill must be passed by the end of this year in order for the Electoral Commission to have sufficient time to operationalise the changes in the Bill. This has led to a tight timeframe to develop and analyse policy options.

As this issue has arisen as a result of select committee consultation, we have been unable to consult on the proposals in this document. However, we were able to benefit from these submissions and draw on the discussions between the Committee and submitters. In addition, the Ministry conducted public consultation prior to the Bill being introduced. Further detail about this consultation is set out below.

There has also been limited consultation with government agencies. The Electoral Commission (the Commission) is not funded to undertake the two additional campaigns that will be required each cycle and will need to seek additional funding. Cost indications have been provided but final costings associated with proposals have not been able to be quantified with sufficient certainty due to time constraints.

### *Non-regulatory changes*

Operational changes have been discounted because the Māori electoral option is set out in the Electoral Act 1993, and changes to the option are set out in the Bill.

### *Lack of evidence on the potential occurrence of, and risk from, tactical voting*

The potential for tactical voting occurring was recognised as a theoretical possibility in the development of the continuous option. Because the current settings for the Māori electoral option only permit Māori voters to change rolls once every five or six years, the risk of tactical voting from roll switching is not possible, so there is no data on its occurrence in real situations, or its actual impacts on electoral outcomes. The concern around tactical voting relates to potential unintended consequences of new enrolment rules that have not yet been implemented.

The evidence of this analysis has been drawn from sources such as the various engagement processes and consultations on the Bill.

### Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment: The Ministry of Justice's Regulatory Impact Assessment quality panel has reviewed the *Regulatory Impact Statement: Timing and frequency of the Māori Electoral Option – Updated with Supplementary Annex: Supplementary Order Paper to the Electoral (Māori Electoral Option) Legislation Bill*. The panel considers that the information and analysis summarised in the Supplementary Annex **partially meets** the Quality Assurance criteria.

The Supplementary Annex, when read together with the *Regulatory Impact Statement: Timing and frequency of the Māori Electoral Option*, clearly and concisely describes the regulatory framework and concerns around the possibility of tactical voting under the new continuous enrolment option. The issue being considered and analysed in the RIS was identified through Ministry of Justice targeted consultation and the Select Committee submission process.

However, the analysis has been constrained by the pace at which these options have been developed and the inability to test them in further consultation. The RIS clearly identifies officials' preferred options with supporting analysis and the differing weightings and judgements that could lead to alternative options being preferred. Limitations and constraints on the analysis are clearly set out in the Supplementary Annex.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem?

#### ***What are the key features of the regulatory system(s) already in place?***

1. The Māori Electoral Option is a four-month period where Māori voters can choose to move between the general and Māori electoral rolls. This occurs every four to six years.
2. Aside from when they first enrol, the Māori Electoral Option is the only time when Māori voters can change their roll choice. The last Māori Electoral Option was in 2018 and the next one is due to be in 2024.
3. Additional information on the current state can be found in paragraphs 1–16 of the main RIS, which sets out the key features of the regulatory framework in place for the Māori electoral option.<sup>2</sup>

#### ***The Bill makes changes to the Māori election option***

4. The Bill supports Māori voters to exercise their democratic rights. It amends the Electoral Act 1993 (the Act) to introduce a continuous option model to enable Māori electors to change electoral rolls between the general and Māori rolls whenever they wish, and up until polling day.
5. New section 78A sets out an exception to the continuous model, relating to parliamentary by-elections. Once the Speaker has published a vacancy notice, a person currently registered as an elector or named on a dormant roll and who lives in, or moves into, the electorate may not change rolls if this would result in them becoming eligible to vote in the by-election.
6. However, new section 78A does not apply where a by-election and triennial local authority elections are happening at the same time, to ensure that voters can exercise their roll choice for the local election. In this situation Māori voters who live in a local electoral district that has Māori wards or constituencies will continue to be able to change rolls.
7. The intent of these amendments is to support increased electoral participation by Māori by balancing freedom of choice for Māori regarding their preferred electoral roll with mitigations against roll changes that could be perceived as unfairly influencing electoral results.
8. The Bill also makes related changes to the Local Electoral Act 2001 and the Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001 to reflect the change to a continuous option model.

#### ***What is tactical voting?***

9. Tactical voting relates to the concern that allowing Māori voters to switch rolls up until the close of polls provides them with an electoral advantage, particularly in electorate seats where the margins between candidates are small. For example, Māori voters could switch rolls to ensure a particular candidate either does or doesn't get elected. The ability of tactical voting being able to influence the electoral outcome increases in a close race between candidates. Polling information prior to election day can assist voters to make voting decisions, and theoretically tactical voting could affect electoral outcomes if enough Māori voters engage in this practice.

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<sup>2</sup> The original RIS can be found [here](#).

10. The National Party in its minority comment on the Justice Committee's report-back described tactical voting as one group of New Zealanders having the opportunity to choose which roll will provide the greatest advantage in any given election (the outcome of a person's Māori electorate might be a forgone conclusion, while the General electorate in which they live might be highly marginal, or vice versa).

### What is the policy problem or opportunity?

*There is a concern that the Bill could enable tactical voting*

11. Some submissions received during select committee consideration of the Bill raised the issue of tactical voting. Three submitters provided options for restrictions to be put in place leading up to a Parliamentary general election date, with the intent to minimise perceived improper voting strategies.
12. One submitter to the select committee considered that the Bill allows Māori to 'identify in order to swing elections'. Another considered that candidates should have a fair contest where they do not have to be significantly concerned about voters strategically changing their registered electorates. This submitter noted a 'typical voter' will not be able to change their registered electorate on a whim to favour a particular candidate in a marginal or swing electorate. They noted that this is not democratic or fair. Another submitter commented that if Māori voters can 'flip flop between the two whenever they want, they might try and jump the system'.
13. The National Party's differing view in the Justice Committee's report-back on the Bill also raised a similar concern.
14. As a result of these concerns the Minister has directed officials to assess potential options to amend the Bill, should Cabinet decide amendments should be made to address the concerns raised about the risk of tactical voting.
15. Tactical voting under the current settings of the Act is not currently an issue as Māori voters cannot switch between rolls other than during the four-month period that occurs every four to five years. Therefore, there is no evidence base about how the proposed rules will be used in the future, and how much tactical voting there could be.
16. However, there is a perception that it will occur if the Bill is passed as currently drafted. In addition to the submissions to the select committee mentioned above, this concern was raised by some submitters to the Ministry's engagement on the Māori Electoral Option. This engagement was carried out between June and August in 2021, and heard from a range of individuals, Māori advocacy, legal and representative groups and academics with an interest in this area.
17. One academic was concerned about allowing Māori voters to change rolls more often, particularly if it was close to an election. They commented that it may cause people to choose the roll they wanted to be on primarily with regard to the candidate they wanted to vote for. Another academic was concerned that if Māori voters were able to change electoral rolls immediately before an election or on election day there could be a perception that Māori could influence outcomes in marginal general electorates by switching rolls. This could lead to allegations of unfairness and tensions.<sup>3</sup>
18. During this consultation, submitters made suggestions about limiting changes to a particular date in an election year. One organisation suggested the date should be writ

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<sup>3</sup> Summary of Engagement on the timing and frequency of the Māori Electoral Option, 16 September 2021; pp 17 and 18. See; [Electoral-Maori-Electoral-OptionFINAL.pdf \(justice.govt.nz\)](#)

day. This submitter said that by this time Māori voters would have sufficient information to decide which roll they would like to be on for the election.

19. The perception that tactical voting could occur was also raised during the focus groups that were held around the country. Many participants acknowledged that Māori may change rolls for several reasons, including tactical voting, and a few participants raised concerns about the impact of such voting on representation.<sup>4</sup>

#### *Local elections*

20. For the reasons discussed at paragraph 15, at present tactical voting in the lead up to triennial local elections (for councils with Māori wards) is not currently an issue, and there is no evidence to indicate whether it might become so under a continuous option. No submitters to either the Ministry's consultation or the Justice Committee discussed the issue of tactical voting at local election level.
21. However, it is preferable for provisions relating to general elections and triennial local elections to be aligned as much as possible to reduce complexity and voter confusion. The perceived risks of tactical voting could undermine confidence in local elections as much at the parliamentary level.

## Annex Section 2: Deciding upon an option to address the policy problem

### What objectives are sought in relation to the policy problem?

22. The key objectives are:
  - 22.1. Te Tiriti o Waitangi – the system enables Māori perspectives to be represented in parliament;
  - 22.2. Encourage political participation – Voter turnout, and other forms of participation, is improved;
  - 22.3. Fair - Electoral laws and procedures provide, and are perceived to provide, a level playing field for all electoral participants;
  - 22.4. Practicable and Enduring - The law reflects current practical realities and can accommodate future changes/developments.

### What criteria will be used to compare options?

23. We have used the same criteria from the main RIS to analyse options to address the policy problems:
  - a) **Gives effect to the Crown's Tiriti o Waitangi obligations** to recognise the Crown's duty to actively protect Māori electoral rights;
  - b) **Accessible and understandable for Māori** so it can be readily understood and has processes are simple for Māori to engage with and use, and
  - c) **Supports the exercise by Māori of their electoral rights**, so Māori not do face unreasonable barriers to exercising their rights

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<sup>4</sup> Report on outcomes from Focus Groups: Māori Electoral Option, p14; See; Electoral-Maori-Electoral-OptionFINAL.pdf (justice.govt.nz)

- d) **Equality of representation at electorate level** – to provide equality of representation and a level playing field for all participants
  - e) **Cost**– including the ease of implementation and administration for the Electoral Commission
24. There are tensions between these criteria. For example, simpler rules ensure electoral processes and voting are more accessible to Māori, but more complex rules are required to reduce the risk of tactical voting. Further discussion on the weighting of these criteria is below.

### What scope will options be considered within?

25. There are no operational options that will prevent tactical voting, so options are limited to legislative amendments.

### What options are being considered?

We have identified three options, which, as with the main RIS, we have compared against the status quo.

#### Status Quo

26. The Electoral Act establishes the Māori Electoral Option, where Māori registered voters can choose to move between the general or Māori electoral rolls.
27. The Māori Electoral Option occurs only once every four to six years. The timing of the Māori Electoral Option is currently tied to the timing of the five-yearly census. This is because the Māori Electoral Option information is provided to the Government Statistician in order to determine the number of Māori and General seats.

#### Option 2 – the continuous option set out in the Bill

28. The Bill replaces the Māori Electoral Option period with a continuous option that allows Māori voters to change rolls at any time and up until polling day for both general elections and local triennial elections.
29. The Bill sets out an exception to the continuous model, relating to parliamentary by-elections. Once the Speaker has published a vacancy notice, a person currently registered as an elector or named on a dormant roll and who lives in, or moves into, the electorate may not change rolls if this would result in them becoming eligible to vote in the by-election. The intent of this exception is to mitigate against roll changes that could be perceived as unfairly influencing electoral results.
30. Under this option there is no exception period immediately prior to polling day for either general or triennial local elections.

### Option 3 – the continuous option with an additional set exception period before polling day

31. Under this option Māori voters are able to change rolls at any time; with two exceptions. The first is the exception for parliamentary by-elections as set out in option 2.
32. The second is a new set exception period of a set number of weeks or months before polling day for a Parliamentary or local general election. For the purposes of this analysis, we have assumed the period would be set at **three months** before polling day.
33. For Parliamentary general elections, three months is generally the period of time prior to an election when other rules and restrictions (for example around to election advertising and some public service activities) become tighter, in order to uphold electoral integrity and maintain political neutrality.
34. Similarly, for local triennial elections, three months is the 'applicable period'; prior to polling day during which the Local Electoral Act places limitations on the amount of candidates' electoral expenses, which candidates must submit as part of their post-electoral return of electoral donations and expenses.
35. One of the downsides of this option is that, for some Māori voters, if a parliamentary by-election is held in their electorate in an earlier part of the year in which the triennial local elections are held, the cumulative effect of the existing parliamentary by-elections and the proposed exception for local elections could mean that Māori voters who are eligible to transfer onto the roll for the by-election district would be unable to change rolls for approximately five months in that year.

\*For example, had these rules been in place in 2022, Māori voters living in the area who wanted to switch onto the by-election roll for the Tauranga Parliamentary electorate, or who had moved into the area at least 1 month before the by-election, would have been unable to change roll type:

- from 9 May 2022, when the notice of vacancy in the Tauranga Parliamentary electorate was issued, until the by-election polling day on 18 June 2022, under the parliamentary by-election exception
- from close of polling day on 18 June 2022 to 7 July 2022 when the writ for the by-election was returned, because existing rules in the Electoral Act prevent any roll changes while the official count is being completed; and
- from 8 July 2022 through to the polling day for local elections on 8 October 2022, under the local election exception period (*note - this rule applies to all Māori electors*).

#### *Additional features for Parliamentary elections where a three-month period is not possible*

36. For Parliamentary general elections, this option will have the following additional features, to deal with circumstances in which a three-month exception period is not possible, or the polling date changes:
  - 36.1. Where a three-month period is **not possible** - for example an early or snap election has been called - the exception period will be the period beginning on the day after the date on which the polling day is announced and ending on the new polling day;
  - 36.2. If the Prime Minister announces a change in polling date after an exception period has already begun, and that announcement is to a new date that is **less than** three months away (as occurred in the lead up to the 2022 General Election) the existing



exception period prior to the new announcement would be extended to end on the new polling day (which could result in an exception period of around 4-5 months)

36.3. If polling day changes after the date has been announced by the Prime Minister to a new date that is **more than** three months away from the announcement of the new polling date:

- any existing exception period already underway would still be valid, but would end on the day of the Prime Minister's announcement; and
- a new exception period would begin three months before the new polling day, under the standard rules.

*Notifications will be sent to Māori voters three months before the start of the exception period*

37. In addition, changes are required to be made to the enrolment notification rules. Under the Bill, as part of its 'enrolment update campaign' the Electoral Commission (the Commission) is required to inform Māori voters whether they are enrolled on the Māori or General roll, and that they are entitled to change rolls. This campaign usually starts approximately 3 months before the [expected] election date.

38. Under this option, the Commission would need to send out a separate notification to Māori voters at least three months prior to the beginning of the exception period, in order to give them time to change rolls. This effectively means the notification would need to be sent out six or seven months prior to the polling date for the parliamentary or local triennial elections.

39. For Parliamentary general elections, in order to provide for a scenario where polling day has not yet been announced before the Commission sends out notification to Māori voters, this option will amend the enrolment notification rules to include a 'default' date near the start of the election years, whereby the Commission must send the notifications, if the Prime Minister has not yet announced the date of the next general election.

#### **Option 4 – the continuous option with an additional exception period commencing at the closing of the rolls**

40. Under this option Māori voters will be able to change rolls at any time for both Parliamentary and local general elections, with two exceptions. The first is the exception for by-elections as set out in option 2.

41. The second is a new exception period that commences at the closing of the rolls. For Parliamentary general elections this is generally on writ day. The issuing of the writ is the statutory event that triggers the election, and so is relatively well publicised and transparent for all electoral participants. It must be no later than seven days after the dissolution or expiration of Parliament, and is approximately five weeks prior to polling day.

42. For triennial local elections, the exception period would begin when the rolls close for local elections, which is 57 days before polling day. Under the Local Electoral Act there is a 28-day period immediately prior to the closing of the rolls for voters to "check and correct" their enrolment details before the roll is officially closed and it makes sense for Māori voters to be able to check and correct their roll type during this period.

## How do the options compare to the status quo/counterfactual?

43. We have compared the options to the status quo in the below table.

	<b>Option 2 – continuous option in the Bill</b>	<b>Option 3 – set exception period</b>	<b>Option 4 – exception aligning with closing of the rolls</b>
<b>Gives effect to the Crown’s Treaty of Waitangi obligations</b>	+++ Flexibility and accessibility supports the Crown in meeting its Treaty obligations	+ Allows a little more flexibility but complexity around the exception period may hinder the expression of individual tino rangatiratanga during lead up to voting	++ Allows more flexibility but the restrictions of the exception period may hinder the expression of individual tino rangatiratanga during the voting period
<b>Accessible and understandable for Māori voters</b>	++ Accessible and understandable due to its ongoing nature and the removal of restrictions that have caused voters confusion as per the data	- Long exception period during peak voter engagement and when many requests to change rolls are made. Prior to enrolment update campaigns may be more complex to understand than current system	+ Slightly more accessible as allows transfers up to the closing of the rolls, which includes period of enrolment update campaign.
<b>Supports the exercise by Māori of their electoral rights</b>	+++ Much less restrictive than the status quo.	+ Less restrictive than the status quo, but restrictions still in place for approx. 6 months over each parliamentary or local electoral cycle	++ Less restrictive than the status quo, but still some periods of restrictions of around 12 weeks over each parliamentary or local electoral cycle
<b>Equality of representation at electorate level</b>	- Some issues around tactical roll shifting	- Some issues around tactical roll shifting	- Some issues around tactical roll shifting
<b>Cost (including ease of implementation)</b>	- There are costs associated with switching to a continuous system	--- Much higher costs and significantly more complex for Commission to implement and communicate	-- There are costs and added communications complexities associated with switching to a continuous system with an exception over the voting period.

### Key:

- ++ much better than the status quo
- + better than the status quo
- 0 about the same as the status quo
- worse than the status quo
- much worse than the status quo

### What option best addresses the problem?

44. The analysis in the table shows that option 2 is our preferred option (i.e. the Bill as it currently stands) as it best meets the criteria. However, if the objective of ensuring the equality of representation is weighted more highly, then option 4 is preferred. Option 4 focuses on the main risk period prior to the election (including the periods of early and advance voting for Parliamentary general elections), while maximising the length of time that Māori voters have to consider their roll choices.
45. The timing of Option 4 also fits better with other aspects of the electoral processes, such as the enrolment update campaign. Option 4 would also provide the same exception period (from writ day) regardless of the circumstances in which polling day is set, and thus is significantly simpler for the Commission to administer. It also provides for simpler communications and messaging for voters, so should minimise voter confusion and increase accessibility for Māori voters.
46. Option 4 also applies a consistent approach in the setting of the exception period for triennial local elections as for parliamentary by-elections and general elections.

### What are the marginal costs and benefits of the option?

47. The costs and benefits are set out in the main regulatory impact statement that can be found in the main RIS.<sup>5</sup> We consider that the costs associated with option 4 – exception period aligning with the closing of the rolls – will be marginal. The costs associated with option 3 – set exception period – will be higher due to the changes required to the Commission's enrolment update campaigns.

## Section 3: Delivering an option

### How will the new arrangements be implemented?

48. The Commission is responsible for implementing any changes to the continuous option. Additional information can be found in paragraphs 79–87 of the main RIS.<sup>6</sup>
49. The Commission is already planning for the implementation of the Bill as currently drafted. Changes arising from these proposals will mean the Commission will need to revise its implementation plan to accommodate the enrolment update campaign being too late as a vehicle for communicating with Māori voters.

### How will the new arrangements be monitored, evaluated, and reviewed?

50. The Commission will track levels of awareness and understanding of the option among Māori on an ongoing basis and regularly report on its findings. The Commission also produces detailed statistical information on enrolment and will be able to report on the number of electors exercising the Māori Electoral Option.
51. The Independent Review of Electoral Law, and any subsequent policy reforms following that Review, will also be an opportunity to evaluate the effects of any changes made.
52. Additional information on monitoring and evaluation can be found in paragraphs 88–94 of the main RIS.<sup>7</sup>

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<sup>5</sup> See footnote 2

<sup>6</sup> See footnote 2

<sup>7</sup> See footnote 2