

REGULATORY IMPACT STATEMENT

ELECTORAL REFERENDUM BILL

EXECUTIVE SUMMARY

New Zealand elects its Members of Parliament in accordance with a Mixed Member Proportional representation system of voting (MMP) and has done so since 1996. The two-vote MMP method of voting is set out in section 168 of the Electoral Act 1993 and because it is entrenched by section 268, requires a 75 percent majority in the House or a majority by referendum to amend.

The December 2008 Speech from the Throne included a commitment that the Government would “give New Zealanders the chance to have their say on the Mixed Member Proportional (MMP) representation system ... (in) the form of a binding referendum, and if a majority of voters decide they want to consider other electoral systems, the new Government will offer them a choice of a range of systems to replace it”.

Seven options for a referendum process were assessed against key factors (public information and participation, legislative requirements, voter turnout, implementation of new voting system, and cost). The preferred option is a two-stage process with the first referendum held in conjunction with the 2011 general election. It will ask voters two questions: whether they wish to retain the MMP voting system and which of the alternative voting systems (from a list) they prefer. The preferred option is the most cost-effective, as holding the referendum in conjunction with the general election reduces costs, compared to a standalone ballot or postal ballot.

If a majority of voters (more than 50%) vote for change, the Government’s intention is that a second and binding referendum will be held with the 2014 general election. The 2017 general election will then be conducted under the preferred voting system, either MMP or another system.

The bill empowering the referendum will include a provision for a review of MMP, to be undertaken by the new Electoral Commission, triggered only if 50 percent or more vote to retain MMP in the first question.

The 2011 referendum questions are similar to those posed for the 1992 referendum and include alternative voting systems consistent with those of the 1992 referendum. The wording of the questions has been formulated so as to be neutral, unambiguous and intelligible.

Proposals for the conduct of the referendum have been developed to address specific risks to the general election: voter confusion, congestion and delays in the polling place and delays to the announcement of the preliminary parliamentary count.

The 2011 referendum will be empowered by a bill which will provide the wording of the referendum questions, a high level description of the alternative voting systems and rules about the conduct of the referendum. The main area of regulatory impact is referendum advertising, which will be regulated by requiring all referendum advertisers to include a promoter statement on advertisements and requiring those who spend more than \$12,000 within the regulated period to register with the new Electoral Commission. There will be no limit on advertising expenditure or any requirement to file expense or donation returns. The regulated period will be the same as the regulated period under the electoral finance regime. The regulation of referendum advertising is intended to promote transparency.

ADEQUACY STATEMENT

The Ministry of Justice prepared this Regulatory Impact Statement (RIS) and considers it to be adequate.

STATUS QUO AND PROBLEM

New Zealand elects its Members of Parliament in accordance with a Mixed Member Proportional representation system of voting (MMP) and has done so since 1996. The decision by New Zealanders to change from a First Past the Post voting system to an MMP voting system was the result of a two-stage referendum process in 1992 and 1993.

Under MMP, voters have two votes:

- an electorate vote – to determine their electorate representative
- a party vote – to determine how many seats each party gets in the House of Representatives.

The two-vote MMP method of voting is an entrenched section of the Electoral Act 1993 that requires a 75 percent majority in the House or a majority by referendum to amend.

The 2001 Select Committee inquiry into MMP (held in accordance with section 264 of the Electoral Act 1993) was divided on whether a further referendum on changes to the electoral system was needed. The Committee reported that there was a level of public expectation that a further referendum would be held.

The December 2008 Speech from the Throne included a commitment that the Government would “give New Zealanders the chance to have their say on the Mixed Member Proportional (MMP) representation system that has formed the basis of the country’s parliamentary elections since 1996. This will take the form of a binding referendum, and if a majority of voters decide they want to consider other electoral systems, the new Government will offer them a choice of a range of systems to replace it.”

Legislation is required to hold a referendum with a general election.

As well as the wording of the referendum questions, the bill will provide for the way in which the referendum is to be conducted, including provisions relating to the regulation of referendum advertising, the form of the ballot paper, and the way the votes are counted.

OBJECTIVE

The objective of this proposal is to establish a referendum process to give the New Zealand voting public an opportunity to have their say on New Zealand’s system of voting.

The constitutional nature of the referendum means that the process must be designed to ensure a clear outcome that New Zealanders accept as legitimate. Achieving this goal will depend on clear and intelligible questions, a high level of public participation, and the careful management of the conduct of the referendum.

OPTIONS FOR REFERENDUM PROCESS

Options for determining the referendum process were assessed against the following key factors:

- public information and participation
- legislation requirements
- voter turnout
- implementation of new voting system
- cost.

Seven referendum process options were considered, some with two referenda and some with three referenda. In each case the last referendum would be binding ie the government or Parliament would be legally obliged to implement the result. The options included referenda by postal ballot, standalone ballot, or held with general elections. The options spanned different periods of time, with implementation of a new voting system (if voted for by a majority) either for the 2014 general election or the 2017 general election. A summary assessment of these options is set out in the table attached as an appendix.

PREFERRED OPTION

The preferred option (option 6 in the attached table) is a two-stage referendum process as follows:

- the first referendum has two questions and is held with the 2011 general election
- if a majority votes for a change, the second referendum has one question and is held with the 2014 general election and the 2017 general election would be conducted under MMP or the preferred alternative voting system if there is a vote for change

If 50 percent or more of voters opts to retain MMP, there will be a review of MMP by the Electoral Commission.

This option is preferred as it allows sufficient time for public participation and to prepare for and conduct public information campaigns for both referenda. As the preferred option has two questions in the first referendum, it allows voters to make their choice on whether or not to retain MMP in the context of the alternative voting systems. The response to the first question is therefore an informed choice. It also accommodates those voters who wish to retain MMP but who consider that aspect of the voting system could be improved.

The preferred option provides sufficient time for all necessary legislation to be drafted, including legislation to provide for an alternative voting system, if there is a vote for change. There is likely to be high voter turnout for both referenda, as they are to be held with general elections. The option provides three years to plan and deliver the 2017 general election under a new voting system, if chosen, minimising the risk to the efficient and effective administration of the 2017 general election. It is the least expensive option, at an estimated total cost of \$22m (with each referendum costing approximately \$11m). It will also minimise administration costs as voting on the referendum will be integrated as much as possible with voting at the general election.

REFERENDUM QUESTIONS: FORM OF QUESTIONS AND ALTERNATIVE VOTING SYSTEMS

Options for the referendum questions were assessed as to whether the questions are neutral, unambiguous and intelligible and drafted in such a way that:

- voters understand the implications of their vote
- the referendum results in a clear outcome to which the Government can respond.

Form of voting questions

Consistent with the ballot paper for the parliamentary vote, the 2011 referendum will present options and voters will tick their preferred option. Similar to the 1992 referendum questions, the 2011 referendum questions are framed to be as neutral, unambiguous and intelligible as possible. The first question will ask voters to indicate their preference either for retention of the current MMP voting system, or for change to another voting system.

The second question will ask voters to indicate their preferred alternative voting system, from a list, regardless of how they voted in the first question. Voters can choose to vote on one or both questions.

The alternative voting systems to include in the second referendum question

The alternative voting systems for voters to consider in the second question of the 2011 referendum are to be the same as those offered to voters in the 1992 referendum (as drawn from the report of the 1986 Royal Commission on the Electoral System):

- First Past the Post
- Preferential Vote
- Single Transferable Vote
- Supplementary Member.

The Royal Commission's comprehensive analysis of different voting system options for New Zealand is still appropriate and relevant to New Zealand, and therefore avoids the need to carry out a further lengthy and costly inquiry.

A summary of the alternative voting systems will be included in the bill. This summary will not include proposals to change the size of the House of Representatives from 120 members, nor to change the provision for the Māori seats.

Modifications to the current MMP voting system

Consideration was given to accommodating those voters who would prefer to retain MMP, but who would like the current version of MMP to be reviewed and possibly modified. Accordingly, the preferred option for addressing this matter is to include in the bill a provision for a review of MMP after the referendum, triggered if 50 percent or more of voters opt to retain MMP in the first question. The review would be undertaken by the new Electoral Commission, which will report to the Minister of Justice on whether any changes to the MMP voting system are necessary or desirable. The Minister of Justice will then present the report to the House of Representatives.

Two other options were considered:

- including "modified MMP" in the list of alternative voting systems in the second question. This option would give voters the opportunity to indicate that they would like a review of the current MMP voting system in the next parliamentary term

- not including “modified MMP” in the second question as an alternative voting system and not providing for a review of MMP in the bill.

The first option was not preferred because it is complex and potentially confusing; voters would need to vote for change in order to ensure their preference for a “modified MMP” is acted on. Furthermore, modified MMP is not an alternative voting system but a commitment to review the current system. It would not have been comparing like with like to include modified MMP in the second question.

The second option was not preferred because it does not accommodate voters who would prefer to retain MMP but with some modifications.

MITIGATING THE RISKS OF CONDUCTING THE REFERENDUM WITH THE GENERAL ELECTION

The three specific risks arising from holding a referendum in conjunction with a general election are voter confusion, congestion and delays in the polling place, and delays to the announcement of the preliminary parliamentary count.

Voter confusion

The public information campaign, conducted by the new Electoral Commission, will play a key role in reducing voter confusion, by providing information about the alternative voting systems, explaining the referendum voting process, and clarifying the distinction between the general election and the referendum.

Voters will also be assisted by the design of the different voting papers: the referendum ballot paper will be separate from the parliamentary election ballot paper, and will be a different size and colour.

Congestion and delays in the polling place

It is proposed that the risk of congestion and delay is managed by: appropriate training and resourcing of polling place staff; the use of colour and signage to guide voters through the process; and the use of polling place staff to monitor ballot boxes and to provide guidance to voters in large polling booths.

Issuing officers will not be required to write the voter’s line and page number from the electoral roll on the stub of the voter’s referendum voting paper. They will continue to do so for the voter’s parliamentary ballot paper. This proposal will simplify and speed up the issuing process, reduce the additional polling place staff required by around 940, and save approximately \$540,000. The proposal is consistent with overseas practice.

Delays to the announcement of the preliminary parliamentary count

Section 174(5) of the Electoral Act 1993 requires that the preliminary parliamentary count is prioritised over any referendum count on election night. As there will be separate ballot papers for the 2011 parliamentary election and for the referendum on the voting system, the two can be counted separately. To minimise the risks to the timeliness of the announcement of the preliminary parliamentary result on election night, options for the count of the referendum voting papers were assessed against cost, integrity of the referendum process, and risks to the timeliness of the count.

The preferred option is as follows:

- referendum votes received in advance of polling day would be counted on election night. Advance votes comprise about 10 percent of the votes (over 250,000 votes). An advance vote count on election night would provide a strongly indicative outcome for the full count
- the count of the referendum votes made at polling places on polling day would be undertaken by the Returning Officer for each district after polling day
- the referendum results would be announced by the Chief Electoral Officer at the time of the official result for the general election (which is generally 14 days after the general election)
- the results would include both the national and electorate by electorate count.

This option is preferred because it offers the best balance in terms of cost, integrity of the referendum process, and risks to the accuracy and timeliness of the parliamentary count.

Three other options were considered:

- a preliminary national referendum count on election night
- a preliminary national and electorate by electorate referendum count on election night
- no preliminary referendum count on election night.

ADVERTISING RULES

An informed and robust public debate is essential to the integrity of the referendum process, which may result in fundamental change to New Zealand's democratic process. Accordingly, rules limiting or regulating referendum advertising should be carefully considered. Public participation and free speech should be encouraged, while ensuring the identity of referendum advertisers is transparent.

The rationale for regulating advertising is to avoid the influence of wealth on the outcome by overwhelming other voices, in particular, the public information campaign. On the other hand, the influence that wealth can have on the outcome of a referendum is debatable. Regulation should not unduly stifle freedom of expression by advertisers.

The proposed rules to govern referendum advertising were considered in light of those proposed for third party electoral campaigning ("parallel campaigning"). While not identical, the issues noted above relating to regulating referendum advertising are similar to the issues relating to parallel campaigning. In addition, the referendum will be held with the 2011 general election and so advertising around the two electoral events will coincide.

The preferred option for regulating advertising is to require all referendum advertisers to include a promoter statement on advertisements to clearly identify the source of the advertising, and to require those who spend, or intend to spend, more than \$12,000 within the regulated period to register with the new Electoral Commission. The bill will provide for offences and penalties for breaches of these requirements.

The Electoral Commission will publish the register of promoters. There will be no limit on advertising expenditure and no requirement for advertisers to file advertising expense or

donation returns. The regulated period will be the same as the regulated period under the electoral finance regime.

This option is preferred because it places no financial limits on the expression of views by referendum advertisers and therefore encourages participation and freedom of expression in the referendum debate. This option will place minimal administrative costs on the Electoral Commission and minimal compliance costs on advertisers. The requirement to include a promoter statement on all advertisements provides for transparency, as does the registration threshold for significant advertisers (i.e., those spending more than \$12,000 during the regulated period). No advertisers would have the administrative burden of filing expense or donation returns, and advertisers spending less than \$12,000 would be able to campaign without the administrative burden of registration. The threshold is \$12,000 to be consistent with the threshold for parallel campaigners in the electoral finance reform.

Three alternative advertising regime options were considered:

- *Option 1 - no regulation:* no limit on referendum advertising expenditure and a requirement to include a promoter statement in the advertisement.

There would be no additional administration costs for the Electoral Commission or compliance costs for advertisers under this option.

- *Option 2 - registration threshold and expense returns:* no limit on referendum advertising expenditure, a requirement to include a promoter statement in the advertisement and a requirement that advertisers who spend over \$40,000 register with the new Electoral Commission and file advertising expense returns.

There would be a low level of compliance costs for significant advertisers in terms of registration and filing of returns (ie, those spending more than \$40,000) and an estimated additional \$270,000 administration costs for the Electoral Commission under this option.

- *Option 3 - registration threshold and expenditure limit:* an upper limit on advertising expenditure of \$750,000, a requirement to include a promoter statement in the advertisement and a requirement that all advertisers who spent over \$40,000 register with the Electoral Commission and file advertising expense returns.

This option would increase administration costs for the new Electoral Commission by approximately \$335,000. There would be some compliance costs for advertisers, in terms of registration and filing of returns, and in particular for those whose advertisements relate to both the general election and the referendum.

These options were not preferred because they do not strike the appropriate balance between participation and freedom of expression, and transparency. In addition, the Electoral Commission would have administration costs under Options 2 and 3 greater than the preferred option.

A fourth option, based on the advertising regulations set out in the Citizens Initiated Referenda Act 1993, has been considered but rejected. This option would cap advertising spending at \$50,000 per person, which is inappropriately low in the context of a significant constitutional issue that requires an informed and robust public debate.

Radio and television advertising by referendum advertisers will be permitted. This contrasts with the position of parallel campaigners in the electoral finance reform.

IMPLEMENTATION AND REVIEW

The proposal to hold the referendum in conjunction with the 2011 general election will be implemented by a bill to be introduced to the House in early 2010. A bill is required to enable the referendum, as it is to be held with a general election. The bill will address the following matters:

- the wording of the referendum questions
- the rules about the conduct of the referendum, including those relating to advertising
- the description of the alternative voting systems to be put to voters.

The new Electoral Commission will conduct an independent and neutral public information campaign to inform voters about the referendum process and voting alternatives.

One of the functions of the new Electoral Commission will be to report to the Minister on the administration of each general election. It is likely, therefore, to report on the conduct of the 2011 referendum in the context of the administration of the general election. Its report will be presented to the House. In addition, following a general election, by convention, a select committee inquiry is conducted into the law pertaining to, and the administrative conduct of, the election. The conduct of the referendum voting process would be addressed in such an inquiry, as it was after the binding referendum on the voting system held with the 1993 general election.

Depending on the result of the 2011 referendum, a second binding referendum could be held with the 2014 general election. The second referendum would ask voters to decide between retaining the MMP system of voting or changing to the alternative voting system preferred by the greatest proportion of voters in the second question of the first referendum.

If 50 percent or more of voters opts to retain MMP, a review will be held by the Electoral Commission and the Electoral Commission will report on whether changes to MMP are necessary or desirable.

CONSULTATION

Te Puni Kōkiri, Treasury, the Crown Law Office, the Chief Electoral Officer, the Chief Executive of the Electoral Commission and the Electoral Enrolment Centre were consulted during the preparation of the proposal and their comments incorporated. The Department of the Prime Minister and Cabinet was informed of its contents.

ATTACHMENT: SUMMARY AND ASSESSMENT OF REFERENDA PROCESS OPTIONS

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6	Option 7
1st referendum	2 questions by postal ballot in Aug-Sept 2010	1 question by postal ballot in Sept 2010	1 question with 2011 general election	2 questions with 2011 general election	1 question with 2011 general election	2 questions with 2011 general election	2 questions by postal ballot Sept 2010
<div> <div>⌵</div> <div><i>If voters vote for a change</i></div> <div>⌴</div> </div>							
2nd referendum	1 question by postal ballot in Aug 2012 Legally binding	1 question by postal ballot in Oct 2012	1 question June 2012 Standalone ballot	1 question Nov 2012 Postal ballot. Legally binding	1 question Nov 2012 Postal ballot	1 question with 2014 general election Legally binding	1 question with 2011 general election Legally binding
3rd referendum		1 question by postal ballot in Nov 2015 Legally binding	1 question in Nov 2012 standalone ballot Legally binding		1 question with 2014 general election Legally binding		
Preferred voting system implemented	2014 general election	2017 general election	2014 general election	2014 general election	2017 general election	2017 general election	2014 general election
Assessment against critical factors							
Public participation	Inadequate time	Adequate time	Limited time	Limited time	Adequate time	Adequate time	Inadequate time
Legislative requirements	Inadequate time	Sufficient time	Inadequate time	Limited time	Sufficient time	Sufficient time	Inadequate time
Probable voter turnout	1 st medium	1 st medium	1 st high	1 st high	1 st high	1 st high	1 st medium
	2 nd medium	2 nd low-medium	2 nd low-medium	2 nd medium-high	2 nd low-medium	2 nd high	2 nd high
		3 rd medium	3 rd medium-high		3 rd high		
Implement new voting system	Insufficient time	Insufficient time	Insufficient time	Insufficient time	Sufficient time	Sufficient time	Sufficient time
Approx. cost	\$26m	\$39m	\$78m	\$24m	\$35m	\$22m	\$24m
Risk assessment	High risk	Moderate risk	High risk	High risk	Second option	Best option	Moderate risk