

Office of the Minister of Justice

Chair, Cabinet

The Port Waikato By-Election

Proposal

- 1 This paper seeks authorisation:
 - 1.1 to submit the Electoral (Port Waikato By-election) Order 2023 (the Order) to the Executive Council to clarify the start of the:
 - 1.1.1 regulated period for the Port Waikato by-election; and
 - 1.1.2 by-election period in relation to the Māori Electoral Option; and
 - 1.2 for \$1.590 million from the Between-Budget Contingency to fund the Port Waikato by-election.

Relation to government priorities

- 2 This is an operational adjustment that requires Cabinet approval.

Executive Summary

- 3 I am seeking agreement to an Order to clarify two matters in relation to the Port Waikato by-election being held on 25 November 2023. This by-election is required to be held due to the passing of a candidate in the general election.
- 4 A by-election is usually triggered by a notice of vacancy published by the Speaker in the *Gazette*. In the circumstances of a death of a candidate, there is no vacancy, and therefore no notice published to trigger the by-election. Instead it is triggered by the Electoral Commission notifying the death of the candidate to the Governor-General, who must then issue a writ.
- 5 The Order clarifies that, for the purposes of Port Waikato by-election, the:
 - 5.1 regulated period starts on 17 October and ends with the close of the day before polling day (24 November); and
 - 5.2 exception period to the Māori electoral option begins on 17 October and ends on polling day (25 November).
- 6 The Order is made pursuant to section 266 of the Electoral Act 1993 (the Act), which allows the Governor-General to make an Order where there is insufficient provision in the Act to deal with unanticipated circumstances.
- 7 I am also seeking \$1.590 million for the Electoral Commission to run the by-election. The Electoral Commission will return any underspend to the centre.

Background

- 8 The ACT party candidate for the Port Waikato electorate has passed away. The Act sets out a clear process in these circumstances, although it has never been used since the advent of MMP.
- 9 Under the Act, following the death of a constituency candidate the Electoral Commission must cancel polling for electoral candidates in the relevant district and notify the Governor-General of the need for a fresh election because of the candidate's death. The Electoral Commission has completed both of these requirements in respect of the Port Waikato electorate.
- 10 The Governor-General is expected to issue the writ for a by-election to be held in Port Waikato on Monday 16 October. The Prime Minister has announced that the by-election will be held on 25 November 2023.

An Order in Council is required for the by-election

- 11 The circumstances that have created the need for this by-election are unusual. Most by-elections are initiated when the Speaker publishes a notice of a vacancy of the seat of a member (for example, due to their resignation) under section 129 of the Act. This notice triggers a number of other processes in the Act to conduct the by-election. In the current circumstances, the need for the by-election has arisen due to the death of a candidate after close of nominations but before polling day, not due to there being a vacancy to be filled in the Port Waikato electorate. Therefore, the Speaker does not publish a notice under section 129.
- 12 Section 266 of the Act provides that where there is insufficient provision in the Act for something that needs to be done, the Governor-General may, by Order in Council published in the *Gazette*, make provision as he or she thinks fit.
- 13 I am seeking agreement to an Order in Council, made pursuant to section 266 of the Act, to clarify two areas in the Act in relation to the by-election. Crown Law has provided advice on this approach.

Clarifying the start of the regulated period

- 14 The first clarification relates to the start of the regulated period for the by-election.
- 15 The 'regulated period' is the period immediately before an election where election expenditure limits and disclosure rules apply to election advertisements for parties, candidates, and third-party promoters.
- 16 Section 3BA of the Act sets out the meaning of the regulated period for a by-election. This section defines the start date of the regulated period for a by-election as commencing the day after the day on which the Speaker publishes a notice of a vacancy of the seat of a member (for example, due to their resignation) under section 129 of the Act.

- 17 This means that the start date of the regulated period is not specified in the Act.
- 18 I consider that there is insufficient provision in the Act in relation to the start of the regulated period where a by-election results from the death of a candidate after the close of nominations but before polling day. The proposed Order clarifies that for the purposes of the Port Waikato by-election to be held on 25 November 2023, the regulated period commences on 17 October (being the day after the writ is issued) and ends with the close of the day before polling day.

Clarifying the start of the exception period under the Māori Electoral Option

- 19 The Māori Electoral Option allows Māori voters to switch rolls between the General roll and the Māori roll at any time, except for the period leading up to a general election or by-election. This exception prevents Māori voters from switching rolls in order to vote in a by-election that they may not have otherwise voted in.
- 20 Section 78C of the Act states that no persons can exercise the Māori Electoral Option during the by-election period. The by-election period is defined as the period beginning on the date on which the Speaker publishes a notice of the vacancy under section 129, and ending on the polling day for the by-election.
- 21 As set out above, in the current circumstances the Speaker does not publish a notice under section 129. This means that the start of the by-election period is not specified in the Act.
- 22 I also consider that there is insufficient provision in the Act in relation to the start of the by-election period in relation to the Māori Electoral Option, where a by-election results from the death of a candidate after the close of nominations but before polling day. The proposed Order clarifies that for the purposes of the Port Waikato by-election to be held on 25 November 2023, the by-election period in relation to the Māori Electoral Option commences on 17 October (being the day after the writ is issued) and ends with the close of polling day.

Funding of \$1.590m is sought towards the costs of delivering the by-election

- 23 The need for by-elections is unpredictable, and the potential cost of running any by-election is not included in the Electoral Commission's baseline funding. Funding for by-elections is appropriated only when these events occur and is sought from the Between-Budget Contingency.
- 24 In 2021/22, funding was provided for the Tauranga by-election through Budget 2022, though this was only possible due to the Tauranga by-election coinciding with the Budget 2022 process. Funding for other by-elections – including the Hamilton West by-election in December 2022 – has historically been provided through the Between-Budget Contingency.
- 25 The two most recent by elections cost \$1.337 million (Hamilton West) and \$1.256 million (Tauranga) respectively. In delivering these, the Electoral Commission was able to absorb some personnel costs and information

technology infrastructure costs through reprioritisation of internal resources. Due to the proximity of the Port Waikato by-election to delivery of the General Election, the Commission is unable to reallocate resource to absorb these costs in the delivery of the Port Waikato by-election. As such, additional personnel – including additional IT vendor support to stand up the necessary systems – is required. As well as the need for additional staff, wage increases have contributed to higher anticipated personnel costs.

- 26 The Commission has estimated the cost of delivering the Port Waikato by-election as \$1.968 million. This is \$0.631 million more than the cost of the Hamilton West by-election. This increase in cost is driven by higher personnel and IT costs, inflationary pressures, increased security needs, a greater number of voting places, higher lease and operational costs due to the rural nature of Port Waikato¹; and increased public information costs to educate the public on the facts and integrity of the by-election process. A summary of the estimated cost compared to recent by-elections is attached as Appendix 1.
- 27 Due to the uncertainty of costs and in recognition of the constrained fiscal environment, the Electoral Commission has advised that it will absorb costs of up to \$0.378 million from baseline funding. As such, a total of \$1.590 million is sought for this event.
- 28 In its Statement of Performance Expectations 2023/24, the Electoral Commission forecast an annual deficit of \$11.308 million for 2023/24. Due to inflationary and risk-based cost pressures, the Electoral Commission is now forecasting a deficit of \$14.153 million, which will reduce reserves to approximately \$2.200 million by 30 June 2024. However, General Election delivery costs are still to be finalised, and the Electoral Commission has no contingency to manage any additional unexpected events.
- 29 If additional funding is not provided and the costs of a by-election are required to be met from within electoral baselines, it is uncertain whether the Electoral Commission will have sufficient reserves to cover this, which will place the Electoral Commission in a position of significant financial risk.
- 30 In delivering the Hamilton West by-election, Cabinet approved additional funding on 28 November 2022, 12 days before the by-election on 10 December 2022. As the Electoral Commission was in the second year of its three-year Multi-Year Appropriation, it had some ability to absorb costs in advance of certainty of funding through the ability to draw funding forward and find savings through de-prioritisation of activity across two years, if necessary.
- 31 The Electoral Commission is now in the final year of its Multi-Year Appropriation and has significant fixed-costs due to the current delivery of the General Election. This includes significant financial commitments over the next six weeks which could impact on the Commission's ability to release funds for the by-election. As such, the Electoral Commission has no flexibility to absorb costs

¹ Due to the rural nature of the Port Waikato electorate compared to Tauranga and Hamilton West, the number of by-election voting places will be higher than in these by-elections.

in the absence of securing additional funding and may find itself in a position of significant financial risk.

- 32 My immediate focus at this point is ensuring the Electoral Commission can proceed with its delivery plans with certainty of funding. However, to manage the inherent uncertainty of the costings, I propose that the additional funding be provided on the understanding that the Electoral Commission reviews actual costs incurred after the by-election, and any unused additional funding be returned to the Crown.
- 33 I propose that the recovery of any underspend be arranged by the Electoral Commission returning the excess funding, or through utilising the provisions of section 165 of the Crown Entities Act 2004. Section 165 requires consultation between a Crown entity, its responsible Minister, and the Minister of Finance before a request to return a net surplus is made to a Crown entity. Regardless of which recovery route is used, I will seek assurance and monitoring from the Ministry of Justice over the disbursement of any additional funding to the Electoral Commission, to enable the return of any net surplus funding, if required.

Cost-of-living Implications

- 34 The proposals in this paper aim to facilitate the effective operation of the Port Waikato by-election on 25 November 2023. There are no associated cost-of-living implications.

Financial Implications

- 35 Funding for by-election activities is appropriated only when these events occur. Therefore, I am seeking \$1.590 million from the Between-Budget Contingency.

Impact Analysis

Regulatory Impact Statement

- 36 The Order under section 266 of the Act sought in this paper is not classified as secondary legislation, and therefore Cabinet's impact analysis requirements do not apply to this proposal.

Climate Implications of Policy Assessment

- 37 The Climate Implications of Policy Assessment team at the Ministry for the Environment has been consulted on the proposals in this paper and confirm that the CIPA requirements do not apply.

Population Implications

- 38 The proposals in this paper have no population implications.

Use of external Resources

- 39 No external resources were used in developing this paper.

Consultation

- 40 The Treasury, the Electoral Commission, and Crown Law were consulted on this paper. The Policy Advisory Group at the Department of the Prime Minister and Cabinet was informed.
- 41 Given this decision will be taken during a period in which the caretaker convention will apply, the National Party has also been consulted.

Communications

- 42 The Prime Minister has announced the date for the by-election will be Saturday 25 November 2023.
- 43 The Electoral Commission will conduct a public information campaign to inform all Port Waikato electors of the date of the by-election, as well as how and where to cast a vote. The cost associated with this campaign is included in the additional funding requested.

Proactive Release

- 44 This Cabinet paper will be proactively released in accordance with the Cabinet Office circular Proactive Release of Cabinet Material: Updated Requirements [CO (23) 4], subject to redaction as appropriate under the Official Information Act 1982.

Timing and the 28-day rule

- 45 The regulated period needs to come into effect as soon as possible, and therefore, I am seeking a waiver of the 28-day period on the grounds that the Order has little or no effect on the public or confers only benefits on the public.
- 46 The Order will be published with urgency in the *Gazette* on Monday 16 October 2023 following approval by the Governor-General.

Compliance

- 47 This Order complies with each of the following:
- 47.1 the principles of the Treaty of Waitangi;
 - 47.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 47.3 the principles and guidelines set out in the Privacy Act 2020;
 - 47.4 relevant international standards and obligations;

- 47.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 48 There are no grounds for the Regulations Review Committee to draw this Order in Council to the attention of the House.

Certification by Parliamentary Counsel

- 49 The Order in Council was certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Recommendations

The Minister of Justice recommends that Cabinet:

Electoral Port Waikato By-election) Order 2023

1. **agree** to clarify the start of the regulated period for the Port Waikato by-election is Monday 17 October 2023 and ending with the close of the day before polling day;
2. **agree** to clarify the start of the by-election period for the Māori Electoral Option is Monday 17 October 2023 and ending the close of polling day;
3. **authorise** the submission to the Executive Council of the Electoral (Regulated Period: Port Waikato By-election) Order 2023;
4. **note** that the Order will be published in the Gazette on Monday 16 October 2023 following approval by the Governor-General;
5. **agree** to waive the 28-day rule because the Order has little or no effect on the public, or confers only benefits on the public;

Funding for the delivery of the by-election

6. **note** that the baseline for the Electoral Commission does not include funding for by-elections;
7. **note** the estimated cost of the Port Waikato by-election is \$1.968 million in 2023/24;
8. **note** that the Electoral Commission will absorb costs of up to \$0.378 million within baseline funding in delivering the Port Waikato by-election;
9. **agree** to fund the Electoral Commission an additional \$1.590 million in 2023/24 for the Port Waikato by-election;
10. **approve** the following change to appropriations to give effect to the policy decision in recommendation 9 above, with a corresponding impact on the operating balance and net debt:

IN CONFIDENCE

Vote Justice Minister of Justice	\$m – increase/(decrease)			
	2023/24	2024/25	2025/26	2026/27 & Outyears
Non-Departmental Output Expense: General Election and Electoral Services	1.590	-	-	-

11. **note** that the indicative spending profile for the multi-year appropriation described in recommendation 9 above is updated as follows:

Indicative annual spending profile	\$m – increase/(decrease)			
	2023/24	2024/25	2025/26	2026/27 & Outyears
	117.609	-	-	-

12. **agree** that the proposed change to appropriations above be included in the 2023/24 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
13. **agree** that that the expenses incurred under recommendation 9 above be charged against the between-Budget contingency established as part of Budget 2023;
14. **note** that any underspends related to funding for the Port Waikato by-election will be returned to the centre; and
15. **note** that the recovery of any underspends will be arranged by the Electoral Commission returning the excess funding or through utilising the provisions of section 165 of the Crown Entites Act 2004.

Consultation

16. **note** that, given this decision will be taken during a period in which the caretaker convention will apply, the National Party has also been consulted.

Authorised for Lodgement

Hon Ginny Andersen

Minister of Justice



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Port Waikato By-Election

Portfolio

Justice

On 16 October 2023, Cabinet:

Electoral (Port Waikato By-election) Order 2023

- 1 **agreed** to clarify that the regulated period for the Port Waikato by-election starts on Tuesday 17 October 2023 and ends with the close of 24 November 2023;
- 2 **agreed** to clarify that the by-election period for the Māori Electoral Option starts on Tuesday 17 October 2023 and ends with the close of 25 November 2023;
- 3 **authorised** the submission to the Executive Council of the Electoral (Port Waikato By-election) Order 2023 [PCO25890/15.0] (the Order);
- 4 **noted** that the Order will be published in the Gazette on Monday 16 October 2023, following approval by the Governor-General;
- 5 **agreed** to waive the 28-day rule because the Order has little or no effect on the public, or confers only benefits on the public;

Funding for the delivery of the by-election

- 6 **noted** that the baseline for the Electoral Commission does not include funding for by-elections;
- 7 **noted** that the estimated cost of the Port Waikato by-election is \$1.968 million in 2023/24;
- 8 **noted** that the Electoral Commission will absorb costs of up to \$0.378 million within baseline funding in delivering the Port Waikato by-election;
- 9 **agreed** to fund the Electoral Commission an additional \$1.590 million in 2023/24 for the Port Waikato by-election;

- 10 **approved** the following change to appropriations to give effect to the decision in paragraph 9 above, with a corresponding impact on the operating balance and net debt:

	\$m – increase/(decrease)			
Vote Justice Minister of Justice	2023/24	2024/25	2025/26	2026/27 & Outyears
Non-Departmental Output Expense: General Election and Electoral Services	1.590	-	-	-

- 11 **noted** that the indicative spending profile for the multi-year appropriation described in paragraph 9 above is updated as follows:

	\$m – increase/(decrease)			
Indicative annual spending profile	2023/24	2024/25	2025/26	2026/27 & Outyears
	117.609	-	-	-

- 12 **agreed** that the change to appropriations above be included in the 2023/24 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
- 13 **agreed** that the expenses incurred under paragraph 9 above be charged against the between-Budget contingency established as part of Budget 2023;
- 14 **noted** that any underspends related to funding for the Port Waikato by-election will be returned to the centre;
- 15 **noted** that the recovery of any underspends will be arranged by the Electoral Commission returning the excess funding or through utilising the provisions of section 165 of the Crown Entities Act 2004;

Consultation

- 16 **noted** that the National Party has been consulted given the above decisions are being taken during a period of caretaker government.

Rachel Hayward
Secretary of the Cabinet