

Hon Kiri Allan
Minister of Justice

Proactive release: Electoral Amendment Bill – Supplementary Order Paper

Date of issue: 22 September 2022

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1.	Electoral Amendment Bill – Supplementary Order Paper <i>Cabinet Paper</i> Office of the Minister of Justice 1 September 2022	Some information has been withheld in accordance with the following section of the OIA: <ul style="list-style-type: none">• Section 9(2)(h) to maintain legal professional privilege.• Section 9(2)(g)(i) to maintain the effective conduct of public affairs through free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty.
2.	Supplementary Order Paper to Electoral Amendment Bill <i>Attachment to Cabinet paper</i> 1 September 2022	Note that the copies of the Supplementary Order Paper provided to Ministers with this paper have been withheld in accordance with section 131 of the Legislation Act 2019 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege. The legislative instruments are publicly available from www.legislation.govt.nz .
3.	Regulatory Impact Statement: Supplementary Annex - Electoral Amendment Bill: Supplementary Order Paper to Electoral Amendment Bill	<ul style="list-style-type: none">• This document has been withheld because it is publicly available at: https://www.treasury.govt.nz/publications/risa

	<i>Attachment to Cabinet paper</i> 25 August 2022	
4.	Electoral Amendment Bill – Supplementary Order Paper <i>Cabinet Minute LEG-22-MIN-0148</i> Cabinet Office 1 September 2022	Release in full

Proactive Release

In Confidence

Office of the Minister of Justice
Chair, Cabinet Legislation Committee

Electoral Amendment Bill – Supplementary Order Paper

Proposal

- 1 This paper seeks approval for two amendments to the Electoral Amendment Bill (the Bill) to be made through a Supplementary Order Paper (SOP).

Relation to government priorities

- 2 The proposals in this paper support the policies relating to electoral matters contained in the Labour Party's 2020 Election Manifesto as well as the New Zealand Labour Party and Green Party of Aotearoa New Zealand Cooperation Agreement.

Executive Summary

- 3 In *R v EF and FG*, the High Court interpreted the definition of 'party donation' in section 207(2) of the Electoral Act 1993 (the Act) in a way that was unexpected. As a result, there is a risk that political parties may adopt an entity structure similar to that in *R v EF and FG*, which could undermine the public's trust in the integrity of our political donations regime.
- 4 Although it did not affect the decision in *R v EF and FG*, the Court also noted that section 207B of the Act (which requires a person to transmit any donation they receive to the intended recipient, being a candidate or party secretary) does not have a specific, corresponding offence provision in the Act.
- 5 Crown Law Office has filed a notice seeking leave to appeal with the Court of Appeal on behalf of the Serious Fraud Office. None of the changes proposed will affect any court proceedings that are underway.
- 6 On 1 August 2022, I took an oral item to Cabinet summarising the Court's key findings in *R v EF and FG*. Cabinet subsequently agreed to progress work immediately to modify the definition of party donation, and to consider creating an offence provision for failing to transmit party donations to a party secretary as required under section 207B of the Act [CAB-22-MIN-0296 refers].

- 7 To clarify the underlying policy intent envisioned by Parliament when it adopted the definition of ‘party donation’ in the Act, I propose to amend the definition of ‘party donation’ in section 207(2) of the Act by:
- 7.1 removing the reference to being “on behalf of the party who are involved in the administration of the affairs of the party”; and
 - 7.2 inserting a reference to a donation being for the benefit of a party.
- 8 I also propose amending the Act to:
- 8.1 create a new offence for failing to comply, without a reasonable excuse, with the obligation in section 207B to transmit donations to the intended recipient; and
 - 8.2 impose a penalty of a fine not exceeding \$40,000 upon conviction for committing this new offence.
- 9 I seek approval to introduce an SOP amending the Bill that contains these two proposed amendments. The SOP would be tabled in the House of Representatives on 6 September 2022 for referral to the Justice Committee to consider alongside the Bill. The Committee is due to report back to the House on the Bill by 5 December 2022.

Approvals sought for further policy changes

Amending the definition of ‘party donation’

- 10 The definition of party donation in section 207(2) of the Act is:

party donation means a donation (whether of money or of the equivalent of money or of goods or services or of a combination of those things) that is made to a party, or to any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party....

- 11 In *R v EF and FG*, the Court held the phrase “who are involved in the administration of the affairs of the party” should be understood to mean involvement in the “governance and management oversight of all the Party’s affairs”,¹ and that a person must receive a donation in that capacity for it to be a ‘party donation’ under the Act. Crown Law Office has filed a notice seeking leave to appeal with the Court of Appeal on behalf of the Serious Fraud Office.
- 12 This interpretation of the definition of party donation in the Act is narrower than the term had generally been understood. This narrower view of a party donation risks undermining the original policy intent of the donations regime. If a person’s intent is to make a donation to a party, either directly to the party or indirectly through an intermediary, the policy intent was that this should be treated as a ‘party donation’. I consider this policy intent is still valid.

¹ *R v EF and FG* [2022] NZHC 1755 at [56].

- 13 There is now a risk that the definition of party donation (as interpreted following *R v EF and FG*) could provide an opportunity for political parties to structure their financial affairs in a way that legally avoids the intention of the political donations disclosure regime. This risk is particularly of note in light of the upcoming 2023 General Election and could undermine public trust in the integrity of our political donations regime.
- 14 I propose to amend the definition of ‘party donation’ in section 207(2) of the Act by:
- 14.1 removing the reference to being “on behalf of the party who are involved in the administration of the affairs of the party”; and
- 14.2 inserting a reference to a donation being for the benefit of a party.
- 15 These changes clarify, without expanding or narrowing, the underlying policy intent envisioned by Parliament when it adopted this definition of ‘party donation’ in the Act. Those monies, goods and/or services that were considered party donations prior to the judgment in *R v EF & FG* should continue to be considered party donations. If a person donates to a political party with the intention that the donation is a party donation, then that is captured.
- 16 The change is narrowly scoped and does not shift the onus from the person (or body of persons) receiving the donation to ascertain its purpose and transmit the donation to the party.² The change simply removes the expectation that the person who receives the donation must be involved in the “governance and management oversight of all the Party’s affairs”, and that they must also receive the donation in that formal capacity.

Creating an offence for failing to transmit donations

- 17 Although it did not affect the decision in *R v EF and FG*, the Court also noted that section 207B of the Act does not have a specific, corresponding offence provision in the Act.³ Section 207B of the Act requires every person to whom a candidate and party donation is sent to, give it to the candidate or the party secretary⁴, respectively, within 10 working days.
- 18 There are offences in the Crimes Act 1961 and other legislation that may apply if someone obtains a party donation by deception or fails to pass a party donation on to the party secretary. The decision to apply offences to any given circumstance is up to the independent decision making of the prosecuting agency.

² Section 207 of the Electoral Act defines a ‘transmitter’ as a person to whom a donor gives or sends a donation for transmittal to a candidate or party. There is an expectation that the person receiving the donation for transmittal is clear on the reason they are receiving the donation.

³ *R v EF and FG*, above n 1, at [6].

⁴ or deposited into the bank account nominated by the party secretary.

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- 19 Providing for a specific offence provision in the Act relating to section 207B would send a clear signal that it is important to:
- 19.1 ensure that donations are transmitted to a candidate or party secretary in a timely way; and
 - 19.2 have transparency of candidate and party donations.
- 20 I propose amending the Act to:
- 20.1 create a new strict liability offence for failing to comply, without a reasonable excuse, with section 207B; and
 - 20.2 impose a penalty of a fine not exceeding \$40,000 upon conviction for committing this new offence.
- 21 The proposed offence and penalty would apply to both candidate and party donations. The offence is modelled after the offence of a party secretary failing to keep proper records of party donations received.⁵ It is also in line with similar offences in the Electoral Act for similar behaviour, each of which has a maximum fine not exceeding \$40,000. For example:
- 21.1 Section 207F – a transmitter failing to disclose the identity of a donor, if known;
 - 21.2 Section 207N - a party secretary failing to keep proper records of party donations received; and
 - 21.3 Section 210D – a party secretary who, without reasonable excuse, files a return of party donations during the late period.
- 22 The maximum fine for which a transmitter is liable under this provision is \$40,000. The discretion to determine the appropriate figure within that range would be placed with the Courts based on the individual facts of each case.
- 23 Because a strict liability offence does not require the prosecution to prove the mental element of the offence, a complete defence is available to anyone charged with failing to comply with section 207B if they can demonstrate they had a 'reasonable excuse' for non-compliance. This is consistent with the structure of other strict liability offences relating to the political donations regime in the Act. The party (party secretary) is not responsible for transactions for which they have no knowledge.

⁵ Electoral Act 1993, s 207N.

- 24 I also note the Independent Review of Electoral Law will be carrying out a more fundamental, first-principles assessment of all offences and penalties in the Act, including those relating to political donations.

Potential appeal of R v EF and FG

- 25 Crown Law Office has filed a notice for leave to appeal with the Court of Appeal; if granted, I understand the appeal is likely to be heard in 2023.
- 26 As a matter of law the changes will not apply to the defendants in *R v EF and FG* and should not affect the Court of Appeal's consideration of whether the High Court's decision in that case was correct. That is because the common law and statute provide that criminal enactments are not to have retrospective effect. Thus, even if the amendments are enacted before the Court of Appeal hears the appeal in *R v EF and FG* (assuming leave to appeal is granted), it will not affect the outcome of that case.

Implementation

- 27 The Electoral Commission (Commission) will be responsible for providing updated guidance on the reporting obligations for parties and candidates. Information will need to be communicated prior to the changes coming into effect on 1 January 2023 to ensure, in particular, that registered parties can continue to meet their ongoing reporting obligations.
- 28 This approach will ensure a smooth transition to the rule changes in election year. Election year guidance for parties and candidates and return forms and reporting processes will need to be updated, including how donations and loans information is published on elections.nz. The Commission will also be responsible for overseeing compliance with the new rules.

Financial Implications

- 29 No additional funding is required. Any additional cost of advising parties and candidates on the changes to the political donations regime are expected to be minimal and will be met from the Commission's existing baseline.

Legislative Implications

- 30 The SOP is an amendment to the Electoral Amendment Bill and will be tabled in the House on 6 September 2022 for referral to the Justice Committee for its consideration. The Justice Committee is due to report back to the House on the Bill by 5 December 2022.

Impact Analysis

Regulatory Impact Statement

- 31 A Regulatory Impact Statement was prepared in accordance with Cabinet's impact analysis requirements and was submitted at the time Cabinet approval was sought on policy related to the Electoral Amendment Bill [Electoral Amendment Bill – changes to political donations settings; CBC-22-MIN-0025 and CAB-22-MIN-0150 refers]. An addendum to the RIS has been produced to

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reflect policy proposals to amend the definition of a party donation, and the creation of an offence and a penalty related to the obligation to transmit donations to the intended recipient as outlined in this Cabinet paper. This addendum is attached in appendix 1.

32 Section 9 (2) (g) (i)

33 Section 9 (2) (g) (i)

[REDACTED]. Given the limited time to enact legislation and have it in force for the 2023 election year, Cabinet may wish to consider asking the Select Committee to undertake targeted consultation on the Supplementary Order Paper.

Climate Implications of Policy Assessment

34 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Compliance

35 The Bill complies with:

- 35.1 the principles of Te Tiriti o Waitangi / the Treaty of Waitangi;
- 35.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
- 35.3 the disclosure statement requirements (a supplementary disclosure statement prepared by the Ministry of Justice is attached);
- 35.4 the principles and guidelines set out in the Privacy Act 2020;
- 35.5 relevant international standards and obligations; and
- 35.6 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

36 Section 9(2)(h)

Te Tiriti o Waitangi / Treaty of Waitangi Implications

- 37 The proposals in this paper have no impacts relating to Te Tiriti o Waitangi / the Treaty of Waitangi (te Tiriti) or the Crown's obligations under te Tiriti beyond the impacts of the proposals on the general public.

Population Implications

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

Consultation

- 39 The Treasury, the Department of Internal Affairs, the Department of Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, Crown Law, the Electoral Commission, the Office of the Privacy Commissioner, and Parliamentary Counsel Office have been consulted.

Binding on the Crown

- 40 Cabinet Circular (02) 4: *Acts Binding the Crown: Procedures for Cabinet Decision* notes that bills that are amending existing Acts will generally follow the position of the principal Act on whether the Act is binding on the Crown.
- 41 The Electoral Act 1993 does not bind the Crown and Cabinet agreed the Electoral Amendment Bill will follow that position [CBC-22-MIN-0025, CBC-22-MIN-0026 and CAB-22-MIN-0150 refers].
- 42 Therefore, the amendments to the Bill do not bind the Crown.

Creating new agencies or amending law relating to existing agencies

- 43 The amendments do not create any new agencies.

Allocation of decision-making powers

- 44 The amendments do not allocate decision making powers between the executive and judiciary.

Associated regulations

- 45 The amendments do not amend any regulations.

Other instruments

- 46 The amendments do not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

- 47 The amendments do not contain a definition of Minister, Department or Chief Executive of a department.

Commencement of legislation

- 48 The amendments will come into force on 1 January 2023.
- 49 This ensures the amendments will apply from the beginning of the 2023 donation returns year. This commencement date also aligns with the other donations-related amendments proposed in the Electoral Amendment Bill.

Parliamentary stages

- 50 The Electoral Amendment Bill was introduced on 20 July 2022 and received its first reading on 2 August 2022.
- 51 The SOP will be tabled in the House on 6 September 2022 for referral to the Justice Committee, to consider alongside the Bill. The Justice Committee is due to report back on that Bill by 5 December 2022.

Publicity

- 52 I intend to issue a media release relating to this package of electoral reforms when the SOP is introduced. I will also write to the leaders of all the Parliamentary parties to draw their attention to the SOP, and invite them to engage with the Justice Committee.

Proactive Release

- 53 I propose to release this Cabinet paper and related Minute with any necessary redactions in accordance with Cabinet Office Circular CO (18) 4, following the tabling of the SOP in the House.

Recommendations

- 54 The Minister of Justice recommends that the Committee:
- 1 **note** that the High Court's interpretation of the definition of 'party donation' in *R v EF and FG* was that the phrase "who are involved in the administration of the affairs of the party" should be understood to mean involvement in the "governance and management oversight of all the Party's affairs";
 - 2 **note** that there is a risk that if political parties adopt an entity structure similar to that in *R v EF and FG*, it could undermine the public's trust in the integrity of our electoral finance rules;
 - 3 **note** that Cabinet agreed to progress work immediately to modify the definition of party donation, and to consider creating an offence provision for failing to transmit party donations to a party secretary as required under section 207B of the Electoral Act [CAB-22-MIN-0296 refers];

Additional policy decisions

Amending the definition of 'party donation'

- 4 **agree** to amend the definition of party donation in section 207(2) of the Electoral Act 1993 to replace the reference to “on behalf of the party who are involved in the administration of the affairs of the party” and incorporating an intention that the donation is for the benefit of the party;

Creating an offence for failing to transmit donations

- 5 **agree** to attach an offence provision to section 207B of the Electoral Act 1993 to create a new strict liability offence, with a penalty of a fine not exceeding \$40,000 upon conviction;

Approval to introduce

- 6 **approve** the tabling of the Supplementary Order Paper to the Electoral Amendment Bill in the House of Representatives and its referral to the Justice Committee.

Authorised for lodgement

Hon Kiri Allan
Minister of Justice



Cabinet Legislation Committee

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.

Electoral Amendment Bill: Supplementary Order Paper

Portfolio **Justice**

On 1 September 2022, the Cabinet Legislation Committee:

- 1 **noted** that the High Court's interpretation of the definition of 'party donation' in *R v EF and FG* was that the phrase "who are involved in the administration of the affairs of the party" should be understood to mean involvement in the "governance and management oversight of all the Party's affairs";
- 2 **noted** that there is a risk that if political parties adopt an entity structure similar to that in *R v EF and FG*, it could undermine the public's trust in the integrity of our electoral finance rules;
- 3 **noted** that in August 2022, Cabinet agreed to amend the Electoral Amendment Bill to modify the definition of party donations, and create an offence provision in the Electoral Act 1993 for failing to transmit party donations to a party secretary within the required 10 working days as required under section 207B of the Electoral Act 1993
[CAB-22-MIN-0296]

Additional policy decisions

Amending the definition of 'party donation'

- 4 **agreed** to amend the definition of party donation in section 207(2) of the Electoral Act 1993 to replace the reference to "on behalf of the party who are involved in the administration of the affairs of the party" and incorporating an intention that the donation is for the benefit of the party;

Creating an offence for failing to transmit donations

- 5 **agreed** to attach an offence provision to section 207B of the Electoral Act 1993 to create a new strict liability offence, with a penalty of a fine not exceeding \$40,000 upon conviction;

Approval to introduce

- 6 **approved** the release of the Supplementary Order Paper to the Electoral Amendment Bill [PCO 24488-1/4.0] for tabling in the House of Representatives and referral to the Justice Committee.

Rebecca Davies
Committee Secretary

Attendance: (see over)

Present:

Hon David Parker (Chair)
Hon Kiri Allan
Hon Keiran McAnulty
Dr Duncan Webb, MP (Senior Government Whip)

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

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