

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Electoral (Integrity) Amendment Bill: Approval for Introduction

Proposal

1 This paper seeks approval to introduce the Electoral (Integrity) Amendment Bill ('the Bill').

Policy

- 2 On 20 November 2017, Cabinet agreed to development of an Electoral (Integrity) Amendment Bill modelled on electoral integrity legislation previously in force from 2001-2005 [CAB-17-MIN-0507 refers]. The Bill would amend the Electoral Act 1993 to provide for a process to declare the seat of a Member of Parliament (MP) vacant if they cease to be a parliamentary member of the political party for which they were elected.
- 3 The purpose of electoral integrity provisions is to help maintain the proportionality of political party representation in Parliament as determined by electors at the last election. This is in order to enhance public confidence in the integrity of the electoral system, Parliament and government.
- 4 The Bill is modelled on, and will have largely the same effect as the Electoral (Integrity) Amendment Act 2001, which was in effect from 2001 to 2005.
- 5 As with that Act, the Bill will provide that an MP ceases to be a parliamentary member of their party, and so must vacate their seat, where either:
 - 5.1 that MP has provided notice to the Speaker of the House that they have resigned membership of the party for which they were elected, or that they wish to be recognised for parliamentary purposes as an Independent or a member of another political party; or
 - 5.2 the parliamentary leader of the party for which the member was elected provided a written notice to the Speaker stating that:
 - 5.2.1 the leader reasonably believes the member has acted in a way which distorts, and is likely to continue to distort, the proportionality of party representation in Parliament as determined at the last general election, and
 - 5.2.2 the leader has given the member written notice of this view, and has given the member 21 working days to respond to the leader in writing, and
 - 5.2.3 at least two thirds of the relevant party's caucus agree that the leader should give the written notice to the Speaker.

- 6 The Bill is likely to be contentious. Electoral integrity legislation has been contentious in the past because it involves a weighing of elected members' independence and conscience against party cohesion and proportionality in Parliament. When previous electoral integrity legislation has been before the House, there was criticism it could have a chilling effect on MPs' dissent and freedom of expression.
- 7 A second reason the Bill is likely to be contentious is because, unlike the Electoral (Integrity) Amendment Act 2001, there is no sunset clause. This will make the amendments an enduring feature of New Zealand's electoral law.
- 8 A Bill is required in order to give effect to this policy by amending the provisions of the Electoral Act that relate to how parliamentary vacancies are created.
- 9 The attached Bill implements these changes. Cabinet has indicated it intends to have the Bill introduced into the House before the end of 2017 [CAB-17-MIN-0507 refers].

Impact analysis

- 10 Treasury has advised that a Regulatory Impact Analysis is not required, as the analysis would substantially replicate the analysis by the Crown Law Office as to the Bill's consistency with the New Zealand Bill of Rights Act 1990.

Compliance

- 11 The Bill complies with:
- the principles of the Treaty of Waitangi;
 - the principles and guidelines set out in the Privacy Act 1993;
 - relevant international standards and obligations; and
 - LAC Guidelines: Guidelines on Process and Content of Legislation.
- 12 Crown Law has reviewed the draft Bill. The Bill limits freedom of expression and freedom of association and so raises the issue of whether those limits are justifiable under the New Zealand Bill of Rights Act 1990. Crown Law has provided advice to the Attorney-General that it considers the limitations on rights are justifiable but that it is for the Attorney-General to make the final assessment as to their proportionality. The Attorney-General will consider that advice and indicate his view to this Committee and/or Cabinet in due course.

Consultation

- 13 I have consulted with the New Zealand First Party and the Green Party.
- 14 The Green party has suggested that the written notice from a political party leader to the Speaker of the House required under proposed new Section 55C of the Bill could, in addition to the requirements set out in new Section 55D, require a statement that the party in question has complied with its rules when initiating the electoral integrity provisions. In such circumstances, the Speaker should not be required to make any qualitative assessment of the written notice.
- 15 I consider this issue would benefit from consideration by the select committee.

16 As the Bill relates to Parliament and the functions of the Speaker of the House, I have also consulted with the Speaker and the Office of the Clerk. Concerns raised by Clerk of the House are listed below in italics, along with my comment.

16.1 The test in the Bill which requires belief that an MP is acting to “distort proportionality of political party representation in Parliament” is uncertain in its application.

This test raises issues that are complex and involve weighing competing interests. If there is any uncertainty about the nature of this test it may be most appropriate for this to be explored at select committee. The Chief Justice in *Awatere Huata v Prebble* did not find this test to be uncertain and relied on this formulation when upholding the decision to remove Ms Huata.

16.2 The test in the Bill might require a court to examine parliamentary proceedings. The Clerk notes that since the previous legislation expired, the Parliamentary Privilege Act 2014 was enacted.

I do not consider that this Bill overrides anything in the Parliamentary Privilege Act, which limits the ability for a court to examine parliamentary proceedings. Any court proceedings involving this Bill would be subject to the Parliamentary Privilege Act.

16.3 The Bill might not be consistent with section 23 of the Parliamentary Privilege Act which removed the power of the House to expel its members for any reason.

Justice officials have received advice from the Parliamentary Counsel Office that the procedure set out in the Bill by which a member’s seat becomes vacant is not an expulsion by the House. This is because under the Bill a vacancy in a member’s seat is created by the member’s own action, or by the action of the leader of the political party for which the member was elected. There is then no inconsistency with section 23 of the Parliamentary Privilege Act 2014.

Binding on the Crown

17 The Electoral Act 1993 currently binds the Crown and the Bill does not propose to change this position.

Allocation of decision making powers

18 The Bill does not involve the allocation of decision making powers between the executive, the courts or tribunals.

Regulations and other instruments

19 No new regulations or other instruments, or amendments to existing regulations or other instruments, will be required to bring the Bill into operation.

Definition of Minister or department

20 The Bill does not contain a definition of a Minister, department or chief executive or any equivalent positions.

Commencement of legislation

21 The Bill's provisions will all come into effect the day after it receives Royal assent.

Parliamentary stages

22 The Bill should be introduced into the House on the first available date after Cabinet approval, and before the end of 2017.

23 I propose the Bill be referred to the Justice Committee.

Recommendations

24 The Minister of Justice recommends that the Committee:

- 1 **note** that the Cabinet has indicated it intends to introduce the Electoral (Integrity) Amendment Bill into the House before the end of 2017, as part of the coalition agreement with the New Zealand First party [CAB-17-MIN-0507 refers];
- 2 **note** that the Bill seeks to help maintain the proportionality of party representation in Parliament as determined by electors, and to enhance public confidence in the integrity of the electoral system;
- 3 **note** that Bill amends the Electoral Act 1993 to provide a process by which an MP can be deemed to no longer be a parliamentary member of their party, and so must vacate their seat;
- 4 **note** that the Bill does not contain a termination ('sunset') clause;
- 5 **note** the Green party has suggested that the written notice from a political party leader to the Speaker of the House require a statement that the party in question has complied with its rules when initiating the electoral integrity provisions;
- 6 **note** this proposal would benefit from further consideration at select committee;
- 7 **note** the Clerk of the House has raised concerns about the Bill's impact on parliamentary privilege and the possible uncertainty of the Bill's application;
- 8 **note** that the Bill does not propose to override any provision of the Parliamentary Privilege Act 2014, and the application of the Bill can be considered at select committee;
- 9 **approve** the Electoral (Integrity) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 10 **agree** that the Bill be introduced on the first available date after Cabinet approval;
- 11 **agree** that the Government propose that the Bill be:
 - 11.1 referred to the Justice Select Committee for consideration;
 - 11.2 enacted by 30 June 2018.

Authorised for lodgement

Hon Andrew Little
Minister of Justice