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Te Kāhui Ture o Aotearoa

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Deborah Hart
Chair
Independent Electoral Review Panel

By email: secretariat@electoralreview.govt.nz

Tēnā koe, Deborah

Re: Independent Electoral Review Interim Report

1 Introduction

1.1 I am writing to you on behalf of the New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**), as convenor of the Public and Administrative Law Committee.

1.2 Thank you for giving us the opportunity to meet with the Independent Electoral Review Panel (**Panel**), to provide feedback on the *Independent Electoral Review Interim Report* (**Interim Report**).

1.3 This letter sets out the feedback we provided to the Panel at the meetings of 7 and 17 July 2023. As previously mentioned to the Panel, our feedback does not address matters of social policy (for example, questions regarding the minimum voting age, the term of parliament, and candidate qualifications). Instead, we have focussed on highlighting potential problems and unintended consequences of the proposed changes, the relevant legal and constitutional principles, and alternative reform options which will help make laws that work.

2 The overall design of electoral law (recommendations 1 and 2)

2.1 We agree that reform of electoral law has often been piecemeal, and the current legislative framework is no longer fit for purpose. As a result, the current law is inaccessible and difficult to understand, and undermines the rule of law.

2.2 We agree the current legislative framework requires a complete overhaul, and support recommendations 1 and 2 in the Interim Report. In creating a new legislative framework, we agree it is necessary to:

(a) apply modern and consistent principles to determine whether a matter should be addressed in primary and secondary legislation (noting it is preferable to have policy matters provided for in primary legislation, and the details and implementation provisions in the secondary legislation);

(b) use modern terminology (for example, in relation to disabilities and mental health);

(c) future-proof systems (however, this may be addressed by providing for the details in secondary legislation, which can be more easily adjusted to adapt to changing circumstances); and

(d) redraft and consolidate all electoral offences and penalties, including those which are outdated, unclear, or have inconsistent penalties.

2.3 However, we emphasise that electoral legislation is constitutional legislation and should be designed in such a way that the core fundamentals of elections are enshrined by Parliament in primary legislation. Too much delegation to executive bodies, or the granting of broad discretions, may affect perceptions of executive control over the legislative process. Any new electoral regime should also comply with the New Zealand Bill of Rights Act 1990 (**NZBORA**), with robust justification for any infringement of those rights and freedoms.

3 Proposed entrenched provisions (recommendation 3)

3.1 The Interim Report recommends entrenching the following provisions (in addition to those currently entrenched):

(a) the Māori electorates;

(b) the allocation of seats in parliament and the party vote threshold;

(c) the right to vote and to stand as a candidate;

(d) the tenure of the Electoral Commission; and

(e) section 40 of the Electoral Act, which provides for the electorates set by the Representation Commission to take legal effect without the involvement of Parliament.

3.2 In a recent submission to the Standing Orders Committee, the Law Society noted there are two broad arguments against the use of entrenchment:[1]

(a) Entrenchment may make it excessively hard to change the law and create difficulties for institutions to respond to needs and wishes of citizens and to hold lawmakers to account for the consequences of their decisions.

(b) Entrenchment can also create friction between institutions within a constitution by enabling one institution to limit another, or by encouraging institutions to circumvent these limits.[2]

3.3 Entrenchment should be confined to constitutional matters and serve a necessary constitutional purpose. It is legitimate where it is used to safeguard the integrity of representative democracy, but not where it is employed to protect contestable government policies.

3.4 Therefore, it is important to demonstrate why entrenchment is needed at all (noting that the usual Parliamentary voting limits and rules allow legislative change in a way that is neither

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1 A copy of that submission is available on the Law Society website: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/SOC-review-of-entrenchment-proposals-3-2_Nilu-Ariyaratne-1.pdf.

2 NW Barber "Why Entrench?" (2016) 14(2) ICON at 342-3.

too hard, nor too easy). We suggest the Panel expand its consideration of entrenchment provisions, and the reasons for entrenching the proposed additional provisions. We also recommend identifying any adverse effects of entrenching each additional provision.

3.5 It is not clear why the Panel has recommended entrenching the tenure of the Electoral Commission – the Interim Report simply states that an independent and impartial electoral administrator is an important part of our electoral system, and entrenchment sends "a strong symbolic message" about the importance of maintaining the Commission's independence.[3] However, we note there are other comparable constitutional bodies which may require entrenchment against this reasoning (for example, judges). In our view, a stronger basis is required to justify entrenching the tenure of the Electoral Commission.

3.6 It is also important to acknowledge that entrenchment (and a higher voting threshold of 75%), only provides some protection against change, as section 234 of the Electoral Act 1993 also allows the alternative process of a majority of the valid votes cast at the election on the General and Māori rolls. Some of the protections provided by entrenchment may be lessened under this alternative process (i.e., by a majority referendum of voters) – for example, Māori seats could be abolished as a result of a majority of votes by electors. If the use of entrenchment is to be expanded, the Panel would need to carefully consider the impacts of representative democracy (a parliamentary vote) against direct democracy (a poll of electors). It would be helpful to provide some guidance on when it is more appropriate to require a higher threshold in a parliamentary vote, and when a poll of electors is a more appropriate form of entrenchment.

3.7 We also recommend the Panel consider and discuss the wider implications of extending entrenchment to provide answers to questions about how to protect human rights and minority rights.

4 Emergencies and disruptions

Vesting emergency powers in the Board of the Electoral Commission (recommendation 36)

4.1 The Panel has recommended the Board of the Electoral Commission be given a new general power to extend the time available for electoral processes or deadlines specified in the Electoral Act. This creates a risk of bringing the Electoral Commission into an implementation and management role, rather than a governance role, while the Chief Electoral Officer remains accountable to the Commission for the decisions made by the Board when exercising those powers.

Power to reconvene Parliament during an emergency or disaster (recommendation 38)

4.2 The Interim Report recommends a new "last resort power" to reconvene an expired or dissolved Parliament in the event of a catastrophic emergency or disaster (recommendation 38). This proposal presents numerous practical, procedural, and legal difficulties:

(a) The House of Representatives comprises the members of Parliament, who will need to be recalled in order to reconvene Parliament. This may not always be possible or practical where, for example, retiring members have other jobs or roles lined up, or

[3] Interim Report at 2.42.

are no longer in the country (noting members are not employees who could be directed to return to Parliament). The absence of a full complement of members would affect the proportionality of the House.

(b) There will be procedural issues about matters such as whether members need to be sworn in to take their seats, and whether a Speaker needs to be elected or re-elected (noting that the continuation of the office of Speaker, where Parliament is dissolved or expires under section 13 of the Constitution Act 1986, would not apply if Parliament were reconvened) and, once Parliament is dissolved, the role of the Speaker is limited to the legislative requirements set out in enactments such as the Parliamentary Service Act 2000 and Public Finance Act 1989.

(c) It is unclear what Parliament would do once it is reconvened, including whether bills would be reinstated and debated amidst a catastrophic emergency or disaster, and whether the House would adjourn to allow members to return to their affected electorates. In an emergency, the public are most likely to be looking to authorities to be in charge and for the Government to "do something", and advancing the legislative programme of the previous Government will likely raise concerns about a lack of legitimacy to progress or introduce new legislation.

(d) The requirement for the Prime Minister to consult all party leaders is sensible, given Parliament has been dissolved. However, an emergency or disaster which makes it impossible to hold an election may also make it impossible or impractical to consult all party leaders. Therefore, it may be necessary to limit this requirement to consult only where it is reasonably possible in light of the circumstances giving rise to the emergency. However, doing so would again add to concerns about the purpose of reconvening Parliament, particularly if it then allows the previous Government to progress bills on its legislative programme.

(e) Reviving a previous Parliament may act as a disincentive to holding an election as soon as possible.

(f) The Prime Minister makes decisions about the date of the election (rather than Parliament). Reinstating a dissolved or expired Parliament, and allowing that Parliament to make decisions about the timing of an election may lead to a perceived lack of legitimacy both by the public and politicians.

(g) The emergency or disaster which requires the election to be delayed may also impact on Parliament's ability to meet. In times of emergencies and disasters (for example, when the Christchurch earthquake struck in February 2011) Parliament has usually had a truncated sitting to receive reports from the Prime Minister or Minister of Emergency Management, and then adjourned.

4.3 In the absence of very clear criteria for reviving a dissolved or expired Parliament, these practical and procedural difficulties are disproportionate to the risks of continuing under the current arrangements. Consideration of reconvening Parliament would apply to an emergency or catastrophe occurring during a very limited time period (after Parliament is dissolved but before an election can be held) and on the occurrence of an extraordinary

event. The risk of that happening must be balanced with the risks of extending the life of Parliament indefinitely on vague and undefined grounds.

4.4 What is essentially required during the election and the government formation period is to ensure continuity. Therefore, it may be more appropriate to continue under the current arrangements, which allow an election to be delayed (even if it requires several delays, and the decision is made by an official).[4] Where an election has taken place but an emergency or a catastrophe delays the processing of results, or the formation of government, the caretaker convention will apply during this period. This means there will be a government in charge in any event – i.e., the existing Government in the pre-election period and a caretaker Government in the post-election period. If there are concerns about ministers not being able to continue because their ministerial warrants will expire, then that matter could be addressed by a specific amendment to the Constitution Act 1986.

4.5 We therefore encourage the Panel to consider if it would be more appropriate to amend the Cabinet Manual and the relevant legislation, to provide clarity and more developed procedures relating to the caretaker convention in the first instance.

4.6 The Panel may also wish to give further thought to the alternative options discussed in Professor Janet McLean KC's study paper, *The Legal Framework for Emergencies in Aotearoa New Zealand*,[5] including the suggestion that the Chief Electoral Officer should be required to consult the Clerk of the Executive Council and the Chief Government Statistician about decisions relating to the caretaker convention. In addition, the Panel could consider whether the Chief Electoral Officer should consult the Cabinet Secretary and the Clerk of the House (who will collectively have a good understanding of the ability of the incumbent Government to carry on, how government formation is developing and how the existing conventions are working).

4.7 If the draft recommendation to reconvene Parliament is to be finalised, notwithstanding these concerns, it would be helpful to provide more information regarding what comprises "a catastrophic emergency or disaster with ongoing impacts" – for example, does the emergency or disaster need to be widespread to trigger the use of the power, or can the emergency be limited to a particular area? What is the extent of Aotearoa New Zealand that must be affected before the power can be exercised? Having regard to the extent of the geographical area or population affected, and the level of disruptiveness of the catastrophic emergency or disaster, would be helpful, as an event may be limited in geographical impact but still incredibly disruptive (for example, resulting in people being displaced, and having no cell phone reception).

4.8 Arguably, the power should not be limited to when there is a nationwide event only. While the intended threshold is likely higher than the "unforeseen or unavoidable disruption" that allows the Chief Electoral Officer to adjourn polling for one or more polling areas on polling

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4 Electoral Act, sections 195 and 195A.

5 Professor Janet McLean KC *The Legal Framework for Emergencies in Aotearoa New Zealand* (Study Paper for the Law Commission | Te Aka Matua o te Ture, November 2022) at 3.105-3.116.

day,[6] greater clarity should be provided to reduce the risk of interpretative difficulties for the Electoral Commission if its board is called upon to exercise this power.

4.9 The Panel should also give further thought to any additional safeguards that are needed to ensure this power is in fact only exercised as a last resort, including by examining comparable electoral laws and safeguards in other jurisdictions. Australia's Joint Standing Committee on Electoral Matters recently conducted an inquiry into the future conduct of elections operating during times of emergency situations, and produced a report which recommended various legislative changes to support the conduct of elections during emergencies.[7]

4.10 The Joint Committee recommended authority be granted to the Electoral Commissioner if an emergency was declared by Commonwealth, state or territory law, to take action such as extending the reasons electors can vote by post or in advance, and extending operating or polling hours before polling begins.[8] The Joint Committee recommended several safeguards which restrict this authority – the authority must:

(a) be limited to circumstances in which all alternative avenues to exercising emergency powers have been deliberated and exhausted;

(b) be limited to the extent necessary to conduct the electoral event;

(c) be limited to the geographical area in which the emergency situation has been declared (which could be only part of an electorate);

(d) be exercised by the Electoral Commissioner, and cannot be delegated; and

(e) be limited only to the time necessary to respond to the emergency situation and to conduct the electoral event.

4.11 While the powers recommended by the Joint Committee are much more limited in scope (as they relate to the period prior to polling), they are more tightly circumscribed than the powers proposed by the Panel. While it is desirable to have powers that are fit for purpose and sufficiently flexible to allow our constitutional arrangements to continue during a catastrophic event, it is equally important to have adequate safeguards in place to ensure these powers are in fact used as a last resort.

4.12 We also encourage the Panel to consider the following suggestions, which may address some of the concerns noted in paragraph 4.1 above:

(a) Setting a timeframe for the reconvened Parliament to organise another election, or to call for an election after the emergency or disaster dissipates; and

(b) Requiring an independent review to automatically occur after the exercise of this power, perhaps by the Electoral Commission, as a further check and balance on the exercise of the power.

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6 Electoral Act, sections 195 and 195A.

7 Joint Standing Committee on Electoral Matters *Report of the inquiry on the future conduct of elections operating during times of emergency situations* (June 2021).

8 Above n 7, at 3.58-3.59.

5 Eligibility to stand as a candidate (recommendation 52)

5.1 The Panel has recommended broadening candidate eligibility to include 16- to 17-year-olds, citizens living overseas for two electoral cycles, and prisoners, on the basis that eligible voters should also be eligible to stand as candidates, and electors are ultimately best-placed to decide who should be a Member of Parliament (**MP**).[9]

5.2 It would be useful for the Panel to consider whether voting and candidate eligibility should always be linked in this manner. One of the reasons advanced for allowing 16- to 17-year-olds to vote is to encourage voter participation. The same argument does not necessarily apply to encouraging 16- to 17-year-olds to stand as MPs. In relation to the potential for prisoners and overseas citizens to be candidates, we note that recent changes to parliamentary rules now allow remote participation by members,[10] and it is no longer an absolute requirement for members to be physically present.

5.3 The automatic linking of voter and candidate eligibility may have the unintended effect of discouraging changes to voting eligibility. Therefore, the Panel may wish to consider if it would be more appropriate to consider voter eligibility and candidate eligibility separately. It may be helpful to also consider the experiences of overseas jurisdictions where voter eligibility and candidate eligibility differ, and whether this has proven to be workable.[11]

6 Political finance (recommendation 53)

6.1 The Panel has recommended permitting only registered electors to make donations and loans to political parties and individual candidates. This would have adverse impacts on legal persons such as iwi, hapū, and voluntary organisations who will no longer be able to make political donations.

6.2 This may also have the effect of reducing transparency if donations are made by an individual (for example, a company or union secretary) who is in fact funded by an entity. We appreciate that the intention may be for this type of funding to be unlawful. If that is to be the case, it should be more clearly specified in the final recommendations and there should be mechanisms in place to ensure there are no alternative means for entities to make political donations.

6.3 It would also be helpful to explicitly state that this recommendation departs from the position in the NZBORA, i.e., that the provisions in that Act generally apply for the benefit of all legal persons, as well as for the benefit of all natural persons.[12] This is important to note, given political donations are expressive acts for the purpose of section 14 of the NZBORA, and political donations are an expression of the donor's support for the donee party or candidate.

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9 Interim Report at 12.28.

10 Sessional Order – Remote participation in sittings of the House.

11 For example, the two rights are unlinked in Samoa and Bhutan – in Samoa, candidates are required to hold a Matai title, and in Bhutan, candidates must be between 25-60 years of age, and hold a university qualification.

12 New Zealand Bill of Rights Act, section 29.

7 Boundary reviews (recommendation 82)

7.1 At our most recent meeting, the Panel clarified that recommendation 82 is intended to allow the Representation Commission to use other data sources to *supplement* census data, and fill in any gaps in the census data, rather than to allow the Commission to use other data sources *in lieu* of census data. This is not apparent from the Interim Report, and we suggest this be expressly noted in the final report.

7.2 The Law Society remains concerned that providing greater flexibility to Statistics New Zealand may risk creating a perception of involvement by government in matters relating to electoral boundaries, and these are matters that overseas have caused some consternation legally and politically. We acknowledge the Government Statistician is generally independent, but the Minister of the day is specifically empowered to direct the Statistician to cease producing statistics of any kind,[13] and there is therefore an ability for the government to influence the statistics utilised by the Government Statistician. In contrast, the Electoral Commission is a Crown Entity and arguably more independent, both politically and legally, than Statistics New Zealand and/or the Government Statistician.

8 Electoral offences and penalties (recommendations 87 and 89)

8.1 We support recommendation 87, to overhaul and consolidate all electoral offences and penalties to ensure they are fit for purpose.

8.2 We also support recommendation 89, to repeal the offences of treating voters with food, drink or entertainment, and accepting food, drink or entertainment.

9 Election recounts (recommendation 94)

9.1 The Panel has recommended permitting judicial discretion as to whether an electorate- or national-level recount goes ahead. This recommendation raises the following concerns and questions, which will need to be addressed in the final report:

(a) Adverse impacts on an overworked District Court bench (noting that District Court Judges will be required to complete a recount within three working days of the Electoral Commission's declaration of an electorate result);

(b) The potential for delays where the exercise of the discretion is to be reviewed or appealed;

(c) Bringing judges into the political sphere (noting that judicial involvement is less contentious where judges have no discretion to hear recount applications);

(d) How judges are expected to determine whether an application is frivolous or vexatious; and

(e) Whether the judges will simply be inclined to take a risk-averse approach, and allow recount applications, as a decision to decline an application has a significant impact on democracy and democratic matters.

9.2 It would also be helpful to clarify whether the discretion is limited to frivolous or vexatious applications, or whether the discretion can be exercised in relation to any application for a

[13] Data and Statistics Act 2022, section 44.

recount. In our view, it is more appropriate to limit the discretion to frivolous or vexatious applications.

10 Next steps

10.1 I hope this feedback is helpful. Please feel free to get in touch with me via the Law Society's Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz), if a further discussion is needed.

Nāku noa, nā

Debra Angus
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