



Electoral (Integrity Repeal) Amendment Bill

304—1

Report of the Justice Committee

April 2021

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Ginny Andersen
Chairperson

Electoral (Integrity Repeal) Amendment Bill

Recommendation

The Justice Committee has examined the Electoral (Integrity Repeal) Amendment Bill and recommends, by majority, that the bill not be passed.

Introduction

This bill would reverse the changes made to the Electoral Act 1993 by the Electoral (Integrity) Amendment Act 2018. The Act established that the seat of a member of Parliament (MP) may become vacant when the MP ceases to be a member of the political party for which they were elected. This can be done either by the MP resigning from the parliamentary membership of the party by notice to the Speaker or by the leader of the party delivering a notice to the Speaker. If the vacated seat is held by a List MP, the next list candidate for the MP's former party is elected to Parliament. If the vacated seat is held by an Electorate MP, a by-election will occur. The former MP may contest the by-election.

Submissions received

The committee received 19 submissions on the bill and heard oral submissions from 7 individuals and organisations. About 10 submissions supported the bill and 3 opposed it.

Supporters of the bill consider that the Electoral Act restricts an MP's independence and ability to express a broad range of views both within their party and in the course of their parliamentary activities. They argued that New Zealand already has elections as a mechanism to hold politicians to account for breaking their electoral mandate, and that the size of the problem that the 2018 changes aimed to address is insignificant.

Critics of the bill argued that the Act upholds the proportionality of political party representation in Parliament as determined by electors and enhances public confidence in the integrity of the electoral system. Some submitters argued that the current electoral provisions are particularly appropriate for List MPs, who are elected based on party affiliation rather than as individual representatives of the people.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to one issue that engages an MP's rights to freedom of speech and association.

Some submitters argued that the current electoral provisions limit an MP's rights to freedom of speech and association and are unjustified. They noted that "the importance of protecting these representative freedoms outweighs the objective of concretising political party representation in the House". The Attorney-General, who examined the consistency of the Electoral (Integrity) Amendment Bill 2018 with the New Zealand Bill of Rights Act 1990, did

not agree with these submitters. He argued that the limits on the MPs' rights imposed by that bill are justified. This is because of the importance of the bill's objectives, and because the capacity to remove and replace the "distorting" MP is the minimum necessary to achieve these objectives.

The New Zealand Law Society, in its submission, argued that limits on rights in the current Act could be justified if MPs have the protection of being able to apply for judicial review. Officials noted that although the 2018 Act does not explicitly preclude or invite judicial review, the policy intent of the current provisions is that the procedure and related decisions in the 2018 Act are judicially reviewable. However, the Law Society questioned whether MPs would be able to apply for judicial review. It drew to our attention the views of the Chief Justice in *Huata v Prebble* that it was "at least arguable" that such a decision was not reviewable or only reviewable on limited grounds.

On 4 March 2021 the committee unanimously resolved to write to Crown Law to request its advice to the Attorney-General regarding the consistency of the 2018 bill with the New Zealand Bill of Rights Act. Crown Law responded that it was unable to supply the advice the committee requested because the advice is subject to legal privilege which has not been waived. On 25 March 2021 Hon Dr Nick Smith moved that the committee write to the Attorney-General to request that legal privilege be waived in respect of Crown Law's advice. The motion was not agreed to.

New Zealand National Party and ACT New Zealand differing view

The National Party and ACT continue to support the Electoral (Integrity Repeal) Amendment Bill, and recommend that it be passed through all remaining stages without amendment.

The Government majority decision on the select committee to oppose this bill is disappointing for New Zealand's democracy noting that the 2018 law change was at the behest of NZ First, was not part of Labour's 2017 policy, and the law is opposed by all the other parties in Parliament.

Process

National and ACT are disappointed that Government members of the committee chose not to engage with the strong submissions from the constitutional, political science, and legal experts on the bill, by not asking any questions, not seeking any additional advice, or making any attempt to justify the current law. Labour members voted down National's motions to seek additional advice from officials. Government members saw no need to argue for or justify the law orally or in their report. The best we can determine of the Government's position is: we do not care if respected experts say it breaches the New Zealand Bill of Rights Act or that it compromises New Zealand's democracy—we have the numbers.

This bill seeks to overturn the 2018 law change that was fast-tracked through Parliament and passed under urgency. The Government has chosen to advance every one of its five electoral law amendments without any consultation with the Opposition parties and under urgency, with some introduced and passed on the same day. This is setting a dangerous precedent against the historic conventions that electoral law changes have a special

constitutional status and should be subject to a wider process involving other parties and civil society – a position Labour accepted in Opposition.

Labour has a poor record in Government of making partisan electoral law changes, reinforced by its approach to this bill. We draw the attention of the House to the academic paper published in January 2021 from the University of Otago by Joshua Ferrer who notes that over the past 65 years Labour Governments have made 18 partisan changes to electoral law as compared to National doing so 4 times.¹

National and ACT's strong support for the bill is based on six key themes highlighted by the bill's sponsor and reinforced by the New Zealand Law Society, five law faculties, four departments of politics, and three schools of history.

Free speech fundamental to Parliament

There is no place in which freedom of speech is as important as in our Parliament.

It is explicitly recognised in the 1688 Bill of Rights, now 333 years old, and reaffirmed at every opening of a new Parliament. That freedom is compromised in this law. This is acknowledged in the Attorney-General's Bill of Rights report where it states "an enforced departure from Parliament will have a chilling effect on the expression of dissenting views by MPs."²

The Shadow Attorney-General goes further, concluding the law breaches the New Zealand Bill of Rights in respect of freedom of speech, association, and conscience.³

The concern is aptly highlighted by the strong submission from Professor Geiringer from Victoria University that the power does not need to be wielded to have an effect.⁴ The very existence of this law means MPs need to be very cautious of questioning the party line due to the risk of being expelled from Parliament. The Chief Justice is plain that the current law does not just apply if a member chooses to leave a party, but where a party acts to exclude a member.⁵ This law needs repealing to reassert the importance of free speech in our Parliament.

Law compromises New Zealand's liberal democratic reputation

The current law is a stain on New Zealand's proud democratic history and the international reputation of our Parliament. New Zealanders, regardless of political persuasion, take pride that we are part of one of the oldest continuous democracies in the world dating back to our first election in 1853. New Zealand extended the franchise to Maori in 1867, moved to general male franchise in 1879 by removing the requirement to own land, and was the first country where women gained the right to vote in 1893.

New Zealand is not just a long standing democracy but ranked amongst the best. The annual global democracy index published in January ranks New Zealand 4th, albeit we should be concerned that our score dropped in 2020 for the first time since the index was

¹ [Joshua Ferrer, "Re-Evaluating Consensus in New Zealand Election Reform" \(2021\) Political Science.](#)

² [New Zealand Bill of Rights Act Report by the Attorney General on the Electoral \(Integrity\) Amendment Bill.](#)

³ [Report of the Shadow Attorney-General in Relation to the New Zealand Bill of Rights Act 1990 and the Electoral \(Integrity\) Amendment Bill. Tabled in the House of Representatives on 14 April 2021.](#)

⁴ [Joint Submission by 15 Academics on Electoral \(Integrity Repeal\) Amendment Bill.](#)

⁵ [Prebble v Huata SC CIV 9/2004.](#)

created in 2006.⁶ This law is completely out of step with being a world leading democracy. None of the top 20 ranked democracies have such laws. The sort of countries that do include sham Parliaments like in Zimbabwe, Cambodia, and Uganda.

This law would breach the United States, Canadian, and Australian constitutions, where it would be barred at both federal and state or provincial levels. It would be an anathema in Westminster or any of the United Kingdom's Parliaments in Scotland, Wales, and Northern Ireland.

This law change in 2018 cannot be connected to New Zealand's change to MMP. It contradicts the Royal Commission's report on which the introduction of MMP was based. It also breaches the basic law of the home of MMP: Germany. Its constitution, written so carefully by the Allied powers post World War II, explicitly requires that MPs' first duty is to the national good and not the party. The vast majority of Parliaments across Europe are elected by proportional representation, but do not have such provisions. Such laws are considered undemocratic by the EU and are not allowed by new member states.

The Inter-Parliamentary Union (or IPU), the lead expert body on best parliamentary practice since its establishment in 1889, vehemently opposes such laws. New Zealand is a long-standing member, of which a majority of our MPs belong. It states in its comprehensive 2011 report, "The parliamentary free mandate remains a cornerstone of democracy."⁷ This law needs to be repealed for the sake of New Zealand's reputation as a leader in democratic governance.

Voters best to decipher principled from opportunistic dissent

MPs falling out with their party can be principled or opportunistic, but voters, not party leaders, are best suited to determine which it is. New Zealand has evolved as one of the more rigid party systems alongside comparable democracies. Crossing the floor is a very rare occurrence in the New Zealand Parliament, and has become less frequent under MMP.

Some MPs' dissent, such as that from Derek Quigley, Marilyn Waring, and Jim Anderton, were principled. Jim Anderton's apt statement during the Rogernomics era that the party left him rather than he left the party, was valid, as was Derek Quigley's criticisms of National in the Muldoon era. National and ACT acknowledge that some dissenters are opportunistic and unprincipled but the voters have been brutal in dealing to those MPs at the next election.

It is ironic that the architect of this law, Winston Peters, strongly defended party hopping in 1995 when Michael Laws switched from National to NZ First, saying it was his constitutional right to be with whatever party best matched his values and if voters disagreed they could vote him out at the next election. Mr Peters only changed his views on this three years later when his own MPs chose to leave his party.

National and ACT's strong contention is that voters, and not party leaders, are best placed to make the judgment as to whether the dissenter had valid reasons to change party allegiance. Parliament needs to jealously guard the overriding principle of a bottom-up

⁶ "Democracy Index 2020: In sickness and in health?" (The Economist Intelligence Unit).

⁷ Submission by Professor Janet McLean QC on Electoral (Integrity) Amendment Bill.

democracy where MPs' primary accountability is to the public, and not to the party or its leadership. It is the public, and the public alone, that should hire and fire MPs.

Realignment of parties part of democracy

The premise of the 2018 law is that MPs changing parties during a term of Parliament is undemocratic and wrong. Professor McLeay from Victoria University rightly highlights that MPs changing parties is a natural and important part of the democratic process.

Every party in the current Parliament was formed by MPs changing parties. The Labour Party was formed in 1916 during the 19th Parliament with four MPs, including heroes Paddy Webb and Alfred Hindmarsh changing from the parties they were elected to represent in 1914. The National Party was formed in 1936 during the 26th Parliament by 19 MPs switching from the Reform and United Parties to National. It is equally true that ACT, the Greens, and the Māori Party were all formed by MPs changing parties.

It is contradictory for political parties to celebrate their founders while maintaining that MPs who changed parties were acting undemocratically or unethically. The truth is that these MPs who changed parties made a hugely positive contribution to New Zealand by founding parties that have gone on to achieve so much.

Winston Churchill is widely recognised as the greatest Parliamentarian ever, with his painting displayed prominently in our Parliament. Winston Churchill switched from the Conservative Party to the Liberal Party in 1904 over his principles on free trade and his opposition to Conservative Party tariffs. He later joined the Constitutionalist Party and then switched back to the Conservative Party in 1925. He famously said, "Anyone can rat, but it takes a certain amount of ingenuity to re-rat."

Political parties play an important role in a democracy but they must evolve and change with the times. Laws that inhibit or limit the natural evolution of political parties actually harm rather than enhance democracies.

Proportionality is important but not immutable

The justification for the 2018 law that proportionality must be rigidly maintained through the term of Parliament to respect the integrity of voters' will is mistaken.

There are already four provisions in the Electoral Act that deviate from pure proportionality. A party that receives less than 5 percent of the vote is denied its proportional representation. The proportional allocation of seats is compromised during a term of Parliament if a by-election occurs and the successful electorate candidate varies from that who previously held the electorate. The law also allows a variance where an independent MP chooses to join a party. The proportionality is also lost where an MP resigns and the seat is left vacant for up to six months. These variations are tolerated for good practical reasons. The small variation in proportionality from the rare occasion when an MP leaves a party is a less significant deviation than these existing provisions.

Law undermines democratic protection of confidence votes

The foundational principle of New Zealand's constitution is that the Government of the day may continue in office for only as long as it enjoys the support of the House of

Representatives. That is why confidence votes in Parliament are so important. Professor Janet McLean QC of the Faculty of Law at the University of Auckland has rightly highlighted that the 2018 law undermines this principle and weakens the only substantive check on the power of Governments in New Zealand between elections.⁸ New Zealand has had four occasions in our history where MPs have lost confidence resulting in changes of Government or early elections.

The law gives the power to the Prime Minister (who is a party leader) to dismiss and potentially replace an MP who has lost confidence in the Government.

This is plain wrong and undemocratic. It is worse for a List MP as they can simply replace them with an obedient newbie. This law needs repealing to maintain the integrity of confidence votes as an important democratic check on Governments between General Elections.

Conclusion

The 2018 law undermines the very important principle that MPs' first duty is not to their party or leader but to the people and the country.

The law change made in 2018 was an aberration associated with one party and one leader's personal frustration with the breakup of his party over 20 years ago. It is not a sound basis for rewriting the fundamental principles of parliamentary democracy established 333 years ago in the Bill of Rights 1688.

National and ACT have consistently opposed this draconian law since first proposed in the late 1990s, even when it may have been politically convenient to use the provisions to remove an aberrant MP. This law is a stain on New Zealand's proud liberal-democratic traditions and our core kiwi value of tolerating dissent.

National and ACT will continue to use every opportunity to have this law repealed and commit to doing so at the earliest possible opportunity in Government.

Green Party of Aotearoa New Zealand differing view

The Green Party strongly supports this bill. When previous party-hopping legislation was being debated in the late 1990s and early 2000s, the Green Party took a strong stance against such laws. The Green Party considers that the voters, and only the voters, should decide whether an MP diverged from their party for the right or the wrong reasons. Political parties and their leaders should not be allowed to un-elect Members of Parliament. If this bill does not proceed and the Act remains as it is, the Green Party has committed to not using the power that the legislation currently grants.

⁸ Submission by Professor Janet McLean QC on Electoral (Integrity) Amendment Bill.

Appendix

Committee procedure

The Electoral (Integrity Repeal) Amendment Bill was referred to the Justice Committee of the 52nd Parliament on 29 July 2020. It was reinstated with this committee in the 53rd Parliament on 26 November 2020.

We called for submissions with a closing date of 29 January 2021. We received and considered 19 submissions from interested groups and individuals. We heard oral evidence from 7 submitters.

We received advice on the bill from the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office was in attendance.

Committee members

Ginny Andersen (Chairperson)
Hon Simon Bridges
Simeon Brown
Dr Emily Henderson
Nicole McKee
Willow-Jean Prime
Hon Dr Nick Smith
Vanushi Walters
Arena Williams

Advice and evidence received

The documents that we received as advice and evidence are available on the Parliament website, www.parliament.nz.