

PROTECTING AOTEAROA DEMOCRACY BY REFORMING PARLIAMENT

Sir Geoffrey Palmer KC and Katrina Williamson***

New Zealand faces an unstable world, perhaps more so than any time since the Second World War. The geopolitical situation is not the only issue. There has been a noticeable decline of democracy in many countries during the last 20 years. The tendency has been toward populism and authoritarianism, even dictatorship. Liberal democracies have come under challenge and people who live in them are uneasy. Democracy has always been a fragile form of government, difficult to establish and relatively easy to lose. New Zealand is one of the world's oldest democracies, establishing universal male suffrage in 1879 and women getting the vote in 1893. New Zealand has had a vigorous commitment to strong democratic institutions. The rule of law, however, is more vulnerable due to executive domination. Values can ebb away without everyone noticing. To guard against such developments in New Zealand, this article suggests that reforming the New Zealand Parliament would be a sound way to keep the commitment to representative democracy. Some of the 12 recommended measures are significant changes, such as increasing the number of MPs to increase the accountability of the executive to the House of Representatives, and better regulating financial donations to political parties. Others are smaller, such as giving better bite to the Official Information Act 1982 and regulating lobbying. Together the recommended measures amount to a significant reform package with which to face uncertain times.

* Distinguished Fellow, Faculty of Law and Centre for Public Law, Victoria University of Wellington | Te Herenga Waka; Global Affiliated Professor, College of Law, University of Iowa.

** BA/LLB graduate, Victoria University of Wellington | Te Herenga Waka 2023; Research Assistant for the Centre for Justice Innovation.

The authors are grateful to Emeritus Professor Jonathan Boston, Victoria University of Wellington | Te Herenga Waka; Colin James, a long-time member of the Parliamentary Press Gallery; Keitha Booth, Adjunct Senior Research Fellow at Victoria University of Wellington School of Government; and Sir Kenneth Keith for helpful comments on a draft of this paper. We were also assisted by comments on the proposals at a seminar held at Village at the Park in Wellington attended by 80 people.

I INTRODUCTION

Aotearoa currently lives in an unstable world. Democracies are under challenge from competing forms of government. As the inhabitants of one of the world's oldest democracies, New Zealanders are accustomed to electing their Members of Parliament every three years.

Parliament, more particularly the House of Representatives, is our central democratic institution and has been since the New Zealand Constitution Act 1852 was passed by the then-Imperial Parliament at Westminster. Now Westminster has no power in Aotearoa. We are totally in charge of our own constitutional rules, democratic structures and institutions. Public trust in Parliament has fallen in recent years: in 2023, it scored 4.9 out of 10 on the institutional trust scale, a larger decrease than most institutions, down from 5.7 in 2021.¹

New Zealanders value the importance of free and fair elections. Increasingly, however, it is becoming plain that elections in Aotearoa are not enough to ensure a peaceful and secure democracy. In such uncertain times, it is important to take steps to enhance the performance of democratic systems so that careful decisions are made, with more accountability for the decisions and more transparency as to how they were made. In this connection, serious efforts to introduce deliberative democracy and the use of citizens' assemblies should be encouraged, as discussed later in the paper. The steps recommended here are far from all that is needed to improve our governance, but Parliament and, more particularly the House of Representatives, is the best place to begin. Changes to MMP itself are not discussed.

The reasons for reforming the Aotearoa New Zealand Parliament need to be stated before we embark on what those reforms should comprise. Factors to consider when deciding what changes are needed to build institutional strength are:

- strengthening the rule of law which is vulnerable due to the high degree of executive domination with few safeguards to ensure compliance;
- recognising that voting alone is not sufficient to produce an effective democracy;
- ensuring that the decisions and policies of our democratic institutions are more closely aligned with the informed preferences and the core ethical values of the community;
- enabling voters to participate more effectively in the decision-making process in the House of Representatives;
- recognising that capitalism requires adequate regulation if people are to be protected from its excesses;
- recognising that some present political procedures need improvement to avoid rot and decay;
- taking steps to avoid the development of illiberal democracy and populism: authoritarianism and autocracy produce chaos;

¹ Stats NZ "New Zealanders trust in key institutions declines" (25 September 2024) <www.stats.govt.nz>.

- being attentive to the importance of long-term institution building and the critical importance of protecting the interests of future generations;
- ensuring our institutions are authentically democratic;
- making changes to produce an inclusive society in which the rich ethnic diversity of the Aotearoa population is represented and heard;
- taking meaningful steps to attack poverty;
- developing policies to combat disinformation and conspiracy theories;
- improving the transparency and accountability of government decision-making; and
- ensuring Aotearoa is a responsible contributor to global governance and a rules-based international order.

The above points have been derived from the extensive international literature on the decline of democracies in the world and what can be done about it.² To address these issues, we propose 12 specific policies to reform Parliament, improve how government functions and how law is made:

- (1) Increase the number of Members of Parliament to 150 or 180.
- (2) Reform the methods of making legislation, the parliamentary timetable and urgency:
 - (a) Pass and follow a resolution on the 10 principles of good law-making specified below.
 - (b) Have the House sit for more hours in a year.
 - (c) Make urgency in the House of Representatives less easily available and more limited in scope.
 - (d) Limit the amount of legislation the House is required by the Executive to assess.
- (3) Extend the maximum term of Parliament from three years to four years so undue speed and hurry do not harm the quality of legislation.
- (4) Reform the select committee system by improving its capacity to scrutinise in a way superior to the present methods.
- (5) Make voting in parliamentary elections compulsory, as in Australia.
- (6) Allow people aged 16 years and above to vote in parliamentary elections.
- (7) Require schools to teach civics programmes to educate future citizens, provide a better understanding of how their system of government works and empower them to participate in it.

2 Steven Levitsky and Daniel Ziblatt *How Democracies Die* (Penguin Random House, London, 2018); David Runciman *How Democracy Ends* (Profile Books, London, 2019); Margaret Atwood and others *Democracy – Eleven Writers and Leaders on What It Is and Why It Matters* (Profile Books, London 2024); AC Grayling *Democracy and Its Crisis* (Oneworld, London, 2018); Maggie Haberman, *Confidence Man: The Making of Donald Trump and the Breaking of America* (Mudlark, London 2022); Geoffrey Palmer "Democracy, monarchy, and civics" [2023] NZLJ 155; Geoffrey Palmer "More reform of Parliament" [2023] NZLJ 192; and Geoffrey Palmer "Disinformation, official information, and political parties" [2023] NZLJ 243. Some details on Geoffrey Palmer's submissions on the Standing Orders on some of these matters can be found in Phil Smith "Reimagining Parliament" (13 November 2022) RNZ <www.rnz.co.nz>.

- (8) Make the Speaker of the House a neutral umpire by enforcing appointment by secret ballot in the House, not on the nomination of the government of the day as happens currently.
- (9) Improve transparency and open government by reforming the Official Information Act 1982 to ensure it applies to more agencies and is enforceable by an Information Commissioner, because voting alone does not produce open government.
- (10) Reform the law relating to the disclosure of donations for political parties by limiting the amount that can be donated by an individual to prevent wealthy individuals and pressure groups from having undue influence upon policy.
- (11) Require individuals and organisations who lobby MPs and government servants for rewards to be catalogued on a publicly available register that records their activities.
- (12) Amend the Public Service Act 2020 to require public servants to provide full and frank advice on all policy proposals considered by the government, and to require such advice to be made publicly available after the decisions have been made.

These changes would substantially improve the parliamentary process and increase public confidence in Aotearoa New Zealand's central democratic institutions: Parliament, the House of Representatives, and the Executive.

II THE CASE FOR MORE MPs

To begin, we need to understand what MPs do. The election of major decision-makers is fundamental to democracy. Voting acts as a way for people to have their say in how they are governed, enabling public opinion to hold elected representatives to account by answering for their actions. The only way a person can become an MP is through becoming a candidate in a competitive, democratic election.

The Aotearoa method of elections is known as a mixed-member proportional system (MMP). It results in the overall number of MPs a political party secures corresponding to the number of votes parties secure across the country. Before 1996, a first-past-the-post (FPP) method was used. In those days, politics was dominated by two parties – National and Labour – which made it difficult for others to secure representation. MMP obstructed the two-party duopoly and altered political incentives.

At present, there are 123 members of the House of Representatives.³ Thirty are within the Executive; that is, ministers in Cabinet, ministers outside Cabinet, and parliamentary under-secretaries. MPs of the parties within the government have little incentive to hold ministers accountable, preferring to exert influence within the privacy of their party caucuses, lest it render the government unpopular and affect their chances of re-election. Changes to the electoral system have

³ Including 51 list MPs, 63 general electorates representatives and 7 Māori electorate representatives: New Zealand Parliament "Members of Parliament" <www.parliament.nz>.

brought greater diversity of representation in terms of age distribution, gender and ethnicity. There are now more Māori and Tagata Pasifika MPs than ever before.

The functions of the House of Representatives are to:

- Provide a government headed by Cabinet ministers and exert influence through votes on confidence and supply.
- Consider and pass Bills into law.
- Provide a place for the airing of grievances.
- Raise money so the government's business may be conducted, including setting taxation rates.
- Approve the expenditure of money via the government's budget.
- Act as a check and restraint on how government is carried out and serve as a forum for party political contests and debates.

The job requires work in two geographical locations: Wellington, where Parliament sits, and the electorate the MP represents or, in the case of list MPs, where that person resides. The pressures are great in both locations. Ministers are under even more pressure than ordinary MPs.

Why do we need more MPs? Given that ministers are accountable for their responsibilities to the House, we need more MPs to carry out the task of holding them to account. This task is made much more difficult because Aotearoa, unlike many Parliaments, has only one House. This is a sound reason for increasing the number of MPs.

There are a number of methods by which ministers can be held to account in the House of Representatives:

- Answering oral and written questions from MPs.
- Parliamentary debates on Bills, expenditure and taxes.
- Select committee hearings on legislation and appropriations where ministers may have to appear in front of the Committee and be questioned.
- Debates and votes in the House on confidence in the government and upon the conduct of ministers.
- Drafting ministerial correspondence to MPs and consulting with constituents.

MPs must interact with many different organisations and individuals. They work long hours. They must travel extensively. When the House is sitting under urgency, those hours are extended, often until midnight and then resuming at 9 am. MPs have so many invitations that they have difficulty accepting them, and their timetables are often disrupted by the House sitting under urgency.

In their electorates, MPs are also busy. MPs have an important constitutional function in supporting the complaints and concerns of their constituents by making representations to the government on their behalf. This is critical in a representative democracy. MPs are provided with an electorate office and an electorate secretary to assist in this work. MPs will then write letters to

ministers drawing attention to, and seeking a remedy for, a decision regarding a constituent by the government machine.

In Wellington, MPs must consider Bills to be debated in the House. These are often long and complicated. They must read briefing papers and do research on the issues. They must keep a close eye on the news and interact with the media to answer their questions. They must attend party caucus meetings and select committee meetings in Wellington, and read the papers for those meetings. They must reply to the voluminous correspondence and emails they receive. The demands made on MPs in modern times have increased enormously as the complexity of life and the extension of government services has multiplied.

For constituents and the wider community to get optimal service from their elected representatives, it is necessary to have sufficient numbers of them to deal with the workload. MPs are chronically overworked; they have competing demands, and it is an extremely stressful lifestyle. Aotearoa needs as many laws enacted and as much care with fiscal policies as is needed in a much more populous democracy like the United Kingdom. If it is desired to run a modern state with a whole range of health, education and government services, it is necessary to have sufficient capacity to ensure accountability for everything the government does.

Close attention is also required to the country's financial needs and capacities. These are and always have been fundamental to the functioning of the United Kingdom Parliament at Westminster. The House of Commons has 650 elected MPs.⁴ Above this is the House of Lords, which also has direct influence over legislation. In July 2024 there were 774 peers in the House of Lords with the capacity to have legislative influence by voting on Bills and debating policies.⁵ This is a far greater range of scrutiny and expertise than is available in the Aotearoa Parliament.

Comparing the size of the Executive in the United Kingdom with that of New Zealand requires some explanation as it is complicated. This is because in the United Kingdom there are two houses of Parliament, the House of Commons and the House of Lords.

As at the beginning of April 2025, the United Kingdom had a total of 119 ministers in the government with 90 of those sitting in the Commons and 29 sitting in the Lords.⁶ Some ministers will also double-hat and cover more than one role, so there are currently 140 ministerial titles split between those 119 people.⁷ There is a legal limit of 109 ministerial salaries,⁸ but two ministers in the Commons

4 UK Parliament "State of the parties" <www.members.parliament.uk>.

5 UK Parliament "House of Lords data dashboard: Current membership of the House" (6 November 2024) <www.lordslibrary.parliament.uk>.

6 Institute for Government "Government ministers" (12 March 2025) <www.instituteforgovernment.org.uk>.

7 Institute for Government, above n 6.

8 Ministerial and other Salaries Act 1975 (UK), sch 1, pt V, cl 2. See also Institute for Government, above n 6.

and nine in the Lords are unpaid ministers.⁹ Ministers who hold two titles are also unpaid for one of their roles.¹⁰

In the United Kingdom, the whips are counted as members of the Executive.¹¹ In addition, there are 43 parliamentary private secretaries who are not paid or considered part of government.¹² They are MPs who act as unpaid assistants to the government minister.¹³ They are variably involved in the work of the minister but act as a go-between for the minister and the parliamentary party.¹⁴ While a tier below the executive, they are still bound by the expectation that they vote with the government.¹⁵ So, if you count these along with ministerial roles then the government currently offers roles to 133 MPs out of the 404 currently holding the whip.

An increase in the number of MPs in Aotearoa would have the added advantage of increasing the talent pool available when it comes to selecting ministers. With a small House, such as Aotearoa has at present, most MPs who are elected aspire to become ministers. Yet in larger Parliaments like the House of Commons, backbenchers can have distinguished parliamentary careers without ever becoming ministers. Serving on select committees and doing select committee inquiries on Bills or other matters is hard and vital work, yet they are not ministers. We need to have a sufficient range of people in our Parliament to enable the carrying out of non-ministerial tasks, which is frequently not the case.

Tables 1 and 2 show that other democratic countries have more MPs per capita than Aotearoa:

9 Institute for Government, above n 6.

10 Ministerial and other Salaries Act, s 1(5).

11 Institute for Government, above n 6.

12 Institute for Government "Parliamentary private secretaries" (2 April 2025) <www.institutefor.gov.uk>.

13 Institute for Government, above n 12.

14 Institute for Government, above n 12.

15 Institute for Government, above n 12.

	Country	Population	House	Seats	Population per seat
1	Finland	5,603,851	Eduskunta	200	28,019
2	Sweden	10,548,877	Riksdag	349	30,226
3	Norway	5,562,363	Storting	169	32,913
4	Denmark	6,081,343	Folketing	179	33,974

Table 1: Parliamentary decision-makers by population: select Nordic countries¹⁶

	Country	Population	House	Seats	Population per seat
1	Ireland	5,281,600	Dáil Éireann	160	33,010
			Seanad Éireann	60	88,027
			<i>Total</i>	220	24,007
2	Aotearoa New Zealand	5,338,900	House of Representatives	123	43,406
3	United Kingdom	67,596,281	House of Commons	650	103,994
			House of Lords (not elected)	774	87,334
			<i>Total</i>	1,424	47,469

Table 2: Parliamentary decision-makers by population: select Westminster countries¹⁷

¹⁶ Statistics as of 1 August 2024.

¹⁷ Statistics as of 1 August 2024.

The Scandinavian countries have been chosen because the literature demonstrates that they are well governed.¹⁸ Ireland was chosen because it is a country we relate to with a similar population but a system with more checks and balances than ours. The number of people represented by each MP in Aotearoa is 43,406, which is substantially more than Ireland's 24,007. In all the Scandinavian countries, the total population represented by an MP is smaller than in Aotearoa. Also, remember that in some European countries, ministers who are not MPs can sometimes be appointed.

It seems a reasonable inference that the quality of government is likely to be better with more MPs. The trust of the people in their democratic institutions with more representatives in the legislature should also improve. It can hardly be fair for the electorate to criticise the outcomes of MPs' work when they have far too much work to be able to do it properly. The pressures on them are great, and the chances of being able to perform within the timeframes required are low. The extraordinary speed with which legislation in Aotearoa New Zealand is passed exacerbates this.¹⁹

The public attitude in Aotearoa tends to be opposed to increasing the number of MPs.²⁰ A citizens-initiated referendum in 1999 overwhelmingly supported reducing the number of MPs in Parliament,²¹ but resulted in no change. It seems unjust to blame the MPs in these circumstances, as it is a highly stressful job. The demands and hours exceed what most people work. But if there were more MPs, more could be accomplished. It could improve decision-making as legislation could be more thoroughly examined and appropriation decisions could be worked through more rigorously. The case for increasing the number of MPs is too strong to leave to the citizens-initiated referendum process, which promises much but delivers nothing of substance.²²

18 Pedro Marques and Kevin Morgan "Getting to Denmark: The dialectic of governance & development in the European periphery" (2021) 135 *Applied Geography* 1; and Francis Fukuyama *Political Order and Political Decay* (Farrar, Straus and Giroux, New York, 2014) at 25.

19 Use of urgency for the first eight months of the 2023 government was 36.4 per cent: Geoffrey Palmer "Lurching towards constitutional impropriety" (23 August 2024) Newsroom <www.newsroom.co.nz>. The prime purpose of more MPs is to reduce executive domination in the House of Representatives, thereby improving the prospects for democracy. Valuing the rule of law but providing few institutional safeguards to protect it is best rectified by increasing the number of MPs, thereby increasing accountability: see Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at i and 138–141.

20 See Part III below.

21 Electoral Commission New Zealand "Return of Citizens Initiated Referenda Poll Votes - Reducing the Number of MPs in Parliament [sic]" (1999) <www.electionresults.govt.nz>. Public opinion may well have changed given the population has grown so significantly in this time, particularly with the need for more seats to represent the South Island's growing population: see Richard Harman "South Island population boom suggests it's time for a larger Parliament" (24 October 2024) Politik <www.politik.co.nz>.

22 See Citizens Initiated Referenda Act 1993. Not only are citizens-initiated referendums non-binding, they require a large number of electors – at least 10 per cent – to agree that a referendum should be held in the first

III THE CASE AGAINST MORE MPs

A Public and Political Disagreement

The official Independent Electoral Review (IER) in 2023 argued that our Parliament needs more MPs, but the public does not seem to agree. In response to their questionnaire, the IER found 66 per cent of respondents did not support allowing the size of Parliament to increase in line with population changes, and only 26 per cent agreed with the idea.²³ Politicians are already at risk of being negatively perceived,²⁴ so they may feel it would not be a good look to support an increase.

B Cost

The Electoral Commission claims each new list MP costs around \$1.7 million across a three-year term, including salary, staff needs and office space.²⁵

IV LEGISLATION, THE PARLIAMENTARY TIMETABLE AND URGENCY

This part includes four items:

- (a) Urgency in the House of Representatives should be made less easily available and more limited in scope.
- (b) The House should sit for more hours to discharge its business properly.
- (c) A 10-point parliamentary resolution on good law-making should be adopted.
- (d) Efforts must be made to limit the amount of legislation the Executive requires the House to address.

Passing Acts of Parliament is a fundamental function of the Aotearoa Parliament: an orderly society needs laws. The first issue is how to secure parliamentary procedures that optimise the prospect of obtaining effective legislation that will endure. The present procedures of the House of Representatives in this regard build on long-established debate processes. First is the introduction and

place: s 18(2). If a referendum is to be held on the question of whether to increase the number of MPs, it should be part of the Bill containing the proposed amendment, as with other binding referendums: see for example End of Life Choice Act 2019, s 2.

23 He Arotake Pōtitanga Motuhake | Independent Electoral Review *Stage 2 Engagement: Questionnaire Responses* (January 2024) vol 3(a) at 11.

24 See Kantar Public *Survey of the New Zealand Public* (New Zealand Parliament, Wellington, January 2023).

25 Tom Dillane "Election 2023: The cost of Parliament's three seat overhang MPs - and how only 29% is salary" *The New Zealand Herald* (online ed, Auckland, 11 November 2023).

first reading in the house, then select committee reports and subsequent readings until the Bill is passed and royal assent is granted.²⁶

Some variables must be factored into this analysis to understand how all the above stages fit into the parliamentary timetable:

- The number of days the House sits.
- The hours the House sits.
- The amount of urgency that is taken by government ministers.
- The occasional need for real speed in passing legislation where an emergency arises that must be dealt with, as in a pandemic.
- The principles that are adopted for good law-making in both the policy design of legislation and the drafting and publication of it by the Parliamentary Counsel Office (PCO).
- The quantity of legislation the government wishes to pass.

A Urgency in the House of Representatives

The House of Commons in the United Kingdom sits on more days and for longer hours than the Aotearoa House of Representatives. This issue was carefully researched for a 2011 book, *What's the Hurry?*, dealing with the use of urgency in the Aotearoa legislative process.²⁷ Between 1987 and 2010, the House of Representatives went into urgency 230 times. It gave urgency to more than 1,600 Bills, many of them on more than one occasion. Close to half the legislation during this period had urgency accorded to it at some stage.

The purpose of urgency is to allow governments to pass legislation more quickly. The result is that Parliament does not follow its own process rules laid down by Standing Orders. This can result in an absence of effective scrutiny, and sometimes there is what the authors say is a "real reason for disquiet".²⁸ Sometimes urgency is used to avoid select committee scrutiny and the hearing of public submissions on Bills.

Some changes were made by the Standing Orders Committee in 2011 on urgency because of submissions the researchers made. The first and most crucial recommendation by the researchers was to conduct a comprehensive review of parliamentary time, but this was not done. It is a pity because legislative pressures since 2011 have increased considerably. The system is not coping with all the work that MPs are required to perform.

26 Geoffrey Palmer and Gwen Palmer Steeds *Democracy in Aotearoa New Zealand: A Survival Guide* (Te Herenga Waka University Press, Wellington, 2022) at 146.

27 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011).

28 At 1.

One recommendation implemented was to introduce a process for extended sitting hours that would not interfere with select committee scrutiny. Its effectiveness since adoption is not possible to determine without detailed research.

The researchers also recommended that better and more extensive reasons be given to the House when deciding upon an urgency motion. A change was made, but not in the terms submitted. It was decided that a minister moving an urgency motion be required to "explain to the House with some particularity the circumstances that warrant the claim for urgency".²⁹ It is far from clear whether this new wording has had much effect on cutting down the use of urgency motions.

In the early life of the government elected in late 2023, record amounts of urgency were taken in circumstances of considerable constitutional dubiety. Aotearoa governments use urgency because they can, while many jurisdictions such as the United Kingdom, Australia and Canada utilise two parliamentary houses, and legislation must pass through them both. This intensifies the scrutiny that each Act of Parliament receives, changing the incentives to use urgency. In Aotearoa, urgency is a critical assertion of the Executive's dominance over the House. Research shows that urgency is used to extend the sitting hours of the House and push forward the government's legislative programme.³⁰

Parliamentary procedures are arcane and unknown to most members of the public. Things are unlikely to change unless there is a greater public outcry against the failure to follow established procedures. How it is possible to hold the government to account when it takes so much urgency is unclear, yet this remains the current landscape. The researchers thought a major cultural shift would be required to stop the House from cutting out select committee scrutiny using urgency. It is obvious that this cultural shift has not occurred.

Proof of this proposition comes from the use of urgency in the Luxon administration. The statistics for urgency in the first eight months of this government compared with their two predecessors are telling. The number of Bills progressed by this Government under urgency for their first and second readings – excluding select committee consideration – was 36.4 per cent of the total number of Bills for the eight months from December 2023 until August 2024. In the previous Parliament, it was 24 per cent for the same period, and in the government before, six per cent.³¹

This is proof positive that urgency is a serious democratic problem in New Zealand. It is, therefore, worth summarising what the 2011 researchers thought about the future back then:³²

29 Standing Orders Committee *Review of Standing Orders* (September 2011) at 17. See Standing Orders of the House of Representatives 2011, SO 55(3), now Standing Orders of the House of Representatives 2023, SO 57(3).

30 Geiringer, Higbee and McLeay, above n 27, at 30.

31 Palmer, above n 19.

32 Geiringer, Higbee and McLeay, above n 27, at 160.

They are:

- providing a more flexible "extended sitting" provision that allows for more than one extended sitting per week, or longer extended sittings;
- limiting urgency motions (or urgency motions that remove select committee scrutiny) to one Bill per motion;
- making urgency motions that remove select committee scrutiny debatable (so as to bring them into line with the new position in relation to instructions to select committees);

...

More details on the intricacies of urgency can be found in the handbook produced by the Office of the Clerk.³³

B Number of Sitting Days and Sitting Hours

The truth is that the Aotearoa House of Representatives does not sit sufficiently long to transact all the business before it in a satisfactory fashion – think of the empire over which the Aotearoa government presides.

The public sector in 2024 employed more than 481,000 people, or 19.2 per cent of the total workforce, the bulk working in central government.³⁴ The public service is organised in 34 departments or ministries by the Public Service Act 2020.³⁵ The New Zealand Defence Force and Police are outside the public service, as is local government. Beyond these sit nearly 70 organisations corralled under the Crown Entities Act 2004 and entrusted with numerous functions.³⁶ These include Crown agents (such as the Accident Compensation Corporation), autonomous Crown entities (such as the Museum of New Zealand Te Papa Tongarewa) and independent Crown entities (such as the Law Commission).

This machine for governance has many moving parts: coordination can be difficult, and the lines of accountability are often complicated. MPs cannot be effective in fashioning the legislation and appropriations necessary for such a sprawling mass of reality unless there are more MPs and unless the House sits for more hours.

Yet the Aotearoa House of Representatives sits fewer days and fewer hours than the House of Commons in London. These arguments for and against sitting more days and more hours were

33 David Wilson (ed) *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023) at [15.5].

34 Public Service Commission "Workforce Data - Workforce size" <www.publicservice.govt.nz>. These numbers exclude the 50,000 who work for local authorities.

35 Public Service Act 2020, sch 2, pt 1.

36 Crown Entities Act 2004, schs 1 and 2.

discussed in the 2011 book. The comparative figures for sitting hours are set out in Table 6.1 of the book.³⁷ In 2008:

- In Australia, the House of Representatives sat for 639 hours, and the Senate sat for 482 hours.
- The House of Commons in the United Kingdom sat for 1,188 hours, and the House of Lords for 1,010 hours.
- The Irish equivalent of our House of Representatives sat for 795 hours, and their Senate sat for 551 hours.

The figures have changed since 2011:

	UK House of Commons	NZ House of Representatives ³⁸
May 2022–Oct 2023	1,556.30 ³⁹	807.12
May 2021–Apr 2022	1,155.62 ⁴⁰	511.6
Dec 2019–Apr 2021	1,699.8 ⁴¹	565.35

Table 3: Total hours sat in each House comparatively

A recent research briefing from the House of Commons Library also has extensive data on what has happened there in more recent times.⁴²

C Ten Points of Good Law-making

Perhaps the most important feature of *What's the Hurry?* are the 10 principles of good law-making that were developed at the beginning of the book.⁴³ We can do no more than summarise the headings here, but these well-researched and evidenced principles deserve to be adopted and followed. They are:

- 1 Legislatures should allow time and opportunity for informed and open policy deliberation

37 Geiringer, Higbee and McLeay, above n 27, at 128.

38 Email from the Office of the Clerk of the House of Representatives to Geoffrey Palmer regarding the New Zealand House of Representatives' sitting hours (8 October 2024).

39 UK House of Commons *Sessional Returns: Session 2022–23* (HC 1 (2023–24), 17 April 2024) at 41.

40 UK House of Commons *Sessional Returns: Session 2021–22* (HC 1 (2022–23), 28 November 2022) at 34–35.

41 UK House of Commons *Sessional Returns: Session 2019–21* (HC 1 (2021–22), 7 February 2022) at 34–35.

42 Helena Carthew "House of Commons: Hours Sat & Late Sitings" (Research Briefing, House of Commons Library, 10 August 2023).

43 Geiringer, Higbee and McLeay, above n 27, at 16–19.

- 2 The legislative process should allow sufficient time and opportunity for the adequate scrutiny of bills
- 3 Citizens should be able to participate in the legislative process
- 4 Parliaments should operate in a transparent manner
- 5 The House should strive to produce high quality legislation
- 6 Legislation should not jeopardise fundamental constitutional rights and principles
- 7 Parliament should follow stable procedural rules
- 8 Parliament should foster, not erode, respect for itself as an institution
- 9 The government has a right to govern, so long as it commands a [simple] majority in the House
- 10 Parliament should be able to enact legislation quickly in (actual) emergency situations

These are normative standards, and they ought to be followed in a democracy that respects democratic processes and the rule of law. The principles should be adopted by parliamentary resolution.

D Amount, Size and Complexity of Legislation

The strain that the legislative timetable imposed on the PCO for the drafting of government Bills was formidable. As the Auditor-General told the Justice Committee considering the Estimates on 17 June 2024:⁴⁴

The number, complexity and size of the Bills on the legislative programme has grown considerably in the past decade. The PCO is unable to keep up with this growth, the gap between PCO's output and the legislative programme is growing wider every year. Tight deadlines, heavy workloads and changing legislative drafting priorities is creating a significant capability and capacity challenge for the PCO.

These warnings must be heeded, and strong remedial measures taken. The plain fact is that there is too much legislation to be properly processed. More omnibus Bills may help, as would better preparation and attention at the design stage within the Executive. Introducing proposals that have not been thought through properly and expecting select committee scrutiny to fix them is not sound. Select committees cannot recommend changes beyond the scope of the Bill as introduced unless the Business Committee agrees. The other truth lies in the fact that higher priority has been given to getting measures passed rather than getting them right.

V A FOUR-YEAR PARLIAMENTARY TERM

One policy agreement made by the coalition between National and ACT in 2023 undertakes to introduce legislation extending the maximum parliamentary term from three years to four years.⁴⁵ If the change were made, it would improve policy design, allow time for better parliamentary scrutiny, contribute to better legislation and may save money through less regular elections. The Term of

⁴⁴ Evidence of John Ryan (Auditor-General) to the Justice Committee regarding Estimates (17 June 2024).

⁴⁵ New Zealand National Party and ACT New Zealand *Coalition Agreement* (23 November 2023) at 9.

Parliament (Enabling 4-year Term) Legislation Amendment Bill was introduced on 27 February 2025.⁴⁶ A draft Bill had previously been circulated as a Member's Bill by David Seymour, leader of the ACT Party.⁴⁷

However, as has been submitted to the select committee considering the Bill, it would appear to be unwise to entrench the new arrangements which provide for optional three- or four-year terms, without any reliable information about how they will work in the real world of party politics in the House.⁴⁸ The original proposal stated in the Explanatory Note that: "it is important that this change goes hand in hand with improving the checks and balances on executive government by improving parliamentary oversight".⁴⁹ There is no real analysis regarding what range of options may be available for improving the checks and balances. Constitutional changes require more attention than this Bill has received.⁵⁰ The policy process and consideration within the Executive branch has been insufficient and there is no record of anything of substance.⁵¹

Referendums on this subject failed to secure majority support in both 1967 and 1990, and it is unclear how either proposal, if successful, would have been implemented in legislation. Few changes would do more to improve the quality of policy-making and the drafting of enduring legislation. It would also lessen public cynicism about what it sees as Aotearoa's highly political and partisan system. We need more attention to governance and less to politics. The change ought to be done in such a way that the term is semi-fixed, allowing for early elections where circumstances require it. Indeed, in the Bill that has been introduced, the term of Parliament can only exceed three years when the number of members of subject select committees is proportionate to the number of non-executive MPs in the House.⁵²

Although the current Bill promises a referendum, requiring only a simple majority of electors to survive, its goal could only be achieved by a 75 per cent vote in the House of Representatives as the term of Parliament is provided in an entrenched provision.⁵³ If Parliament agrees, there is no legal

46 Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill 2025 (128-1).

47 Constitution (Enabling a 4-Year Term) Amendment Bill 2021 [consultation draft].

48 Jonathan Boston and Geoffrey Palmer "Submission to the Justice Committee on the Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill 2025" at [29].

49 At [5], citing the consultation draft, above n 47, explanatory note at 1.

50 Boston and Palmer, above n 48, at [6].

51 At [6].

52 Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill (128-1), cl 5, which would insert Constitution Act 1986, s 17(4), containing the proportionality requirement.

53 Standing Orders of the House of Representatives, SO 270(3). See Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill (128-1), cl 8, which would amend the Electoral Act 1993, s 268(1)(a), which contains the entrenchment of the term of Parliament.

reason why the change should not be done this way: a 75 per cent majority is an adequate protection against arbitrary power, although it should not apply to the extension of an existing term. There are many issues involved here, and securing an adequate level of public understanding is not easy. One consequence is that a reform that would improve the performance of the House may never occur.

The strain on the policy-making and legislative system caused by a three-year term is profound. Consider the situation that emerged after the 2023 election: a strategy of mass repeal of the previous Government's legislation was engaged in by the Luxon Government under urgency early in its term, with repeal Bills being introduced and passed. This seems to have been without considered advice from the public service being taken or the usual checks and balances being followed, such as Regulatory Impact Statements. This was dubious behaviour from a constitutional point of view and reduced public confidence in Parliament.

This also wasted massive amounts of money spent on policy advice and legal drafting resources for resource management reform going back over a three-year period.⁵⁴ It would have been cheaper and quicker to amend the two massive environmental statutes involved. Instead, the government began a new process that will itself take years to complete. The result will be chronic uncertainty for years as to what the legal framework for development and resource management in Aotearoa will be.

The amount of urgency taken marks a departure from recent parliamentary practice and has set a record for the number of laws passed in the first hundred days.⁵⁵ The tight executive control of the legislative process was remarkable and a loss for democratic and parliamentary accountability. To legislate so fast and with so little reflection creates a dangerous precedent for the future of the Aotearoa law-making system. It demeans the role of the House of Representatives and undermines public confidence and trust in our political institutions. Drafting complex legislation at speed without proper advice, public consultation or proper scrutiny is undesirable and dangerous.

This recent experience highlights the need for change. The processes must be slowed down and receive better consideration. A semi-fixed four-year parliamentary term will allow that to occur.

VI REFORMING SELECT COMMITTEE SYSTEMS

Much of the work of Parliament carried out by MPs is bound with their membership of select committees. The workload attached to these committees is heavy and has become heavier over the years. Scrutiny of legislation and appropriations are key features of what select committees do. For legislation, this encompasses getting the Bills introduced to be made more effective by ironing out

54 See Natural and Built Environment Act 2023 and Spatial Planning Act 2023, both intended to replace the Resource Management Act 1991 and both repealed on 23 December 2023: Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Act 2023, s 5.

55 Office of the Clerk, above n 38. Also of note is that from 5 December 2023 to 7 August 2024, the House sat in normal sitting hours for 221.47 hours and under urgency for 153.37 hours.

defects and making the legislation fit for its purpose. Submissions made to the committee by members of the public may reveal errors, anomalies and unsuspected consequences. On some occasions, Bills are substantially rewritten. Few escape any amendment. On rare occasions, select committees may recommend that Bills are not passed.

Parliament's website sets out its system of select committees, which it describes as the "engine-room of Parliament".⁵⁶ Apart from legislation, committees also consider a wide range of issues in detail, including government policy and estimates of expenditure included in the Budget, petitions and inquiries into topics.

The select committee process also serves to hold ministers to account for their legislative decisions and to defend them. A comprehensive system of committees was established in the 1980s when one of the authors was Leader of the House. It has become somewhat decayed and tired in recent years. The proceedings are sometimes perfunctory due to the pressure of business on overworked MPs.

A Submissions to Select Committees: Quantity over Quality

We should have better select committee procedures and much more support to ask the questions that need to be asked. They need to have more access to experts than they get and need to hold the government to account more rigorously. Until 1985, ministers were members of subject select committees tasked with keeping them accountable, which was impossible and a negation of accountability. That was stopped for subject select committees, but they still sit on others, and it is both desirable and necessary that they do so.

Much less time is given to members of the public to interact with committee members than used to be the case. The amount of time MPs spend questioning witnesses and officials varies, but there has been undue legislative pressure for years now. The pressure is to get the work agreed to and not delve into it thoroughly.

The reduction of effective scrutiny over the last few years has been noticeable. Emeritus Professor Jane Kelsey of the Auckland University Faculty of Law, who has made many submissions to such committees, wrote to one of the authors, Geoffrey Palmer, setting out her recent experience:⁵⁷

For the past 3 or 4 years select committees have been routinely allocating 5 minutes to individuals and 10 minutes to groups to present submissions and answer questions. Select committee cannot perform their responsibilities through that process.

⁵⁶ New Zealand Parliament "Select committee members in the 54th Parliament" (13 December 2024) <www.parliament.nz>.

⁵⁷ Email from Jane Kelsey to Geoffrey Palmer regarding New Zealand select committees (24 August 2024).

This is especially egregious for me because they give me 5 minutes to present submissions on complex international treaty examinations where I am one of very few who understand the implications and can explain them simply to a committee that really has no idea and is otherwise captive of MFAT.

...

The standing orders committee last year finally recommended a review of the international treaty examination process, but that it be carried out by the [Foreign Affairs, Defence and Trade Committee] which has been the problem. Without even calling for submissions, based on a memo from MFAT saying everything is fine, they decided a review was not necessary. Their report is a couple of pages that does not engage with any issue whatsoever.

This is direct evidence of how the system is failing and must be repaired as a matter of urgency. The question is how to fix the situation. It is easy to make submissions. Many submissions are the result of pressure group activity where a person sends in what a pressure group suggests. The overwhelming of select committees by any overly large quantity of submissions needs to be curbed. The process needs to be rethought. It is not working properly, as shown by the select committee considering the Fast-track Approvals Bill that received nearly 27,000 submissions.⁵⁸ Constructive use of citizens' assemblies could reduce the chaos by getting an accurate read of informed opinions on particular issues before introducing a Bill. There has been some recent improvement, with scrutiny weeks being set aside. The House does not meet during these weeks, but MPs are in Wellington focused on dealing with financial scrutiny work on committees.⁵⁹ The introduction of scrutiny weeks has enabled the committees to double their hours, resulting in more searching and rigorous scrutiny, thus improving accountability. The treatment of legislation needs some equivalent changes, and such changes need to be engineered urgently.

The new system worked quite well to begin with, but it has degraded over time. The departments largely have a monopoly on the advice, although the Office of the Clerk now has advisers who are highly competent. The Executive, however, is so big, powerful and well-resourced compared with the resources available to the House that it usually prevails. But there is a tendency to rely on departmental advisers who, of course, are part of the executive. Proper scrutiny requires access to expert and neutral advice, and the Parliamentary Library could certainly be utilised more.

B Reforming Membership of Select Committees

Committees usually have between six and 12 members each. The overall membership across committees is proportional to the number of seats political parties hold in the House. Committees are appointed at the start of each Parliament after a general election. Committees work in a different way

58 Environment Committee "Environment Committee begins hearings on the Fast-track Approvals Bill" (press release, 2 May 2024).

59 New Zealand Parliament "Introducing: scrutiny weeks" (6 June 2024) <www.parliament.nz>.

to the style of debate that occurs in the House. Members spend their time in select committees examining Bills in detail and other business, including hearing from the public and expert advisers. Every three years, the Standing Orders Committee reviews Parliament's rules and procedures. The most recent review of Standing Orders made several changes to how select committees operate. Parliament has 12 subject-focused select committees charged with particular areas of responsibility, including the Environment Committee, Health Committee, and Māori Affairs Committee. There was one new "specialist" select committee: the Petitions Committee. This means there are now six specialist committees, including the Petitions Committee and the Privileges Committee.

Ministers do not sit on select committees except for the Standing Orders Committee, the Privileges Committee, the Business Committee and the Officers of Parliament Committee. It is not appropriate for ministers to sit on subject matter select committees as their actions will be judged there, and they may be required to appear before the committee. The House is the primary instrument for ministerial responsibility and accountability. The Executive cannot sit in judgment on itself. As a matter of simple arithmetic, 95 MPs are left to deal with the 12 subject matter committees, as well as the Regulations Review Committee and the Petitions Committee, both of which are also busy.

Many MPs are members of more than one select committee (Table 4), causing scheduling problems. There are two MPs on three different subject committees and 22 on two subject committees, which, given their importance and scope, is too burdensome within the scheduling and resources confines of an MP.

	One committee	Two committees	Three committees
NZ First Party	1	2	1
ACT Party	2	3	1
National Party	15	13	0
Labour Party	25	2	0
Green Party	12	1	0
Te Pāti Māori	5	1	0
Total	60	22	2

Table 4: Number of subject committees sat on by MPs⁶⁰

The time has come for reorganisation and improvements. It is a complex task and cannot be dealt with in detail here, but there are some ideas that could help. For big and significant Bills, it would be useful to use the techniques of deliberative democracy and connect the House with the public in a superior way to what is being achieved now. Parliament is rather inward-looking and preoccupied

60 Statistics as of 3 October 2024: New Zealand Parliament "Members of Parliament" <www.parliament.nz>. When the Parliament Bill 2024 was introduced, the House set up a special select committee to consider the constitutional implications of the Bill and to scrutinise it: New Zealand Parliament "Parliament Bill" <www.parliament.nz>.

with political advantage rather than good governance. Currently, the reasonably high number of submissions Parliament receives suggests its use of social media and broadcasts of public committee meetings is a success. However, with digital communication now the primary form of connection on a broad scale, its use can always be enhanced, allowing the public to participate in its proceedings more easily.

The membership of each committee should be constant. Often, there are replacement members substituted in by the Whips. Careful allocation should ensure better use of the resources, and an increase in the number of MPs to 150 or 180 would assist in improving the quality of decisions. Major legislative Bills – two or three a year – should be scrutinised by enlarged committees. The old Legislative Council Chamber could be used for this as it has been largely idle since the Upper House was abolished. Bigger select committees could hear submissions with plenty of room for the public to be present. The hearings should be televised and livestreamed by the House.

MPs should be encouraged to specialise in particular fields and build up expertise in them. The complexity of the policy issues these days demands more analytical grunt than the average select committee is equipped with. The problem boils down to there being too few MPs.

The use of parliamentary under-secretaries also bolsters the power of the Executive, with their appointments allowing them to assist ministers in their departments through delegation of any functions, duties and powers they maintain.⁶¹ An under-secretary "occupies a space between ministerial and non-ministerial members of Parliament".⁶² They cannot, therefore, act for ministers generally, but they are also not strictly forbidden from sitting on subject committees like ministers are. This is evidenced by ACT Party MP Simon Court being Under-Secretary to the Minister for Infrastructure and to the Minister for RMA Reform while sitting on the Environment Committee.⁶³ Similarly, NZ First Party MP Jenny Marcroft is Under-Secretary to the Minister for Media and Communications and to the Minister for Oceans and Fisheries while sitting on the Health

61 Constitution Act, s 9(1). Legal reformer Jeremy Bentham would refer to such positions as "placemen", once describing how "... any member of the House of Representatives, who holds an office producing to him either money, or power, actually harbours in his bosom a portion of the pestilential matter of corruption, and is under the dominion of its baneful influence": Jeremy Bentham *Plan of Parliamentary Reform in the form of a Catechism* (London, 1817) at 29.

62 Wilson, above n 33, at [5.4].

63 New Zealand Parliament "Environment Committee" <www.parliament.nz>; and New Zealand Parliament "Simon Court" <www.parliament.nz>.

Committee.⁶⁴ This is of concern, as committees limit their membership to prevent domination by MPs in the Executive, but those acting on behalf of a minister are effectively ignoring this convention.⁶⁵

Indeed, the convention is beginning to erode. Between 1998 and 2018, five members of the executive have chaired select committees: two under-secretaries, two ministers outside Cabinet and one Cabinet minister.⁶⁶ Standing Orders "do not require members to excuse themselves from proceedings in which they have an interest", and it is only convention that prevents Cabinet ministers from being appointed to select committees.⁶⁷ Under-secretaries are touted as being more viable committee members than ministers simply because they are "less likely to face conflicts" between their duties to the executive and their duties to select committees.⁶⁸ That does not necessarily mean they are unlikely to face such conflicts. And, when they do, it is left to the "member to manage", and "the public [to] judge" them.⁶⁹ Yet it is hard to see how the public would have full insight into most of these situations. Even if they did, there is every reason for those involved to treat it as a special case, missing the opportunity to prevent it from arising in the first place.

There should be safeguards that strengthen the existing convention and they should be contained in a firm and clear rule: all members of the executive should be excluded from membership of select committees.⁷⁰

The difficulty is that Westminster's system of government is based on a very clear theory: that the executive government (the ministers and the public servants) is accountable to the parliament. However, they cannot be accountable if there are not enough members to carry out the task effectively. If any further argument was needed for having more MPs, then this is it.⁷¹

64 New Zealand Parliament "Health Committee" <www.parliament.nz>; and New Zealand Parliament "Jenny Marcroft" <www.parliament.nz>.

65 Elizabeth McLeay "Mapping and Assessing Accountability: Institutional Rules and Political Dynamics in the New Zealand Parliament" (paper presented to the Annual Conference of the Australasian Study of Parliament Group, Sydney, October 2005) at 13.

66 Email from David Wilson (Clerk of the House of Representatives) to Geoffrey Palmer regarding ministers on subject select committees (15 April 2025).

67 (8 June 2017) 723 NZPD 18673 (Speaker Carter); and Cabinet Office *Cabinet Manual 2023* at [7.112].

68 (8 June 2017) 723 NZPD 18673 (Speaker Carter).

69 (8 June 2017) 723 NZPD 18674 (Speaker Carter).

70 We would go so far as to say that the utility that the position of under-secretary provides to governance in Aotearoa, if any, is outweighed by the risk of the position being used to dilute the efficacy of select committees to hold ministers to account. If no firm restrictions are placed on executive membership of select committees, the position should be abolished through repeal of ss 8 and 9 of the Constitution Act.

71 See Part II above.

C Adopting Principles of Deliberative Democracy

The way we make decisions in Parliament needs to change. Our central democratic institution needs to adopt more modern methods of the digital age to engage better with the public. Since the litany of problems that have occurred in recent years, a sense of uncertainty and worry has taken hold. These threaten the nation's sense of social cohesion, the confidence of people in the institutions of government and the ways in which government engages with the people.

There has been extensive research on deliberative democracy in recent years.⁷² The idea has reached a stage where it can be usefully deployed in the actual practice of governing and making policy decisions.⁷³ The concept has several important features that would take too much space to be fully developed here. While perfection can never be reached, progress could be made in thickening, strengthening and enhancing the nature of our democracy by better deliberation, rendering the results more acceptable to more people and better examined. The deliberations must be authentic and inclusive. Communication and the media have a big role to play in these processes.

Respect for those with opposing views, reciprocity of consideration and reflection are the important elements. In the end, decisions must be made, and not everyone will agree with them. But more of our political discourse and decision-making could be deliberative in a way that opens the Executive up to more diverse influences and better information. The policies will then be infused with better reflections about what has been discussed. In these discussions, some people will change their minds. The knowledge of different people in different spheres is pooled in such processes, and all ideas are brought to bear upon the issue in question.

Listening is an important element of the process. It enhances the legitimacy of decisions when they are taken. It results in better decisions and, therefore, better outcomes for people. Such processes will break down the appeal of simple solutions to complex problems advanced by populist politicians. Indeed, many of the methods of deliberative democracy are similar to the methods of communication and discussions that are so much a feature of Māori culture. At hui, everyone talks and discusses. Such methods will also reduce the degree to which cynicism surrounds democracies these days.

Deliberation emphasises that democracy is much more than the counting of votes. This point was powerfully made by David Van Reybrouck, whose book had the provocative title *Against Elections: The Case for Democracy*.⁷⁴ People are both in favour of democracy, and mistrust it. If "democracy"

72 Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 236–248; Simon Wright, Tatjana Buklijas and Max Rashbrooke "The Rise, Fall and Re-Rise Of Deliberative Democracy In New Zealand" (2024) 20 Policy Quarterly 3.

73 Nicole Curato and others "Twelve Key Findings in Deliberative Democracy Research" (2017) 146(3) *Daedalus* 28.

74 David Van Reybrouck *Against Elections: The Case for Democracy* (Bodley Head, London, 2016).

comprises only elections, then participation and dialogue on issues tend to be lost. Most Western democracies are representative democracies. They are governed by a select few who are chosen to represent the interests of all the people within that country. Many of these countries are now suffering from what Van Reybrouck terms "Democratic Fatigue Syndrome" – a crisis of both legitimacy and efficiency.

What can be done? Van Reybrouck champions the "deliberative democracy" that we have discussed above. He defines this as follows:⁷⁵

Deliberative democracy is a form of democracy in which collective deliberation is central and in which participants formulate concrete, rational solutions to social challenges based on information and reasoning.

It originated in Athenian democracy in ancient Greece and combines political equality with deliberation.

In order to enhance scrutiny of government Bills by select committees, a new procedure should be adopted for major pieces of legislation that will attract interest from the general public and will have significant consequences for them. This includes the use of citizens' assemblies chosen randomly by lot and educated on the issues in order to appreciate the advantages of one policy versus another.

Another element of reform would introduce modern models of citizen engagement that would allow citizens to engage effectively and improve the acceptability of policy before it is chosen. Ireland and Iceland have pioneered effective models for accomplishing this.⁷⁶ It has the advantage of increasing the legitimacy of parliamentary deliberations and allowing it to plumb opinion more carefully.

Two University of Auckland academics published a most interesting account of techniques used in Auckland on the problem of wastewater disposal:⁷⁷

Internationally, deliberative processes have been convened around questions that involve trade-offs, draw on values as well [as] evidence and require weighing options rather than simple yes/no answers. These questions included problems of city planning and infrastructure.

In our first deliberative process, we invited a randomly selected group of Aucklanders to discuss what should be the next source of water for Auckland after 2040. ...

⁷⁵ At 109.

⁷⁶ Palmer and Butler, above n 72, at 273.

⁷⁷ Anne Bardsley and Tatjana Buklijas "Can we do democracy more ... democratically?" (9 September 2024) Newsroom <www.newsroom.co.nz>.

Their final decision was surprising but made a lot of sense: direct recycled wastewater was the least costly source and had the lowest environmental impact. After that, we worked on several more issues facing Aucklanders. Each time, the people showed themselves capable of meeting others halfway – or, rather, with a decision that everyone can "live with" – and coming up with practical solutions that considered social and environmental impact alongside economic costs and benefits. It made it clear to us that, free from the pressures of short election cycles faced by politicians, citizens can think long-term and appreciate the impact of our decisions on future generations.

These are exactly the methods that could and should be utilised by the House of Representatives to assist in making better and more acceptable decisions. Modern technology is readily available to help. Persuading elected officials to use the techniques may not be easy, however. The best incentive is to point to a more inclusive democracy.

VII COMPULSORY VOTING

The year 2024 marks the centenary of compulsory voting for Australian federal elections. Australia has been a keen innovator in electoral matters and has taken pride in the quality of its democracy. Not only was compulsory voting pioneered there, but so was the secret ballot and preferential voting. A report published in 2024 entitled *Strengthening Australian democracy: A practical agenda for democratic resilience* said the following about compulsory voting:⁷⁸

Compulsory voting is embraced comprehensively in Australia, arguably more so than anywhere else in the world. Very few countries have systems of compulsory voting, and Australia was among the first to introduce it. The introduction of compulsory voting over a century ago enshrined not just a right but a duty to vote in elections. While the law underpinning compulsory voting is important and rigorously enforced, the public embrace of this duty is perhaps more significant.

Not all features of Australia's governance are admirable, but the issue of compulsory voting suggests they have it right.

A History and Technicalities

Enrolment for Australian federal elections has been compulsory since 1911, which saw a rise in voter turnout from 62 per cent to 73 per cent.⁷⁹ In 2024, to enrol to vote, you must be over 16 (for early enrolment, but you must be 18 to vote), be an Australian citizen, and have lived at your address for at least one month.⁸⁰ In 1915, compulsory voting was introduced in Queensland in an attempt to

78 Strengthening Democracy Taskforce *Strengthening Australian democracy: A practical agenda for democratic resilience* (Department of Home Affairs, Commonwealth of Australia, 2024) at 11 (footnotes omitted).

79 Joint Standing Committee on Electoral Matters *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* (Parliament of Australia, Canberra, September 2005) at [8.5].

80 Australian Electoral Commission "Enrol to vote" (6 June 2024) <www.aec.gov.au>.

level the ground for parties.⁸¹ However, it was not until 1924 that compulsory voting was implemented at a federal level in response to a significant decline in voter turnout, from 71 per cent to 59.38 per cent.⁸² A Bill to amend the Electoral Act 1918 (Cth) was passed in the House of Representatives in 1924, which immediately saw a substantial rise in voter turnout in 1925 to 91.38 per cent.⁸³

The technical requirement of compulsory voting in Australia is for every eligible voter to attend the polling place, have their name ticked off, be issued a ballot paper, take it to a booth, mark it, fold it and place it in the ballot box.⁸⁴ However, it is impossible to know whether the ballot paper has been filled out prior to placing it in the box due to necessary secrecy. Hence, regulating compulsory voting must be restricted to determining whether a voter has had their name ticked off as attending and receiving the ballot. This does not mean this is all that is compulsory, as the common law has found that all facets of the technicalities are legally required under compulsory voting in the Electoral Act.⁸⁵ Given this strict nature and the need for every citizen to be able to access voting, there are a few additional ways in which a vote can be cast, including postal, pre-poll, absent, at overseas missions and via mobile teams visiting hospitals and nursing homes.⁸⁶

Australia is not alone in its use of compulsory voting, but it is difficult to ascertain just how many countries utilise it as so many do not enforce it. Most estimates claim that between 20 and 30 countries use compulsory voting, or around 15 per cent of democracies, which includes Belgium, Luxembourg, Singapore, Nauru and Argentina.⁸⁷ What makes Australia's use of compulsory voting unique is how long-standing it is (only three countries pre-date Australia's adoption), and it being alone amongst the comparable anglophone democracies such as Britain, Canada and New Zealand.⁸⁸ It is also claimed to be relatively unique in its consistent voter turnout, remaining around 90 per cent since adoption, and broad support by the public, with approval sitting at about 70 per cent of the population.⁸⁹ However, it is interesting to note how this support can fluctuate sometimes. For example, between

81 Tim Evans *Compulsory Voting in Australia* (Australian Electoral Commission, 16 January 2006) at 5.

82 At 5 and 7.

83 At 7.

84 At 4.

85 At 4.

86 At 4.

87 Matteo Bonotti and Paul Strangio "Introduction" in Matteo Bonotti and Paul Strangio (eds) *A Century of Compulsory Voting in Australia: Genesis, Impact and Future* (Palgrave Macmillan, Singapore, 2021) 1 at 2.

88 At 3.

89 At 3–4.

2007 and 2010, male support for compulsory voting dropped from about 75 to 65 per cent as their first female prime minister, Julia Gillard, was elected.⁹⁰

Also, unlike many countries that practise compulsory voting, Australia enforces legislation against those who do not vote, with an AUD 20 fine being issued to those who cannot explain themselves in response to a "show cause" notice.⁹¹ Explanations are assessed by electoral authorities to determine whether they are "valid and sufficient" reasons for not voting, with the fine kept in place if not.⁹² If no explanation is given or accepted and the fine is not paid, the Australian Electoral Commission (AEC) may pursue further action in court. In 2013, roughly 663,000 show cause notices were issued, with fewer than 3,500 taken to the courts. The maximum penalty was a fine of AUD 210 and a recorded conviction.⁹³

The importance of civics and citizenship education is apparent for all nations but is particularly debated within compulsory voting systems. Some Australian critics argue that compulsory voting increases the number of uninformed voters, which produces poor government representation.⁹⁴ Australian schools are governed by a national curriculum of expectations, which includes a subject on Civics and Citizenship. The subject was most recently updated in 2015 and is taught to students from Years 7 to 10 in their Humanities and Social Sciences class.⁹⁵ Within this subject, students are required to study government, constitution, legal system, rights participating in a democracy, making laws, political parties, policy and international comparison.⁹⁶ However, states and territories are responsible for how the curriculum is implemented in their jurisdictions,⁹⁷ which can result in vastly different teachings across states and schools. In a bipartisan parliamentary report on Australian

90 Jill Sheppard "Public Opinion and Compulsory Voting in Australia" in Matteo Bonotti and Paul Strangio (eds) *A Century of Compulsory Voting in Australia: Genesis, Impact and Future* (Palgrave Macmillan, Singapore, 2021) 83 at 88–89.

91 Bonotti and Strangio, above n 87, at 5.

92 At 5.

93 At 5.

94 Rodney Smith and others *The Challenge of Informed Voting in the 21st Century* (Electoral Regulation Research Network, University of Melbourne Law School, April 2015) at 11.

95 Stephanie Gill "Civics education: is Australia making the grade?" (14 June 2023) Parliament of Australia <www.aph.gov.au>.

96 Gill, above n 95.

97 Gill, above n 95.

nationhood and democracy, the Senate called for the curriculum to be compulsory in Years 9 and 10, to have increased dedicated hours and to be reviewed every five years.⁹⁸

B Arguments for Compulsory Voting

There is consensus that the outcome of an election should be a genuine reflection of the views of the people, but how that is best gathered is debated. Arguments for the use of compulsory voting include the following:

- Turnout: maintains an elevated level of participation in elections.⁹⁹
- Accuracy in representation produces a more accurate indication of the opinions of the people within the makeup of the government.¹⁰⁰
- Legitimacy: everyone must participate in the creation of their government to aid in its legitimacy.¹⁰¹
- Teaching benefits: thought to teach citizens the benefits of political participation.¹⁰²
- Party accountability encourages parties to advocate for policies that address all elector values.¹⁰³
- Migrant participation: minority migrant groups are encouraged to enrol and participate, ensuring their voices are heard in the democratic process.¹⁰⁴
- Active engagement: people pay more attention to policy and follow politics between elections due to their civic duty.¹⁰⁵

98 Legal and Constitutional Affairs References Committee *Nationhood, national identity and democracy* (Parliament of Australia, Canberra, 2021) at [3.137]. In February 2025, the Joint Standing Committee on Electoral Matters released a report on this topic: Joint Standing Committee on Electoral Matters *From Classroom to Community: Civics education and political participation in Australia* (Parliament of Australia, Canberra, January 2025). Like the Senate committee did in 2021, the Joint Standing Committee recommended the curriculum be compulsory in Years 9 and 10: at xiii. However, they differed from the Senate committee in recommending a minimum of 10 hours per year, with reviews annually: at xiii and xiv.

99 Evans, above n 81, at 7.

100 Joint Standing Committee on Electoral Matters, above n 79, at [8.23]. A primary argument against compulsory voting is the concerns of "donkey votes" skewing representation where voters randomly order their numbers down the ballot line: at [8.29]. However, this is not of concern in Aotearoa as we do not have a required preferential voting scheme forcing voters to order their choices.

101 At [8.40].

102 See Alois Stutzer and Bruno S Frey "Political participation and procedural utility: An empirical study" (2006) 45 *European Journal of Political Research* 391 at 410 and 412.

103 Joint Standing Committee on Electoral Matters, above n 79, at [8.32].

104 At [8.32]–[8.33].

105 At [8.27].

- Popular favour: in Australia, there is popular support for compulsory voting, consistently sitting around 70 per cent.¹⁰⁶
- A reasonable trade-off: attending a polling booth is not an insurmountable burden for a fair and democratic society.¹⁰⁷
- Minimal penalty: the fine for refusing to vote is a relatively minor cost.¹⁰⁸

C Comparing Voter Turnout

The impact compulsory voting had on voter turnout in Australia is difficult to deny, with the AEC recording the number of eligible citizens voting rising from 59.38 per cent for the House of Representatives election in 1922 to 91.38 per cent in 1925 and similar levels for Senate elections (57.95 per cent to 91.32 per cent).¹⁰⁹ The numbers then continued to climb, regularly reaching 95 per cent.¹¹⁰ However, this began to stall in 2010 as numbers dropped to around 93 per cent, then 88.50 per cent in the 2014 Senate election, the first time since compulsory voting was implemented that it had dropped below 90 per cent.¹¹¹

Critics of compulsory voting schemes claim the voter turnout, while high, is of inferior quality due to the number of informal votes, allegedly reflecting an apathy toward voting. The total quantity of informal votes in the 2022 election for the House of Representatives was 5.1 per cent, and 5.5 per cent in 2019.¹¹² Informal votes are those that have to be discarded for reasons such as being blank; having incomplete numbering; using ticks or crosses or other symbols instead of numbers; slogans or scribbles; illegibility; or issues with voter identification.¹¹³ Contextually, the highest proportion of discarded votes in the 2016 House of Representatives election (5.05 per cent total) were due to blank ballots (1.26 per cent), incomplete numbering (1.28 per cent), and slogans and protest marks (1.00 per

106 Sheppard, above n 90, at 85.

107 See Joint Standing Committee on Electoral Matters, above n 79, at [8.61].

108 Lachlan Montgomery Umbers "Assessing Objections to Compulsory Voting in Australia" in Matteo Bonotti and Paul Strangio (eds) *A Century of Compulsory Voting in Australia: Genesis, Impact and Future* (Palgrave Macmillan, Singapore, 2021) 59 at 69.

109 Australian Electoral Commission "Voter turnout – previous events" (7 November 2023) <www.aec.gov.au>.

110 Australian Electoral Commission, above n 109.

111 Australian Electoral Commission, above n 109.

112 Australian Electoral Commission "Informality (%) House of Representatives and Senate" (24 August 2022) <www.aec.gov.au>.

113 Australian Electoral Commission *Analysis of informal voting: 2016 House of Representatives elections* (12 December 2018) at 7.

cent). This is quite high compared to the 16,252 informal votes and 16,333 disallowed votes for parties in the 2023 Aotearoa General Election, resulting in 0.01 per cent of votes being discarded.¹¹⁴

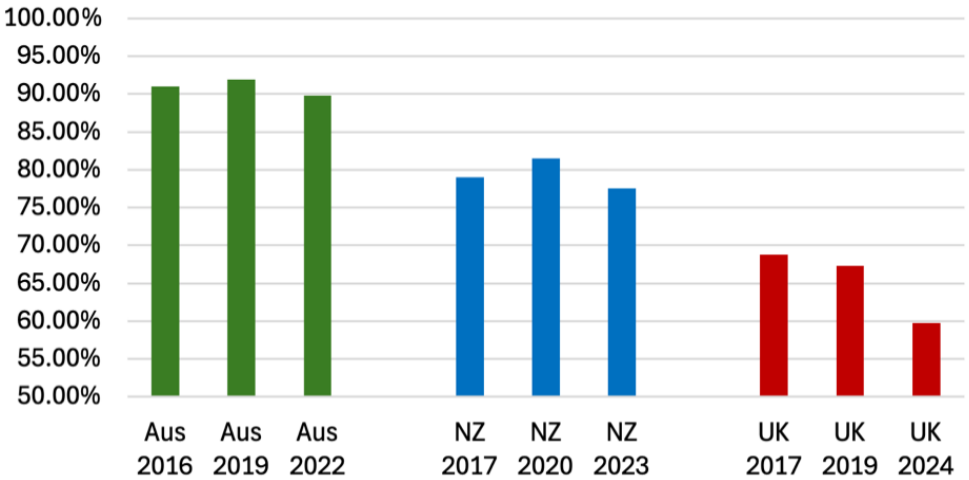


Figure 1: Voter turnout across jurisdictions: last three elections¹¹⁵

Aotearoa New Zealand has long been heralded for reasonably high participation rates in elections without compulsory voting,¹¹⁶ yet rates consistently remain around 10 per cent lower than our Australian neighbours (Figure 1). The highest rate of turnout in Aotearoa's history is recorded by the Electoral Commission to have been in 1984, when the general election saw 93.7 per cent of enrolled voters participating.¹¹⁷ However, there was a reasonably steady decline in voter turnout in the years

114 Electoral Commission New Zealand "Official results for the 2023 General Election" (press release, 3 November 2023).

115 Data from Australian Electoral Commission, above n 109; Electoral Commission New Zealand "1853-2020 general elections: Overview" <www.elections.nz>; Electoral Commission New Zealand "Election turnout by age and descent" (press release, 15 December 2023); Roderick McInnes "GE2017: Marginal seats and turnout" (23 June 2017) House of Commons Library <www.commonslibrary.parliament.uk>; Roderick McInnes "General Election 2019: Turnout" (7 January 2020) House of Commons Library <www.commonslibrary.parliament.uk>; and Georgina Sturge "2024 general election: Turnout" (5 September 2024) House of Commons Library <www.commonslibrary.parliament.uk>.

116 Shane P Singh and Neil S Williams "Compulsory Voting: The View from Canada and the United States" in *A Century of Compulsory Voting in Australia* (Palgrave Macmillan, Singapore, 2021) 235 at 251.

117 Electoral Commission New Zealand "1853-2020 general elections: Overview", above n 115.

following, with 77.0 per cent in 2002 and 74.2 per cent participation in 2011.¹¹⁸ There has been a slight increase recently, with 82.2 per cent in 2020 and 78.2 per cent in 2023.¹¹⁹

There is an even more drastic comparison with the United Kingdom, which since 1918 saw its highest voter participation rate, 83.9 per cent, in 1950.¹²⁰ These numbers have fluctuated in recent years, demonstrating a poor turnout of 59.7 per cent in 2024 but 67.3 per cent in 2019 (Figure 1).¹²¹

There are arguments against compulsory voting, prime among them the freedom to register disapproval by not voting. In Australia this contributes to people spoiling their ballot paper, but at least they have to turn up. At a time when democracy is under challenge, asking citizens to be actively engaged in their democracy seems to be a useful safeguard. It ensures that the government of the day enjoys a reasonable measure of legitimacy from the voters. It also assists in institutional trust and encourages voters to pay closer attention to what is going on in the Parliament. There are a variety of other arguments raised from time to time in Australia.¹²²

VIII VOTING RIGHTS FOR CITIZENS 16 YEARS AND OLDER

There is overwhelming evidence in favour of lowering the voting age to 16 in New Zealand, and with ongoing public debate, the Government continues to dismiss the literature and informed advice of agencies. The IER's 2023 report on the electoral system recommended lowering the voting age to 16 due to the right to freedom from discrimination, cognitive and behavioural scientific evidence and the importance of participation.¹²³ However, the Coalition Government ruled out any implementation or referendum on this recommendation in January 2024, describing it as a distraction for councils and withdrawing the Bill after consideration of it had begun.¹²⁴ This was also in the face of a 2022 Supreme Court decision which found:¹²⁵

... the provisions of the Electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of the New Zealand Bill of Rights Act 1990 to be free from discrimination on the basis of age.

118 Electoral Commission New Zealand "1853-2020 general elections: Overview", above n 115.

119 Electoral Commission New Zealand "Election turnout by age and descent", above n 115.

120 Richard Cracknell, Elise Uberoi and Matthew Burton *UK Election Statistics: 1918-2023, A Long Century of Elections* (House of Commons Library, 9 August 2023) at 29.

121 McInnes "General Election 2019: Turnout", above n 115; and Sturge, above n 115.

122 See Joint Standing Committee on Electoral Matters, above n 79.

123 See recommendation 19 of He Arotake Pōtitanga Motuhake | Independent Electoral Review *Final Report: Our recommendations for a fairer, clearer, and more accessible electoral system* (November 2023) at 32.

124 Simeon Brown "Government withdraws voting age bill" (press release, 26 January 2024).

125 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [72].

At 14 years old, a New Zealander can be held criminally responsible for breaking any law; at 15, they can leave school with parental permission; and at 16, they can qualify as an adult worker, consent to sex, get married, leave home, make decisions about medical treatment, leave school and apply for a firearms licence.¹²⁶ It is not reasonable to deny 16- and 17-year-olds the right to vote when the government treats them as adults in other ways. For example, the argument that under-18-year-olds should not be permitted to vote because they do not pay taxes is based on categorical falsehood, as employment amongst teenagers is continually increasing.¹²⁷ At the end of the June 2022 quarter, 42.6 per cent of youth aged 15 to 19 were employed,¹²⁸ and this number is expected to have increased. When holiday jobs are included, 76 per cent of school children aged 16 and over participated in paid work, according to a 2010 report.¹²⁹ The figures are likely to be higher now.

Other arguments against lowering the voting age include the belief that under-18s do not have the competence, knowledge, stability, maturity or willingness required for electoral decision-making.¹³⁰ However, each of these facets has been disproven through scientific investigation and assessment of lowered voting ages internationally. No significant difference in abilities of 16-year-olds has been found when compared to adults, and they have reached the same level of moral and logical reasoning as adults.¹³¹ Comprehensive research has found they are mature and engaged, with the same level of political interest as older voters overall.¹³² Telling a young person they are incapable of making political decisions at this age is in direct contradiction to other expectations of their capacity. There is also evidence that this age group has at least the same amount of understanding as older adults, but more often is more prepared and more knowledgeable regarding voting.¹³³

The benefit of coming late to this discussion is the availability of extensive research on the countries that have given 16- and 17-year-olds the ability to vote. Positive political engagement and civic attitudes have been found when assessing the impact of lowering the voting age in Argentina,

126 YouthLaw "Your Rights: Legal Ages" <www.youthlaw.co.nz>.

127 Catherine Harrow *Benefit System Update: October 2021 to June 2022* (Ministry of Social Development, Wellington, 2023) at 30.

128 At 30.

129 Damian O'Neill *Schoolchildren in Paid Employment: A Summary of Research Findings* (Department of Labour, Wellington, September 2010) at 16.

130 See for example Marcus Roberts "Lowering the Voting Age: it's all about competency" (2023) 19 Policy Quarterly 67; and Tommy Peto "Why the voting age should be lowered to 16" (2018) 17(3) Politics, Philosophy & Economics 277 at 279.

131 At 279.

132 At 292.

133 At 282–283.

Austria, Brazil, Cuba, Greece, Indonesia, Malta and more countries.¹³⁴ None of these nations found negative effects from lowering the voting age, with overall positive results showing increased interest in politics, increased motivation to vote, pro-civic attitudes, and more.¹³⁵ Further findings have shown that a lowered voting age increases political engagement from a young age, thereby increasing lifelong turnout, and the quality of decision-making is not diminished in comparison to older cohorts.¹³⁶ The benefits of habitual pattern creation at an age where routine is more stable are immense. One explanation discusses how:¹³⁷

... by 18 years of age many young adults have left the parental home and are engaged in the arduous process of establishing their separate existence as self-sufficient individuals, leaving little time or motivation for learning the skills needed for voting.

The voting age decision is linked to civics education. For any voter to be prepared for the obligations that come with the privilege of electoral participation, they must be educated on New Zealand's system of MMP, parties and civic duty generally – especially in the case of young, first-time voters. It must also be acknowledged that the voting age is an entrenched element of the New Zealand Electoral Act and, as such, may only be altered through public referendum or by 75 per cent in favour in Parliament.¹³⁸

IX CIVICS EDUCATION

It is difficult to argue for the implementation of compulsory voting and a lower voting age without also having compulsory elements of education that inform voters of what it means to have such a duty and why it is important. Also crucial is education on how the electoral system functions so voters can make informed decisions, but this is not to be confused with teaching what should be voted for, as often feared. Every individual who operates as a citizen of the social contract in Aotearoa New Zealand should have the tools and knowledge to effect change. Our young people are also showing they want this engagement and opportunity for learning, with the voter turnout for 18- to 24-year-olds in the 2023 General Election reaching 74.2 per cent, which was higher than voters aged 25 to 44.¹³⁹ Though, this is still a number that can be increased through civics education. Particularly of concern

134 Jan Eichhorn and Johannes Bergh "Lowering the Voting Age to 16 in Practice: Processes and Outcomes Compared" (2021) 74 Parl Aff 507 at 517.

135 At 517.

136 Mark N Franklin "Consequences of Lowering the Voting Age to 16: Lessons from Comparative Research" in Jan Eichhorn and Johannes Bergh (eds) *Lowering the Voting Age to 16: Learning from Real Experiences Worldwide* (Palgrave Macmillan, Cham, 2020) 13 at 15–16.

137 At 15.

138 Electoral Act, s 268(1)(e).

139 Electoral Commission New Zealand "Election turnout by age and descent", above n 115.

is citizens' understanding of the importance of local government elections, with only 45.41 per cent of enrolled electors voting in the Wellington local body election in 2022.¹⁴⁰

It was maintained on the instigation of compulsory voting in Australia that just by virtue of compelling citizens, they would develop political interest and seek knowledge of what they do not understand in government and policy.¹⁴¹ This may be true, as a multivariate analysis of data from electoral systems has shown that rates of political knowledge are more evenly distributed across compulsory voting systems than voluntary ones.¹⁴²

A survey of 1000 voting-aged New Zealanders in 2020 found that only 12 per cent knew the three branches of government, and 69 per cent could name all political parties in Parliament at the time.¹⁴³ Also of substantial concern was that only 46 per cent knew how a party gains a seat under MMP.¹⁴⁴ The survey further reflects the lack of knowledge about what parties endorse what policies: only 20 per cent of respondents accurately knew which parties voted in favour of the Zero Carbon Bill, which was a popular debate at the time.¹⁴⁵ The report's findings are especially concerning as it is believed that the greater one's political knowledge, the more accurately they will vote in alignment with their views – though this may be reduced by new findings showing the influence of misinformation on voting.¹⁴⁶

A publication from the International Civic and Citizenship Education Study in 2010 explored Year 9 students' achievement in civic knowledge compared with other countries.¹⁴⁷ They found that Aotearoa students were generally well prepared for their roles as citizens compared with many

140 Wellington City Council *Voter turnout in the 2022 Wellington local election* (December 2022) at 2.

141 Zareh Ghazarian and Jacqueline Laughland-Booÿ "Becoming an Informed Voter: Compulsory Voting and Developing Political Knowledge in Australia" in Matteo Bonotti and Paul Strangio (eds) *A Century of Compulsory Voting in Australia: Genesis, Impact and Future* (Palgrave Macmillan, Singapore, 2021) 119 at 121–122.

142 Jill Sheppard "Compulsory voting and political knowledge: Testing a 'compelled engagement' hypothesis" (2015) 40 *Electoral Studies* 300 at 305.

143 Eric Crampton and Nathan Smith *Democracy in the Dark* (The New Zealand Initiative, Wellington, 2020) at 22 and 24. This is the limited data available on the topic. For further assessment and institution of civics education, there would need to be more reliable research.

144 At 22.

145 At 23.

146 Michele Cantarella, Nicolò Fraccharoli and Roberto Volpe "Does fake news affect voting behaviour?" (2023) 52 *Research Policy* 1 at 11.

147 Kate Lang *What do New Zealand students understand about civic knowledge and citizenship? Results from the International Civic and Citizenship Education Study* (Ministry of Education, November 2010).

countries, with 10 out of 38 participating countries outperforming them.¹⁴⁸ One of these countries was Denmark, which saw the second-highest results in civic knowledge, behind Finland.¹⁴⁹ Comparatively, Aotearoa only has a teaching and learning guide for primary and secondary school teachers to "develop their understanding and practice in relation to effective civics and citizenship education in Aotearoa New Zealand".¹⁵⁰ However, there is no mandatory use of it. The Toolkit was acknowledged by the Rt Hon Chris Hipkins, who was Minister of Education at the time, as a "starting point".¹⁵¹ However, the commitment to a comprehensive, compulsory curriculum has not yet come to fruition.

X A SECRET BALLOT SPEAKER

The Speaker of the Aotearoa House of Representatives regulates order in the House, determines proceedings and communicates as a spokesperson to the Crown.¹⁵² The Speaker interprets parliamentary rules, both written and unwritten, calls Members of Parliament to speak in debates and defends their rights and privileges. It is the highest office to which an MP can be elected by the House, sitting third in precedence behind the Governor-General and Prime Minister since a revision of the Order of Precedence in 1974.¹⁵³ The Speaker will generally be a member of a governing party, with only two in history belonging to an opposition party when elected (1923 to 1935 and 1993 to 1996).¹⁵⁴ Speaker of the House from 2017 until 2022, Sir Trevor Mallard, suggested that "if the Prime Minister's party put up someone for Speaker and they were not elected, in the New Zealand system, that would be a very bad sign".¹⁵⁵ This longstanding tradition is concerning, as the consistent appointment of the nominee of the party in government damages the Speaker's reputation for independence.

Impartiality is crucial to the operation of the Speaker. The Speaker cannot be biased towards any political party and must ensure equal opportunity for debate and participation in dealings of the House. The position has discretionary power to exercise where resources may be invested and is vulnerable

148 At 6.

149 At 7. See also Jens Bruun "Civic and Citizenship Education in Denmark 1999–2019: Discourses of Progressive and Productive Education" in Barbara Malak-Minkiewicz and Judith Torney-Purta (eds) *Influences of the IEA Civic and Citizenship Education Studies: Practice, Policy, and Research Across Countries and Regions* (Springer International Publishing, Cham, 2021) 49 at 50.

150 Kate Potter *Civics and Citizenship Education: Teaching and Learning Guide* (Ministry of Education, 2020) at 3.

151 Chris Hipkins "Toolkit equips school leavers for the world" (press release, 25 September 2019).

152 New Zealand Parliament "Role & election of the Speaker" (15 January 2016) <www.parliament.nz>.

153 Wilson, above n 33, at [17.1.1].

154 At [17.1.3].

155 Palmer and Palmer Steeds, above n 26, at 159.

to favouring the ideology of a particular party in the operation of this duty.¹⁵⁶ Yet, Speakers are not required to sever ties with their party. They automatically have their votes cast on their behalf in any party vote, and communicated to the teller from the Speaker's Chair during personal votes rather than entering the lobbies.¹⁵⁷ This is in contrast to the House of Commons at Westminster, where on their election, the sitting MP must resign from his or her political party and continue to be separate from political disputes into retirement.¹⁵⁸ Bridging the gap between such positions are the rules in Canada, where the Speaker will only ever vote in the case of a tie.¹⁵⁹ Denmark displays concern about the influence of party affiliations on a Speaker, so the four Deputy Speakers in their system are elected by the four political parties that have the most seats in Parliament, excluding the Speaker's party.¹⁶⁰

The debate between impartiality and non-partisanship has historically been considered in Aotearoa, with the Standing Orders committee review in 1995 concluding that the political positioning of the Speaker had caused no significant problem yet.¹⁶¹ However, this review is now almost 30 years old, and it is time for further consideration. Some literature argues that the key is the mere perception of neutrality, wherein a Speaker should not even be in such a position that it is possible to question their loyalties.¹⁶²

One alternative way in which faith in impartiality and representation can be enhanced is in the election of the Speaker through the use of a secret ballot. This would ensure that MPs' votes are not pressured to comply with party lines when choosing a favoured Speaker. Currently, this is not utilised in New Zealand's selection of a Speaker. Election of the Speaker is the first order of business when a new government assembles,¹⁶³ with the process outlined in the Standing Orders.¹⁶⁴ The Clerk will call for nominations, where any member may nominate another for election as Speaker. If only one person is nominated, they are declared to be elected. If two members are nominated, the election is decided through a personal vote (each member individually deciding to enter the Aye or Noe lobby). If more than two members are elected, members vote as the Clerk of the House calls on them

156 Pita Roycroft "The Ayes Have it: The Development of the Roles of the Speaker of the House, 1854–2015" (2017) 15 NZJPI 353 at 377.

157 Wilson, above n 33, at [17.1.3].

158 They may still, however, continue to represent their constituency: UK Parliament "Speaker and the Chamber" <www.parliament.uk>.

159 House of Commons Canada "The Speaker" <www.ourcommons.ca>.

160 Folketinget | The Danish Parliament "The Presidium of the Danish Parliament" <www.thedanishparliament.dk>.

161 Roycroft, above n 156, at 376.

162 At 376.

163 Constitution Act, s 12.

164 Standing Orders of the House of Representatives 2023, SO 16–26.

individually, and the member with the majority is elected. If there is ever a tie, the Clerk calls for nominations again. This process is entirely public in the House, rather than via secret ballot, as utilised in many nations, including the United Kingdom, Scotland, Wales, Canada, Australia and Ireland.¹⁶⁵ In Aotearoa, this should be easy to accomplish by adapting the process that is presently used.

XI OFFICIAL INFORMATION ACT REFORM

An open society has many enemies, and democratic institutions and decision-makers can easily be blown off course by new challenges and public fears. It is for this reason that transparency has become such a critical concept to ensure that the political ecosystem is not only functioning well but demonstrably seen to be so functioning. New Zealand is a small and intimate democracy. Because it is small, it may be thought that it is not possible to hide conduct and practices that could not easily survive had their presence been publicly known. But this is not a sound argument.

The Official Information Act 1982 does not apply to information about a member of Parliament, a recognised party or a member of the Press Gallery unless they provide consent or are compelled to by an authority such as a court order.¹⁶⁶ This is because the protocol maintains that parliamentary privilege is so fundamental "that it takes priority when balanced against competing public interests".¹⁶⁷ Over the past few years, there has been a tendency not to apply the Act to new agencies when they are created. The Ministry of Justice is reviewing this issue.

Transparency International has a vision of a world free of corruption. It is active in over 100 countries and aims to end the injustice of corruption by promoting transparency, accountability and integrity. Obviously, there are strong provisions in the Crimes Act 1961 against bribery and corruption; occasionally, such cases appear in the courts. Aotearoa rates decently in the international indices of corruption,¹⁶⁸ but continuing vigilance is required as concerns have enhanced in recent times.

American judge Louis Brandeis once said: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."¹⁶⁹ That is why we have an Official Information Act and have done so since 1982. Aotearoa was an early adopter of freedom of access to government information. While it was a positive contribution to transparency, there are serious problems with it now and reluctance by

¹⁶⁵ Palmer and Butler, above n 72, at 95–96.

¹⁶⁶ David Carter "Protocol for the release of information from the parliamentary information, communication and security systems" (Speaker of the House of Representatives, 17 August 2016) at pt 2 para 5.

¹⁶⁷ At 1.

¹⁶⁸ Transparency International *Corruption Perceptions Index 2024* (February 2025) at 4.

¹⁶⁹ Louis D Brandeis *Other People's Money and How the Bankers Use It* (Frederick A Stokes Co, New York, 1914) at 92.

ministers of both main parties to do anything significant about it. The application of the Act to some centres of public power is lacking.

Various reports have been produced over the years proposing changes, but very few have been made. Two studies by the Law Commission with recommendations for change have been published, but they have not been acted upon.¹⁷⁰ The second Law Commission report in 2012 made 137 recommendations. It recommended that the Act cover the PCO, the Office of the Clerk of the House, the Parliamentary Service, and the Speaker.¹⁷¹ These were all rejected.¹⁷²

The reports cited there have been occasional efforts by ministers to suggest they will take up the issue again, but nothing has happened of any significance since 2017. The inevitable conclusion is that ministers do not like the Act, and they give little priority to changing it. The issue needs to be taken seriously, or trust will be eroded in a system that purports to be open but, in practice, contains weaknesses.

After more than 30 years of experience with the Act, there is no need to be afraid of it. A new Act should be drafted, and a new independent information authority should be set up by the Act to restructure the administration of the Act, with the aim of improving transparency. The Authority should have the power to decide upon disputes about release, and those decisions should be binding, which means that dealing with such disputes is not an appropriate role for the Ombudsman. A whole new Act will enable the original aims of the reform to be achieved. Successive governments have resisted efforts to improve the Act. Yet a strengthened Act would increase protection against corruption and questionable decision-making.

We need to recall the principles upon which the Act was based, as set down by the Danks Committee that reported in 1980 on the need for change:¹⁷³

- A better-informed public can better participate in the democratic process.

¹⁷⁰ Te Aka Matua o te Ture | Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997); and Te Aka Matua o te Ture | Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012). There have been other reports, as well as an important one by the Ombudsman: Beverley Wakem *Not a game of hide and seek: Report on an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (December 2015). See also Nicola White *Free and Frank: Making the Official Information Act 1982 work better* (Victoria University of Wellington Institute of Policy Studies, Wellington, 2007).

¹⁷¹ Te Aka Matua o te Ture | Law Commission *The Public's Right to Know: Review of the Official Information Legislation*, above n 170, at 341 and 346.

¹⁷² *Government Response to Law Commission Report on The Public's Right to Know: Review of the Official Information Legislation* (House of Representatives, 4 February 2013).

¹⁷³ Committee on Official Information *Towards Open Government: General Report* (Wellington, 19 December 1980) at 14.

- Secrecy is an impediment to accountability when Parliament, press and the public cannot properly follow and scrutinise the actions of government. Public servants make many important decisions that affect people, and should also be accountable through greater flows of information about what they are doing.
- Better information flows will produce more effective government and facilitate the more flexible development of policy. With more information available, it is easier to prepare for change.
- If more information is available, public cooperation with government will be enhanced.

The principles remain sound but are currently being imperfectly followed. The Act is showing signs of its age, and it is in serious need of refreshment. There has been clear political resistance to making changes and freeing up further the release of information. There is disquiet about the administration of the Act within the journalistic community.

XII POLITICAL DONATIONS REFORM

Political parties in Aotearoa are constantly raising money to fund their endeavours and campaigns and, in turn, to persuade voters to support them. The primary ways in which funds are acquired are through party membership fees and donations, but with rates of membership declining across all parties, donations have become more heavily relied upon.¹⁷⁴ These donations are said to be "the lifeblood of political parties" as they fund day-to-day party activities alongside billboards, digital advertising, social media campaigning, consultants and polling during election years.¹⁷⁵ However, while this may be the standard, there is growing discontent with the ways in which party donations are made, how they are disclosed and who is making the payments. With 65 per cent of New Zealanders believing our economy is rigged to advantage the rich and powerful, an increasing wealth disparity and overall slipping in corruption statistics,¹⁷⁶ it is time for serious reform to address the deficiencies in our systems.

Funding systems for New Zealand's political parties are vulnerable to malpractice and abuse. There is a suggestion in recent research that expectations for a return on investment when large donations are made are not uncommon and create too great of an influence from wealthy donors on policy.¹⁷⁷ The current law dictates that political parties and candidates can receive donations in the form of money, the equivalent of money, or goods and services, with no limit on the amount from

174 Bridie Witton "Richlister behind Les Mills gym empire reveals why he donates to political parties" (21 March 2024) Stuff <www.stuff.co.nz>.

175 Bridie Witton "Richlisters speak out on why they splash big cash on political parties" (20 March 2024) Stuff <www.stuff.co.nz>.

176 Philippa Yasbek *Shining a Light: Improving transparency in New Zealand's political and governance systems* (The Helen Clark Foundation, Auckland, 18 August 2024) at 8.

177 At 11.

donors in New Zealand.¹⁷⁸ There is a limit of \$50 for donations from an "overseas person", with any amount in excess being required to be returned or paid to the Electoral Commission.¹⁷⁹ A candidate or party may also receive anonymous donations up to \$1,500 unless there are reasonable grounds to suspect they are from an overseas person.¹⁸⁰ A donor donating over this amount must disclose their name and address alongside the amount.¹⁸¹

A party secretary must each year file a return of party donations with details for each donation exceeding \$5,000 or where each donation from the same donor aggregates to more than \$5,000.¹⁸² This is a relatively recent requirement, only beginning from 1 January 2023.¹⁸³ Before this, parties were only required to report details of donations over \$15,000.¹⁸⁴ The other details that must be reported are the number of anonymous donations under \$1,500,¹⁸⁵ donations not exceeding \$1,500,¹⁸⁶ and the number of donations between \$1,500 and \$5,000,¹⁸⁷ alongside each total.¹⁸⁸ As a result, there were more detailed and revealing reports of donations in 2023 than ever:¹⁸⁹

178 Electoral Act, s 207.

179 Section 207K(2).

180 Section 207I.

181 Section 207C.

182 Section 210.

183 See Electoral Amendment Act 2022, s 6.

184 Electoral Commission New Zealand "Rules for party donations and loans" <www.elections.nz>.

185 Electoral Act, s 210(6A)(a)(i).

186 Section 210(6A)(b)(i).

187 Section 210(6A)(c)(i).

188 Section 210(6A)(a)(ii), (b)(ii) and (c)(ii).

189 Max Rashbrooke and Lisa Marriott *Money for Something: A report on political party funding in Aotearoa New Zealand* (Victoria University of Wellington, Wellington, November 2022) at 72.

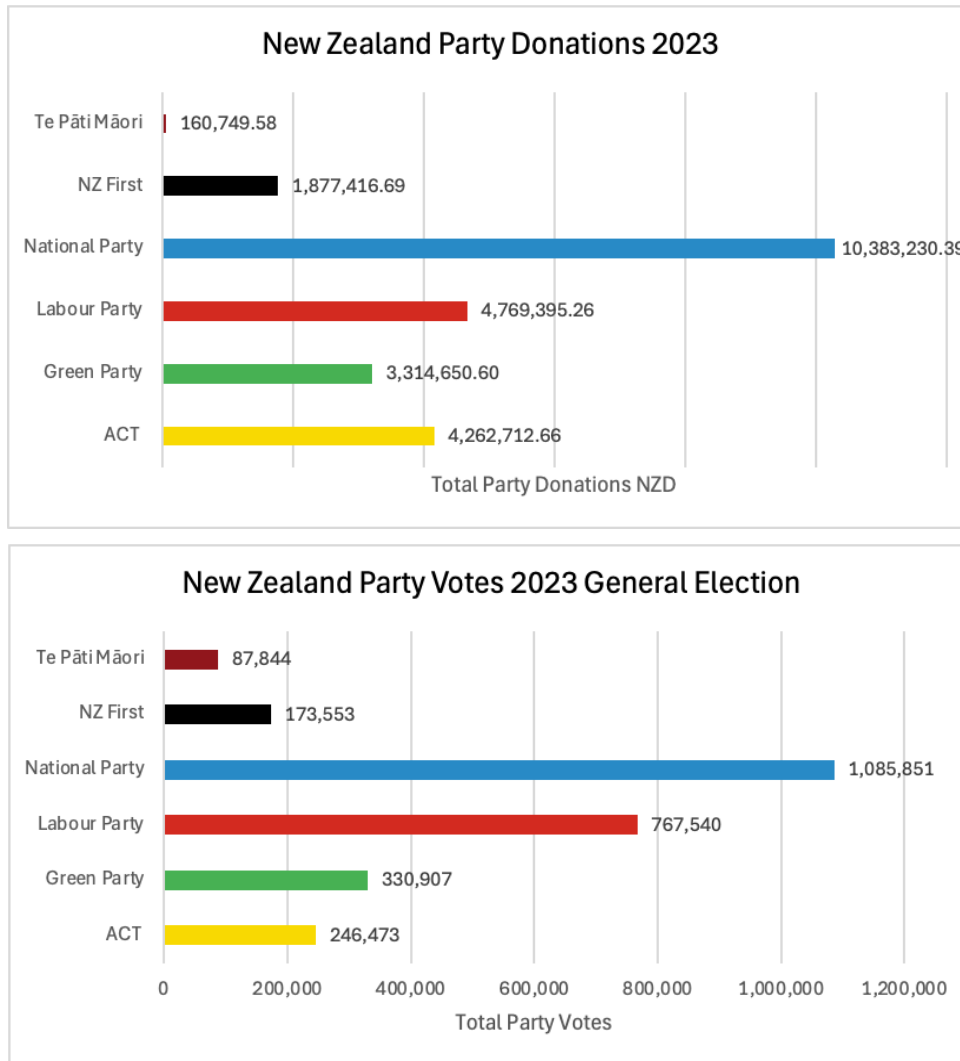


Figure 2: 2023 General Election results¹⁹⁰

¹⁹⁰ Data from Electoral Commission New Zealand "Party donations and loans by year" <www.elections.nz>; and Electoral Commission New Zealand "2023 General Election - Official Result" <www.electionresults.govt.nz>.

The 2023 party donation reports have shown the wider scope of funds parties may be working with (Figure 2). The amount seems to be continuing to grow, particularly among certain parties, as "never before has the political right amassed so much from wealthy donors".¹⁹¹ This is a cause for concern, as large donations may be a means for undue influence, and increases in funds from outside sources into the political sphere may create greater inequality. Public interest is therefore raised, and it is important to address that "the high rate of wealthy donations this electoral cycle increased the risk of a scandal".¹⁹²

International research suggests fundraising significantly impacts on electoral success, with an investigation of the United States, France, Japan, Brazil, Australia and the United Kingdom showing fundraising is a strong predictor of election vote shares.¹⁹³ However, this correlation was far more positive for mainstream parties than for "radical or extreme" parties. Such findings are consistent with studies showing that the highest-spending candidates or parties typically win but are also qualified by the potentially opposing nexus that the parties with the largest support gain the most donations due to that support.¹⁹⁴ The research mirrors these findings in Aotearoa (Figure 2), with newer, smaller parties seeing ineffective results from large spending and larger, more established parties seeing relatively positive returns from spending.¹⁹⁵ However, funding alone is clearly not the only determinant of the success of a party in elections. For example, in 2020, the National Party fundraised double the amount of Labour but lost the election by a significant margin.¹⁹⁶

There are several issues surrounding the vast quantities of money being raised for political parties. First, more parties – other than those surviving off large donations – should be able to participate fully in the system. A fine line exists between having the funds to engage politically as a party due to the expensive nature of campaigning, and amassing an amount that stifles fair competition with parties less endowed.¹⁹⁷ The IER, in its 2023 report, expressed the importance of equal access to participation in an election. This included the fact that the use of wealthy donors should not be maintained as the only realistic way to campaign,¹⁹⁸ which is now the standard.¹⁹⁹ Funding imbalances create a

¹⁹¹ Witton, above n 174; and Witton, above n 175.

¹⁹² Witton, above n 175.

¹⁹³ Rashbrooke and Marriott, above n 189, at 26–27.

¹⁹⁴ At 27.

¹⁹⁵ At 27–28.

¹⁹⁶ At 28.

¹⁹⁷ At 48.

¹⁹⁸ Independent Electoral Review, above n 123, at [13.20].

¹⁹⁹ See Witton, above n 174.

disparity in resources available to parties, impacting the ability to communicate their message to the public:²⁰⁰

... simply by having more money for advertising, creating an uneven playing field. This violates the principle that elections should be determined by who has the best ideas, not who has the most money to communicate them.

Intrinsically linked with a lack of equal participation due to party funding is the risk of large donations being a form of receiving undue access and influence on policy.²⁰¹ The position of donating large funds to a party should reflect a desire to support democracy by allowing them to participate in a fair election. However, this is not always the case, with increasing instances of donors acknowledging their donations are to advance a particular cause for their own benefit.²⁰² Recent research asserts there is a growing volume of corrupt appeals to political parties from donors explicitly seeking favours in return for their funding, with "a clear expectation of influence".²⁰³ This can be through the general and cyclical manner of urging donors to continue offering money by making political decisions that benefit their endeavours, thereby encouraging them to want to keep that party in control.²⁰⁴ This was demonstrated by landlords expecting to receive benefits from a National-led government, and therefore, many of their donors, such as Bayley Corporation and Stonewood Group, were associated with the property sector.²⁰⁵ Not only does increased influence from a minority of wealthy individuals with aims to benefit an already privileged group mean policies are advanced in an imbalanced nature, but also, on a broader level, that there is not the equal participation required for a healthy, modern democracy.

Another way in which donors can unduly influence policy is through the granting of donor access to social events and discussions with MPs. Selling face-time with politicians is not an uncommon practice, with Members needing to appeal to donors to acquire their financial support and the donors wanting to try and have their say directly to the Member.²⁰⁶ For example, in the most recent electoral cycle, there was the 2022 "president's dinner" in Auckland with Christopher Luxon MP, which was \$1500 a head, and a lunch with the Rt Hon Jacinda Ardern in 2019 for the same price.²⁰⁷ Such events are a reflection of the close proximity between wealthy donors and decision-makers in the world of

200 Rashbrooke and Marriott, above n 189, at 19.

201 Independent Electoral Review, above n 123, at [13.20].

202 Rashbrooke and Marriott, above n 189, at 19–20.

203 At 46.

204 At 19–20.

205 Witton, above n 174.

206 Rashbrooke and Marriott, above n 189, at 33–34.

207 Witton, above n 174.

business and politics, which, in turn, means that law tends to favour them.²⁰⁸ This is not the access that the ordinary person has. They do not have the privilege of time spent with law-makers, having their voices heard and considered, and this can skew what an MP thinks the average New Zealander wants. There is a socialising effect of wealthy donors spending so much time with politicians, even if they are not always talking about policy.²⁰⁹

While one individual donation of, say, \$30,000 may not immediately change a politician's mind, it is not hard to see how this constant socialisation – sometimes ... occupying an MP's entire day – can lead to a subtle but sure inclination of the politician's beliefs towards those of the donor.

The Hon David Seymour MP has discussed regularly meeting with a wealthy donor who would offer money to the ACT Party with each "catch up" they had.²¹⁰ When asked if their views would unduly shape his own or impact policy, he said that "[i]t's possible", but no more than expected, given many of his donors were "met in part because of shared views".²¹¹ This demonstrates the cyclical nature of funding allowing donors to gain private access to politicians, the feedback loop of policy views they hear and the disproportionate influence certain individuals get on the governing of New Zealand. Greater transparency has been advocated for by the IER, who believe it is important to improve public trust in the political system by allowing understanding of who exactly is driving change in policy.²¹²

Beyond the general influence granted to donors, there is direct corruption and circumvention of funding laws. One such example, in 1996, was the splitting of \$100,000 by businessman Trevor Farmer into 12 donations from various family members and law partners to hide his participation and keep the amounts under the disclosure recommendations of the time.²¹³ Any reporting on overall donations will be inaccurate due to the use of donation splitting to deliberately obscure funding sources.²¹⁴ Another significant case concluded in 2022, finding after a trial that the New Zealand First Party had received nearly \$750,000 in donations through their Foundation, bypassing the need for each donor to be named for the many amounts that were over \$15,000.²¹⁵ The donations were shown

208 Rashbrooke and Marriott, above n 189, at 29.

209 At 29.

210 Witton, above n 175.

211 Witton, above n 175.

212 Independent Electoral Review, above n 123, at [13.49].

213 Rashbrooke and Marriott, above n 189, at 33.

214 Independent Electoral Review, above n 123, at [13.151]; and Yasbek, above n 176, at 30.

215 *R v EF* [2022] NZHC 1755. The defendants were found not guilty, and a Crown appeal was dismissed: *R v EF* [2024] NZCA 77. See also Rashbrooke and Marriott, above n 189, at 37–38.

to have come from organisations that would benefit from policy decisions made by New Zealand First's MPs, such as the racing industry.

More generally, there have been many instances of failure to declare large donations.²¹⁶ These continuous cases of parties failing to disclose thousands of dollars or obscuring their sources are an atrocious, fraudulent abuse of the purpose of the legislation and a perfect example of the need for more regulation and transparency. They also indicate that there are likely to be many further breaches of electoral donation rules that are not discovered, with donations from industries that can be significantly impacted by policy decisions of the parties they are donating to. The system is particularly vulnerable to this as the Electoral Commission has "virtually non-existent powers to investigate donation fraud" as they are unable to check returns against a party's internal records.²¹⁷

One recent, highly publicised example of donation fraud resulted in the dismissal of Labour Party Minister Hon Stuart Nash in March 2023. This dismissal occurred after the Prime Minister became aware of an email the MP had sent to two contacts regarding the commercial rent relief package being considered by Cabinet in June 2020.²¹⁸ The emails contained a description of Mr Nash's opposition to Cabinet's decision on the package and the positions of other ministers, which was considered to be a clear breach of collective responsibility and Cabinet confidentiality.²¹⁹ Of particular note was that the recipients were two of the largest commercial property owners in Wellington, both of whom had worked with Mr Nash on his proposal and had previously donated to his election campaign.²²⁰

More regular disclosure of party donations is important to enhance transparency, as parties are constantly campaigning, being influenced and being donated to, not just in election years. There is currently very delayed annual disclosure of donations outside of the regulated period, making it difficult to align when a party's policy or public discussions are introduced due to a particular donation.²²¹ It is not uncommon outside of Aotearoa for donations to be published more regularly to keep up with the speed at which the processes can be completed in the modern day. For example, in Queensland, donations are mostly published within seven days, and even within 24 hours during an election period.²²²

²¹⁶ At 36.

²¹⁷ At 39.

²¹⁸ Secretary of the Cabinet *Hon Stuart Nash's Ministerial Communications with Donors: Report to the Prime Minister* (Cabinet Office, 14 June 2023) at [6].

²¹⁹ At [6].

²²⁰ At [7].

²²¹ Yasbek, above n 176, at 33.

²²² At 33.

The indistinct nature of an "overseas person" in the legislation has also created a margin for manipulation and loopholes. When it is the people of this country that have to live with the outcome, there are questions around why an overseas individual or group should have any say at all.²²³ There is also a broader risk of influence from other countries trying to "disrupt or subvert our national interest", with confirmation from the New Zealand Security Intelligence Service that "a small number of states engage in interference activity against our national interest, including by targeting our political sector".²²⁴ One way the ambiguity can be exploited is through overseas donations being funnelled through third-party promoters, who are permitted to accept them to fund electoral campaigns from outside of New Zealand. The scope of overseas interference is particularly difficult to identify, as third-party promoters are not required to record or report any donations to their campaign.²²⁵

The use of third-party promoters is potentially the easiest way of circumventing electoral donation rules due to this lack of requirement to disclose donations. Third-party promoters are groups who run election advertising, which can be unregistered (only allowed to spend up to \$16,300) or registered (can spend up to \$407,000).²²⁶ They are only required to report the amount they spend if it exceeds \$100,000,²²⁷ and although offshore people cannot be registered as promoters, there are no limits on their ability to donate. The amount being spent by third-party promoters has increased significantly, with \$147,000 declared in 2020 but nearly \$2 million in 2023, suggesting it is time for more serious regulation.²²⁸ The lack of transparency surrounding third-party promoters makes it difficult to ascertain who is endorsing whom in a financial capacity, leaving room for the pitfalls discussed earlier.

Also at risk of exploitation is the lack of an extensive and complete definition of electoral advertising. The current definition does not include the full gambit of strategies used in modern campaigning, such as payments to social media influencers, polling and focus groups, public relations activity or celebrity endorsements.²²⁹ This leaves too much room for a lack of disclosure through the excuse of spending not being categorised appropriately.

223 Rashbrooke and Marriott, above n 189, at 47.

224 Independent Electoral Review, above n 123, at 28.

225 Electoral Commission New Zealand *Third Party Handbook: General Election 2023* (January 2023) at 38.

226 Electoral Act, ss 204B(1)(d) and 206V(1), as from 1 July 2024. These amounts are regularly adjusted to keep pace with the New Zealand Consumers Price Index (CPI): Electoral (Expenditure Limit) Order 2024 (explanatory note) at 3.

227 Section 206ZC.

228 Yasbek, above n 176, at 35.

229 At 34.

These many flaws and vulnerabilities in the current system of electoral donations require in-depth reform of the legislation to limit corruption. The recommendations from the 2024 *Shining a Light* report by the Helen Clark Foundation adopt and add to those of the IER's 2023 report and a 2020 report for Transparency International New Zealand. They are comprehensive and supported, including:²³⁰

- (1) Donations
 - (a) Allow only registered electors to donate and provide loans to parties and candidates.
 - (b) Limit donations and loans to \$30,000 per electoral cycle.
- (2) Disclosure
 - (a) Require greater disclosure of donations during election periods, such as disclosure of amounts above \$10,000 within 10 working days.
 - (b) Require disclosure of donors giving more than \$1,000 a year.
 - (c) Require monthly disclosure of political party donations.
- (3) Registered third-party promoters
 - (a) Introduce offence provisions in the Electoral Act 1993 to restrict collusion between political parties and third-party promoters.
 - (b) Prohibit third-party promoters from using overseas donations to fund electoral advertising.
 - (c) Require third-party promoters to record election campaign donations.
 - (d) Require third-party promoters that spend more than \$100,000 on election expenditure during the regulated period to also disclose donors who donate over \$30,000 in total during an electoral cycle.
 - (e) Require third-party promoters to follow the same rules as political parties in declaring the names of donors to their political campaigns.
 - (f) Only allow registered voters to donate to third-party promoters' political campaigns with the same restrictions as are recommended for donating to a political party.
 - (g) Limit third-party promoters to spending no more on a political campaign than they receive in donations to that campaign.
- (4) Online political campaigning
 - (a) Require those who sell advertisements online to keep a public, searchable register of published election advertisements, including information on demographic micro-targeting, ad reach, cost and source of payment.
 - (b) Require parties, candidates and third-party promoters to provide more detailed accounts of online ad buys and the medium of expenditure in their expense returns.
 - (c) Require itemised expense reports of all Parliamentary Service-funded advertising.

230 At 62–63; Independent Electoral Review, above n 123, at 37; and Joshua Ferrer *Online Political Campaigning in New Zealand* (Transparency International New Zealand, October 2020) at 9–10.

- (5) Expand the definition of election advertising to include all communications and marketing expenses.

The aim is that with increased transparency, there will be less room for insidious behaviour and corruption behind closed doors. Furthermore, New Zealanders deserve to know what is happening within their Parliament and their elections, who has a stake in which party and why politicians may be making decisions in favour of certain groups.

The ability to donate is a privilege accorded to the very few people in society who have more influence than most, particularly when the voices of vulnerable and minority groups already struggle to be heard.²³¹

For Māori, the significant losses of land and resources as a result of colonisation has resulted in economic disadvantage (among other issues), including less intergenerational wealth in Māori communities. As a result of the wealth gap between Māori and non-Māori individuals, some Māori may have lower available disposable income and resources to donate.

The current system seems to be indefensible.

XIII A REGISTER OF LOBBYISTS

Transparency of political decision-making would be improved if regulation of lobbying was implemented. "Lobbying" is a term that dates from 1640. As the *Shorter Oxford English Dictionary* puts it:

... in the House of Commons and other Houses of legislature, [a lobby is] a large entrance hall open to the public, and chiefly used for interviews between members and non-members of the House.

Lobbying is communication designed to influence government decisions, covering a broad canvas.²³²

In New Zealand, the traditional view has been that the need for protections to be built around the interactions of MPs, pressure groups and lobbyists is not necessary. Further, it took much effort to establish the annual Register of Pecuniary and Other Specified Interests of Members of Parliament, although a searchable one is now available online.²³³ Conflicts of interest have been dealt with less

231 Independent Electoral Review, above n 123, at [13.62] (footnotes omitted).

232 Geoffrey Palmer "Lawyer as lobbyist: The role of lawyers in influencing and managing change" [1993] NZLJ 93 at 93.

233 See for example Maarten Wevers *Register of Pecuniary and Other Specified Interests of Members of Parliament: Summary of annual returns (Fifty-fourth Parliament)* (House of Representatives, 31 January 2024).

than rigorously for many years, although there are now detailed provisions regarding ministers' interests and managing their conflicts in the *Cabinet Manual*.²³⁴

Yet many democracies have seen the need to respond by imposing new regulatory mechanisms such as publicly searchable registers of professional lobbyists to promote transparency. Serious efforts to create a register of professional lobbyists were made by the Green Party in 2012 but failed to be adopted. The naivety and innocence of the traditional Aotearoa approach has caused us to fall behind other reputable democratic countries.

There have been recent indications that both the Labour and National parties are open to considering this issue. A spate of publicity caused the issue to arise from investigative journalism by Radio New Zealand's Guyon Espiner. It involved criticism of a recently retired minister, Kris Faafoi, who established a lobbying firm a few weeks after leaving Parliament.²³⁵ One result of the debate was the decision of the Prime Minister to cancel lobbyists' parliamentary precinct access cards.²³⁶ More measures may eventually result, but recent events do not suggest a movement in such a direction.²³⁷

Regulation of lobbying in the interests of transparency occurs in many countries with which we compare ourselves, including Australia, Canada, Great Britain and the United States.²³⁸ A group of Aotearoa academics interested in health have compiled a report pointing to the lobbying power of various industries selling unhealthy commodities such as alcohol and unhealthy food, contributing significantly to poor health.²³⁹ As a person who had much contact with liquor law over the years, both as a Minister of Justice and as the President of the Law Commission when it reported on alcohol law in 2010, one of the authors can confirm from experience that the liquor industry exerts undue influence over political actors when it comes to liquor law. However, lobbying regulations should not be restricted to health issues.

234 Cabinet Office *Cabinet Manual 2023* at [2.59]–[2.72].

235 Danyl McLauchlan "Inside job: The opaque nature of political lobbying in NZ and the role of ministerial advisers belie our reputation for transparency." *New Zealand Listener* (New Zealand, 8–14 April 2023) at 14.

236 RNZ "Chris Hipkins: Lobbyists' swipe card access to Parliament a 'perception issue'" (4 April 2023) <www.rnz.co.nz>.

237 See Guyon Espiner "Lobbyists are back at Parliament - with a new privacy measure hiding their identities" (12 February 2024) RNZ <www.mz.co.nz>.

238 Parliamentary Library *Lobbying regimes: an outline* (April 2012); and High Authority for Transparency in Public Life "Comparative study of lobbying regulation mechanisms" (21 October 2020) <www.hatvp.fr>.

239 June YY Leung and others "Addressing the influence of the alcohol industry in Aotearoa New Zealand" (2023) 136 NZMJ 104.

The *Shining a Light* report contains important recommendations about regulating lobbying.²⁴⁰ The OECD has recommended for a considerable period that Aotearoa should act on this issue, but nothing has been done. The report recommends implementing the Health Coalition Aotearoa *A Balance of Voices: Options for the regulation of lobbying in Aotearoa* report recommendations.²⁴¹

- Enacting a Regulation of Lobbying Act.
- Establishing an online and publicly accessible register in which lobbyists must make quarterly returns detailing their contacts with Designated Public Officials (DPOs).
- Creating a stand-down period of three years in which former DPOs cannot lobby the government on issues where they had official dealings.
- Establishing a mandatory code of conduct for lobbyists, and lobbying-related provisions added to existing codes of conduct for DPOs.
- Creating an independent Crown entity, either a narrowly focused Lobbying Commission or a more wide-ranging Integrity Commission, with the power to levy fines, prosecute lawbreakers and enforce the above provisions.

The policy work on these proposals is well advanced and should be acted upon as a matter of exigency.

XIV PUBLIC SERVICE ACT REFORM

Public servants are the most constant source of advice available to ministers, and the most important. They are politically neutral, appointed on merit and often much more knowledgeable than ministers. Much of the relationship between ministers and public servants is governed by constitutional conventions. This is generally true of Westminster systems, of which Aotearoa is one. Conventions are non-legal rules of constitutional behaviour, although the law sometimes recognises their existence and importance. They are perhaps best understood as customs, practices or usages of how government works.

Public servants have a duty of loyalty to the government of the day, and they must maintain their political neutrality. The law on this matter is contained in the Public Service Act. One element of the obligations of public servants is to provide ministers with "free and frank advice".²⁴² This should not be misunderstood: ministers can disregard the advice – they are not obligated to follow it, but they must receive it.

The capacity to provide free and frank advice is identified in legislation as a principal responsibility of the chief executives of the departments. The Official Information Act provides that

²⁴⁰ Yasbek, above n 176, at 28–29.

²⁴¹ At 28. See Max Rashbrooke *A Balance of Voices: Options for the regulation of lobbying in New Zealand* (Health Coalition Aotearoa, March 2024).

²⁴² Public Service Act, s 12(b). See Palmer and Knight, above n 19, at 97–99.

free and frank advice is an explicit reason for withholding information after a request is made for specific information,²⁴³ although it may be overridden by the Ombudsman.

The provision of free and frank advice, however, can and does cause tensions between public servants and ministers. Sometimes, ministers wish that advice they do not agree with had not been given to them. The commitment to free and frank advice has waxed and waned over time, but there have been some welcome developments in recent times from the Ombudsman and the former Chief Executive of the Department of the Prime Minister and Cabinet, clarifying aspects of how the convention should work.²⁴⁴

On the other hand, there have also been developments in recent times in which ministers have been evading the receipt of free and frank advice. There has been a bonfire of legislative repeals of big and important statutes upon which little or no advice was secured, and a record amount of urgency has been used to introduce legislation and avoid select committee scrutiny.²⁴⁵

The authors have learned of instances where this has occurred. It seems sufficiently important to arrest this tendency by changing the law. The new tendency has gone as far as chief executives instructing their officials not to provide advice contrary to what is contained in coalition agreements, or other advice that ministers do not wish to receive. This is not in accordance with the traditional approach to free and frank advice within the public service based on long-standing principles of the Westminster system.

It is recommended that the Public Service Act be amended by inserting the words in italics below in section 12(b):

- (b) when giving advice to Ministers, to do so in a free and frank manner; and *must provide advice on all proposals for legislation whether Ministers request them or not.*

Such a provision will arrest the decay of the constitutional convention relating to free and frank advice. It is important to have such a safeguard in our parliamentary system to warn ministers against making unwise decisions. Ministers, for their part, must not attempt to discourage the provision of such advice.

243 Official Information Act 1982, s 9(2)(g)(i).

244 Andrew Kibblewhite and Peter Boshier "Free and Frank Advice and the Official Information Act: balancing competing principles of good government" (2018) 14 Policy Quarterly 3.

245 Marc Daalder "Govt sets record for laws passed under urgency in first 100 days" (8 March 2024) Newsroom <www.newsroom.co.nz>.

XV CONCLUSION

The changes advanced in this article emphasise the need to improve the way in which the House of Representatives performs its functions. Aotearoa is unusual in that it has only one House, and its membership is small.

Improving the accountability of ministers is one important aim, and adequate scrutiny of legislation and public expenditure is another. Both aims require more MPs to carry out the tasks to the standard required and to spread the load better. The number of MPs has not been increased since 1993 after the Royal Commission on Electoral Law recommended the increase in its 1986 report.²⁴⁶ The population of Aotearoa has increased substantially from 3.8 million in 1998 to over 5.2 million in 2024.²⁴⁷ As a result, MPs are drastically overworked and if the public desires better outcomes to be achieved, more MPs are necessary.

An effective select committee system for the House requires more MPs, as many are on two committees or more, and the committees are too small. The whole of the select committee system needs to be re-engineered. More MPs will also reduce the domination by the Executive, which has been a constant feature of Aotearoa governance, and which damages the role of the House. Urgency being taken by the government on legislation must be more limited, and a resolution on good law-making needs to be adopted by the House.

The House also needs to sit for more hours to accomplish its workload, and the Executive should not try to pass as much legislation as it does. The three-year term makes legislation unduly hurried and not adequately scrutinised to ensure the legislative proposals are workable. A four-year term, as proposed by the Government, should be supported.

The preparation of legislation should involve the use of deliberative democracy and citizens' assemblies to ensure there is more public input into the design of legislation from the beginning. It is essential to concentrate on getting the legislation right rather than passing it in a somewhat unfinished state, as has been the case in recent years.

Compulsory voting on the Australian model should be adopted for both central and local government in Aotearoa. Ten per cent more people vote in parliamentary elections in Australia than in Aotearoa. It seems fair that people who enjoy the advantage of democracy should be required to participate when an election is held.

246 John Wallace and others *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at 129.

247 Stats NZ "Population" (31 December 2024) <www.stats.govt.nz>.

Voting should be introduced for 16-year-olds alongside a programme of civic education in schools so that people are educated on how their democracy and the electoral system work, and on the opportunities it offers them to participate.

The Speaker of the House should be appointed by secret ballot of all members of the House and should not be the nominee of the governing party, as it operates currently. The Speaker needs not only to be seen as politically neutral but also to be appointed in a way that is politically neutral.

The Official Information Act should be revised and extended to organisations it does not apply to at present. It should be policed by an independent Information Commissioner, who can make decisions on the release of information. The Act is not popular with ministers, and efforts to reform it have failed for years. Transparency is the prime requirement for both an informed citizenry and a guard against corruption in government decision-making.

Reform of the system of donations to political parties is urgently needed. It would be desirable for MPs to receive an authoritative report from a Royal Commission on their funding schemes before decisions are made. The MPs have too much skin in the game, and statements of no foul intentions are not proof of none in practice. There is evidence that we are travelling down the American road of unlimited corporate donations due to an excess of loopholes: a system that has produced political decay and elitism and one that tends to be controlled by the rich. There is a wealth of excellent research on this topic in Aotearoa, and action must be taken. As in other democracies, there should also be a public register of professional lobbyists in Aotearoa, and a Regulation of Lobbying Act should be enacted.

The Public Service Act should be amended to ensure that ministers are advised by public servants on all legislative and expenditure proposals, whether the ministers want the advice or not. This is a fundamental principle of the Westminster system that has been eroded in Aotearoa.

New Zealanders need to stop and think about how they are governed because the system needs urgent and dramatic improvement.

