

# Departmental Disclosure Statement

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New Zealand Flag Referendums Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

9 March 2015

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## **Part One: General Policy Statement**

For some time there has been public debate about whether New Zealand should consider changing its flag. To provide New Zealanders with a forum in which to progress this discussion in a formal and respectful way the Government decided to initiate a broad public engagement process, followed by the opportunity for the public to vote on the New Zealand Flag. The Government has appointed a Flag Consideration Panel to lead public engagement and to recommend alternative flag designs for New Zealanders to consider through referendum.

This Bill establishes a process for the holding of two postal referendums. The first will determine which alternative flag design is preferred by voters, and the second will determine whether this alternative flag or the current flag is to be the New Zealand Flag.

The Bill provides for the administration of the referendums, and specifies the voting process and how the activities of promoters will be regulated. This is in order that the referendum process is transparent and has integrity and public confidence, so that the outcome can be enduring.

The Bill provides that, if voters decide in the second referendum that the New Zealand flag is to change, this will automatically lead to the necessary legislative changes and the status of the current flag (the 1902 Flag) will be recognised.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>
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### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p>The Ministry of Justice has provided two Regulatory Impact Statements relating to policy decisions. One informed the first set of Cabinet policy decisions on process matters in October 2014 including voting system. This can be accessed at <a href="http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-considering-changing-the-new-zealand-flag">http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-considering-changing-the-new-zealand-flag</a> . The other, prepared in December 2014, informed decisions on referendum advertising. This can be accessed at <a href="http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-regulation-of-new-zealand-flag-referendum-advertising/index">http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-regulation-of-new-zealand-flag-referendum-advertising/index</a></p>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
<p>No formal independent opinion was given as neither RIS meet the threshold for RIA Team assessment. However, the Treasury were consulted on both RISs. Both RISs were assessed internally as meeting the quality assurance criteria.</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
The key groups who are likely to be impacted by this Bill are businesses, cultural and sporting groups, and individuals who use the New Zealand flag. An analysis of the costs and benefits of this Bill can be found in the October 2014 Regulatory Impact Statement. This can be accessed at <a href="http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-considering-changing-the-new-zealand-flag">http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-considering-changing-the-new-zealand-flag</a> .	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The Ministry has not identified any relevant international obligations.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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<p>The Bill provides the legislative basis for the administration of the flag referendums. The Ministry formed a view internally that the overall flag consideration process adequately takes into account relevant Treaty obligations (refer below) and no further steps were taken.</p>
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<p>Cabinet has agreed on principles to guide the overall process to consider changing the New Zealand Flag. These principles include that process should be:</p>
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| <ul style="list-style-type: none"><li>• <i>inclusive</i>: all perspectives are invited and considered from within New Zealand's diverse communities, including Māori as tangata whenua; and</li><li>• <i>consistent</i>: with the Crown's Treaty obligations</li></ul> |
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<p>The Flag Consideration Panel, who will design and lead the public engagement process and recommend a shortlist of alternative flag designs, is required to take into account the guiding principles agreed by Cabinet.</p>
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### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>
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YES
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<p>Advice provided to the Attorney-General by Crown Law, or a Bill of Rights Act 1990 section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon a Bill's introduction. Any such advice or reports will be accessible on the Ministry's website at:</p>
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<p><a href="http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/">http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/</a>.</p>
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## Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
<p>a) Offences</p> <p>Part 2, Subpart 6 (clauses 50-61) create a series of offences which replicate, with necessary modifications, the offences in the Referenda (Postal Voting) Act 2000. These are listed in Appendix 1.</p> <p>Clause 65 creates an offence of failing to include a promoter statement in a referendum advertisement. Anyone guilty of such an offence is liable to a fine not exceeding \$40,000.</p> <p>b) Court Jurisdiction</p> <p>Clause 48 gives the court the power to determine the result of the referendum. The court will either need to determine the total number of valid votes recorded for each option, or determine whether the referendum is void because of some irregularity that in the court's opinion materially affected the outcome of the referendum.</p> <p>Clause 49 provides that if the court determines the referendum void a fresh referendum must be held in the manner specified by the Bill. The voting period must commence at the start of the 21<sup>st</sup> day before the day appointed for the close of the voting period and no later than 30 working days after the date on which the Returning Officer is notified.</p> <p>Again these two clauses replicate provisions in the Referenda (Postal Voting) Act 2000.</p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice is the responsible department for the New Zealand Flag Referendums Bill, and has led the policy development for the Bill. Internal consultation occurred.	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>
The Bill uses provisions relating to the electoral roll under the Referendum (Postal Voting) Act 2000.	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
In November 2014 the Ministry of Culture and Heritage undertook targeted consultation with Business New Zealand and the New Zealand Olympic Committee. The views of these agencies and organisations informed decisions on transitional provisions and on implementation in the event there is a vote in second referendum in favour of changing the flag.	

### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
The Electoral Commission has been involved in developing the Bill to ensure the administrative processes are practical and workable. In addition, the referendum questions in Schedule 1 and Schedule 2 have been independently assessed for plain English.	



## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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### Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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### Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p><u>Clause 2</u>: provides that, if there is a vote in second referendum in favour of changing the flag, the flag would change on a date set by Order in Council but no later than six months after the result of the second referendum is declared.</p> <p><u>Clauses 11 to 14</u> provide for an Order in Council to set the dates for both referendums and to prescribe the alternative flag designs to go into the first referendum (with the winner going into the second referendum). Orders in Council will also prescribe official descriptions of the flags for dictation voting and the technical specifications of the flags (as well as images of the design). There is also ability for Orders in Council to change the dates of referendums if required.</p> <p><u>Clauses 67 to 68</u> provide for regulation-making powers that will not necessarily be used but are required to take into account unanticipated issues with the referendum processes.</p> <p>These clauses are listed in Appendix 2.</p> <p>Delegated legislation is required because these issues are detailed matters which require flexibility and hence are inappropriate for the primary Act. In particular:</p> <p><u>Clause 2</u> allows for flexibility in how the Act is applied with respect to the date a new flag would come into force;</p> <p><u>Clauses 11 to 14</u> allows for flexibility relating to the actual flags to be in the referendums (which are yet to be selected) and to be able to change referendum dates more readily in response to an emergency ; and</p> <p><u>Clauses 67 to 68</u> allow for general flexibility in how the Act is applied and for actions requiring an immediate response to take into account unanticipated issues with the referendum processes.</p>	

### Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p><u>Clauses 69-71</u> of the Bill may be viewed as unusual transitional provisions as they only come into force if there is a vote in the second referendum in favour of changing the flag (via clause 2).</p> <p><u>Clause 69</u> amends the Flags, Emblems and Names Protection Act 1981 to:</p> <ul style="list-style-type: none"> <li>• change the flag to the new flag;</li> <li>• recognise the historic (but not official) status of the old flag and the right of any individual or group to continue to use or display that flag; and</li> <li>• allow the Minister responsible for that Act to prescribe rules for the use of the old flag, or other national or historic flags, in relation to Government land or buildings; and to issue rules of general conduct and etiquette (but which do not have the force of law) for those flags.</li> </ul> <p><u>Clause 70</u> amends the Land Transport Act (Driver Licensing Rule) 1999 to provide that driver licences can display the old flag until their expiry.</p> <p><u>Clause 71</u> allows, for the purposes of the Ship Registration Act 1992, for a period of six months after the change of flag, New Zealand-registered ships (other than New Zealand Government ships) to fly the old New Zealand Flag, the new flag, or the marine flag of New Zealand.</p> <p>Having these provisions in the Bill removes the need for separate legislation to amend these three pieces of legislation in the event of a vote in second referendum in favour of changing the flag.</p>	

## Appendix One: Further Information Relating to Part Three

### Offences, penalties and court jurisdictions -

#### 3.4 (a) . Does this Bill create, amend, or remove: offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

Clause 50 prohibits officials from using referendum information for unauthorised purposes. A person who commits such an offence is guilty of corrupt practices for the purposes of the Electoral Act 1993 and is liable on conviction to the penalties specified in section 224 of that Act.

Clause 51 prohibits any person any time during the three days prior to the voting period from influencing voters generally, and every such person is liable for a fine not exceeding \$5,000.

Clause 52 creates an offence for anyone to destroy voting papers or to use them for unlawful purposes. Every person who commits an offence against this section is liable on conviction, if the Returning Officer, or any person employed or engaged under section 16, or any person acting under delegation under section 17, to imprisonment for a term not exceeding two years; any other person is liable to conviction for a term not exceeding 6 months.

Clauses 53-55 create the offence of bribery by any person any time, including after the voting period and before it. Every person who commits the offence of bribery is guilty of corrupt practices for the purpose of the Electoral Act 1993.

Clause 56 prohibits anyone from treating someone in a corrupt way, by entertaining, dining them. Every person who commits the offence of treating is guilty of a corrupt practice for the purposes of the Electoral Act 1993.

Clause 57 makes it an offence for any person to use undue influence in order to convince someone to vote in a certain way. Every person who commits an offence of undue influence is guilty of corrupt practice for the purposes of the Electoral Act 1993.

Clause 58 prohibits anyone from interfering with someone's attempt to vote by, for instance, failing to mark the voting paper as instructed by the voter when authorised to do so. Every person guilty of such an offence is liable to a fine not exceeding \$5,000.

Clause 59 claims that it is an offence for someone to personate a voter. Every person who commits, or aids, abets, counsels, or procures the commission of, the offence of personation is guilty of a corrupt practice is guilty of a corrupt practice for the purposes of the Electoral Act 1993.

Clause 60 creates certain offences in relation to processing of voting papers. For instance, every person without the express authorisation of the Returning Officer who enters the premises of the Returning Officer commits an offence, and is liable to a fine not exceeding \$2,000. If any returned voting paper is removed from the custody of the Returning Officer, or a person acting under a delegation under section 17(1), that person is liable to a fine not exceeding \$2,000. Lastly, every person who commits an offence against subsection (3) is guilty of a corrupt practice for the purposes of the Electoral Act 1993.

Clause 61 states that in any prosecution for an offence in relation to any voting paper or any envelope containing any voting paper, the property in the voting paper or envelope may be stated as vesting in the Returning Officer.

Clause 65 creates an offence of failing to include a promoter statement in a referendum advertisement. Anyone guilty of such an offence is liable to a fine not exceeding \$40,000.

## Appendix Two: Further Information Relating to Part Four

### Powers to make delegated legislation

#### 4.8. Does this Bill create or amend any other powers to make delegated legislation?

Clause 2 provides that, if there is a vote in second referendum in favour of changing the flag. The flag would change on a date set by Order in Council but no later than six months after the result of the second referendum is declared.

Clause 11 states the Governor-General must, by Order in Council made on the recommendation of the Minister, as soon as practicable after the commencement of this Act, -

- (a) appoint a date for the close of the first flag referendum that is at least 90 days after the day on which the Act commences; and
- (b) appoint a date for the close of the second flag referendum that is at least 90 days after the day appointed under paragraph (a).

Clause 12 states that the Governor-General may, from time to time, before the commencement of the voting period for the referendum, by Order in Council –

- (a) revoke an Order in Council made under section 11 and appoint a later date;
- (b) revoke any Order in Council made under section 21(2) of the 2000 Act as that provision applies to this Act, and appoint a later date for the closing of the referendum roll.

Clause 13 states that the Governor-General must, by Order in Council made on the recommendation of the Minister, at least 60 days before the commencement of the voting period for the first flag referendum, prescribe 4 alternative flag designs to appear on the voting paper.

Clause 14 states that the Governor-General must, by Order in Council made on the recommendation of the Minister, at least 28 days before the commencement of the voting period for the second flag referendum, prescribe an official description of the current New Zealand flag, to be used for the purposes of dictating the relevant parts of the voting paper under section 24(4)(c).

Clause 67 allows the Governor-General to, from time to time, by Order in Council, make regulations for all or any of the following purposes:

- a) prescribing forms for the purposes of this Act;
- b) applying, with or without modifications, for the purposes of this Act, any other provisions of the Electoral Act 1993 and any regulations made under that Act;
- c) applying, with or without modifications, for the purposes of this Act, any other provisions of the 2000 Act and any regulations made under that Act;
- d) providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

Clause 68 states that in certain circumstances (described in subsection (2)), the Governor-General may, by Order in Council–

- a) at any time before or after the time within which the thing is required to be done, to extend that time; or
- b) to validate anything irregularly done in matter of form; or
- c) to validate anything irregularly done in matter of form ; or
- d) to make such other provision for the case as the Governor-General thinks fit.