Regulatory Impact Statement: Electoral Amendment Bill: changes to political donations settings

UPDATED with Supplementary Annex: Supplementary Order Paper to Electoral Amendment Bill

Annex Coversheet

Purpose of Supplementary Annex	
Decision sought:	This analysis was produced for the purpose of seeking approval to introduce amendments to the Electoral Amendment Bill through a Supplementary Order Paper, following the High Court judgment in *R v EF and FG*. If adopted, these amendments would: 1) clarify the definition of 'party donation' in section 207(2) of the Electoral Act 1993; and 2) create a new offence and penalty for failing to comply with the existing obligation to transmit donations to the intended recipient in section 207B of the Electoral Act 1993.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised / updated:	25 August 2022

Executive Summary

The Electoral Amendment Bill (the Bill) was introduced to the House of Representatives (the House) on 20 July 2022 and completed its first reading on 2 August 2022. The Bill was then referred to the Justice Committee.

On 22 July 2022, the High Court (Court) issued its judgment in *R v EF and FG*. The Court's judgment interpreted the definition of 'party donation' in section 207(2) of the Electoral Act 1993 (the Act) in a way that was unexpected. As a result, there is a risk that political parties may structure their financial affairs in a way that legally avoids the intention of the political donations disclosure regime and undermines public trust in the integrity of the regime.

Although it did not affect the decision in *R v EF and FG*, the Court also noted that section 207B of the Act (which requires a person to transmit any donation they receive to the intended recipient, being a candidate or party secretary) does not have a specific, corresponding offence provision in the Act.

Following the Court's judgment in *R v EF and FG*, Cabinet is considering whether to introduce a Supplementary Order Paper (SOP) to the House proposing two amendments to the Bill. The SOP intends to give effect to the underlying policy intent envisioned by the

House when these provisions in the Act were enacted. This Regulatory Impact Statement (RIS) was prepared to assist Cabinet decisions.

If adopted, the SOP would:

a) clarify the definition of 'party donation' in section 207(2) of the Act by:

   i) removing the reference to being "on behalf of the party who are involved in the administration of the affairs of the party"; and

   ii) inserting a reference to a donation being intended for the benefit of a party; and

b) create a new offence for failing to comply (without a reasonable excuse) with the obligation in section 207B to transmit donations to the intended recipient, with a penalty of a fine not exceeding $40,000 to be imposed upon conviction for committing this new offence.

Limitations and Constraints on Analysis

The Minister directed officials to consider changes to the relevant provisions in the Act that could be implemented by 1 January 2023. The changes need to be in place by the start of calendar year for the reporting of party donations, ahead of the 2023 General Election. This resulted in analysis on a narrow range of changes.

The Minister also directed officials to propose options to be introduced in a SOP to the Electoral Amendment Bill in September. This was so the Justice Committee can consider the proposed changes alongside the Bill. The result was a tight timeframe to develop and analyse policy options.

Due to this very tight timeframe:

- no public or party secretary consultation, has been possible; and
- the benefits and costs of any proposed changes could not be quantified with sufficient certainty, but a qualitative assessment was possible.

The underlying policy rationale for the relevant provisions in the Act is to be maintained. Minimal changes should be made in order to clarify, but not expand or narrow, how Parliament intended the regime to be applied.

The Electoral Commission (Commission) were able to provide preliminary views on the changes proposed in this RIS, but have been unable to provide a more fulsome consultation response due to the tight timeframe.

Engagement with enforcement agencies (New Zealand Police and the SFO) could not be conducted due to both the tight timeframe and the ongoing judicial proceedings in *R v EF and FG*.

The Independent Review of Electoral Law (Independent Review) will be able to consider the broader context of existing electoral policy settings when it carries out a more fundamental, first-principles review of the electoral finance regime and all the offences and penalties in the Electoral Act 1993. We did not consider the other aspects of political donations or the effectiveness of the offences and penalties regime in the Act.

The issues were identified and limited to the wording of the relevant provisions in the Act. Therefore, the range of options we have identified in this Annex is limited to the status quo and legislative amendments.

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Justice QA panel
Panel Assessment & Comment:	The Ministry of Justice RIS QA Panel has assessed the Supplementary Annex “Supplementary Order Paper to Electoral Amendment Bill” and considers that it does not meet the standards required to demonstrate robust regulatory analysis of the underlying problems and the options put forward. While the Annex, when read together with the main RIS “Electoral Amendment Bill – changes to political donations settings”, is clear and concise, the inability to consult stakeholders has significantly impacted the quality of analysis. Based on the analysis contained in the Annex, there is a risk that the options either do not address the underlying problem or have potential unintended consequences. These risks could be mitigated by consulting stakeholders on the impacts of the proposals. Given the limited time to enact legislation and have it in force for the 2023 election year, Cabinet may wish to consider asking the Select Committee to undertake targeted consultation on the Supplementary Order Paper.

Annex Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

What are the key features of the regulatory system(s) already in place?

1. Paragraphs 1 to 6 of the main RIS sets out the key features of the regulatory framework for the disclosure and reporting of political donations.

The meaning of 'party donation' is defined in the Electoral Act

2. The definition of party donation in section 207(2) of the Act provides:

   207 Interpretation

   …
   (2) In this subpart and subparts 4 to 6 of this Part, unless the context otherwise requires,—
   …
   *"**party donation** means a donation (whether of money or of the equivalent of money or of goods or services or of a combination of those things) that is made to a party, or to any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party…"*.

3. In its ruling in *R v EF and FG*,[1] the Court interpreted the definition of 'party donation' in the Act in a way that was unexpected. This is inconsistent with the policy intent which is that donations provided with the expectation that the monies, goods or services donated will benefit the party, would be considered 'party donations' for the purposes of the Act.

4. The Court interpreted the phrase "who are involved in the administration of the affairs of the party" narrowly to mean a requirement for a formal role under the party's constitutional arrangements for the person receiving the donation. The Court considered the requirement for a formal role to mean involvement in the "governance and management oversight of all the Party's affairs",[2] and that a person must receive a donation in that capacity for it to be a 'party donation' under the Act.

The Electoral Act does not contain a specific offence for failing to comply with the existing obligation to transmit donations to the intended recipient

5. Section 207B of the Act (the transmission rule) currently states:

   207B Donations to be transmitted to candidate or party secretary

   (1) Every person to whom a candidate donation is given or sent must, within 10 working days after receiving the donation, transmit the donation to the candidate.

   (2) Every person to whom a party donation is given or sent must, within 10 working days after receiving the donation, either—
   (a) transmit the donation to the party secretary; or
   (b) deposit the donation into a bank account nominated by the party secretary.

6. Unlike other similar obligations in the Act, the transmission rule does not have a specific, corresponding offence provision in the Act. The Court noted this in its judgment in *R v EF and FG*, although it did not affect the Court's decision.[3]

What is the policy problem or opportunity?

Public trust in the integrity of the political donations regime could be undermined by how political parties structure their financial affairs

7. There is a risk that the definition of 'party donation' as now interpreted could provide an opportunity for political parties to structure their financial affairs in a way that legally avoids the intention of the political donations disclosure regime and undermines public trust in the integrity of the regime. This risk is particularly noteworthy in light of the upcoming 2023 General Election.

8. It is not possible to quantify this risk in monetary terms; beyond the circumstances before the courts, we do not know how many parties might be able to (under the terms of their own constitutions) or choose to adopt similar structures, nor do we have any basis to estimate the amount of money that may subsequently flow through such structures. Actions to uphold public trust in the rules that political parties must abide by impact on intangible constitutional concepts, such as the integrity of New Zealand's democracy. The impact on issues such as public confidence in the democratic process and political institutions are hard to measure and many costs and benefits are hard to estimate. The analysis of impacts in this RIS is therefore primarily qualitative.

9. If a person's intent is to make a donation to a party, either directly to the party or indirectly through an intermediary, the policy intent is that such a donation should be treated as a 'party donation' and transmitted to the party, and declared by the party if the payment or benefit is received.

The absence of a specific offence for failing to comply with the existing obligation to transmit donations to the intended recipient may make such behaviour more likely

10. Any person given a donation to transmit to an intended recipient may be less likely to do so, because there is no specific offence in the Act for failing to comply with the transmission rule. This conduct could also occur to avoid such donations (and the original donor) being subject to existing disclosure obligations, because the person given a donation to transmit may instead spend the donated money themselves to nevertheless benefit the intended recipient.

11. The absence of a specific offence in the Act prohibiting non-compliance means conduct would have to meet the thresholds set out in an offence located in other legislation (such as the Crimes Act 1961) to be punishable by law. The applicability of these offences would need to be assessed on a case-by-case basis depending on the severity of both the alleged offending and the penalty attached to the offence, and would depend on how prosecuting agencies applied their independent discretion in each case.

What objectives are sought in relation to the policy problem?

12. The objectives of this work are to:

    a) clarify how the political donations regime is intended to operate to maintain the transparency and integrity of the regime; and

    b) to maintain public trust in the regime.

[1] *R v EF and FG* [2022] NZHC 1755.
[2] At [56].
[3] At [6].

Annex Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options?

13. We have used the following criteria to analyse options to address the policy problems. We note there is the potential for tension between all the criteria, which can necessitate a balance being struck between them:

    a) **promote transparency and accountability** of the electoral regime by remaining consistent with the policy intent of the electoral finance rules;

    b) **clear and consistent** to those who are assigned responsibility in the current electoral regime; and

    c) **ease of implementation** within the current regime by not adding to the administrative burden of those needing to comply with the electoral finance rules.

What options were considered but discounted?

14. We considered an option to introduce provisions in the Act relating to the function, purpose and regulation of entities that are, or are perceived to be, associated with political parties, whatever their respective legal statuses. Many such entities are not presently required to register their activities under the Act.

15. However, we discounted this option because it:

    a) goes beyond the scope of the immediate policy problems;

    b) introduces a new and significant change into the Act without sufficient time to carry out the policy work and consultation required; and

    c) is most appropriately considered by the Independent Review, as was decided when this option was considered in relation to the original package of proposals in the Bill.

What options are being considered?

16. Following the discussion of each proposal, we have included a table analysing how the options considered compare to the status quo. Option one for all proposals is the status quo. We have not included this option in the tables below.

17. The key for the tables is as follows:

Key:	
++	much better than the status quo
+	better than the status quo
0	about the same as the status quo
-	worse than the status quo
- -	much worse than the status quo

Proposal One: Clarify the definition of 'party donation' in the Act

Options

Option One – the status quo

18. The current definition of 'party donation' is in section 207(2) of the Act (at paragraph 2 above). A donation must be given (other than to the party directly) to a person formally involved in a party's governance and management affairs, and to be given to them in that capacity, to fall within the definition of 'party donation' in the Act.

19. Maintaining the status quo at this time has the benefit of:

    a) allowing a complex issue to be worked through with a broader frame of reference, limiting the risk of unintended consequences from any rapid changes and increasing the likelihood that any change will engender confidence in the reformed election regime – the Independent Review can consider this issue within its terms of reference;

    b) maximising the opportunity for public consultation by ensuring that anyone impacted by a potential change has an opportunity to engage in the decision-making process, which has been the approach traditionally taken when considering changes to electoral law;

    c) waiting for the outcome of the application for leave to appeal sought in *R v EF and FG* and any subsequent judicial rulings and commentary on this issue; and

    d) allowing potential non-legislative interventions to occur that may minimise the impact of the issue, such as parties facing positive or negative electoral consequences due to voters' views on, and media coverage of, the way parties have structured their financial affairs.

20. However, the status quo would also:

    a) allow political parties the opportunity to structure their financial affairs in a way that legally avoids the intention of the political donations disclosure regime, undermining public trust in the transparency and integrity of the regime; and

    b) permit at least one and potentially two general elections to occur with a visible, known gap contrary to the Act's policy intent remaining in place due to the time it would take to respond to and implement any recommendations by the Independent Review, undermining public trust in the integrity of the political donations regime.

Option Two – amend the definition's reference to "on behalf of the party who are involved in the administration of the affairs of the party"

21. This option would amend the definition of 'party donation' in the Act by:

    a) removing the reference to "on behalf of the party who are involved in the administration of the affairs of the party"; and

    b) inserting a reference to a donation being intended for the benefit of a party.

22. This option:

    a) clarifies, without expanding or narrowing, the underlying policy intent envisioned by Parliament when it adopted the definition of 'party donation' in the Act by making it clear that a person does <u>not</u> have to be formally involved in a party's organisational structure (i.e. a governance or management role) to receive a party donation;

    b) should ensure continued and appropriate transparency of party donations; and

c) is not expected to create any significant additional compliance burden for donors, party secretaries, party fundraisers and transmitters.

23. As with the existing rules, this option requires a person receiving the donation to ascertain the intent of the donor.

24. Removing the reference to "on behalf of the party who are involved in the administration of the affairs of the party" does not open the party secretary to additional risk of legal liability. This is because a party secretary is not legally responsible for the handling and recording of party donations they had no knowledge of. It is reflected in the Act where:

    a) a party secretary having a defence against the offence of failing to properly record party donations in section 207N(2) of the Act if they had a reasonable excuse for failing to do so; and

    b) in section 210D(2) where the party secretary, who files a false return is guilty of an illegal practice unless they can prove that they took all reasonable steps in the circumstances to ensure the information was accurate. To be found guilty of the offence in this provision also requires intent to be proved.

Option Three – add an explanatory provision to clarify the meaning of "involved in the administration of the affairs of the party" in the definition

25. This option would address the problem by clarifying that a person "involved in the administration of the affairs of the party" is not limited to someone holding a formal role or being a member of the constitutional arrangements for the party structure for the purposes of the 'party donation' definition in the Act.

26. This option would add more clarification to the definition of 'party donation' so that it is closer to the way the definition had been previously understood to operate, and is also not expected to create any significant additional compliance burden.

27. However, this option continues the existing approach that determines what constitutes a party donation by reference to who receives it, rather than adopting an approach consistent with the underlying policy intent that a donation intended to benefit a party, regardless of who receives it, should be treated as a 'party donation'.

Proposal One: Clarify the definition of 'party donation' in the Act

	Promote transparency and accountability	Clear and consistent	Ease of implementation
Option 2 - amend the definition's reference to "on behalf of the party who are involved in the administration of the affairs of the party"	++	+	+
Option 3 - add an explanatory provision to clarify the meaning of "involved in the administration of the affairs of the party" in the definition	+	+	+

Proposal Two: Create a new offence and penalty in the Act specifically attached to a failure to comply with the transmission rule

Options

Option One – the status quo

28. Currently, the Act does not contain a specific offence or penalty for failing to comply with the transmission rule. There are offences in the Crimes Act 1961 and other legislation that may apply if someone obtains a party donation by deception or fails to pass a party donation on to the party secretary, but the decision to apply offences to any given circumstance is up to the independent decision making of prosecuting agencies.

29. The benefits of the status quo are outlined at paragraph 19 above, and also include acknowledgement of the existence of offences in other legislation, which may have greater application and be more appropriate charges depending on the circumstances of any particular case/scenario.

30. However, the status quo also has the potential to incentivise non-compliance with the transmission rule as outlined at paragraph 10 above.

Option Two – create a new strict liability offence with a penalty of a fine not exceeding $40,000 upon conviction

31. This option creates a strict liability offence, which would not require the prosecution to prove a person acted either with intent or recklessly or negligently to find a person guilty of the offence. This offence would be modelled on similar offence and penalty provisions in the Act, such as the offence and penalty in section 207N. In that section, a party secretary who, without reasonable excuse, fails to keep proper records of all party donations received is liable on conviction to a fine not exceeding $40,000.

32. The benefits of this option are that it:

    a) sends a clear signal about the importance of transparency in dealing with donations, reflecting to an extent the impact the offending can have on voter trust and electoral integrity;

    b) is relatively simple to understand and implement; and

    c) contains the availability of a complete defence to anyone who can demonstrate they had a ‘reasonable excuse’ for non-compliance, consistent with the structure of other similar strict liability offences in the Act.

33. However, this option risks unduly penalising many people by criminalising potentially inadvertent conduct that may have only been an administrative oversight. This is addressed by including “without reasonable excuse” in the provision. The discretion that already exists in the Act and is referenced in paragraph [24] mitigates this risk.

Option Three – create a new offence with an element of intent that provides for different penalties depending on the circumstances of the offending

34. This option creates an offence that incorporates the need to assess whether an element of intent can be established prior to charging someone. This option can provide for different penalties depending on the nature of the conduct (inadvertent or deliberate), and the status of the offender (e.g. a party secretary or a constituency candidate). This approach could be modelled on existing offences, such as section 210D of the Act, which provides that a party secretary:

a) commits an offence if they fail to file, or file late, a return of party donations without a reasonable excuse (carrying a penalty of a fine not exceeding $40,000 upon conviction); and

b) is guilty of an illegal practice if they file a false or misleading return unless they can prove they had no intention to misstate or conceal the facts (carrying a penalty of a fine not exceeding $40,000 upon conviction); or

c) is guilty of a corrupt practice if they knowingly file a false or misleading return (carrying a penalty of a term of imprisonment not exceeding two years along with a potential fine not exceeding $100,000 upon conviction).

35. The main benefit of this option is that it sends a very strong signal about the importance of transparency in dealing with donations, and the impact the offending can have on voter trust and electoral integrity. This is because being found guilty of a corrupt practice may result in imprisonment for an offender and/or additional electoral consequences, such as disqualification from voting under section 100 of the Act. By requiring the prosecution to prove an offender's intent or recklessness or negligence, this option is also less likely to criminalise inadvertent administrative oversights.

36. However, this option is more complicated to implement and administer than a standalone strict liability offence because of its 'hybrid', tiered approach, due to the number of combinations of different offences and penalties that may be applicable depending on the state of mind and the status of the offender. This may lead to uncertainty about which offence and penalty within the approach best applies to any scenario.

Proposal Two: Create a new offence and penalty in the Act specifically attached to a failure to comply with the transmission rule

	Promote transparency and accountability	Clear and consistent	Ease of implementation
Option 2 - create a new strict liability offence with a penalty of a fine not exceeding $40,000 upon conviction	+	++	+
Option 3 - create a new offence with an element of intent that provides for different penalties depending on the circumstances of the offending	++	+	+

What option best addresses the problem?

37. Our analysis shows that Option 2 would best address the issues in **Proposal 1**, by amending the definition's reference to "involvement in the administration of the affairs of the party". The option clarifies, without expanding or narrowing, the underlying policy intent envisioned by Parliament. It does so, without exposing persons or groups of persons to any additional liability.

38. Our analysis shows that Options 2 and 3 would both sufficiently address the issue in **Proposal 2**, particularly compared to the status quo. Option 3 treats deliberate and intentional offending more severely than an inadvertent failure to comply, and holds people in positions of particular importance and influence in our electoral system who offend accountable above and beyond members of the general public.

39. Option 2 is clearer and slightly easier to implement. It may also better address the nature of the behaviour because a person either transmits the donations to the party secretary or candidate within the required 10 working days or not. The defence available is 'without reasonable excuse' which is easy to understand.

What are the costs and benefits of the most suitable options?

Proposal 1 – clarify the definition of 'party donation' in the Act

40. Adopting Option 2 for this proposal is not expected to impose significant additional costs on notable electoral participants, such as donors, party secretaries, party fundraisers and transmitters. However, this is uncertain and there may be more costs on participants, particularly any recipient of a donation reasonably suspected to be intended for the benefit of a party. Any additional cost of advising parties and candidates on changes arising from adopting Option 2 is expected to be minimal because it clarifies the existing policy intent of the relevant provision of the Act, and will be met from the Commission's existing baseline.

41. Option 2 will likely mitigate the risk that political parties structure their financial affairs in a way that legally avoids the intention of the political donations disclosure regime. This has the benefit of helping maintain the integrity of the regime by ensuring appropriate transparency mechanisms relating to the disclosure of political donations continue to be in place, while also maintaining public trust in the integrity of the regime.

42. A quantitative assessment was not possible, meaning there is limited certainty that the costs and benefits outlined will eventuate when assessed qualitatively. This is because:

    a) although Option 2 clarifies, rather than broadening or narrowing, the existing policy intent behind the definition of 'party donation' in the Act, Option 2 also amends the existing wording of the Act which may have longer-term implications that are not immediately apparent; and

    b) while Option 2 aligns closely with the way the political donations disclosure regime is currently understood to operate, the extent to which this understanding matches operational practice cannot be determined due to there being limited information available. Our initial assessment with the Electoral Commission is compliance costs are about the same because requirements are not increasing or decreasing.

Proposal 2 - create a new offence and penalty in the Act specifically attached to a failure to comply with the transmission rule

43. Adopting Option 3 for this proposal will impose no cost on transmitters who comply with the transmission rule. There may be some costs for the Commission and prosecuting agencies associated with conducting investigations and prosecutions relating to alleged non-compliance, but this will depend on the nature of each individual scenario. These costs are uncertain as engagement with relevant agencies could not occur within the allotted timeframe.

44. Option 3 makes it explicit that a specific offence exists in the Act for non-compliance with the transmission rule. This has the broad benefit of maintaining public trust in the integrity of the regime for the reasons outlined in paragraph 35 above, and potentially deterring non-compliance as well.

45. A quantitative assessment was not possible, meaning there is limited certainty that the costs and benefits outlined will eventuate when assessed qualitatively. This is because

the number and scale of potential investigations and prosecutions for alleged non-compliance with the transmission rule, and the general public's views on these investigations and prosecutions, cannot be accurately ascertained at this time.

Annex Section 3: Delivering an option

How will the new arrangements be implemented?

46. The Commission will update its guidance to party secretaries and electoral participants to inform them of these changes and any resulting implications, such as new obligations.

47. This is in addition to the general implementation, monitoring, evaluation and review process outlined in paragraphs 90 to 96 of the main RIS.