

Cabinet

Update on the process to consider changing the New Zealand Flag

Proposal

- 1 Cabinet has agreed to a process to consider changing the New Zealand Flag. This paper asks Cabinet to consider three recommendations of the New Zealand Flag Cross-Party MPs' Group (the CPG) and either confirm the original decisions or agree to modify the process in line with the CPG's recommendations. This paper also updates Cabinet on decisions made by Ministers with Power to Act.

Executive Summary

- 2 On 28 October 2014, Cabinet agreed to a process to consider changing the New Zealand Flag. An important aspect of the process was the early establishment of the New Zealand Flag Cross-Party MPs' Group (the CPG), to ensure there is cross-party input into the parameters of the discussion about the national flag. All parliamentary parties are represented on the CPG, with the exception of New Zealand First, which declined to participate.
- 3 The CPG met several times during November and December 2014 to consider its two discrete tasks: to nominate suitable candidates for the New Zealand Flag Consideration Panel (the FCP), and to review the legislation enabling the referendum process before the Bill is approved for introduction to the House. The CPG agreed that for its role to be most effective, it wished to have the ability to make recommendations on the shape of the legislation, including, if necessary, on matters relating to the flag referendum process already decided. The CPG asked me for an assurance that Cabinet would reconsider decisions already made on some aspects of the flag referendum legislation if the CPG as a group agreed that a matter should be reconsidered, and Cabinet agreed to this approach.
- 4 The CPG has made three recommendations to me on aspects of the flag referendum process, on matters which have been agreed either by Cabinet or by Ministers with Power to Act. I propose that Cabinet considers the CPG's recommendations and either confirms the original decisions or agrees to modify the process in line with the CPG's recommendations. Briefly, the CPG's recommendations are:

Preferential voting as the voting system in first referendum

- 4.1 the voting system to be used in the first referendum should be optional preferential voting rather than single vote (first past the post);

Four flag designs on voting paper in first referendum if preferential voting used

- 4.2 if preferential voting is used, the voting options on the voting paper in the first referendum should include four alternative flag designs, rather than three; and

Bringing forward timing of second referendum to March 2016

- 4.3 the timing of the second referendum should be earlier than currently planned, to avoid proximity to Anzac Day 2016.

5 Each of these matters has implications for the legislation which will enable the two flag referendums: the New Zealand Flag Referendums Bill (the Bill). The timing for the legislative process remains tight, with only four months available for select committee examination. Given this, I propose that Cabinet agrees to the consideration of a special select committee, centred on the CPG and supplemented with additional members as necessary, being established to consider the Bill.

6 Finally, this paper updates Cabinet on other decisions made by Ministers with Power to Act.

Background

7 On 28 October 2014 Cabinet agreed to a process to consider changing the New Zealand Flag. [CAB Min (14) 34/1 refers.]

8 The following activities occurred shortly thereafter:

New Zealand Flag Cross-Party MPs' Group

8.1 the CPG was established, and met during November and December 2014 to consider its two, discrete tasks:

8.1.1 to nominate suitable candidates for the FCP to the Responsible Minister by 12 December 2014; and

8.1.2 to focus on the quality of the legislation enabling the referendum process, before the Bill is approved for introduction to the House;

Legislative drafting

8.2 drafting instructions for the Bill were issued, based on the decisions made in the October 2014 Cabinet paper;

Ministers with Power to Act

8.3 the group of Ministers with Power to Act (the Responsible Minister, the Leader of the House, the Minister for Arts, Culture and Heritage, and the Minister of Justice) made decisions on a small number of matters required in order for further, detailed drafting instructions to be issued; and

New Zealand Flag Project Secretariat

8.4 the Department of the Prime Minister and Cabinet (DPMC) took steps to establish a Project Secretariat to provide support and advice to the FCP.

9 The CPG has completed its first task, and I intend to take a paper to Cabinet shortly proposing appointments to the FCP.

10 In terms of the CPG's second task, the CPG has been briefed on the key elements of the proposed legislation, and considered and made recommendations to me on issues relating to regulation of referendum advertising. The CPG is scheduled to review the Bill this month.

11 The CPG agreed that for its role to be most effective, it wished to have the ability to make recommendations on the shape of the legislation, including, if necessary, on matters relating to the flag referendum process that have already been the subject of Cabinet decisions. The CPG asked me for an assurance that Cabinet would reconsider decisions already made on

some aspects of the process if the CPG as a group agreed that a matter should be reconsidered. Cabinet agreed to this approach on 1 December 2014. [CAB Min (14) 38/15 refers.]

- 12 The CPG has now made three recommendations to me on aspects of the flag referendum process, which I am asking Cabinet to consider.

CPG recommendation one: Preferential voting as the voting system in the first referendum

- 13 When deciding the process to consider changing the New Zealand Flag, Cabinet was asked to indicate its preferred option for structuring the voting process [CAB Min (14) 34/1 refers]. Cabinet decided the voting system to be used in the first referendum would be single vote (first past the post [FPP]) between three to four alternative flag designs, followed by a single vote between the most preferred alternative flag design and the current New Zealand Flag. An alternative option presented to Cabinet was for the first referendum to use preferential voting (PV), by which voters rank three to four alternative flag designs.

- 14 Cabinet made the decision to use FPP over PV based on the following analysis:

14.1 PV would find the overall most preferred alternative flag design, but it may be complex for voters and involve some additional administrative costs.

14.2 While FPP carries the risk that the top flag in the first referendum has substantially less than 50% of the votes, the Electoral Commission recommended FPP as less confusing.

- 15 The CPG questioned why Cabinet had preferred FPP to PV. Further information on the different voting systems was subsequently provided to the CPG, and Electoral Commission officials attended the CPG's meeting on 4 December 2014. At this meeting, the Electoral Commission advised that it had revised the estimated cost of adapting its ballot scanning and counting systems for PV from \$0.5 million to \$0.25 million, and has since confirmed that this could be funded within the existing budget for the process.

- 16 The Electoral Commission notes that the key risk with using PV is voter confusion, as PV has not previously been used for a national electoral event, and the second referendum will use FPP. The Electoral Commission considers that to fully mitigate this risk would require an additional \$1.102 million for a public advertising campaign, in order to reach less engaged voters. This Cabinet paper does not seek this additional funding as the CPG did not accept that this level of public information would be required to avoid public confusion.

- 17 After discussion, the CPG agreed that it would recommend the use of PV in the first referendum instead of FPP. This was on the basis that PV finds the overall most preferred alternative flag design. The CPG was confident that voters would be able to rank three or four flags in order of preference. Specifically, the CPG recommends the use of *optional* PV, where voters only need to indicate their first preference for the vote to be valid and have the choice whether to rank any additional preferences.

- 18 The Electoral Commission has since confirmed that the mitigation of the risk of voter confusion that it could achieve within budget would include:

18.1 for the first referendum, instructions on the letter attached to the voting paper, and a brochure in each voting pack explaining how to vote with PV and how the results will be calculated;

- 18.2 limited information on the voting systems for each referendum in the enrolment-focused brochure to be mailed to every household before the first referendum;
- 18.3 providing information on the voting systems for each referendum (in multiple languages) on its website www.elections.org.nz, and answering questions from electors via its 0800 number, website, email, and staff.

CPG recommendation two: Four flag designs on voting paper in first referendum if preferential voting used

- 19 One of the matters that has been considered by the Ministers with Power to Act is whether there should be three or four alternative flag designs on the voting paper in the first referendum, as the format of the voting paper needs to be set out in the Bill. The Ministers with Power to Act agreed that three designs would be preferable to four, as under FPP a winning flag would come through with more than 33% of the vote, as opposed to more than 25%. That decision was made on the basis that the first referendum will use FPP.
- 20 If PV is used for the first referendum, however, the winning flag will have over 50% of votes regardless of the number of flags on the voting paper. (If no flag has more than 50% of first preference votes, the flag with the fewest votes is removed from contention. Voters for the flag that has been removed then have their second preferences counted if they have indicated a second preference. This method continues until a flag has over 50% of valid votes.) This makes having four alternative designs on the voting paper more viable.
- 21 The CPG recommends that if PV is used for the first referendum, the voting options on the voting paper in the first referendum should include four alternative flag designs rather than three, as this will give the public more choice.

CPG recommendation three: Bringing forward timing of second referendum to March 2016

- 22 The timing of the referendums will be set by Order in Council (paragraph 39 below refers). For planning purposes, however, the first referendum has been timed for Friday 20 November 2015 to Friday 11 December 2015 (a three-week postal voting period), with preliminary results available after 7pm on Friday 11 December 2015, and final results available on Tuesday 15 December 2015.
- 23 The second referendum is currently planned for Friday 1 April to Friday 22 April 2016 (a three-week postal voting period) with preliminary results available after 7pm on Friday 22 April, and final results available on Tuesday 26 April 2016. This timeframe was chosen for several reasons:
 - 23.1 maintaining momentum from the first referendum, while allowing sufficient time for the necessary administrative processes to be completed (including the Order in Council which finalises the voting papers and sets the dates, finalising and printing the information brochure on the flag designs to be included in the voting packs, and gazetting the closure of the preliminary referendum rolls);
 - 23.2 allowing sufficient time for public education of voters leading up to the second referendum;
 - 23.3 avoiding, as much as possible, public and school holidays, to ensure that voters are not absent from home; and

23.4 avoiding significant national and international events, such as Budget 2016, the Rio Olympics 2016, and local body and DHB elections in late 2016.

- 24 The current timing for the second referendum, however, has the final result available the day after Anzac Day 2016.
- 25 The CPG noted that it would be preferable to avoid such close proximity to Anzac Day. The CPG therefore recommends the second referendum is held earlier in 2016, to maintain momentum from the first referendum. Timing of Thursday 3 March to Thursday 24 March 2016 would allow the necessary administrative processes to be completed. (Preliminary results would be available after 7pm on Thursday 24 March 2016, and final results available on Thursday 31 March 2016, after Easter.)
- 26 The diagram at Appendix 1 shows the revised timetable for the second referendum, should the earlier timing be agreed in principle by Cabinet.

Risk to timing of second referendum should there be an application for inquiry

- 27 Regardless of which option is preferred, there is a risk that the second referendum would need to be delayed if there is an application to the High Court for an inquiry into the conduct of the first referendum. Should an inquiry be lodged, I will report to Cabinet on the scope, likely timing, and cost of the inquiry, and the implications for the timing of the second referendum.

Legislative implications: the New Zealand Flag Referendums Bill

- 28 The decisions in this Cabinet paper are needed to enable final drafting of the Bill. The timeframe is tight. The current timetable has Cabinet approving the Bill for introduction on 9 March 2015, with Royal Assent by 24 August 2015.
- 29 The Bill is being drafted based on earlier Cabinet decisions and subsequent decisions by Ministers with Power to Act [CAB Min (14) 34/1 refers]. The administrative provisions for the conduct of the flag referendums are mainly based on the provisions in the Referenda (Postal Voting) Act 2000 and the Electoral Act 1993, supplemented to recognise the particular nature of these referendums.
- 30 Given time constraints, Ministers with Power to Act have agreed to the drafting of parallel clauses to provide for PV as well as FPP, should Cabinet agree to the CPG's recommendation on the nature of the voting system to be used in the first referendum. The draft Bill will be revised to reflect Cabinet's decisions on the issues outlined in this paper.
- 31 As agreed by Cabinet, I have made a draft of the Bill available to the CPG for its consideration. The CPG is scheduled to discuss the draft Bill at its meetings in February 2015. Any substantive recommendations may require further Cabinet consideration.
- 32 I also propose to provide a copy of the finalised Bill to the CPG, for its information, before Cabinet approves the legislation for introduction to the House in early March 2015.

CPG convened as a special select committee?

- 33 In order to meet the project's tight timetable, a shortened legislative process is required. Select committee consideration of the Bill will need to be limited to just over four months.

- 34 Normally a bill of this nature would be referred to the Justice and Electoral Select Committee. However, given the CPG's role in the process to date, I consider there would be advantages in proposing to the House Business Committee that a special select committee, centred on the CPG and supplemented with additional members as necessary, be established to consider the Bill. These advantages include the CPG's existing familiarity with the policy issues and the Bill, and the likelihood that this continuity of knowledge will lead to enhanced efficiency of the select committee's consideration, facilitating the passage of the Bill.
- 35 If Cabinet agrees, I will work with the Leader of the House and the Office of the Clerk to develop a proposal for consideration by the House Business Committee.

Update on other decisions made by the Ministers with Power to Act

- 36 In addition to the matters included above, the Ministers with Power to Act have made decisions on a number of other issues.

Regulation of referendum advertising

- 37 The Ministers with Power to Act have agreed that the regulation of referendum advertising for the New Zealand Flag referendums will be the "light touch" approach recommended by the CPG, as follows.

Scope

- 37.1 A definition of a referendum advertisement based on that used in the 2011 MMP referendum but exempting flags which are voting options, and images of these flags and related symbols by themselves without any accompanying words about voting in the referendum; and only regulate referendum advertisements in broadcast and print media (including billboards) but excluding the internet.

Promoter statements

- 37.2 That the only regulatory requirement is a requirement for all referendum advertisements to contain a promoter statement (and that this apply from the point of enactment of the Bill).

Transitional issues if there is a vote in favour of changing the Flag

- 38 The Ministers with Power to Act have agreed that, if the second referendum results in a vote in favour of changing the Flag:
- 38.1 the Flags, Emblems, and Names Protection Act 1981 should be amended to change the Flag on a date to be set by Order in Council, but no later than six months after the result of the second referendum is declared;
- 38.2 the Ship Registration Act 1992 should be amended to provide that, for a period of six months after the change of Flag, New Zealand-registered ships (other than New Zealand Government ships) should be allowed to fly any of the following flags: the old New Zealand Flag, the new New Zealand Flag, or the marine flag of New Zealand;

- 38.3 the Land Transport (Driver Licensing) Rule 1999 should be amended to provide that driver licences displaying an image of the old Flag should remain valid until their expiry;
- 38.4 the Flags, Emblems, and Names Protection Act 1981 should be amended to recognise the historic (but not official) status of the old Flag as New Zealand's former national Flag, and the right of any individual or group to continue to use or display that Flag;
- 38.5 the Flags, Emblems, and Names Protection Act 1981 should be amended to provide that the Minister responsible for the Act may prescribe rules for the use of the old Flag, or other national or historic flags, in relation to Government land or buildings; and may issue rules of conduct and etiquette of general application (but which do not have the force of law) for the use of the old Flag, or other national or historic flags.

Mechanism for setting referendum dates

- 39 While the proposed timeframes for the two referendums are discussed in paragraphs 22 to 27 above, the Ministers with Power to Act have agreed that the actual mechanism to set the referendum periods is for the Bill to enable the Governor General to set the final day of the voting period by Order in Council.
- 40 This approach is preferable to setting the dates in the Bill itself, because it provides flexibility in a situation where the dates of either of referendum needed to change (for example, as the result of civil emergency).

Alternative methods of voting for certain groups of voters

- 41 The Ministers with Power to Act have agreed that the specific groups of voters who find it difficult to cast a postal vote should have the following alternative methods of voting:
- 41.1 voters in non-remote overseas locations: by returning completed voting paper by fax or by uploading it to the secure Electoral Commission website;
- 41.2 voters on fishing or naval vessels or in specific remote locations: voting by telephone dictation, receiving voting paper by fax or by email, returning voting paper by fax, or by uploading it to the secure Electoral Commission website; and
- 41.3 voters in New Zealand and unable to mark the voting paper without assistance due to blindness or other disability: voting by telephone dictation.

Financial implications

- 42 The CPG's recommendations outlined in this paper have no additional financial implications.
- 43 As noted at paragraph 15 above, the initial estimated additional system cost to the Electoral Commission of \$0.5 million for PV in the first referendum has been revised to \$0.25 million, which can be met from within the existing budget.

Human rights implications

- 44 There are no specific human rights implications arising. The Bill will be subject to Crown Law review.

Gender implications

45 There are no specific gender implications.

Disability perspective

46 Provision has been made for voters with blindness or other disability (paragraph 41.3 above refers).

Regulatory impact analysis

47 The Ministry of Justice has provided two Regulatory Impact Statements (RISs) relating to previous policy decisions. The first RIS informed the October 2014 Cabinet paper and is published on the Ministry's website. The second RIS informed Ministers' Power to Act decisions on referendum advertising. Further analysis is not required.

Consultation

48 The following departments and agencies were consulted in the preparation of the draft Cabinet paper: the Ministry of Justice, the Ministry for Culture and Heritage, the Electoral Commission, and the Treasury.

Publicity

49 I propose to inform the CPG of Cabinet's decisions on this paper as soon as practicable. After this, I propose this Cabinet paper and its appendix be made publicly available on DPMC's website. A high level of public engagement is required for the flag consideration process to be successful, and making the information available ensures transparency.

Recommendations

50 I recommend that Cabinet:

Background

50.1 note that on 28 October 2014 Cabinet agreed to a process to consider changing the New Zealand Flag;

[CAB Min (14) 34/1]

50.2 note that as part of this process, the New Zealand Flag Cross-Party MPs' Group was established and met during November and December 2014 to consider its two discrete tasks, namely to:

50.2.1 nominate suitable candidates for the New Zealand Flag Consideration Panel (the FCP) to the Responsible Minister by 12 December 2014, and

50.2.2 focus on the quality of the legislation enabling the referendum process, before the New Zealand Flag Referendums Bill is approved for introduction to the House;

50.3 note that:

50.3.1 the New Zealand Flag Cross-Party MPs' Group agreed that for its role to be most effective, it should be able to make recommendations on matters relating to the flag referendum process that may have already been subject to Cabinet and Ministerial decisions;

50.3.2 on 1 December 2014 Cabinet agreed that the Responsible Minister may bring policy decisions made by Cabinet, or by Ministers with Power to Act, in relation to the flag referendum legislation back to Cabinet for further consideration if the CPG members as a group agree that a policy should be reconsidered;

[CAB Min (14) 38/15]

New Zealand Flag Cross-Party Members' Group's recommendations

50.4 note that the New Zealand Flag Cross-Party MPs' Group has made recommendations on three aspects of the flag consideration process which have already been the subject of Cabinet or Ministerial decisions;

Voting system and number of flags on voting paper in first referendum

50.5 note that Ministers with Power to Act have agreed that the voting options on the voting paper in the first referendum will be three alternative flag designs, on the basis that the voting system to be used in the first referendum will be single vote (first past the post);

50.6 EITHER (*as previously determined by Cabinet*)

50.6.1 agree that the voting system to be used in the first referendum will be single vote (first past the post);

OR (*recommended by the New Zealand Flag Cross-Party MPs' Group*)

50.6.2 agree that the voting system to be used in the first referendum will be optional preferential voting; and if so,

EITHER

50.6.2.1 agree that the voting options on the voting paper in the first referendum will be three alternative flag designs;

OR (*recommended by the New Zealand Flag Cross-Party MPs' Group*)

50.6.2.2 agree that the voting options on the voting paper in the first referendum will be four alternative flag designs;

Timing of second referendum

50.7 note that while the dates of the second referendum will be set by Order in Council, as noted at 50.15 below, the second referendum is currently planned for 1 to 22 April 2016, with final results available on Tuesday 26 April 2016, which is the day following Anzac Day 2016;

50.8 EITHER

50.8.1 agree in principle that the second referendum will be held during April 2016;

OR (*recommended by the New Zealand Flag Cross-Party MPs' Group*)

50.8.2 agree in principle that the second referendum will be held during March 2016;

50.9 note there is a risk that the second referendum would need to be delayed if there is an application to the High Court for an inquiry into the conduct of the first referendum;

50.10 note that should an inquiry be lodged, the Deputy Prime Minister will report to Cabinet on the scope, likely timing, and cost of the inquiry, and the implications for the timing of the second referendum;

50.11 invite the Deputy Prime Minister to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;

New Zealand Flag Cross-Party MPs' Group convened as special select committee

50.12 invite the Deputy Prime Minister to work with the Leader of the House and the Office of the Clerk to develop a proposal for consideration by the House Business Committee, by which the New Zealand Flag Cross-Party MPs' Group, supplemented with additional members as necessary, is established as a special select committee to consider the New Zealand Flag Referendums Bill;

Decisions made by Ministers with Power to Act

Regulation of referendum advertising

50.13 note that Ministers with Power to Act have agreed that the regulation of referendum advertising will consist of:

50.13.1 a definition of a referendum advertisement based on that used in the 2011 MMP referendum but exempting flags which are voting options, and images of these flags and related symbols by themselves without any accompanying words about voting in the referendum;

50.13.2 a requirement from the point of enactment of the New Zealand Flag Referendums Bill that referendum advertisements, in broadcast and print media (including billboards) only, must contain a promoter statement;

Transitional issues if there is a vote in favour of changing the Flag

50.14 note that Ministers with Power to Act have agreed if the second referendum results in a vote in favour of changing the Flag, that:

50.14.1 the Flags, Emblems and Names Protection Act 1981 should be amended to:

50.14.1.1 change the Flag on a date to be set by Order in Council but no later than six months after the result of the second referendum is declared;

50.14.1.2 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;

50.14.1.3 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;

50.14.2 the Ship Registration Act 1992 should be amended to allow, 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;

50.14.3 the Land Transport (Driver Licensing) Rule 1999 should be amended to provide that driver licences can display the old flag until their expiry;

Mechanism for setting referendum dates

50.15 note that Ministers with Power to Act have agreed that the New Zealand Flag Referendums Bill will enable the Governor General to set the final day of both voting periods by Order in Council;

Alternative methods of voting for certain groups of voters

50.16 note that Ministers with Power to Act have agreed that specific groups of voters who find it difficult to cast a postal vote should have the following alternative methods of voting:

- 50.16.1 voters in non-remote overseas locations: returning completed voting paper by fax or by uploading it to the secure Electoral Commission website;
- 50.16.2 voters on fishing or naval vessels or in specific remote locations: voting by telephone dictation, receiving voting paper by fax or by email, returning voting paper by fax or by uploading it to the secure Electoral Commission website;
- 50.16.3 voters in New Zealand and unable to mark voting paper without assistance due to blindness or other disability: voting by telephone dictation;

Financial implications

- 50.17 note that the additional costs to the Electoral Commission associated with preferential voting can be managed within budget;

Publicity

- 50.18 invite the Deputy Prime Minister to inform the New Zealand Flag Cross-Party MPs' Group of Cabinet's decisions on this paper as soon as practicable; and
- 50.19 note that this paper and its appendix will be made publicly available after the New Zealand Flag Cross-Party MPs' Group has been informed.

Hon Bill English
Deputy Prime Minister

____/____/2015

Appendix 1: New Zealand Flag revised timetable (subject to Cabinet decisions February 2015)