Justice Select Committee
Parliament Buildings
Wellington

Dear Sir / Madam

Submission on Electoral (Integrity) Amendment Bill

Executive Summary

The New Zealand National Party opposes the Bill as it:

1. Changes the accountability of MPs away from electors to party leaders.
2. Undermines freedom of expression and association.
3. Excessively constrains debate and dissent.
4. Weakens the parliamentary checks on the powers of cabinet.
5. Unnecessarily constrains the development of new parties.
6. Tarnishes NZ's reputation on human rights and democracy.
7. Concentrates political power excessively with party leaders.
8. Sets a poor precedent in changes to electoral law.
9. Compromises the separation of powers between Parliament and the Courts.
10. Misrepresents 'integrity' and the mandate of electors.

The detailed submission of each of the ten points is covered below. We strongly urge the Select Committee recommends the Bill not proceed. We seek the opportunity to present to the committee to explain and expand on these serious concerns.

Background

The New Zealand National Party is New Zealand's largest and most successful political party founded in 1936. National has formed five Governments in its history, each for periods ranging from 8 to 12 years, totalling 47 years. National secured 1,152,075 party votes at the 2017 election, the most of any party in any election in New Zealand history. The 44.5 per cent party vote was only exceeded by the 44.9

per cent, 47.1 per cent and 47 per cent by National in the 2008, 2011 and 2014 elections. National also won 41 constituencies in 2017 compared to Labours 29.

National's founding principles include a strong emphasis on democracy, freedom, individual rights, competition and choice. All of these are undermined by this Bill.

The party's purpose is to select and promote quality candidates to serve New Zealand in Parliament and Government and for them to promote the values and principles of the party. We do not seek the right to dismiss MPs as we believe this exceeds our mandate and undermines democratic government.

1. Changes the accountability of MPs away from electors to party leaders.

The New Zealand National Party strongly opposes this amendment because of the change it makes to the accountability of Members of Parliament (MPs), away from electors and communities to political parties and their leaders.

We concur with the important quote from Sir Winston Churchill "The first duty of a Member of Parliament is to do what he [or she] thinks in his [or her] faithful and disinterested judgment is right and necessary... His [or her] second duty is to his constituents, of whom he is the representative but not the delegate... It is only in the third place that his duty to party organization or programme takes rank." This amendment reverses the order and makes an MPs first duty to party and party leader. This change is not in the interests of democracy, Parliament or New Zealand.

The New Zealand National Party does view discipline and party loyalty as important and necessary for good governance and stability. Political party leaders already have strong powers through allocation of ministerial and parliamentary roles, party spokespersonships, and the party has the power to rank and select candidates for future elections. An errant MP can be dismissed from caucus and have their party membership removed, but to dismiss them from Parliament goes too far. The Bill tips the balance of power too far in favour of the leader and party at the expense of MPs and the communities they serve. The only circumstances where an MP should be dismissed from Parliament is where they have committed a serious criminal offence and been found guilty by a properly constituted independent court.

The New Zealand National Party opposes this Bill as the right to dismiss MPs must rest with electors and not party leaders.

2. Undermines freedom of expression and association.

The freedom of expression of MPs is fundamental to our Parliament and dates back to the Bill of Rights 1688. Parliamentarians prior to this period faced the risk of being excluded from parliament if they queried the decisions or powers of the ruling monarch. The Bill of Rights specifically protected MPs right to serve in the Parliament and guarantees "freedom of speech and debate on proceedings in Parliament." The Crown today is represented by the executive government and the party leaders of the governing parties. This Bill will allow an MP who expresses a view that is different or offends a party leader to be dismissed from Parliament. It undermines the very intent of the original Bill of Rights that guaranteed MPs freedom of expression.

It is not sufficient that the leader needs a two-thirds vote in the caucus to action an MPs dismissal. We should be prepared to defend the freedom of speech of an MP, even if they are alone in holding that opinion. The first MPs to criticize slavery, support women's suffrage and gay rights were often alone but society would not have changed had they been curtailed from expressing these views. Party leaders hold enormous sway over their caucus through allocation of ministerial roles, select and caucus committee chairs and spokespersonships. Achieving a two-thirds majority would be easy to achieve and provides no realistic check. If we reflect on examples of party dissidents from John A Lee, Marilyn Waring, Jim Anderton, Dame Tariana Turia or Hone Harawira, party leaders could easily have secured a two-thirds majority in caucus to dismiss them as per the provisions in Section 55(c) of this Bill.

The advice provided to the Justice Select Committee in 2000 from the Solicitor-General confirms that this Bill breaches the Bill of Rights. The Bill before Select Committee then only covered the situation where an MP voluntarily resigned from a political party and the Solicitor-General advised to extend it beyond that would have a "considerable chilling effect on the expression of dissenting views within Parliament." The Solicitor-General went on and advised that "core proposition underlying the New Zealand Bill of Rights Act protection of democratic and civil rights is that the manifestation of expressions of dissent is vital to a healthy democratic process."

The New Zealand National Party opposes this Bill because it undermines the specific intent of the Bill of Rights protections of the right to serve in Parliament and free speech in Parliament.

3. Excessively constrains debate and dissent.

The New Zealand National Party's concern is not that this provision will be used extensively, but that it will change the behaviour of parliamentarians, make them less critical, less challenging and ultimately less effective in debating - in Cabinet, caucus and Parliament - the policies that govern our society.

Democracy is sometimes messy. National has had its share of difficulty with dissenting Members of Parliament ranging from Derek Quigley, Marilyn Waring and Mike Minogue in the 1980s, to Gilbert Myles and Winston Peters in the 1990s and Maurice Williamson in the early 2000s. It may have made the National Party's job easier in these circumstances had the party leader had the power to dismiss the Member of Parliament, but this would be at the expense of undermining democracy. What is in the party's interest is not always what is in the country's interest. Dissent and disagreement are essential ingredients of a functioning democracy.

The purpose of electoral law should not be to make the job of political party leaders or party organisations easier, but to ensure we have a dynamic and effective democracy in which ideas and policies are vigorously debated and tested.

> The New Zealand National Party opposes this bill because it will weaken our democracy by constraining debate and make our Members of Parliament less likely to scrutinise, challenge and test the policies and actions of our political leaders.

4. Weakens the parliamentary checks on the powers of Cabinet.

New Zealand has a simple but effective system of Government whereby the Executive of the Prime Minister, Deputy Prime Minister and Ministers must maintain the confidence of the House of Representatives. We do not have a constitution whereby laws can be struck down by the courts. We need to be cautious of any change that weakens this crucial safety valve on executive power of the Government having to maintain the confidence of the House. There have been hundreds of confidence votes in Parliament and they have been lost by Government's on 13 occasions resulting in changes of Government or early elections. Any measure that weakens this parliamentary check risks New Zealand drifting towards the situation faced by many countries where the Parliament is ineffectual and a puppet to the Executive.

This proposal, in allowing party leaders to dismiss an errant Member of Parliament, significantly shifts the balance of power towards the Executive. Party leaders lead the Executive with currently all leaders of the Coalition Government parties holding Ministerial Warrants – the offices of Prime Minister, Deputy Prime Minister and Minister of Climate Change and Statistics. These Ministers are being provided with a gun to hold to the head of any Member of Parliament who questions their power, policies or actions. A Government could avoid defeat on a motion of no-confidence where a Member of Parliament had lost confidence in their Government, by the leader simply dismissing that Member.

There can be no question that a Member of Parliament who opted to vote against their own party on a confidence motion would meet the legislative test in the Bill, of

acting in a way that disturbs the proportionality of Parliament The very intent of this Bill arises from the events during the first MMP Parliament in 1998 when a number of New Zealand First Members of Parliament took a different view to the leader on the issue of confidence. The problem is that in giving the power to party leaders to dismiss a Member of Parliament who votes FOR a confidence motion against the view of the leader, we are also giving the power for a party leader to dismiss a Member of Parliament who may vote AGAINST a confidence motion.

There are many examples internationally where a corrupt or failing Government has fallen over as a consequence of its own Members of Parliament losing confidence in it. It occurred in New Zealand on 6 July 1912 when four Liberal Members of Parliament voted no-confidence in the failing Liberal Government of Thomas Mackenzie and resulted in the first Reform Government of William Massey. This proposed law would have enabled Liberal leader Thomas Mackenzie to dismiss those Members of Parliament and thwart the no-confidence vote. A similar situation developed in 1984 when National Member of Parliament for Waipa Marilyn Waring threatened to vote against the then National Government over the issue of nuclear-free legislation that triggered an early election. This law would have enabled Sir Robert Muldoon to have dismissed Ms Waring. This would not only have bought Sir Robert time, but the most likely outcome would have been a new National MP winning Waipa (as it was a very safe National seat). The benefit to a Government of dismissing a list MP under these conditions is greater in that the amended electoral law would enable the immediate replacement by the next candidate on the party list. The new MP is unlikely to rock the boat noting the consequences for his or her predecessor.

The Bill would also impact on less crucial checks than confidence votes. A Parliamentary Select Committee may be considering an inquiry into a Government agency or Minister. A member of the same party as the Party Leader or Minister on such a Select Committee could risk dismissal as a Member of Parliament under this Bill if they voted in the Select Committee for such an inquiry. This Bill will impact on even the day to day work of our Select Committees in constraining Members of Parliament from challenging and testing Ministers who are party leaders or their offices for risk of it being interpreted by their leader as not supporting the party line, and as a consequence distorting the proportionality of parliament.

The New Zealand National Party opposes the Bill because it undermines the important check of a Government having to maintain the confidence of the Parliament by enabling a Government MP threatening to vote no confidence to be dismissed.

5. Unnecessarily constrains the development of new parties.

The New Zealand National Party believes in competition and the benefits to society from the contest of ideas, policies and mandates that is at the heart of a democracy. We urge caution of measures that constrain the development of new and merged political parties as it is the evolution of parties that ensures our democracy remains dynamic and responsive to the public. This proposed law will make a change in political parties more difficult, advantaging existing political parties, but making them and our democracy less responsive to change.

The history of political parties in New Zealand and abroad has seen the vast bulk of new parties evolve from splits and mergers of existing parties.

The New Zealand National Party was formed in 1936 from the merger of the Reform and United Parties, the United Party evolving from the former Liberal Party. The modern Labour Party was formed in 1916 from the merger of the Social Democratic Party and the former United Labour Party during the term of the 19th Parliament. The MPs involved with the formation of both New Zealand's main two political parties would have been unlawful had this Bill been electoral law during the 19th or 26th Parliaments, because they switched from the parties which they were elected during that parliamentary term. The implication of this Bill is that these MP's lacked integrity (noting the title of this Bill) yet both National and Labour celebrate the actions of these MP's in helping form the modern political movements that have both made significant contributions to New Zealand's successful governance over the past 80-plus years.

The list of new political parties formed from splits of existing parties in parliament is long. Recent examples include NewLabour splitting from Labour in 1989, New Zealand First from National in 1993, Future NZ from National and Labour in 1994 Right of Centre Party (that went on to become the Conservatives) from National in 1995, Mauri Pacific Party from NZ First in 1998, the Greens from Alliance in 1998, the Progressive Party from the Alliance in 2002, the Māori Party from Labour in 2003 and the Mana party from the Māori Party in 2011.

Two important observations from this history of party splits are relevant to this Bill. Firstly, the number of MP's switching party allegiances peaked in the period surrounding the introduction of MMP. In the 1970s one MP switched parties, in the 1980s one, in the 1990s 25, in the 2000s two and since 2010 one. It is no surprise that MPs changing parties became a significant public issue in the 1990s given the numbers then, but in hindsight it is clear that this was primarily a transitional problem as our Parliament and parties adjusted to the MMP reform. The fact that there has been a minimal level of MPs changing parties in the last decade shows this bill is outdated and unnecessary.

The second observation is that during the 46th Parliament a similar law to this existed but proved ineffectual when the Hon Jim Anderton left the Alliance Party to join the Progressive Party. Inside Parliament he maintained the pretence that he was an

Alliance MP while outside he was the Progressive Party leader. Mr Anderton was able to thwart the intent of section 55A that a seat becomes vacant if an MP leaves the party they were elected with, simply by avoiding issuing the notice required in Section 55B by the Party leader or MP themselves. The uproar that arose in 2002 had the opposite effect of the intent to enhance public confidence. It made a mockery of Parliament and the electoral law. This bill has the same deficiencies and will likewise fail to achieve this objective.

It is noteworthy that in the Select Committee report on the equivalent legislation in 2001, the legislation contained a sunset clause ending its powers after the 2005 Election, stating "this provision recognises that the problem of members leaving parties is expected to be a temporary one." This proved to be correct. The Labour MPs of that Select Committee in 2001 went on to state in their minority report than extension of this law beyond 2005 would only be justified if the rate of party defections continued at the high rate of the 1990s, This was the reason given by Labour in 2005 for not proceeding with a Bill then. There is no justification for Labour changing its position now with this Bill.

The New Zealand National Party opposes the Bill because it unnecessarily constrains the development and evolution of political parties that is a healthy part of a democracy.

6. Tarnishes NZ's reputation on human rights and democracy.

New Zealand has a good international reputation for its strong democratic traditions, fair elections, low corruption, transparency and high regards for human rights. We take pride in being the first country that extended the vote to women and for having one of the longest continuous functioning Parliaments in the world. We are looked up to internationally as a model democracy. Many countries take a lead from us on how to improve their own electoral laws and parliamentary practice. A good reputation for our democracy and parliament also brings wider economic benefits of helping attract quality migrants and encourages investment.

This Bill damages New Zealand's reputation by contravening basic democratic and human rights of freedom of speech and freedom of association. This is well expressed in the report of the Inter Parliamentary Union based in Geneva, titled "*The impact of political party control over the parliamentary mandate",* that states that the free mandate of MPs is an **"indispensable guarantee of parliamentary democracy"** and that such provisions in this Bill breach "**fundamental human rights."**

There are no countries in the OECD that have such equivalent provisions in their electoral laws, despite 34 of 38 having proportional representation systems. *The Economist's* 2017 comprehensive report on democracy and free speech ranks 167 countries and classifies them into four categories: full democracies, flawed

democracies, hybrids and authoritarian regimes. It rates 19 countries as full democracies, ranking New Zealand fourth best in the world. None of these 19 countries have laws of this sort although 16 have proportional representation systems with party lists similar to MMP. New Zealand scored a perfect 10.00 for its electoral processes and pluralism, a score that will be put at risk with this Bill.

The countries that do have such provisions include South Africa, Sri Lanka, Guyana, Namibia, Pakistan and Zimbabwe. These are not countries with strong democratic traditions that we should look to for improving our electoral laws. These countries rank 41st, 62nd, 63rd, 71st, 110th and 136th, in *The Economist* democracy rankings, with all falling into the categories of flawed democracies, hybrids or authoritarian regimes. This provision goes further than many other countries who require MPs to resign if they become a member of another political party, by extending the power to party leaders to dismiss an MP. This Bill would have New Zealand as an outlier and with one of the most draconian laws of this type internationally.

The experience of countries dismissing MPs under such laws has caused those countries significant reputational harm. Examples include Zimbabwe who expelled 17 MPs in 2015 and 3 MPs expelled in South Africa in 2015 after accusing party leaders of corruption and embezzling funds.

It is significant that Germany, the country on which New Zealand modelled its MMP electoral system on, does have not such provisions and that these proposals would beach their basic law or constitution. Other European countries that have attempted to introduce such provisions in their electoral law have had them struck down by the courts. New Zealand should expect international criticism for passing such a law because it goes well outside international best practice in electoral law.

The New Zealand National Party is concerned these electoral law changes that would be unconstitutional in most developed countries will tarnish our strong reputation for human rights and an effective parliamentary democracy.

7. Concentrates political power excessively with party leaders.

A significant change in this Bill is the shift in power from ordinary MPs to party leaders. This shift arises out of the mistaken view that the mandate given by voters under MMP rests with party leaders and not individual MPs.

The Bill achieves this shift in power by enabling a party leader to dismiss a Member of Parliament of the same party if the leader reasonably believes that the Member of

Parliament “has acted in a way that has distorted, and is likely to distort, the proportionally of political party representation in Parliament as determined at the last general election.” The legal test in the Bill is not whether the MP has acted in a way to distort the intent of voters, but that *the leader* reasonably believes they have.

The reality of disputes between party leaders and MPs is that both will reasonably believe they are acting consistent with the mandate of voters. Derek Quigley reasonably believed National voters did not support National’s interventionist economic policies whereas Sir Robert Muldoon reasonably believed they did. Jim Anderton reasonably believed Labour voters did not support the free market policies whereas David Lange reasonably believed they did. Dame Tariana Turia reasonably believed Labour voters did not support the Foreshore and Seabed Act whereas Helen Clark reasonably believed they did. Hone Harawira reasonably believed Māori Party voters did not support the deal with National; whereas Sir Pita Sharples and Dame Tariana Turia reasonably believed they did. This change to the Electoral Act gives superior legal status to the beliefs of a party leader than those of MPs. It will be irrelevant to the court that the MP believes they have acted consistent with electors’ mandate - all the court will need to be satisfied of is that the party leader reasonably believes the election result is being distorted.

This shift in power is well illustrated by the experience in other jurisdictions that have these sorts of provisions in their law. MPs have been dismissed from Parliaments under such a law for not following the direction from the party leader on how to vote on a piece of legislation, holding an unauthorised media conference, making public statements contrary to those of the party leader, addressing a rally with views different to the party leader, making public statements alleging party leaders of corruption and embezzlement of funds, supporting an alternative candidate for the party leadership and making allegations of harassment against a party leader. An MP should not be able to be dismissed for these sort of actions. Yet it will be possible under this proposed law to do so in New Zealand if the party leader “reasonably believes” the MP is not acting consistently with the mandate of voters.

The New Zealand National Party is opposed to the concentration of power in party leaders at the expense of individual MPs and believes there is neither the public mandate nor public support for increasing party leader’s powers.

8. Sets a poor precedent in changes to electoral law.

This Bill sets a poor precedent for the development of electoral law. New Zealand is unusual internationally in allowing its Electoral Act to be amended by simple majority by a single house of Parliament. The practice has developed in New Zealand that

significant electoral law changes should only be made with a super majority or by referendum.

National observed this with its 2017 electoral amendment bill which passed unanimously, and the 2017 changes to the Broadcasting Act that passed 108 votes to 12 and the significant changes in the electoral law relating to electoral financing passed in 2010 by 116 to 6. These supermajorities were achieved by strong cross-party dialogues and National compromising on a number of important details so as to secure support beyond a bare majority.

A concerning aspect to this electoral amendment bill is not only is it being advanced with a bare majority (63-57), but it is being advanced on the demand of a party with just 9 MPs and that gained 7 per cent of the vote. It is clear that neither Labour nor the Greens advocated for this law change but are providing its votes as part of the deal with New Zealand First supporting them into Government. This is evidenced by the fact that neither Labour nor the Greens made any mention of this change in their justice or electoral law policies at Election 2017, the Greens strong opposition to two previous and near identical Bills and Labour's statements previously that this sort of law was only necessary during MMP transition.

Nor have the changes in this Bill come about from any recommendation of an independent review of MMP. This issue was canvased and rejected by the original Royal Commission on the Electoral System in 1986, by the 1992 cross-party Select Committee that developed the new MMP Electoral Act 1993, and statutorily required Select Committee review of MMP in 2001 and the Electoral Commission review of MMP in 2012.

New Zealand's constitutional framework relies on good precedent and practice. Governments need to show restraint in not using their simple majorities to impose controversial changes to electoral law. This Bill sets a bad precedent where a minor party holding just 9 seats and securing 7 per cent of the vote is able to secure significant permanent changes in electoral law by leveraging its position in the process of government formation.

The New Zealand National Party believes significant Electoral Act changes need broad cross party support or referenda to advance, and that this significant amendment proposed by a single party with 7 per cent voter support leveraged in the government formation processes sets a bad precedent .

9. Compromises the separation of powers between Parliament and the Courts.

The National Party is concerned that this bill will blur the separation of powers between Parliament and the courts, and have the courts entangling themselves unnecessarily in the political process. This arises because of the legal tests in the Bill are likely to be challenged in the courts if a party leader dismisses an MP. The courts will need to interpret whether an MP "has acted in a way that has distorted, and is likely to distort, the proportionally of political party representation in Parliament as determined at the last general election", whether the two thirds majority in the caucus was fairly obtained and whether proper process has been followed in regard to a political party's rules.

The legal test in section 55D is particularly fraught in this regard because it will require the courts to make a judgement as to whether a parliamentary leader of a political party 'reasonably believes" another MP has acted in a particular way. This will inject the courts into making highly subjective political judgements.

The New Zealand National Party does not support the amendment because it will have the courts making subjective political judgements and compromise the proper separation of power between the courts and Parliament.

10. Misrepresents 'integrity' and the mandate of electors.

This legislation has colloquially been referred to public as the 'party hopping bill'. This misrepresents the Bill by suggesting its provisions of dismissing an MP only arise if an MP voluntary choses to leave the party they were elected with at the last election. The detail of the Bill makes plain that an MP ceases to be a member if they resign, if they are dismissed from their party, or if they act in a way that their party leader reasonably believes distorts the proportionality of party representation in Parliament. National's opposition to the Bill will not be as fervent were it restricted to the situation where an MP voluntarily resigned from a party.

This Bill is inappropriately named the Electoral (Integrity) Amendment Bill. This title wrongly assumes that any person changing parties during a term of Parliament is acting without integrity. It was particularly ill-informed of new Labour MP Paul Eagle to quote Sir Winston Churchill in justifying the name of this Bill when Sir Winston Churchill switched parties mid-term twice during his parliamentary career. It is difficult to maintain that Sir Winston Churchill's switch of parties lacked integrity, when the change proved pivotal to the formation of the Government that successfully defended Britain against Nazi Germany. This bill would ironically have required Sir Winston Churchill's resignation from Parliament.

The Bill is erroneously based on the view that the integrity of the election result is compromised if the proportionally of party representation varies at all from that

determined by the party votes at the last general election. This overlooks the five existing provisions in the Electoral Act that distort pure proportionality.

Firstly, the 5 per cent threshold means a party like TOP getting 2.5 per cent of the party vote in 2017 gets no representation and National getting 46.6 per cent of parliamentary representation off 44.5 per cent of the vote.

Secondly, a party is also entitled to all its constituency seats in Parliament even if this distorts the proportionality of Parliament from its party vote result such as an occurred with the Maori party in 2008 with 5 seats but only 2.4 per cent of the party vote.

Thirdly, the by-election provisions of the current Electoral Act also allow distortion of proportionality from the last General Election party vote result as occurred in 2015 in Northland. If proportionality based on party vote was the all-important consideration there would be an adjustment to list seat allocations if proportionality was altered in a by-election.

The fourth way the Electoral Act allows a distortion in party parliamentary representation is in allowing a constituency MP to resign up to 6 months prior to a General Election which means Parliament is no longer purely proportional for that period. This can be a considerable proportion of the three year electoral cycle.

The Electoral Act also allows the proportionality of Parliament to be distorted in allowing an independent MP to join and become a member of a parliamentary party as has occurred in the New Zealand Parliament several times historically under FPP. This Bill creates an anomaly whereby an MP who is a member of a party must resign if they become independent on the basis of maintaining proportionality, but an independent can join a party, distort proportionality and stay in Parliament.

These five variations from pure proportionality are more significant than the recent variations that have resulted from an MP leaving their original party. If absolute proportionality is the principle on which this Bill is being advanced, these other five issues must also be advised.

The fundamental flaw in this Bill is the view that the electoral mandate from the party vote belongs to the leader and not to all the MPs duly elected from that party. Voters are no more homogeneous in their political views than MPs and where there is an issue causing an MP to split from the party, there will be a portion of that parties voters who support the MP rather than the party leader.

The argument that party leaders need the power to dismiss MPs to maintain integrity of the previous general election result incorrectly assumes that all of the party's voters support the views of the Leader over the errant MP. This falsely assumes leaders have a monopoly on integrity.

We concur with the view expressed by the International Parliamentary Union, an organisation that represents 178 parliaments and has advised on constitutional law since 1889, that this law will result in “political party dictatorship.”

> The New Zealand National Party opposes the representation of this Bill as being about electoral “integrity” when it will weaken our democracy and create what the Inter-Parliamentary Union describes as “political party dictatorships.”