

Impact Summary: Mitigating foreign interference through party and candidate donations

Section 1: General information

Purpose
<p>The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated.</p> <p>This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet about the proposal to ban foreign donations to both parties and candidates.</p>

Key Limitations or Constraints on Analysis
<p><i>Foreign interference risks for elections are multifaceted, and the evidence base is, by its nature, difficult to quantify</i></p> <p>Foreign interference refers to an act by a foreign state or its proxy that is intended to influence, disrupt or subvert our national interest, by covert, deceptive or threatening means. Concern about the risks of foreign interference is growing, based on recent experience in overseas elections. New Zealand intelligence agencies have advised the Justice Committee that they have seen actions taken by foreign state actors in New Zealand that is of concern.</p> <p>But due to its covert nature, direct evidence of foreign interference on our democratic system, and its impacts, can be difficult to obtain, and often emerges post-facto. The inability to quantify the impact of the different options on political candidates and parties is a limitation of this analysis.</p> <p><i>The options considered were limited by the Minister’s desire to have changes in place ahead of next year’s General Election</i></p> <p>Potential avenues for foreign interference are wide ranging and complex, and there are many different ways this issue will need to be addressed. The Minister of Justice directed officials to consider options related to the risk of foreign interference via political donations from overseas persons; a limitation was that any changes needed to be implemented in time for the 2020 General Election.</p> <p>This impact summary reviews our analysis of two options for restricting donations from overseas persons. A comparative analysis is used for assessing change options, using data from candidate election returns and party annual returns.</p> <p>We have not assessed options which could not be implemented for the 2020 General Election. Timing constraints also meant that consultation with those likely to be impacted by</p>

the proposed changes (e.g. political parties, party secretaries and candidates) was not possible.

The impact assessment is largely qualitative, as the data on foreign donations is minimal and the impacts of foreign interference are largely intangible

A key assumption underpinning this RIS is that foreign interference is a risk for New Zealand, and that donations from foreign sources are one way this risk may be manifested.

In terms of tangible impact, the proposal to ban foreign donations will affect New Zealand political parties and candidates, but not to a significant degree. Donation returns indicate that the level of foreign donations received by political parties is low; we have assumed the same is true for candidates.

Actions to safeguard against foreign interference also 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 public 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.

Responsible Manager (signature and date):



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Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Political donations are a legitimate expression of political participation, but there is a risk they provide a channel for foreign influence to be established

Donations to political parties and candidates are a legitimate form of political participation. New Zealand’s donation rules balance freedom of expression with transparency through limits on the amounts that can be donated, and disclosure of larger donations.

Under the current rules, donations from an “overseas person” cannot exceed \$1,500 for parties in a calendar year, and in a single election for candidates.¹ Any excess donation must be returned to the donor or sent to the Electoral Commission.

Parties must submit returns to the Electoral Commission detailing the number and total amount of overseas donations received, including any excess. Candidates must include donations from overseas persons only if they exceed (as a single donation or aggregate) \$1,500. These returns are publicly available.

There is concern that foreign actors could leverage influence through political donations. This concern is not necessarily about the amount donated, or what a donation is used for, but that once a relationship of influence or sense of reciprocity is established, it may be used as leverage to facilitate future interference in decision-making.

Foreign influence may become unwarranted foreign interference when it is covert and intended to undermine or subvert our sovereignty

All states engage in foreign influence activity to shape perceptions and decision making in other countries, as part of normal diplomacy. Such activities become foreign interference when they are deliberately used in an unscrupulous manner to undermine the sovereignty of another country. This can come in many forms, including attacking a country’s institutions, misleading its decision makers, or circumventing norms of international engagement.

Foreign interference refers to an act by a foreign state or its proxy that is intended to influence, disrupt or subvert our national interest, by covert, deceptive or threatening means. The objectives can include aligning New Zealand attitudes and policies with the interests of the foreign state through hidden or obscured means, or otherwise attempting to undermine citizens' trust in democracy and the institutions of state, thus destabilising our political economic and social structures.

Globally, concern about foreign interference is growing in light of allegations/recent international experience, including:

- alleged interference in the 2016 US presidential Election and the 2016 United Kingdom referendum to exit the European Union ('Brexit')
- the 2019 cybersecurity attacks that accessed Australian Parliamentary and political networks, and
- suspected information manipulation campaigns to amplify critical viewpoints against Canadian Government legislation.

¹ The definition of an 'overseas person' in Section 207K of the Election Act 1993 is:

- an individual who resides outside New Zealand, and is neither a NZ citizen nor registered as an elector, or
- a body corporate incorporated outside of New Zealand, or
- an unincorporated body that has its head office/principle place of business outside of New Zealand.

In light of these and other similar events, comparable jurisdictions have taken steps to address different types of foreign interference. This has included tightening political donations rules. For example, Australia, Canada, the UK and the US all restrict foreign and or anonymous donations (to AUS\$1,000, CAN \$20, GBP £500 and USD\$50 respectively).

Tightening the foreign donations rules sends a statement about foreign interference

The absolute and relative dollar value of donations from overseas persons to political parties in New Zealand is low. As the table in Appendix 1 indicates, across all parties since 2011, the cumulative total of overseas donations is under \$45,000; (an average of less than \$100 per donor). No candidate has reported receiving overseas donations in excess of \$1,500 in any of the last four general elections.²

The Government's rationale to further restrict overseas donations is not related to the absolute amount that is being donated, but rather, it is the implicit message that allowing foreign donations sends to domestic political parties and prospective candidates, and those who are not part of New Zealand's electoral system. As donation activity tends to increase significantly in the lead up to a general election, the Government considers this an opportune time to examine the rules around foreign donations and to make a statement about unwelcome foreign interference in our electoral system.

Other measures may still be needed to address the risks of financial foreign interference

While there is limited evidence on the extent to which foreign states have used overseas donations to interfere in our democracy, this does not mean such activity has not occurred or could not be used as an avenue of interference in the future. However, as there is insufficient time to undertake in depth analysis of this issue or consult with those who will most likely be affected by the proposed changes (e.g. candidates and parties), we are unsure as to how effective this proposal will be at addressing the range of issues related to foreign interference in New Zealand.

This proposal need not, and should not, preclude further legislative (and non-legislative) measures being adopted at a later date. We note this in recognition of the work being undertaken by the Justice Committee on the risks of donations being used to exert foreign interference in New Zealand. This issue has been considered as part of the Committee's year-long investigation into foreign interference, which is part of its Inquiry into the 2017 General Election and 2016 Local Elections. The Committee is expected to report back to the House in mid-November 2019.

2.2 Who is affected and how?

The proposal is intended to dissuade foreign states from using political donations as an avenue to interfere in New Zealand affairs. The purpose of this change is to provide a clear statement to foreign states and others about attempting to leverage covert influence in New Zealand through the donations regime. In turn, this is expected to increase public confidence in the integrity of our democracy and decision-making processes.

Though the change is directed towards foreign actors, it will also affect New Zealand political parties and candidates by limiting potential avenues for raising funds. However, as the existing levels of overseas donations appears to be relatively low (see Appendix 1), we consider the financial impact of the proposal to be justified.

² Candidates are not required to separately identify in their returns and foreign donations received under \$1,500. Only foreign donations in excess of the \$1,500 threshold must be identified.

2.3 Are there any constraints on the scope for decision making?

The need to have changes in place ahead of next year's General Election significantly constrained the options considered in this analysis

Potential avenues for foreign interference in New Zealand are wide ranging and complex, and will need to be addressed in many different ways. However, due to time constraints and decisions made by the Minister of Justice, only changes to overseas donations rules in the Electoral Act are currently being considered.

The Minister of Justice directed officials to consider options related to the risk of foreign interference via foreign donations in New Zealand's democracy ahead of the 2020 General Election. Options which would risk the feasibility of implementation within the constrained timeframes set for the 2020 General Election have not been considered; for example, addressing the risk that foreign states could circumvent any new rules that ban overseas donations by providing donations through a New Zealand citizen or resident, or New Zealand-registered company or unincorporated body which maintains a head office or principal place of business in New Zealand (to appear as though it is a domestic donation but is, in fact, from a foreign actor).

Similarly, options related to the risk of overseas donations to third-party election campaigners have not been considered. This could be a potential weakness for the 2020 elections, which are expected to include at least one referendum on the legalisation of cannabis, and possibly a second referendum in relation to the End of Life Choice Bill/Act. Both of these referendums are expected to be contested by domestic campaigners and could attract significant interest from overseas too.

Timing constraints meant that we were unable to consult with relevant individuals and groups likely to be impacted by the proposed changes (e.g. political parties and past candidates).

The timing of this analysis also meant we were unable to consider broader recommendations from the Justice Committee in respect of foreign interference, following its year-long Inquiry into the 2017 General Election and 2016 Local Elections. The Committee's report is expected to be tabled in November 2019. Recommendations from this report will be considered by the Government as part of ongoing policy work in this area.

Interdependencies – local elections

The current proposals apply only to parliamentary elections. There are currently no restrictions on overseas donations to candidates in local elections; this is something that may need to be considered in advance of the 2022 local elections.

Section 3: Options identification

3.1 What options have been considered?

Considerations that informed the development of the proposed options

The potential to circumvent through an anonymous donation

Currently, the threshold for overseas and anonymous donations are both set at \$1,500. Lowering the threshold or banning overseas donations without also amending the threshold for anonymous donations may undermine the intent of the change.

The risk that anonymous donations will end up being treated as foreign donations

A candidate or party secretary who does not either return or send to the Electoral Commission an anonymous or overseas donation received in excess of \$1,500 commits an illegal practice.

If the overseas and anonymous donation thresholds differ, it will no longer be possible to ensure that an anonymous donation is not being accepted in breach of the prohibition on overseas donations. This could lead to donor information being required from anyone that makes any donation, or contribution to a donation, to ensure it has not come from an overseas source.

This would place an excessive compliance burden on candidates and parties and would effectively mean anonymous donations could not be made. This could affect many innocuous and normal fundraising activities, such as raffles and bucket collections.

Influence through 'free' goods and services with a market value under \$300 or \$1,500

To effectively address the issue of undue influence, changes to overseas donations must cover the range of items that may be provided to candidates and parties. Currently under the Electoral Act, goods and services under \$300 (for candidates) or \$1,500 (for parties) are not considered donations. There is a risk that goods and services could be provided by overseas persons under these thresholds (e.g. allowing a political event to be held in a foreign owned venue in New Zealand at no cost).

Options

We considered two options for amending the rules on overseas donations to parties and candidates.

Option 1: Ban all overseas donations. Candidates and party secretaries will not be guilty of an illegal practice if they have taken reasonable steps, in the circumstances, to ensure that a donation was not from an overseas person. *(Minister's preference)*

Option 2: Maintain alignment and reduce both the overseas donations and the anonymous donations thresholds. *(Ministry's preference)*

Criteria

New Zealand, as a free and open society, promotes the right to freedom of expression, engaging in advocacy, protest and dissent, and other forms of political participation.

Efforts to deter, prevent or respond to foreign interference must be proportionate to the risks and uphold New Zealand's fundamental values; the same values we are trying to protect

from foreign interference. Accordingly, measures put in place to address the risk of foreign interference in the electoral system need to effectively address this risk while preserving New Zealanders' democratic freedoms.

With these issues in mind, we have assessed all options against the following criteria:

Proportionality

- Measures are proportionate to the foreign interference risk

Effectiveness

- Measures reduce the risk of interference by foreign actors attempting to build covert influence and leverage
- Measures indicate that foreign interference is not welcome in New Zealand's electoral system

Compliance burden

- Administrative and compliance costs are minimalised
- Impact on legitimate fundraising activities is minimal

Summary assessment of proposed options

	No action Overseas donations under \$1,500 are allowed	Option 1: Ban overseas donations Ban all overseas donations. Candidates and party secretaries will not be guilty of an illegal practice if they have taken reasonable steps, in the circumstances, to check that a donation was not from an overseas person. <i>(Minister's preference)</i>	Option 2: Reduce overseas and anonymous donation thresholds Reduce both the overseas donations and the anonymous donations thresholds, keeping both aligned. <i>(Ministry's preference)</i>
Proportionality	0	+ small and justified limit on freedom of expression + measure is proportionate to risk of interference through the overseas donations regime	+ small and justified limit on freedom of expression + measure is proportionate to risk of interference through the overseas donations regime
Effectiveness	0	++ provides a clear and unambiguous statement about foreign donations not being acceptable in New Zealand ++ total ban would reduce risk of foreign actors from building covert influence and leverage through donations - a ban could be circumvented through anonymous donations (although anonymity may reduce potential for donor to gain leverage)	+ reduces potential for foreign actors to build covert influence and gain leverage through donations + sends a signal about the concern with unwelcome foreign interference through donations - still allows foreign actors to donate and potentially gain influence through donations
Compliance burden	0	- requires recipients to take steps to check origins of all donations, even small ones - difficult to apply to anonymous donations -- will impact some fundraising activities (e.g. dinners) if overseas persons must be excluded	0 similar to status quo, just at a lower threshold - depending on threshold, may impact some fundraising activities
Overall assessment	0	0	+

Key:

- | | | | |
|----|------------------------------------------------|----|----------------------------------------------|
| ++ | much better than doing nothing/the status quo | + | better than doing nothing/the status quo |
| 0 | about the same as doing nothing/the status quo | | |
| - | worse than doing nothing/the status quo | -- | much worse than doing nothing/the status quo |

3.2 Which of these options is the proposed approach?

Both options reduce the possibility that foreign states could use donations from overseas persons to establish covert influence and leverage in New Zealand.³ They both also send a signal about New Zealand's position with regard to foreign interference through such avenues; this signalling is expected to have the greater impact internationally and domestically (rather than the absolute dollar amounts involved).

The two options differ in effectiveness and compliance costs which are discussed below.

Option 1 Ban overseas donations and keep anonymous donation threshold at \$1,500. Candidates and party secretaries will not be guilty of an illegal practice if they have taken reasonable steps, in the circumstances, to ensure that a donation was not from an overseas person. (Minister's preference)

Option 1 sends a strong signal of New Zealand's stance towards foreign interference. It directly addresses the concern of foreign states using donations as a means to develop relationships in order to gain influence in New Zealand. The concern is that, as a sense of reciprocity is established, they may be used as leverage to facilitate future interference or espionage activity. Therefore, this ban discourages such efforts and, where a foreign individual or entity does circumvent the ban, attempts to inform candidates and parties would bring their illegal activity to light.

Operationally, this approach is weaker. It is likely to be less effective in stopping foreign donors from supporting candidates and parties through anonymous donations (albeit that it remains an offence to do so for the purpose of circumventing the foreign donation rules).

Option 1 does not fit well with the scheme of the Electoral Act. Under the Act, a donation is only anonymous if the party does not, and could not reasonably, know who made it. Such people cannot be contacted to verify they are not an overseas donor and due diligence efforts to identify donations from overseas donors would be difficult. Option 1 would likely impose greater compliance costs for parties, without providing much real reassurance that a donation is not a foreign donation.

Option 2 Maintain alignment and reduce both the overseas donations and the anonymous donations thresholds (Ministry's preference).

Option 2 is the Ministry's preferred option. As well as reducing the risk of foreign influence, it would increase transparency of small donations to political parties without introducing new compliance requirements. Other than accommodating for a lower threshold, the compliance rules and requirements for candidates and parties would remain the same; they would not need to implement new processes or change their websites to include new functionality. This is a particular advantage in terms of speed and ease of implementation.

Due to time constraints and an inability to consult with impacted parties, we have not identified a preferred threshold, but recognise that setting a threshold would need to balance the intent of deterring foreign interference with the potential negative impact on political participation through compliance costs.

We consider the minimum viable threshold is probably around \$200; this would lower the risk of foreign interference through donations and is unlikely to affect activities such as raffles and bucket collections. It could, however, affect higher-end fundraising activities, such as dinners and auctions, and so a slightly higher threshold of \$300 might be preferable to prevent unintended

³ Both options include the provision of goods and services, but not volunteer labour. While this would mean a foreign individual could still attempt to influence by providing volunteer labour, this avenue for interference is unlikely. Most volunteers will be people living in New Zealand, so will not fall within the definition of overseas persons.

capture. \$500 is probably the highest threshold level that could be considered, while still achieving the policy objective. Anything higher than this would have less impact on fundraising activities, but would undermine the purposes of reducing covert and undue foreign influence.

The key weakness of this option is that it does not send as strong of a signal, domestically or internationally, of New Zealand's stance towards unwanted foreign interference. This option would still allow some level of overseas donation.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties	Comment:	Impact
Additional costs of proposed approach, compared to taking no action		
Political parties	The impact will be ongoing as funding from overseas donations will be reduced or banned. But, as overseas donations make up a very small amount (in both absolute and relative terms) of all overall donations, the financial impact will be marginal. Tighter due diligence requirements may result in greater compliance costs	Loss of funding from overseas donations totalling approximately \$100 - \$17,000 per annum for parties (estimated from party returns to the Electoral Commission)
Candidates	As above	Not known (candidates only have to declare overseas donations received of over \$1,500)
Total Monetised Cost		<17,000
Non-monetised costs	Greater compliance costs for parties and candidates	<i>Low</i>

Expected benefits of proposed approach, compared to taking no action		
Political candidates and parties	The changes provide a signal to candidates and parties to be mindful of potential foreign interference when receiving political donations	<i>Low</i>
Electoral System	Lower likelihood of foreign interference in our electoral system which can undermine the integrity of this essential democratic process	<i>Low</i>
General public	The public will have greater transparency around political donations which can support confidence in the integrity of elections and Government in general	<i>Low</i>
Total Monetised Benefit	-	-
Non-monetised benefits	The main benefit will be the signal that the proposal will send, both domestically and internationally, about New Zealand's position on foreign interference through donations	<i>Low/Medium</i>

4.2 What other impacts is this approach likely to have?

New Zealand Bill of Rights Act implications

Both options impact on the right to freedom of expression affirmed in section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), to the extent that the making and receiving of donations is regarded as a freedom of expression issue.

The Electoral Act 1993 already limits the ability of overseas persons to participate in our electoral system and engage with New Zealanders during the electoral period. Both the options considered would extend this existing limitation further. In light of objectives of reducing the risk of foreign interference in our electoral system and increasing transparency we consider this limitation is justified.

Treaty of Waitangi implications

The Stage 1 Report of the Waitangi Tribunal's *Te Paparahi o Te Raki Inquiry* concluded that, through the Treaty of Waitangi, the Crown acquired the right to protect Māori from 'foreign threats and represent them in international affairs, where necessary'. This has been considered in relation to the Crown's role in negotiating international treaties and is equally relevant in the context of foreign interference.

The Electoral Act 1993 contains provisions relevant to the Treaty – most notably Māori parliamentary representation and electoral participation. The policy options identified above do not affect these provisions.

Māori individuals who are New Zealand citizens would still be able to exercise their right to political participation through donations, even if they are living overseas (because they would not fall under the definition of 'overseas person').

There is potential for some bodies or organisations incorporated overseas, for example in Australia, to be affected by a ban on overseas persons from donating to political parties – including Māori overseas incorporated groups. However, we do not think the proposed changes would disproportionately affect overseas Māori organisations.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Electoral Commission

The Electoral Commission does not take any policy view on either option. It has noted previously that if the thresholds for overseas and anonymous donations are different, it would no longer be possible to ensure that an anonymous donation was not being accepted in breach of the prohibition on overseas donations.

Political parties and candidates

Political parties, current and former MPs, and political candidates have expressed concerns in the House and other fora, about the risk of foreign interference through donations. The direction of travel, i.e. imposing further restrictions on overseas donations, is likely to be supported by parties and candidates, but there may be differing views on the most appropriate way to achieve this. There will also be divergent views on whether the proposed changes go far enough to address the issue of foreign interference and will likely lead to the wider issue of political finance reform.

Due to the high-profile implications for New Zealand democracy, there may be a substantial level of public interest on the issue of foreign interference. But, due to the relatively small changes proposed, interest may be lower than other possible types of reform.

Other consultation

Justice Committee's Inquiry into the 2017 General Election

Fourteen submitters on the foreign interference aspect of the Justice Committee's Inquiry into the 2017 General Election and 2016 Local Elections thought that there should be a total ban on foreign donations to political parties.

The Committee has not yet tabled its final report, but we have had the benefit of reviewing these public submissions and attending the oral hearings where this issue was discussed. This has assisted in our analysis.

Departmental consultation

The following departments, agencies and crown entities were consulted in developing the Cabinet paper on banning overseas donations: Treasury, the State Services Commission, the Ministry of Foreign Affairs and Trade, the Departments of Prime Minister and Cabinet and Internal Affairs, NZSIS, GCSB and the Electoral Commission.

Wider consultation on the problem and proposed solutions have not yet occurred. We note that, as this issue addresses political financing, candidates and parties will have an interest in this issue.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

The proposed changes to the Electoral Act are expected to occur through an Electoral Amendment Bill (No 2). It is expected to come into effect from 1 January 2020 (start of year for donation returns).

The Electoral Commission will update its guidance on party and candidate donations accordingly.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The Electoral Commission will collect and collate data from elections and parties' annual returns, which includes data for donor returns. This will show foreign donations received and returned or sent to the Commission by candidates and parties. No other new form of data collection will be implemented.

7.2 When and how will the new arrangements be reviewed?

The Justice Committee is due to report back shortly on its consideration of potential risks and mitigations relating to foreign interference (which has formed part of its Inquiry into the 2017 General Election and 2016 Local Elections).

In addition, aspects of the electoral system are regularly reviewed. The Electoral Commission and the Justice Committee both complete a triennial review after each general election which could include further review of the risk foreign interference poses to New Zealand. The public and other stakeholders have an opportunity to submit to the Justice Committee review. The Government's Response to the Justice Committee's recommendations is tabled in the House.

The Minister has also indicated that he considered a comprehensive review of the Electoral Act 1993 is overdue. Any such review would require a highly consultative process over the next two Parliamentary terms.

Appendix 1: Overseas donations in New Zealand

Table 1: Overseas donations to parties since 2011

Year of Return (Return filed by 30 April the following year)	Party	Number of overseas donations under \$1500	Total of overseas donations under \$1,500	Overseas donations over \$1500	Overseas donations returned
2011 Return	Libertarianz	1	\$129.87		
	National	2	\$2,500.00		
2012 Return	Libertarianz	1	\$97.53		
	Mana	2	\$306.00		
	NZ First	1	\$116.18		
2013 Return	ACT	12	\$960.00	\$7,450.00	Returned excess of \$5,950 to donor
	Māori				
	National	1	\$400.00		
2014 Return	ACT	1	\$1,360.00		
	Green	2	\$2,000.00		
2015 Return	ACT	12	\$960.00		
	Green	300	\$9,698.00		
2016 Return	ACT	12	\$960.00		
2017 Return	ACT	12	\$960.00	\$49,975.00	Returned all to donor Returned excess of \$2,500 to donor
	Green	60	\$2,825.00		
	Internet	3	\$376.21		
	National	17	\$17,180.00		
	NZ First	29	\$1,930.50		
2018 Return	Green Party	57	\$510.00		
	Labour	16	\$900.00		

No candidates reported receiving any contributions or donations from overseas donors over the \$1,500 reporting threshold in any of the last four general elections.

Source: Electoral Commission