THE ELECTORAL SYSTEM

The first elections for members of Parliament took place over eight months in 1853, in time for Parliament to assemble for its first meeting in Auckland in the following year. The New Zealand Constitution Act 1852 (UK) did not prescribe in detail how the electoral system was to operate, leaving much of this to be determined by the Governor. This is in marked contrast to the present-day electoral legislation, the Electoral Act 1993, which sets out highly detailed and prescriptive electoral rules, and is supplemented by only a small body of regulations made by the Governor-General.

New Zealand has employed three types of voting system in its history: simple first-past-the-post (FPP); a form of preferential voting system known as the second ballot; and the proportional representation system known as mixed member proportional (MMP). From the 1853 to the 1905 elections FPP was used. The candidate or candidates polling the highest number of votes in each constituency were automatically elected. Most constituencies were single-member electoral districts, each electing one member, but the larger cities formed multi-member electoral districts from which the two or three highest polling candidates were elected to Parliament. Multi-member constituencies were abolished at the time of the 1905 election.1

For the 1908 and 1911 elections New Zealand employed the second ballot voting system.2 Under this system the election was held as for FPP, but only a candidate winning at least half the total valid votes cast in the electoral district was successful. Where no one won half of the votes a run-off election (the second ballot) was held one week later (two weeks in some rural constituencies) between the two top-polling candidates. The elections from 1914 to 1993 were again conducted under FPP, with single-member electoral districts. At the 1996 election a new system of voting, MMP, was introduced. This is the present system employed.3

The MMP system

The MMP system combines members of Parliament elected from single-member electoral districts with members elected from nationally drawn-up party lists. It is designed to produce a legislature whose overall party composition is approximately

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1 City Single Electorates Act 1903.
2 Second Ballot Act 1908.
proportional to the nationwide support for the political parties contesting the election.

MMP was recommended for parliamentary elections by a royal commission that reported in 1986. An indicative referendum was held in September 1992 at which voters were asked whether they wished to retain FPP or to change to another (unspecified) system. At that same referendum, voters were asked which one of four alternative forms of voting they would prefer to be adopted if there was a change in the system, regardless of whether they had expressed a wish to see a change in the voting system. A large majority of those who voted favoured a change in the voting system, and the most clearly favoured option was MMP.

A further referendum was held in November 1993, simultaneously with the general election of that year. This was a straight run-off between FPP and MMP. A majority of those voting (53.9 per cent) favoured MMP. Under the legislation governing the holding of the referendum, this result was binding in that the vote for MMP automatically repealed the previous electoral law and a new electoral law was brought into effect, subject to a transitional period extending up to the next election, due in 1996. This process of holding a binding referendum on a proposed alternative system fully prescribed in legislation was designed to satisfy the requirement of the law that certain important ingredients of the electoral system, known as “reserved provisions”, could be amended or repealed only by a majority of the valid votes cast at a poll of all electors. In order to prevent the representation of a plethora of minor parties in the House, a threshold of five per cent is set as the minimum proportion of the total votes that a party must ordinarily win nationally in order to be entitled to seats in the House. But the system, whilst ensuring party proportionality, also incorporates an element of constituency representation by requiring that over half the members of Parliament be elected directly in single-member electoral districts, on an FPP basis. Thus, each voter has two votes: one for a constituency member and the other for a political party. Once the constituency members are decided, the membership of the House is topped up with candidates drawn from the party lists to produce overall proportionality.

Electoral Commission

The 1993 legislation created an Electoral Commission to oversee the registration of political parties and carry out other duties in regard to the electoral system. Amendments to the Electoral Act in 2010 and 2011 consolidated the functions of the commission and those of the Chief Electoral Officer and the Electoral Enrolment Centre into a newly established Electoral Commission. Its functions include:

- registration of political parties and logos
- registration of electors and compilation of the electoral rolls
- conducting parliamentary elections and referenda
- allocating funding and time to political parties for election broadcasting
- administration of the rules for election advertising, expenditure and donations

7 Electoral Act 1993, s 268.
8 Electoral Act 1993, s 4B.
14 Electoral Act 1993, pts 6A and 6AA.
conducting the five-yearly Māori electoral option, and servicing the work of the Representation Commission\textsuperscript{15}

- promoting public awareness of electoral matters by conducting education and information programmes\textsuperscript{16}
- reporting to the Minister of Justice and the House on electoral matters referred to it by the Minister or the House\textsuperscript{17}
- providing information to help parties, candidates and others meet their statutory obligations in respect of electoral matters administered by the commission.\textsuperscript{18}

The Electoral Commission has three members appointed by the Governor-General on the recommendation of the House. One member is appointed as the chairperson, another as deputy chairperson, and the third as Chief Electoral Officer and chief executive of the commission.\textsuperscript{19}

The Electoral Commission must act independently in performing its statutory functions and duties and exercising its statutory powers.\textsuperscript{20} For governance, reporting and accountability purposes the commission is classified as an independent Crown entity (that is, one that is generally independent of Government policy).\textsuperscript{21}

### Review of the electoral system

The electoral system and how it operates are subject to review by both the Electoral Commission and the House. The Electoral Act requires the commission, within six months of the return of the writ after a general election, to report to the Minister of Justice on the administration of the election, and the Minister is required to table the report in the House. The commission reports on the services provided to electors to facilitate voting, enrolment and voting statistics, any substantive issues arising during the course of the election, any administrative or legislative changes that are desirable, any matter the Minister asks the commission to address, and any other matter the commission considers relevant.\textsuperscript{22}

In 2010, an ad hoc select committee, the Electoral Legislation Committee, was established to consider three bills dealing with electoral finance, advance voting, and a referendum on the voting system to be held at the same time as the 2011 general election. A non-binding referendum was held in 2011. It asked voters two questions: whether the MMP voting system should be retained, and which of four alternative systems the voter would choose if New Zealand were to change to another voting system.\textsuperscript{23} A majority (56.17 per cent) voted to keep the MMP system.\textsuperscript{24}

The legislation also provided for the Electoral Commission to undertake a review of the MMP system if 50 per cent or more of the votes cast were in favour of its retention.\textsuperscript{25} The Electoral Commission completed its review in 2012. The final recommendations were as follows:\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{15} Electoral Act 1993, pts 3 and 5.
  \item \textsuperscript{16} Electoral Act 1993, s 5.
  \item \textsuperscript{17} Electoral Act 1993, s 5.
  \item \textsuperscript{18} Electoral Act 1993, s 5.
  \item \textsuperscript{19} Electoral Act 1993, s 4D. If a vacancy occurs during a period when the House is not sitting, the Governor-General may fill the vacancy, but the appointment lapses if not endorsed by the House within 24 sitting days (s 4H(2) and (3)).
  \item \textsuperscript{20} Electoral Act 1993, s 7.
  \item \textsuperscript{21} Electoral Act 1993, s 4B; Crown Entities Act 2004, sch 1.
  \item \textsuperscript{22} Electoral Act 1993, s 8(1).
  \item \textsuperscript{23} Electoral Referendum Act 2010, s 8(1) and sch 1.
  \item \textsuperscript{24} Electoral Commission “Overall results—2011 Referendum on the Voting System” (10 December 2011) <www.electionresults.govt.nz>.
  \item \textsuperscript{25} Electoral Referendum Act 2010, ss 74–78.
\end{itemize}
The one electorate seat threshold should be abolished (along with the provision for overhang seats [see Composition of the House, following]).

The party vote threshold should be lowered from five per cent to four per cent (with the commission required to review how the four per cent threshold was working after three general elections).

Consideration should be given to fixing the ratio of electorate seats to list seats at 60:40 to help maintain the diversity of representation and its proportionality.

Political parties should continue to have responsibility for selecting and ranking candidates on their party lists, but should be required to make a statutory declaration that they have done so in accordance with their party rules.

Candidates should continue to be able to both stand for an electorate seat and be on a party list.

List members should be able to continue to contest by-elections.

The Minister of Justice subsequently announced that there would be no changes to the MMP voting system before the 2014 election because consensus on them had not been reached amongst the political parties in Parliament.  

Since 1981 a select committee has had electoral matters within its terms of reference. Until 1999 an ad hoc Electoral Law Committee was established in each Parliament. Since 1999 electoral matters have been linked with justice issues in the terms of reference of one of the subject select committees—the Justice and Electoral Committee. This committee considers any electoral legislation referred to it, and in the course of its Estimates and annual review work may also receive information on the administrative support available for the electoral system.

The Justice and Electoral Committee has developed a practice of initiating an inquiry after every general election into the conduct of the election and issues that have arisen in this regard. The committee seeks advice or submissions from officials as the starting point for its inquiry, and calls for submissions from the public. The Electoral Commission works closely with the committee as it carries out these reviews. The committee’s report or reports may lead directly to the preparation of amending legislation to remedy any defects that have been found in the electoral process.

COMPONENT OF THE HOUSE

The House of Representatives consisted of 37 members when it was elected for the first time in 1853. This figure was determined by Governor George Grey under powers delegated to the Governor. Parliament very soon took into its own hands the determination of the total membership of the House, and it has gone up and down (usually up) over the succeeding years. The current electoral legislation does not prescribe a total number of members. Rather, it prescribes a formula, based on there being 120 members normally, by which the precise total membership of the House is established. While 120 members is the norm, this number can be exceeded or reduced in certain circumstances. The House consists of members elected to represent general electoral districts, members elected to represent Māori electoral districts and members elected from lists submitted by political parties. On the basis of the 2013 census and the Māori electoral option exercised at that time, the membership of the House for the 2014 and 2017 elections was calculated

27  Hon Judith Collins, Minister of Justice “MMP changes impossible without agreement” (media release, 15 May 2013).
to comprise 64 members for general electoral districts, seven members for Māori electoral districts and 49 party list members.

**General electoral districts**

There are 16 general electoral districts in the South Island. The general electoral population of the South Island (the total number of people ordinarily resident there at the time of the last census, less the Māori electoral population) is divided by 16 to obtain a figure known as the quota for the South Island. The function of the quota is to provide a degree of numerical equality in the electoral population of each electoral district. The general electoral population of the North Island (the total number of persons ordinarily resident there at the time of the last census, less the Māori electoral population) is divided by the quota to calculate the number of general electoral districts in the North Island. Thus the two islands each have numbers of general electoral districts that are equivalent to their general electoral populations. While there will always be 16 general electoral districts in the South Island, the number of such districts in the North Island will go up or down depending upon relative population movements between the islands and the number of Māori electoral districts that are created.

**Māori electoral districts**

Four Māori electoral districts were created in 1867 to provide Māori with parliamentary representation. The number of Māori electoral districts remained at four until the 1996 election. There is now no prescribed number of Māori electoral districts. Their total number is calculated from the Māori electoral population. This is the number of people who have registered to vote in Māori electoral districts, plus a figure to represent an appropriate proportion of the estimated number of people of Māori descent who have not registered as electors at all or who are under 18 years of age. The Māori electoral population is divided by the South Island’s quota, and the resulting figure gives the total number (for both the North and the South islands) of Māori electoral districts. The number of Māori electoral districts will therefore largely be determined by the number of Māori who choose to enrol to vote in a Māori electoral district. At the 1996 election there were five Māori electoral districts. This increased to six districts at the 1999 election, and to seven at the 2002 election since which it has not changed.

**Party lists**

The members elected from party lists are additional to the members elected from general and Māori electoral districts. Party list seats are awarded according to a formula designed to ensure that each party’s total number of members is approximately proportionate to its share of the party vote at the election. Generally these members will take the total number of members up to 120. However, this figure can be exceeded in the case of an “overhang”, where a party’s constituency candidates win more seats than its national party vote entitles it to. It may also not be reached, if a party’s share of the vote entitles it to more party list seats than it has nominated candidates for.

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29 Electoral Act 1993, s 35(3)(a).
30 Electoral Act 1993, s 35(3)(b).
31 Electoral Act 1993, s 35(3)(c).
32 Māori Representation Act 1867.
33 Electoral Act 1993, s 3(1).
34 Electoral Act 1993, s 45(3)(a).
35 Electoral Act 1993, s 192(5).
36 Electoral Act 1993, s 193(4).
REDISTRIBUTION OF SEATS

Representation Commission

The job of dividing New Zealand into the ascertained number of electoral districts falls to a statutory body, called the Representation Commission, which meets every five years following each national census.37

The Representation Commission was established in 1887.38 The creation of an independent commission to draw up electoral boundaries (this was previously done by Parliament itself) is recognised as a significant landmark in New Zealand’s electoral history. It became a model for similar commissions in the United Kingdom and Australia.39

For the purposes of determining the boundaries of general electoral districts, the Representation Commission consists of seven members. Four members belong by virtue of their offices: the Surveyor-General, the Government Statistician, the Chief Electoral Officer, and the Chairperson of the Local Government Commission (who does not have a vote). Two further members are appointed by the Governor-General on the nomination of the House, one to represent the Government and one to represent the Opposition. The final member is appointed by the Governor-General as chairperson on the nomination of the members of the Representation Commission or of a majority of them.40 None of the Representation Commission’s nominated members can be a member of Parliament.

When the commission is determining Māori electoral districts, its membership is supplemented by three additional members. One of these is the chief executive of Te Puni Kōkiri (the Ministry of Māori Development). The other two, who must both be Māori, are appointed by the Governor-General on the nomination of the House, one to represent the Government and one to represent the Opposition.41

Any political party to which a member of Parliament belongs, any independent member of Parliament and any party whose candidates obtained at least five per cent of the votes cast at the last general election may make submissions to the commission.42 Any party that obtains five per cent of the votes will, by definition, have members of Parliament belonging to it.

The commission deliberates in private. It is accepted, however, that the commissioners nominated to represent Government and Opposition parties have a particular need to consult and take advice from those that they represent.

Administrative services to the Representation Commission are provided by the Electoral Commission, while technical advice is provided by Land Information New Zealand and Statistics New Zealand.

Boundaries

In principle, the Representation Commission tries to draw electoral boundaries so that each district contains an equal number of electors. This will never be entirely practicable, so the commission is allowed to deviate from mathematical equality by drawing electoral boundaries for general electoral districts that contain up to five per cent more or less of the general electoral population than the quota for the districts within each island,43 and to allow a similar percentage deviation relative to the Māori electoral population for any Māori electoral district.44

37 The Canterbury earthquakes of 2011 resulted in the scheduled census being postponed until 2013. The Representation Commission therefore met in 2006 and then 2013.
38 Representation Act 1887.
40 Electoral Act 1993, ss 28(1), (2), (5).
41 Electoral Act 1993, ss 28(3), (4).
42 Electoral Act 1993, s 34.
43 Electoral Act 1993, s 36.
44 Electoral Act 1993, s 45(7).
When drawing new boundaries, the commission is obliged to give due consideration to existing boundaries, community of interest, communications facilities, topographical features, and any projected variation in the electoral population of the districts during their life. In the case of Māori electoral districts, this includes community of interest among Māori people generally and the members of Māori tribes.\(^45\)

The commission publishes the details of its provisional proposals in the *New Zealand Gazette*, and people have at least one month from their publication to lodge objections to them. Objections received by the commission are also published, and the public is given at least two weeks to lodge counter-objections. The commission is obliged to consider these objections and counter-objections before coming to a final decision on boundaries.\(^46\) But it may change its provisional proposals without regard to whether they have been the subject of objections.\(^47\)

Within six months of its being convened, the commission must deliver its final report to the Governor-General and publish it in the *Gazette*. No appeals or objections are possible after that point. The redrawn boundaries then become the electoral districts for subsequent general elections until they are superseded by a new determination by the commission in five years’ time.\(^48\) Thus, depending upon the timing of the census and of subsequent elections, one or two general elections will be fought on the basis of boundaries determined by each Representation Commission’s report.

Any by-election occurring between the publication of the new boundaries and the next general election is fought using the old boundaries.

**ELECTORS**

**Registration**

The first step towards securing the right to vote at an election is to register as an elector. It is compulsory to register in an electoral district within one month of becoming qualified to vote.\(^49\) Everyone of or over the age of 18 years who is a New Zealand citizen or permanent resident of New Zealand and has resided continuously at some time for at least one year in New Zealand is qualified to register as an elector. (A permanent resident is a person who is lawfully resident in New Zealand and who is not subject to any immigration restriction.\(^50\))

The electoral district in which a person qualifies to register is the district in which they last resided continuously for at least one month or, if they have never resided continuously for a month in any electoral district, the district in which he or she now resides or last resided.\(^51\) A person may be registered in only one electoral district at a time. However, a person’s registration in a new district in which they have recently become qualified to vote is not invalidated merely because they remain registered in the old district (but the previous registration must have been cancelled by the time of the next election to entitle the person to vote).\(^52\) New Zealand citizens who have not been in New Zealand for three years and permanent residents who have not been in New Zealand for 12 months lose their qualification to register as electors. Exempt from this disqualification are people (and their accompanying partners and children) who are absent on a diplomatic mission, serving in the armed forces or working as an employee of New Zealand Trade and Enterprise. Also disqualified as electors are special categories of people detained

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45 Electoral Act 1993, ss 35(3)(f) and 45(6).
46 Electoral Act 1993, ss 38 and 45(8).
47 *Timmins v Governor-General* [1984] 2 NZLR 298 (HC).
48 Electoral Act 1993, s 40.
49 Electoral Act 1993, s 82.
50 Electoral Act 1993, s 73.
51 Electoral Act 1993, s 74(1).
52 Electoral Act 1993, s 75.
in a hospital because of mental disorder or intellectual disability, persons detained in prison under a sentence imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, and those who have been convicted of a corrupt electoral practice within the last three years.\(^{53}\)

Registration is effected by making an application to a registrar of electors.\(^{54}\) The registrar then adds the elector to the electoral roll for the appropriate electoral district. Electors who have registered by writ day for an election are included on the printed electoral roll produced for polling day. Electors who register after writ day do not appear on the roll, but may cast a special declaration vote. No registration is permitted on polling day itself.

### Māori option

A Māori, or a descendant of a Māori, may register as an elector of either a Māori electoral district or a general electoral district. A Māori may exercise the option of enrolling in either type of district when first qualifying and registering as a voter, and may opt to be transferred to the other type of electoral district during the Māori electoral option conducted after each five-yearly census.\(^{55}\) No transfer between roll types may be made at any other time.\(^{56}\) Between February and April 1994 there was a special opportunity to exercise the option to move between the rolls for the purposes of drawing boundaries for the new MMP system.\(^{57}\) This special option was offered because the Government was held to have had a duty to publicise the option in a way that was reasonable considering the position of Māori in society and the unsatisfactory number of Māori enrolled to vote.\(^{58}\)

### Electoral rolls

At the 2014 general election it was estimated that 92.6 per cent of the eligible voting population had actually enrolled.\(^{59}\) New Zealand’s enrolment rate is just below the average (93 per cent) for developed (OECD) countries.\(^{60}\) However, the enrolment rate for people under 30 is much lower at 79 per cent. Indeed, nearly two-thirds (63.2 per cent) of all non-enrolled people are under the age of 30.\(^{61}\)

Lists of people registered as electors are printed periodically on electoral rolls under the direction of the registrar of electors for each electoral district. The “electoral roll” for any district is technically a compilation of completed forms of application for registration held by the registrar of electors.\(^{62}\)

Persons who can show that publication of their names and addresses could be harmful to their safety or the safety of their families may apply to the Electoral Commission for registration on an unpublished roll.\(^{63}\) In 2014 there were 16,878 people on the unpublished electoral roll.\(^{64}\)

Any elector may object to the name of any person being on a district’s electoral roll on the grounds that that person is not qualified to be registered as an elector of that district.\(^{65}\)

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53 Electoral Act 1993, s 80.
54 Electoral Act 1993, s 83.
55 Electoral Act 1993, ss 76–78.
56 Electoral Act 1993, s 79.
57 Electoral Act 1993, s 269(2).
58 [Taiaroa v Minister of Justice [1995] 1 NZLR 411 (CA)].
62 Electoral Act 1993, s 3(1).
63 Electoral Act 1993, s 115.
65 Electoral Act 1993, s 95.
REGISTRATION OF POLITICAL PARTIES

In order to obtain party list seats, a political party must first be registered with the Electoral Commission on the Register of Political Parties.

Applications for registration of a party, which carry a $500 fee, may be made by the secretary of the party or by any member of Parliament who is a current financial member of the party.66 A party may be registered with any component parties;67 that is, parties that are themselves members of the registered party, or have combined their memberships with another party for the purposes of registering with the commission. The commission may also register party logos for registered political parties.68

To be a registered party the party must have and maintain a current financial membership of at least 500.69 However, the commission does not disclose any membership list made available to it. Membership of a political party is a matter for an individual to make known if he or she wishes to do so.70 There can be no registration of a political party during an election campaign (that is, after the issue of the writ),71 although this restriction does not apply for a by-election. For both general and by-elections, no action can be taken on an application to register a party logo from the date of the issue of the writ until the latest day for the writ’s return.72 At the time of the 2014 election there were 19 parties registered with the Electoral Commission.

The commission has power to deny registration to a political party proposing to use an indecent or offensive name, a name that refers to a title or honour, a name that is too long, or one that is likely to cause confusion.73 Subject to compliance with the formal requirement to provide the secretary’s name and address, the commission advises its consent to registration in the New Zealand Gazette and approves an abbreviation for the name of the party, if one is sought.74 The commission may cancel registration on the application of the secretary or of a member of Parliament belonging to the party where such an application is made on behalf of the party. It must cancel registration if the party’s financial membership falls below 500.75 There are procedural, legal and funding implications for its parliamentary party should a political party have its registration cancelled while it has serving members of Parliament (see pp 114–117 for further discussion).

Changes to the rules on the disclosure of donations to political parties and candidates took effect on 1 January 2011. Every registered party must make an annual return by 30 April of donations that it has received of money or goods and services in the previous 12 months for the year ending 31 December. The return must include details of every donation or contribution over $15,000, the identity of the person who made the donation or contribution, every anonymous donation over $1,500, every contribution or donation from an overseas person over $1,500, and all payments received from the Electoral Commission of donations protected from disclosure. The return must also disclose the number and amount of other party donations that fall within specified monetary bands.76 At the same time, parties are required to lodge an annual return of any loans exceeding $15,000 with an unpaid balance exceeding $15,000, whether entered into during the calendar

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66 Electoral Act 1993, ss 63 and 63A.
67 Electoral Act 1993, s 67(1)(a)(iii).
68 Electoral Act 1993, s 71C.
69 Electoral Act 1993, ss 66(1)(b) and 70(2).
70 Office of the Ombudsmen Eleventh compendium of case notes of the Ombudsmen (April 1998) at 75–77 (Case No W33807).
71 Electoral Act 1993, s 64.
72 Electoral Act 1993, s 71E.
73 Electoral Act 1993, s 65.
74 Electoral Act 1993, s 67.
75 Electoral Act 1993, s 70.
year or previously. They also have to disclose the number and total amount of any loans entered into during the year between $1,500 and $15,000, and disclose within 10 working days any loans exceeding $30,000.77 The return of donations and loans must be accompanied by an auditor’s report. A separate return must be filed within 10 working days on donations or loans exceeding $30,000, or if the same donor or lender has donated or lent sums in the preceding 12 months that in total exceed $30,000.78

Where a party believes that it has nothing to disclose in respect of the year in question it must submit a “nil” return, which is effectively advice to the commission that it received no donations.79 The commission is charged with ensuring that parties submit returns of donations and loans, and with making the information available for public inspection.80

QUALIFICATIONS FOR MEMBERS

In principle, every person who is a registered elector and who is a New Zealand citizen is qualified to be a candidate and to be elected as a member of Parliament.81 The fact that a person must be a registered elector to be a member of Parliament effectively imports the qualifications for registering as an elector (such as age and residence) and the disqualifications from registering (such as falling within a very narrow range of kinds of mental health patients specified in the Electoral Act,82 imprisonment, and conviction for a corrupt practice) into the membership qualifications.

If a person is not qualified to be registered as an elector, but has nevertheless been registered, the person is not qualified to be a candidate or to be elected as a member of Parliament.83 The election of such a person could therefore be challenged by way of an election petition. However, an election petition must be presented within 28 days of the declaration of the result of the election.84 There is no way of challenging the validity of an election other than by means of an election petition.85 If the fact that a person was invalidly registered as an elector is discovered after the time for presenting an election petition has passed, it cannot be challenged by election petition. As no vacancy automatically arises by virtue of the fact that a sitting member is discovered to have been invalidly registered, it is likely that in such circumstances the person declared elected would remain as a member.

The qualifications for candidature and membership of the House are linked in the legislation. Nevertheless, it is conceivable that a person who was invalidly registered at the time he or she was nominated as a candidate would qualify to be registered before the result of the election was declared. It would seem that in these circumstances the election of such a person would be void (unless, possibly, he or she re-registered before the election) since the defect in their registration at the outset would prevent their being a valid candidate for election.86

A number of legislative provisions relate to membership of Parliament. They operate to disqualify people who hold or have held certain offices from being members of Parliament. They operate whether the offices concerned are held at the time of election or are acquired subsequently.

77 Electoral Act 1993, ss 214C and 214F.
78 Electoral Act 1993, s 210G.
79 Electoral Act 1993, s 210B.
80 Electoral Act 1993, ss 210D, 210F and 214J.
81 Electoral Act 1993, ss 47(1), (3).
82 Electoral Act 1993, s 80(1)(c).
83 Electoral Act 1993, s 47(2).
84 Electoral Act 1993, s 231.
85 Electoral Act 1993, s 229(1).
86 Compare, for example: Sykes v Cleary (1992) 176 CLR 77.
The following people are disqualified from being or becoming members of the House:

- members of the Representation Commission (while they hold office, and for up to two years after ceasing to be members) \(^{87}\)
- the Controller and Auditor-General \(^{88}\)
- the Clerk of the House of Representatives and the Deputy Clerk \(^{89}\)
- an Ombudsman \(^{90}\)
- the Parliamentary Commissioner for the Environment \(^{91}\)

To be qualified for election, a candidate must be living. This is not as obvious as it may sound. In some jurisdictions a deceased candidate may be elected, in which case a vacancy immediately arises and is filled in the manner prescribed. \(^{92}\) In New Zealand, if a candidate for an electoral district dies after the close of nominations and before the polls have closed, the constituency election for that electoral district is aborted. \(^{93}\) If a candidate who would have been successful dies after the close of the polls but before the declaration of the result, the candidate is not formally returned as a member and the writ is endorsed with this fact. \(^{94}\) In all such cases a fresh election is held as if it were a by-election. \(^{95}\) In the case of a party list candidate dying after the submission of the list, the poll proceeds but the deceased candidate’s name is entirely disregarded. \(^{96}\)

**CALLING AN ELECTION**

The term of Parliament is three years, computed from the day fixed for the return of the writ for the previous election. At the end of this period, unless it has already been dissolved, Parliament expires. \(^{97}\) In fact, in every election year except 1943, Parliament has always been dissolved before it was due to expire. This is effected by the Governor-General issuing a proclamation on the advice of the Prime Minister (see p 144). Dissolution (or the expiration of Parliament) sets in motion a train of events leading to a general election. The Governor-General, within seven days, issues a writ to the Electoral Commission to make all necessary arrangements for the conduct of the general election. \(^{98}\) The writ appoints a day by which candidates are to be nominated, a day for the poll to be held if there is more than one candidate in an electoral district and the latest day for the return of the writ. Nomination day must be no fewer than 20 and not more than 27 days before polling day. The same day (which must be a Saturday) must be appointed for the poll to be held in every electoral district. \(^{99}\) This was not always the case. Until 1881 European electorates (as they were then known) could hold polls on different days, and until 1951 polls took place in the Māori electorates on a different day from those in the European electorates. The latest day for the return of the writ is the same for each electoral district—the 50th day after the writ is issued. \(^{100}\)

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87 Electoral Act 1993, s 44.
89 Clerk of the House of Representatives Act 1988, s 9.
90 Ombudsmen Act 1975, s 4.
91 Environment Act 1986, s 5.
92 See, for example: The Economist (11 November 2000) (a candidate killed in a plane crash three weeks before the election won a United States Senate seat).
93 Electoral Act 1993, ss 153A and 153B.
94 Electoral Act 1993, s 153C.
95 Electoral Act 1993, s 153E.
96 Electoral Act 1993, s 153.
97 Constitution Act 1986, s 17(1).
98 Electoral Act 1993, s 125. This Act was amended in 2002 to provide that a single writ is issued for each general election, prior to that a separate writ was issued for each electoral district.
99 Electoral Act 1993, s 139(1)–(2).
100 Electoral Act 1993, s 139(4).
It is for the Prime Minister to decide how long before the dissolution of Parliament an announcement is made that a general election is to be held on a particular day. In 1984 the announcement was made only a matter of hours before dissolution, with the election following one month later. In 1931 an election to be held on 2 December was only announced on 11 November, resulting in the shortest campaign on record.\(^{101}\) The Electoral Commission usually requests a minimum of eight weeks’ notice to organise an election. In 2014 the date of the election was announced six months beforehand. During the pre-election period, Governments have tended to restrict certain activities and advertising in recognition of the potential for a change of Government, and to avoid the possible perception of public funds being used for party political purposes. Such restraints have tended to be applied from three months before an election date or three months from the announcement of an election (if the gap between the announcement and the polling date is less than three months).\(^{102}\)

In one particular set of circumstances the Prime Minister is obliged to signal in advance that an election is to be held: where it is desired not to hold a by-election to fill a vacancy that has arisen more than six months before Parliament is due to expire, but within six months of the date when it is intended that an election actually be held. The House can, by a resolution carried by 75 per cent of all its members, dispense with such a by-election; but it must be informed beforehand by the Prime Minister that the general election is indeed to be held within the next six months.\(^{103}\) A by-election that would otherwise have been held has been cancelled upon such advice from the Prime Minister.\(^{104}\) The Prime Minister is not obliged to disclose the exact date of the election in order to invoke the cancellation procedure (though he or she may do so), only the fact of the election’s imminence.

### THE ELECTION

#### Candidates

**Constituency nominations**

Any person who is registered as an elector and is a New Zealand citizen is qualified to be a candidate for an electoral district or on a party list.\(^{105}\) Any agreement not to stand for election to Parliament is unenforceable as contrary to public policy.\(^{106}\) Persons employed in the State services (which includes the education service and the police) who become candidates for election must be placed on leave of absence from nomination day for the election until the first working day after polling day.\(^{107}\) If elected, a State servant is deemed to have vacated office as a State servant.\(^{108}\) Candidates do not need to be qualified to vote in the electoral district for which they are standing for election, but a person cannot be a candidate for more than one district at the same general election.\(^{109}\)

A person must consent to be nominated as a candidate. Any two electors registered in an electoral district can nominate a candidate for election for that district.\(^{110}\) A deposit of $300 must be lodged with the Returning Officer for each candidate. This is refunded if the candidate polls five per cent or more of the total number of votes received by constituency candidates in the district.\(^{111}\)

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\(^{101}\) Michael Bassett *Three Party Politics in New Zealand 1911–1931* (Historical Publications, Auckland, 1982) at 60.


\(^{103}\) Electoral Act 1993, s 131(b).

\(^{104}\) (1996) 555 NZPD 12541–12562.

\(^{105}\) Electoral Act 1993, s 47.

\(^{106}\) Peters v Collinge [1993] 2 NZLR 554 (HC).

\(^{107}\) Electoral Act 1993, s 52.

\(^{108}\) Electoral Act 1993, s 53(2).

\(^{109}\) Electoral Act 1993, s 59.

\(^{110}\) Electoral Act 1993, s 143.

\(^{111}\) Electoral Act 1993, s 144.
As an alternative to nominating candidates constituency by constituency, a registered party may lodge a single bulk nomination schedule with the Electoral Commission by midday the day before the last day for nomination of constituency candidates. If a party uses this method of nominating candidates, no person may be nominated as a candidate for that party on an individual basis. A bulk nomination is lodged by the secretary of the party. It must be accompanied by a declaration by the secretary that each person nominated is qualified to be a candidate, and by a deposit of $300 for each candidate nominated. Most major parties use the bulk nomination system.

**Party list nominations**

In respect of candidates for election from party lists, the secretary of a registered party forwards a list of candidates to the Electoral Commission by noon on the last day for the nomination of constituency candidates. Each candidate must consent to the inclusion of his or her name on the list. The list must set out the candidates in the party’s order of preference for election. A deposit of $1,000 (inclusive of goods and services tax) must be lodged along with the list. This deposit is refunded if the party receives at least 0.5 per cent of the total number of party votes cast at the election or wins a constituency seat. However, the deposit is not refunded until the required returns of election expenses for the party have been made to the Electoral Commission.

Registered parties are obliged to adopt internal procedures for selecting parliamentary candidates that ensure that provision is made for participation in the selection process by the parties’ current financial members, or delegates elected or otherwise chosen by current financial members. Precisely what such procedures should entail is not defined in the legislation. It has been held that the requirement for registered parties to follow democratic procedures in their selection of candidates applies both to the rules of the party concerned and to the selection processes undertaken by the party. However, the obligation to provide for participation in the selection of candidates is flexible in scope and the extent to which current financial members participate in the process is a matter for the individual political party to determine. The candidates thus selected do not themselves have to be current financial members or even members of the parties in whose interest they are nominated.

The Electoral Commission has no role in enforcing the requirement for parties to have democratic candidate selection procedures. The only form of redress for party members dissatisfied with their party’s selection procedures would appear to be to bring court proceedings for compliance. Nor is a party’s candidate selection procedure a criterion for registration on the Register of Political Parties. Each party has developed its own practices for drawing up its party list of candidates—some giving more emphasis to central control, others to regional participation in the decision-making, and each with its own methods of achieving balance in the final party list.

**Campaign**

How parties and candidates conduct their electoral campaigns, within the constraints of election expenditure limits and the law against corrupt practices
(such as bribing, threatening or intimidating voters) and illegal practices (such as requirements for advertisements promoting candidates to make it clear that they are officially authorised), is largely over to them. School premises may be used free of any rental charge for the purposes of candidates’ meetings, and meetings at other venues within each electoral district will be held by candidates. If advertisements promoting a party or a candidate are displayed in a public place or on private land, on any road or visible from any road, their shape, colour, design and layout must conform with prescribed conditions. These restrictions do not apply to newspaper and periodical advertising or to handbills and small posters. Any person convicted of breaching the rules for campaigning at an election by interfering with or influencing voters on election day is liable to a fine of up to $20,000. Complaints about breaches of campaign rules are made to the Electoral Commission, and offences may be referred to the police. No campaigning is permitted on polling day itself.

Most parties will publish election manifestos setting out their policy intentions should they become the Government, or describing how they will act if their members are elected to Parliament. Promises made in election manifestos are not regarded as legally binding, but if an election promise was shown to be sufficiently seriously misleading it could conceivably constitute electoral fraud and therefore give grounds for challenging the election result. However, this must be regarded as an extreme possibility.

**Election broadcasting**

Since the 1990 general election a statutory regime has governed parliamentary election broadcasting. This regime does not apply to paid broadcasting promoting the election of an individual constituency candidate in a particular electoral district. In any other circumstances, it is unlawful to broadcast an election programme, either during the election campaign or outside the period of the campaign, except as approved under the legislation. Anyone breaching the rule for election broadcasting may be fined up to $100,000. Election programmes can be broadcast on behalf of candidates and parties only between writ day and the close of the day before election day. It is also unlawful to broadcast election programmes on television between 6 am and noon on a Sunday or Anzac Day, or to broadcast such programmes at all on television or radio on Christmas Day, Good Friday or Easter Sunday.

The allocation of money to political parties for election broadcasting has been carried out by the Electoral Commission since 1996. The task was formerly discharged by the Broadcasting Standards Authority.

**Political parties**

To qualify for an allocation of broadcasting money for an election programme, a party must have been registered on the Register of Political Parties at the dissolution or expiration of Parliament, and must have advised the commission (by a date specified by the commission and notified in the Gazette) that it considers itself

120 Electoral Act 1993, s 154.
122 Electoral Act 1993, s 197.
126 The Broadcasting (Election Programmes and Election Advertising) Amendment Bill was introduced by the Government in October 2016, and was expected to be passed by the House before the 2017 general election. The bill is intended to modernise the electoral broadcasting regime.
127 Broadcasting Act 1989, s 70.
128 Broadcasting Act 1989, s 79A.
qualified for such an allocation. The commission must take into account in allocating money the votes the party received at the previous election; votes won at intervening by-elections; the number of members of Parliament belonging to the party; relationships with other parties; other indications of public support, such as opinion polls; and, finally, the need to provide a fair opportunity for each party to convey its policies to the public by television broadcasting. Having considered these criteria, the commission has taken the approach of dividing the eligible parties into a number of categories, and treating each party within each category equally for the purposes of allocating broadcasting money.

Allocation of money to parties for election broadcasting

In each year in which an election is due, the commission is notified by political parties as to whether they consider that they will be entitled to an allocation of money to produce an election programme. The Minister of Justice is obliged to notify the commission how much money Parliament has appropriated for the cost of such production. If no appropriation is made, an amount equal to that appropriated for the previous election is deemed to have been appropriated. The same amount of money has been made available for general elections since 2005.

The commission allocates the available money among the political parties who apply to it for an allocation. In doing so the commission must consult the political parties that have notified it that they believe they will qualify for an allocation of money. Consultation with the parties must include the opportunity to meet with and be heard by the commission.

The commission may vary its allocation of money if a party ceases to be registered, fails to file a party list, or fails to comply with any conditions imposed by the commission for the expenditure of the allocation. The commission may also stagger its decision-making on election broadcasting, reflecting the uncertainty of the date of the dissolution of Parliament. For example, in 1999 the commission made an initial allocation of 90 per cent of the money at its disposal before the date of the election became known. The unallocated 10 per cent was used to allow for adjustments regarding parties registering after the initial decisions were taken but in time to qualify for some allocation of broadcasting resources. Special provisions apply to expedite decision-making procedures if an early election is called.

There is no appeal against the commission’s allocation of broadcasting money. While it is conceivable that a court might be persuaded to intervene if the commission was clearly misinterpreting its legal powers, the commission has a wide area of discretion as to how it makes its allocations, and the short time within which it must work makes it undesirable in the public interest for its task to be unduly inhibited.

129 Broadcasting Act 1989, s 75(1).
130 Broadcasting Act 1989, s 75(2).
131 Electoral Commission Decision of the Electoral Commission on the allocation of time and money to eligible political parties for the broadcasting of election programmes for the 2011 general election (31 May 2011) at 7–8.
132 Broadcasting Act 1989, s 70A.
133 Broadcasting Act 1989, s 74.
134 Electoral Commission Decision of the Electoral Commission on the allocation of time and money to eligible political parties for the broadcasting of election programmes for the 2014 general election (6 June 2014) at 3.
135 Broadcasting Act 1989, ss 75A and 76.
136 Broadcasting Act 1989, s 76(2).
137 Broadcasting Act 1989, s 76A.
139 Broadcasting Act 1989, ss 76C and 76D.
140 Alton v Broadcasting Standards Authority [1990] NZAR 571 (HC) (interim injunction refused).
Political parties to which money is made available for the making of an election programme may spend that money only on the production costs of the programme or on purchasing broadcasting time for it.\textsuperscript{141} Parties cannot use their own money to buy broadcasting time, but they can use their own money for production costs.\textsuperscript{142} A broadcaster may not discriminate between political parties in respect of the terms offered for broadcasting an election programme.\textsuperscript{143} It is possible that a broadcaster unjustifiably refusing access to a party for an election programme (for example, on discriminatory, arbitrary or unreasonable grounds) would be subject to judicial intervention.\textsuperscript{144} A radio station has banned all election advertising rather than accept a particular advertisement that it did not agree with on political grounds.\textsuperscript{145} Specific standards apply to all election programmes broadcast in New Zealand.\textsuperscript{146}

Accounts for costs incurred in producing an election programme are submitted to the Electoral Commission for payment.\textsuperscript{147} Broadcasters must provide the commission with a return showing all election programmes broadcast during the three-month period preceding polling day. These returns are available for inspection.\textsuperscript{148}

**Public information campaigns**

The election broadcasting restrictions do not prevent non-partisan public information broadcasting about the election. This can take the form of advertisements placed by the Electoral Commission, or community service broadcasting.\textsuperscript{149} The commission runs nationwide information campaigns designed to raise voters’ general awareness of the imminence of the election and how votes are cast. It also sponsors advertising to encourage registration, and local advertisements advising the location of polling places. Where such advertising is carried out within a statutory framework (as it is by the Electoral Commission), the advertising is not subject to effective control by other bodies performing private regulatory functions.\textsuperscript{150}

**News and current affairs programmes**

News and current affairs broadcasting on the election is unaffected by the election broadcasting regime.\textsuperscript{151} It is, of course, subject to the general broadcasting standards applying to all programmes. However, it has been held that in carrying out election coverage, television companies (even private ones) are performing public functions and that programming decisions are susceptible to judicial review for unreasonableness.\textsuperscript{152}

**By-elections**

By-elections are not subject to the provisions for allocation of money to produce election programmes.\textsuperscript{153} However, the limited restrictions on the times and days on which election programmes may be broadcast on television and radio apply also in respect of by-elections,\textsuperscript{154} as does the general requirement that broadcasters offer identical terms to each party or candidate for election programmes.\textsuperscript{155}

\textsuperscript{141} Broadcasting Act 1989, s 74B(1).
\textsuperscript{142} Broadcasting Act 1989, s 70(2A).
\textsuperscript{143} Broadcasting Act 1989, s 79B.
\textsuperscript{144} See, for example, R v British Broadcasting Corporation, ex parte ProLife Alliance [2003] UKHL 23 (broadcaster’s decision to exclude offensive material upheld in that case).
\textsuperscript{145} “Iwi radio station bans all election ads” The Dominion Post (3 September 2005).
\textsuperscript{146} Broadcasting Standards Authority Election programmes code of broadcasting practice (May 2011) at 6.
\textsuperscript{147} Broadcasting Act 1989, ss 74B(2), (2A), (3) and (4).
\textsuperscript{148} Broadcasting Act 1989, ss 79C and 79D.
\textsuperscript{149} Broadcasting Act 1989, ss 70(2)(d), (e).
\textsuperscript{150} Electoral Commission v Cameron [1997] 2 NZLR 421 (CA) (Advertising Standards Authority could not control how Electoral Commission carried out its public information campaign).
\textsuperscript{151} Broadcasting Act 1989, s 79(3).
\textsuperscript{152} Dunne v CanWest TV Works Ltd [2005] NZAR 577 (HC).
\textsuperscript{153} Broadcasting Act 1989, s 69A.
\textsuperscript{154} Broadcasting Act 1989, s 79A.
\textsuperscript{155} Broadcasting Act 1989, s 79B.
Pre-election economic and fiscal update

Between 20 and 30 working days before each general election (10 working days if there is an early or snap election), the Minister of Finance is obliged to publish a report containing an economic and fiscal update prepared by the Treasury. The update must include forecasts of movements in key economic data for New Zealand and projections of the Crown’s financial position, for the financial year in which the report is prepared and the two following years.156

Election expenses

The Electoral Act sets out a regulated period for election expenditure.157 It begins approximately three months before the date of the general election, depending on the circumstances under which the timing of the polling day is announced. The regulated period for a general election or a by-election always ends with the close of the day before polling day.

During the regulated period, candidates, political parties and registered third parties may spend a certain amount on election advertising. Such advertising is not limited to traditional forms of advertising such as newspapers, posters, billboards, leaflets and radio and television advertising. Any advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote, or not to vote, for a candidate or party is considered to be an election advertisement.158 Every election advertisement must carry a statement from its promoter.159

Candidates, parties and registered promoters may spend a maximum amount on election advertising. These amounts are prescribed in legislation, and revised annually in line with the Consumer Price Index.160 There is provision for apportioning expenditure for candidate advertisements published both before and during the regulated period, expenditure where a single advertisement comprises two or more candidate advertisements, and where an advertisement promotes both a candidate and a party.161 What constitutes election advertising expenses is a potentially contentious matter, which has been considered by the courts.162 The Electoral Act’s definition of advertising expenses addresses the range of circumstances under which costs have to be accounted for.163 For example, such expenses include the reasonable market value of any material used for an advertisement that has been provided free or below market value, but exclude the costs of any labour provided free of charge.

Candidates must file returns of election expenses within 70 working days of polling day.164 Each party secretary must forward an audited return of the party’s election expenses to the Electoral Commission within 90 working days of polling day.165 The Electoral Commission may prescribe the precise form in which such a declaration is to be made, which may include the categorisation of election expenses by particular activities.166

Failure by a candidate, party secretary or third party to comply with the requirements to file expense returns is an offence, and such persons are liable on

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156 Public Finance Act 1989, s 26T.
157 Electoral Act 1993, s 3B.
158 Electoral Act 1993, s 3A(1).
159 Electoral Act 1993, s 204F.
160 Electoral Act 1993, ss 205C, 206G and 206V. At 1 July 2015, the maximum amount including GST for total party expenditure at a general election was $1,109,000 plus $26,100 for each party’s electorate candidates contesting the election, and $313,000 for total registered promoter expenditure.
161 Electoral Act 1993, ss 205D, 205E and 205EA.
163 Electoral Act 1993, s 3E.
164 Electoral Act 1993, s 205K.
165 Electoral Act 1993, ss 206I and 206J.
166 Electoral Commission v Tate [1999] 3 NZLR 174 (CA).
conviction to a fine of up to $40,000. Filing a false return, or failing to file a return within 15 working days after the date it is due, may be a corrupt practice offence.\textsuperscript{167}

**Administration of the election**

The Electoral Commission is responsible for the conduct of elections and by-elections. It delegates its functions and powers to electoral officials to ensure the election is administered appropriately. The commission must designate a Returning Officer for each electoral district.\textsuperscript{168} Each Returning Officer, under the direction of the commission, makes the detailed arrangements for the conduct of the poll and the counting of votes in their particular district. In practice, all returning officers follow detailed national standards and processes prescribed by the commission. State-sector agencies are under an obligation to provide the commission with assistance in the conduct of elections,\textsuperscript{169} and State servants and others are recruited to perform duties as election officials. The commission establishes polling places (such as at schools and church halls) for voting in each electoral district. At least 12 polling places must be set up within each electoral district with access that is suitable for people with disabilities. Subject to this requirement, polling places may be established for a district even though they are actually located outside of it.\textsuperscript{170}

The commission has contingency plans for managing polling in the event of an emergency preceding or on polling day. If the area affected is local only, the commission may revoke and amend particular polling places, while continuing the conduct of the election in the rest of the electorate and country. If an emergency event has a wider effect, the commission can adjourn polling in particular places but continue with the conduct of the election elsewhere. It will then publish preliminary polling results before the adjourned poll takes place.\textsuperscript{171}

**Uncontested elections**

If there is only one candidate nominated for an electoral district or if all the other candidates withdraw leaving only one for the district, that candidate is declared elected and no poll is held for that seat. A party-vote poll will still be held.\textsuperscript{172} A member has not been returned in this way since 1943, when two members who were overseas on military service were elected unopposed.\textsuperscript{173}

**Voting**

There will almost always be more than one candidate for election as the constituency member for the district, and, in any case, a party list vote must be held in every electoral district. A poll will therefore be held. People who are lawfully registered as electors in a district are entitled to vote at any election held in that district.

The ballot paper for a general election has two parts to it and each elector has two votes. On the left-hand side of the ballot paper a voter casts a party vote for the party of their choice. On the right-hand side the voter casts a vote for a candidate for the electoral district. Candidates are arranged on the ballot paper in alphabetical order. Their party affiliations are printed underneath the candidates’ names. Where a registered party has a constituency candidate, its party name appears on the party vote side of the ballot paper opposite that candidate’s name. Where a candidate for the electoral district (for example, an independent) does not have a corresponding party standing for the party vote, the space on the party

\textsuperscript{167} Electoral Act 1993, ss 205N, 206N and 206ZE.
\textsuperscript{168} Electoral Act 1993, ss 20A and 20B.
\textsuperscript{169} Electoral Act 1993, s 20D.
\textsuperscript{170} Electoral Act 1993, s 155.
\textsuperscript{171} Electoral Commission Plans for managing adjournment of polling in an emergency (14 July 2014).
\textsuperscript{172} Electoral Act 1993, s 148.
\textsuperscript{173} Neill Atkinson Adventures in Democracy—A History of the Vote in New Zealand (University of Otago Press, Dunedin, 2003) at 155.
vote side of the ballot paper is left blank. Parties without individual constituency candidates are arranged alphabetically on the party vote side of the ballot paper, below the parties with candidates.  

Voting is carried out in secret at a polling place on a Saturday between 9 am and 7 pm. The voter votes by ticking the circle to the right of the name of the party or candidate (as the case may be) for whom he or she wishes to vote.  

Special and advance voting

New Zealand first made provision for absentee or “special” voting in 1890, for seamen. A general right to cast an absentee vote was introduced in 1905 and voting by post was first permitted in 1928. Regulations allow people who will be absent from New Zealand or their own electoral district on polling day, or will otherwise be unable (for example, because of illness or infirmity) to vote at a polling place within the district, to vote by special vote. A special vote may be cast within a specified period before polling day, for example, if the elector is intending to go overseas shortly before the election. To cast a special vote, the elector must make a written application to an official authorised to issue special ballot papers. Effectively, electors may vote at any polling place in New Zealand, though they are encouraged to vote at a polling place in their own electoral district.

Since 2011, voters have been able to vote in advance in their electorates without having to make a written application to do so. As a result the volume of advance voting has become much larger. There were 717,579 advance votes cast in the 2014 general election, compared with 334,558 in the 2011 general election and 270,427 in 2008.

There is currently no provision for online voting in New Zealand. Special ballot papers may be issued by electronic means to voters outside New Zealand, but the ballot paper must be completed by conventional means and returned by faxing, posting, or couriér ing the paper to the commission, or posting, couriering, or hand-delivering the paper to the nearest diplomatic post. Special votes may be returned to the commission electronically if it makes a system for secure transmission of papers available. In 2014, voters could return their papers by scanning and uploading them to the commission’s website.

Completed special ballot papers are sealed and deposited in a ballot box. A high proportion of special votes have been disallowed in the past mainly because the electors were not enrolled. For example, 20 per cent of candidate and eight per cent of party special votes cast at the 2011 general election were disallowed. Special votes have also been disallowed because the voters voted for a constituency candidate standing in an electoral district in which the voters were not enrolled. Since the 2002 election a voter who votes for a candidate in an electoral district in which the voter is not enrolled has the party vote counted rather than the entire vote disallowed.

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174 Electoral Act 1993, s 150 and sch 2, form 11.
175 Electoral Act 1993, s 161.
176 Electoral Act 1993, s 168.
178 Electoral Act 1993, s 172.
181 Electoral Regulations 1996, regs 45A, 47, 47A, and 47B.
183 Electoral Act 1993, s 178(5A).
Turnout

Turnout at New Zealand elections has traditionally been high. A survey of elections held between 1945 and 1997 found that New Zealand and Iceland had, at 89 per cent, the highest average turnout among countries where voting is not compulsory. While some countries with compulsory voting scored higher (Australia’s average for the survey period, for example, was 94 per cent), others with compulsory voting had lower turnouts than New Zealand.184 However, there is evidence of a decline in New Zealand in recent years. Average registered voter turnout was estimated at 77.9 per cent in the four elections from 2002 to 2011, and was 74 per cent in 2011,185 which, while reasonably steady, reflects probably the lowest turnout since 1902. (Turnout at the 1978 election was officially recorded as 69.15 per cent but there was considerable duplication of electoral rolls. A more realistic estimate for turnout at that election is 79.86 per cent.186) The overall turnout figure can also disguise considerable differences between the turnout of voters enrolled on the general roll and those on the Māori roll. Turnout of voters on the Māori roll was only 58 per cent in 2011.187

Counting of votes

The Returning Officer may, if authorised by the commission, conduct a preliminary count of votes received before polling day (advance ordinary votes), beginning after 2 pm on polling day.188 The votes must be counted in a restricted area from which those who enter (officials and scrutineers) may not leave without the Returning Officer’s permission until the close of the poll, and no information about the results of the count may be communicated to any non-authorised person.189

After the polls have closed, the manager of each polling place conducts a count of the votes cast for each candidate and for political party lists.190 The aggregate totals from these preliminary counts are communicated to the Returning Officer for the electoral district, and entered into a national results system controlled by the commission. The results are fed to the media and posted on a website. Together with any advance vote totals, these figures form the basis of provisional election results released during the course of the evening of polling day. All ballot papers are then sent to the Returning Officer.

Over the next few days the Returning Officer for each district scrutinises the rolls for irregularities (such as a voter being issued with more than one ballot paper).191 The Returning Officer then makes an official count of the votes from the various polling places in the district and counts any special votes remaining uncounted for the district, disallowing all ballot papers that do not carry an official mark or do not clearly indicate the constituency candidate or the party for which the voter desired to vote.192

Scrutineers appointed by candidates or, where a party does not have an electorate candidate, the parties themselves, may witness the counting (and any recounting) of the votes.193

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188 Electoral Act 1993, s 174C.
189 Electoral Act 1993, ss 174D and 174E.
190 Electoral Act 1993, s 174.
191 Electoral Act 1993, ss 173 and 176.
192 Electoral Act 1993, s 178.
Declaration of result and recounts

When the official count is completed the result is reported to the Electoral Commission.\textsuperscript{194} As soon as practicable after receiving this information the commission must declare the results of the voting by notice in the \textit{New Zealand Gazette}.\textsuperscript{195} The results are also released to the media and published on a website.

Any constituency candidate may apply within three working days of the public declaration of the result to a District Court judge for a recount of the votes cast for constituency candidates in that district.\textsuperscript{196} If as a result of conducting the recount the judge finds that the original result was incorrect, the judge orders the commission to publish an amended declaration of the result.\textsuperscript{197} Similarly, the secretary of any registered party may require a judicial recount of the party votes recorded on ballot papers in the electoral district, and the judge may also order that the declared result of the party vote be amended.\textsuperscript{198} Alternatively, the secretary of a party can seek from the Chief District Court Judge a national recount of party votes recorded in every electoral district. In this case a deposit of $90,000 (including goods and services tax) must be paid. A national recount is carried out by District Court judges in each electoral district under the Chief District Court Judge’s direction. The deposit can, at the discretion of the Chief District Court Judge, be used to defray the costs of the recount.\textsuperscript{199}

Return of the writ for constituency members

The Electoral Commission, after declaring the result, and if satisfied that no application is to be made for a judicial recount, or after any recount has taken place, endorses on the writ the full name of every constituency candidate declared to be elected and the date of the endorsement, and delivers the writ to the Clerk of the House. The date endorsed on the writ is the date of the return of the writ, which should be (but is not always) within the time originally specified in the writ for its return.\textsuperscript{200} The returned writ is, in effect, a certificate of election, proving the right to membership of the House of the person named on it. It has been called the best available evidence that a person is a member of Parliament.\textsuperscript{201} The elected candidate comes into office as a member of Parliament on the day after the date of the return of the writ.\textsuperscript{202}

On being informed of an error on a returned writ, the House has ordered an official (formerly the Clerk of the Writs) to attend the House in person with the original writ to amend it or correct it.\textsuperscript{203} An Electoral Commissioner now has power to correct an error in the name of a member as recorded on the writ.\textsuperscript{204} A returned writ may also need to be amended if the result in an electoral district is overturned following an election petition to the High Court.

Party list returns

The results of the party voting on the ballot papers as declared by the Electoral Commission are aggregated into national totals.

Where a party does not receive more than five per cent of the total votes cast and no constituency candidate belonging to that party is elected for an electoral district, the votes cast for the party are entirely disregarded. If a constituency

\textsuperscript{194} Electoral Act 1993, s 179(1).
\textsuperscript{195} Electoral Act 1993, s 179(2).
\textsuperscript{196} Electoral Act 1993, s 180(1).
\textsuperscript{197} Electoral Act 1993, s 180(10).
\textsuperscript{198} Electoral Act 1993, s 180(2), (10).
\textsuperscript{199} Electoral Act 1993, s 181.
\textsuperscript{200} Electoral Act 1993, s 185.
\textsuperscript{201} Forbes v Samuel [1913] 3 KB 706 at 719, 720 and 725.
\textsuperscript{202} Electoral Act 1993, s 54(1)(a).
\textsuperscript{203} (19 May 1882) [1882] JHR 4 (Moeraki election return); (1997) 559 NZPD 1117–1118 (Ilam election return). Both returns referred to the member by the wrong given name.
\textsuperscript{204} Electoral Act 1993, s 186.
candidate belonging to a party that gains less than five per cent of the party vote is returned for an electoral district, then the candidate’s party also shares in the allocation of party seats, notwithstanding its failure to achieve the threshold. The commission calculates the number of party list seats in the new Parliament to which every party achieving the five per cent threshold of votes or electing a constituency member is entitled.205

The mathematical methodology used to allocate party list seats is known as the Sainte-Laguë formula after the political scientist who devised it. The application of this formula results in a near-proportional allocation of seats among the various parties entitled to party list seats. If a party has won more constituency seats than it is entitled to on the basis of its share of the party vote, it keeps the constituency seats it has won and the size of the House is increased accordingly until the next election. This occurrence is referred to as an “overhang”. The first overhang occurred at the 2005 general election when a party won four constituency seats but its share of the party vote would have entitled it to only three seats. The party seats to which each party is entitled are allocated by the Electoral Commission to the candidates on each list in the party’s order of preference. The same person may be a candidate in a constituency and also be included on a party list. Indeed this is common. A person who has already been elected for an electoral district is thus disregarded by the commission in allocating party list seats, and the next candidate on the list is selected. If a party has not nominated enough candidates on its party list to take up all the seats to which it is entitled, those seats are not filled and the size of the House is reduced accordingly.

When the process of allocating party list seats is complete, the Electoral Commission declares the candidates to whom party list seats are allocated to have been elected, and forwards to the Clerk of the House a return listing their full names.206 These members come into office as members of Parliament on the day after this return is made.207 The commission may correct any error in the name of a member on the list of members elected.208

Storage of ballot papers

Unused ballot papers are destroyed by the returning officers. The ballot papers that were used at an election are packaged and forwarded by the returning officers to the Clerk of the House, who must retain the packages unopened for six months before they can be destroyed. (The legislation that requires the preservation of public records does not apply to such papers.209) A court of competent jurisdiction or the House itself may order any of the packages so delivered to the Clerk to be opened.210 A “court of competent jurisdiction” is any court with jurisdiction over any matter in which the question of voting at an election is relevant.211 Thus, the High Court on the trial of an election petition can order the opening of the packages, and the District Court has done so in the case of a prosecution for double voting.

DISPUTED ELECTIONS

Originally, the House was declared to be judge without appeal of the validity of election of each of its members.212 Until 1880 anyone questioning the validity of an election did so by means of a petition to the House, which the House appointed a
Constituency seats

Election petitions complaining of the election or return of a member for an electoral district may be brought by defeated candidates or by electors of the district. They may also be brought by anyone “claiming to have had a right to be elected or returned at the election”, which appears to mean anyone at all on the electoral roll whether or not they offered themselves as candidates in that electoral district. Legal aid is not available for those involved in bringing an election petition. An election petition must be presented to the High Court within 28 days of the public notification of the official results. This requirement for a petition to be filed within a fixed, relatively short time of the result being announced is mandatory. In Australia it has been held to be an essential condition or jurisdictional requirement of any challenge to the election result. The time bar is designed to reflect the public interest in resolving questions about disputed elections expeditiously and with finality.

The trial of an election petition takes place before three judges of the High Court named by the Chief Justice under rules made for the purpose. The trial is held in open court, and the court has jurisdiction to inquire into and adjudicate on any matter relating to the petition that it sees fit. It may direct a recount or scrutiny of some or all of the votes cast at the election; and, where another candidate claims to have been elected, may receive evidence rebutting such a claim as if an election petition had been presented against that person’s election. The onus of proof is on the petitioner in any election petition to establish any element of unlawfulness or impropriety.

The decision of the High Court as to who was duly elected or whether the election was void is final and conclusive without any right of appeal. The High Court (by majority if need be) certifies to the Speaker its determination as to whether the member whose election is at issue was duly elected, whether one of the other candidates was duly elected or whether the election in that district was void. The court must also report on any allegations of corrupt or illegal practices made in the petition, and may also make a special report to the Speaker on any matters arising in the course of the trial that it considers should be submitted to the House. The court must also order the Electoral Commission to undertake a reallocation of list seats in the event of a successful election petition.

The Speaker presents the certificate and any accompanying report to the House. The House then orders them to be entered in its journals, and gives any necessary directions for confirming or altering the return or for otherwise carrying out the determination. If the original writ is required to be amended because the court certifies that a candidate other than the one originally returned was properly elected, the House may order the Electoral Commission to attend with the writ and to amend it accordingly. Where the court confirms the validity of the election of

213 Electoral Act 1993, s 230(1)(a), (c).
214 Electoral Act 1993, s 230(1)(b).
215 Legal Services Act 2011, s 7(5)(b).
216 Electoral Act 1993, s 231.
218 Electoral Act 1993, s 235(1).
219 Electoral Act 1993, s 234.
220 Electoral Act 1993, s 236.
222 Electoral Act 1993, s 242.
223 Electoral Act 1993, s 243.
224 Electoral Act 1993, ss 244 and 245.
225 Electoral Act 1993, s 243A.
226 Electoral Act 1993, s 246(2).
a sitting member, the court’s certificate is merely entered in the journals without any other direction from the House. 228 No notice is required of a motion to enter the court’s certificate in the journals. 229

Party list seats
An election petition seeking a review of the procedures and methods used to allocate seats to political parties may be presented by the secretary of a party listed on the ballot paper. Such a petition must be presented to the Court of Appeal within 28 days of the declaration of the election of party list members. 230 The Court of Appeal then tries the petition. Any trial of an election petition relating to party list seats is concerned only with how the seats were allocated. No challenge to the fact that the vote of an elector was allowed or disallowed is permitted, nor may any allegation be made of corrupt or illegal practices at the election. 231

The Court of Appeal determines whether the procedures used to allocate seats were correctly applied and consequently whether a valid return of members for party list seats has been made. 232 The court may make orders invalidating any candidate’s return, declaring another candidate to have been elected or requiring the Electoral Commission to repeat the allocation procedures for party list seats. 233

VACANCIES
In addition to provisions disqualifying a person who is otherwise qualified from becoming a member of Parliament in the first place, a number of provisions operate to disqualify a person who is already a member of Parliament from continuing to be a member and thus causing a supervening vacancy in the member’s seat.

The following events cause the seat of a member of Parliament to become vacant.

Failing to attend the House 234
A member who fails, without the House’s permission, to attend the House for one whole session of Parliament vacates his or her seat. Two members have lost their seats for failing to attend throughout a session. 235 The fact that a member who is in lawful detention stands in danger of losing his or her seat for not attending the House is not a ground for relief against the consequences of the decision to detain. 236 But disqualification on this ground is less likely to arise now given the longer parliamentary sessions (up to three years compared with up to one year formerly) throughout which a member would have to be absent to attract it, and the House’s more liberal rules on granting permission for members’ absences. (See p 55.)

Taking an oath or making a declaration or acknowledgement of allegiance to a foreign State, foreign Head of State or foreign power, or becoming entitled to the rights, privileges or immunities of, a subject or citizen of a foreign State or power 237
These disqualifications are directly linked with the Oath of Allegiance that members must take before sitting or voting in the House. A violation of the allegiance proclaimed in the oath leads to the member’s disqualification. It makes no difference whether New Zealand has friendly relations with the foreign State or power concerned, nor whether New Zealand may share a Sovereign with the other

229 (1894) 83 NZPD 18–19.
231 Electoral Act 1993, s 260.
232 Electoral Act 1993, s 262(a), (b).
233 Electoral Act 1993, s 262(c).
235 Thomas Fraser (Hampden) in 1862 and Patrick Charles Webb (Grey) in 1918.
237 Electoral Act 1993, ss 55(1)(b), (c).
country involved. It may be doubted whether New Zealand does any longer share a Sovereign with those countries, such as the United Kingdom, Australia and Canada, where the person of the Sovereign is the same. In New Zealand law the Sovereign is now Sovereign in right of New Zealand, a separate sovereignty from that of Her Majesty’s other realms.) However, the self-governing States with special constitutional relationships with New Zealand—Cook Islands, Niue and Tokelau—are unlikely to be considered foreign States or powers to which the provision applies.

Dual nationality at the time of a member’s election is not a disqualification, but voluntarily acquiring a foreign citizenship or the status attaching to a foreign citizenship subsequently may result in disqualification. Acquisition of a foreign citizenship or of the rights attaching to a foreign citizenship solely as a result of marriage does not disqualify the member. Nor does a member who acquires another citizenship as a consequence of the member’s birth in another country or because of another country’s rules on acquisition of citizenship by descent thereby vacate his or her seat. To incur disqualification a member must have taken some positive action to acquire the foreign citizenship concerned. A member who renews a passport or travel document issued to the member before his or her election does not thereby lose his or her seat, though if the process of renewal involves taking an oath or making a declaration of allegiance to that foreign State, the member may incur a disqualification.

Becoming an honorary consul for a foreign State is not incompatible with membership of the House. A number of members have acted as honorary consuls for foreign States. One member continued to act as an honorary consul after becoming a Minister.

Ceasing to be a New Zealand citizen

This disqualification is the counterpart to the requirement that a person cannot be elected to Parliament unless he or she is a New Zealand citizen. A member who subsequently loses his or her New Zealand citizenship also ceases to be a member of Parliament. New Zealand citizenship can be lost by voluntary renunciation. A person can also be deprived of New Zealand citizenship where he or she acquires another citizenship and acts in a manner contrary to the interests of New Zealand or where the person originally acquired New Zealand citizenship fraudulently. The mere fact that a person acquires a foreign citizenship does not affect that person’s New Zealand citizenship, though a member voluntarily acquiring another citizenship would incur disqualification in any case.

Accepting nomination as, agreeing to be a candidate for election as, or agreeing to appointment as a member of Parliament of any other country or a governing body of any association of States exercising governing powers

Agreeing to become a candidate for election to a foreign legislature (whether at a national, state, territorial or municipal level) automatically vacates a member’s seat.

238 See, for example: Re Wood (1988) 167 CLR 145.
239 See (6 August 2003) 610 NZPD 7719–7818 (Electoral (Vacancies) Amendment Bill).
240 Electoral Act 1993, s 55(2).
241 Electoral Act 1993, s 55AA(a).
242 Electoral Act 1993, s 55AA(b).
243 See, for example: (1950) 289 NZPD 518 (Panama); Audrey Young “MP will be Monaco’s man in NZ” The New Zealand Herald (5 February 2003).
244 Sir Clifton Webb, first appointed as consul for Panama in 1944, continued in that role after becoming a Minister in 1949. See: Sheila M Belshaw A Man of Integrity—A Biography of Sir Clifton Webb (Dunmore Press, Palmerston North, 1979) at 77–78.
245 Electoral Act 1993, s 55(1)(ca).
246 Electoral Act 1993, s 47(3).
247 Citizenship Act 1977, s 15.
248 Citizenship Act 1977, ss 16 and 17.
So too does agreeing to become a member of a governing body of an association of countries, states, territories or municipalities of which New Zealand is not a member which exercises governing powers. The legislation itself gives the European Union as an instance of such an association. Thus a member of Parliament agreeing to be a candidate for election to the European Parliament or to be appointed to the European Commission would thereby vacate his or her seat.

Conviction of an offence punishable by imprisonment for a term of two years or more

This disqualification applies regardless of the term of imprisonment to which the member is actually sentenced. If the offence of which the member is convicted carries a possible sentence of two years or more of imprisonment, the seat becomes vacant. A person who was discharged without conviction (which is deemed to be an acquittal) would not be disqualified. In the United Kingdom a successful appeal against conviction was held to remove any incapacity to sit created by the conviction, and, as the vacancy caused by the original conviction had not yet been filled, the court, in an endeavour to remove all penalties flowing from the conviction, restored the member to office. In New Zealand, conviction creates an immediate vacancy rather than a continuing incapacity to sit (though serving a resulting term of imprisonment may create an incapacity to sit). Nevertheless, a successful appeal against conviction would seem to remove the justification for disqualification in the first place; and the same principles for avoiding the loss of a member’s seat, if this was still possible, might apply in New Zealand. A finding of contempt of court is not conviction of an offence, and a member found in contempt does not vacate his or her seat.

The registrar of a court in which a member is convicted is obliged to advise the Speaker of the conviction within 48 hours.

Conviction of a corrupt electoral practice or being reported by the High Court in its report on the trial of an election petition to have been guilty of a corrupt practice

The same principles for avoiding disqualification in the case of a successful appeal of a conviction of a corrupt electoral practice as were discussed above in regard to conviction for an offence would seem to apply, if this is still possible.

Becoming a public servant

A member becoming a public servant thereby vacates his or her seat. If a member continues to sit knowing that his or her seat has become vacant on this ground, he or she is liable to a fine of $400 for each day he or she sits, in addition to the loss of the seat.

Resigning the seat by signing a written notice addressed and delivered to the Speaker

In the early days of parliamentary government in New Zealand, resignation was very common. (There were 46 resignations in the fourth Parliament between 1866 and 1870, out of a House of 70, including those of one member who resigned on two occasions in the course of the Parliament. One member resigned parliamentary

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251 Sentencing Act 2002, s 106.
253 (6 April 2004) 616 NZPD 12365; Clerk of the House of Representatives, Hon Nicholas Smith MP—finding of contempt (6 April 2004).
254 Electoral Act 1993, s 57.
256 Electoral Act 1993, s 55(1)(e).
258 Electoral Act 1993, s 55(1)(f).
Electoral seats on five occasions in the course of his career.\textsuperscript{259} Resignation subsequently became less common, but has been increasing in frequency, especially among party list members since the introduction of the MMP electoral system.

Members may, if they wish, pledge to resign in certain circumstances, such as a majority of electors calling on them to do so,\textsuperscript{260} or their leaving their party. But such pledges are not legally enforceable.\textsuperscript{261} It is regarded as a contempt of the House for anyone to offer a financial inducement to a member to resign\textsuperscript{262} or to attempt to procure a member to resign by threats or other improper means. But merely calling on a member to resign for a supposed breach of an election promise or for other reasons is an accepted part of political debate, and is not expected to issue in any action.

A member’s reasons for resigning are no concern of the Speaker. Nor is the Speaker concerned with the circumstances that caused a member to resign, although if improper conduct was involved, the House may wish to inquire whether a contempt has been committed. The Speaker cannot refuse to receive a written resignation on the ground that the member has been subject to undue influence,\textsuperscript{263} though the Speaker may privately counsel the member before the resignation is tendered.

A resignation must be unequivocal. It is direct advice to the Speaker that the member is resigning his or her seat. Resignation cannot be construed from a series of documents. It must itself be contained in a single notice.\textsuperscript{264} Once a member has given the Speaker written notice of resignation, the notice takes effect according to its tenor. It cannot be withdrawn after it has taken effect. Unless the notice is postdated, resignation is effective immediately on its receipt by the Speaker. At that point the member’s seat becomes vacant. But members often give written notice of resignation to take effect on a future day. A postdated resignation can be withdrawn before it takes effect, whether the Speaker has already informed the House of its receipt or not. No formal steps to fill a vacancy caused by resignation are taken until the notice takes effect.

\textbf{Member’s election being declared void on an election petition}\textsuperscript{265}

(See pp 41–42.)

\textbf{Death}\textsuperscript{266}

The registrar by whom a member’s death is registered is obliged to notify the Speaker of the registration within 12 hours.\textsuperscript{267}

\textbf{Becoming mentally disordered}\textsuperscript{268}

A member who is made the subject of a compulsory treatment order or is detained in a hospital under an in-patient order is subject to disqualification on the grounds of mental disorder.\textsuperscript{269} The Speaker must be advised as soon as possible of either of these circumstances occurring.\textsuperscript{270} A medical examination after at least six months’ detention must be made before the Speaker may declare the seat vacant for reasons of mental disorder.\textsuperscript{271}

\textsuperscript{259} Thomas Dick (City of Dunedin three times, Port Chalmers twice).
\textsuperscript{261} Privileges Committee, report relating to the status of Manu Kopu as a member of Parliament (September 1997) [1996–1999] AJHR I.15B.
\textsuperscript{262} (1998) 574 NZPD 14721 Kidd.
\textsuperscript{263} Vikram Singh v Shri Ram Ballabhji Kasat [1995] AIR (Madhya Pradesh) 140.
\textsuperscript{264} Privileges Committee, report relating to the status of Manu Kopu as a member of Parliament (September 1997) [1996–1999] AJHR I.15B.
\textsuperscript{265} Electoral Act 1993, s 55(1)(g).
\textsuperscript{266} Electoral Act 1993, s 55(1)(h).
\textsuperscript{267} Electoral Act 1993, s 58.
\textsuperscript{268} Electoral Act 1993, s 55(1)(i).
\textsuperscript{269} Electoral Act 1993, s 56; Mental Health (Compulsory Assessment and Treatment) Act 1992, pt 2.
\textsuperscript{270} Electoral Act 1993, s 56(1), (2).
\textsuperscript{271} Electoral Act 1993, s 56(4).
Any one of these listed events causes the member concerned to lose the seat. But any such events must occur after the member’s election to be relevant. They do not in themselves disqualify a person from seeking and securing election to the House in the first place (though some of them, such as New Zealand citizenship, are common to the rules qualifying a person for election to the House). In exceptional circumstances, Parliament has removed by legislation a disqualification that has been incurred so as to permit a member to remain in Parliament.272

All members vacate office at the close of polling day for the next election,273 and these vacancies are filled at the ensuing general election.

### FILLING VACANCIES

**Determining that a vacancy exists**

The responsibility for setting in train the machinery for filling a vacancy in the membership of the House rests with the Speaker. The Speaker is enjoined to act, without delay, to fill a vacancy (whether for an electoral district or arising from a party list) once satisfied that a seat has become vacant.274 In most cases the Speaker makes the judgement that a vacancy exists unprompted on receiving the relevant information or formal advice. However, both the House and the courts may have a role in establishing or helping to establish for the Speaker whether a vacancy in fact exists.

As far as the House is concerned the Speaker has indicated that before taking the drastic step of declaring the seat of a sitting member to be vacant, the Speaker will give the member concerned leeway to argue to the contrary.275 In a doubtful case this may involve the Speaker referring the matter to the Privileges Committee for consideration.276 The Speaker’s decision on whether a vacancy exists would then be informed by the report of the Privileges Committee and the House’s consideration of it. The Speaker has delayed taking a decision in such circumstances to permit the committee to report and the House to debate the report.277 Ultimately, however, the statutory duty of determining whether a vacancy exists is the Speaker’s, not the House’s.278

It is conceivable that, in a certain case, a court of competent jurisdiction could declare that a member’s seat had become vacant. This would arise most obviously with regard to petitions, where the High Court (for constituency members) and the Court of Appeal (for party list members) may declare a member’s election void, thus establishing a vacancy. Indeed, if the attack is on the validity of the member’s election in the first place, this is the only means of establishing that there is a vacancy. A court has also considered the question of a vacancy arising subsequent to a member’s election on specific statutory referral by Parliament. The Court of Appeal was asked to certify if a particular member’s seat had become vacant due to bankruptcy.279 But it is also conceivable that the question of whether a member was disqualified could arise for resolution incidentally by a court (for example, on a prosecution for sitting as a member after becoming a public servant, if there was a dispute as to whether the member had in fact become a public servant) or directly if a declaration as to the member’s status was sought;280 though the court might consider in the latter case that this was a matter for the Speaker or the House to determine, at least initially, rather than the court to rule on.

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272 Finance Act 1941, s 37; Electoral (Vacancies) Amendment Act 2003, ss 4 and 5.
273 Electoral Act 1993, s 54(1)(b), (2)(b).
274 Electoral Act 1993, ss 129(1) and 134(1).
275 (6 August 2003) 610 NZPD 7636, 7749 Hunt.
276 Ibid, at 7636.
277 Ibid, at 7749.
278 Electoral Act 1993, ss 129(1) and 134(1).
279 Awarua Seat Inquiry Act 1897.
280 See, for example: Ré Wood (1988) 167 CLR 145; Sue v Hill (1999) 199 CLR 462 at 568 per Kirby J dissenting.
The House itself claims the power of determining the qualifications of its members to sit and vote in the House, and a related question may be considered by the House as a question of privilege. (See pp 759–760.) The House’s determination of the right of a person to sit and vote in the House may lead the Speaker to initiate the provisions for the filling of a vacancy, or to confirm that there is no vacancy to fill.281 No question as to the validity of the House’s procedures arises from the fact that a member continues to sit and participate in its proceedings after incurring a disqualification.282

Electoral district vacancies

A vacancy arising among the members representing electoral districts is filled by a by-election.

The Speaker must publish a notice of the vacancy in the New Zealand Gazette.283 The Speaker also advises the House of the vacancy, though if the House is not sitting when the vacancy arises, this advice may not be communicated until after the publication of the notice or indeed until after the vacancy has been filled. The Governor-General is obliged within 21 days of the publication of a vacancy notice to issue a writ to the Electoral Commission directing it to make all necessary arrangements for the conduct of a by-election to fill the vacancy.284 This direction appoints a date (which must be a Saturday) for polling.285 The Governor-General may by Order in Council postpone the issue of a writ for a by-election for up to 42 days after the publication of the vacancy.286 A by-election has also been postponed for a few weeks by specific legislation.287 The rules for conducting a by-election and returning the writ are similar to those for conducting a general election. The main difference is that there is no party vote.

Since 1994 (to late 2016) there have been only 11 by-elections, four of them occurring during a single parliamentary term, the 49th Parliament (2008–2011).

Party list vacancies

In the case of a vacancy arising among members elected from a party list, the vacancy is filled from the party list.

The Speaker publishes a notice of the vacancy in the New Zealand Gazette.288 The Speaker also advises the House of the vacancy, in the same way as for a vacancy among constituency members. As soon as practicable after the publication of the notice the Governor-General must direct the Electoral Commission to proceed to fill the vacancy.289 The commission then asks the secretary of the party concerned if the next-ranked unelected candidate on the list of the party to which the member vacating the seat belonged as at nomination day for the preceding election (whether or not the vacating member still belonged to the party when the vacancy occurred) remains a member of the party. If the candidate does, the commission then asks him or her if he or she is still willing to be a member of Parliament. If that person is no longer willing to be a member or is no longer alive, then the next candidate on the list is approached and so on, until a candidate from the party’s list is found who is still a member of the party and is willing to take up the vacant seat. If there is no such candidate willing to do so, the seat remains vacant until the next general election.290 The Electoral Commission declares the new member elected

281 See, for example: Privileges Committee, report relating to the status of Manu Kopu as a member of Parliament (September 1997) [1996–1999] AJHR I.15B.
282 Vardon v O’Loghlin (1907) 5 CLR 201; Re Wood (1988) 167 CLR 145.
283 Electoral Act 1993, s 129(1).
284 Electoral Act 1993, s 129(2).
286 Electoral Act 1993, s 129(3).
287 Patea By-election Act 1954.
288 Electoral Act 1993, s 134(1).
289 Electoral Act 1993, s 134(2).
290 Electoral Act 1993, s 137.
by publishing a notice in the New Zealand Gazette and files a return with the Clerk of the House or indicates that the vacancy cannot be filled, as the case may be.\textsuperscript{291}

**Vacancies not filled in certain circumstances**

Where a vacancy occurs in the period between a dissolution of Parliament and the close of the subsequent polling day, it is not filled.\textsuperscript{292}

The House also has power to dispense with the holding of a by-election or the filling of a party list vacancy in two sets of circumstances. These are if Parliament is due to expire within six months of the vacancy arising, or if the Prime Minister informs the House in writing that a general election is to be held within six months of the occurrence of the vacancy. In either case the House can, by a resolution passed by a majority of 75 per cent of all members, direct that no steps be taken to fill the vacancy.\textsuperscript{293}

Where the procedure for filling a vacancy caused by the conviction of a member for a crime or corrupt practice had been put in train it could be cancelled by order of a court where that conviction is overturned on appeal.\textsuperscript{294} (See p 44.) Otherwise, the standard procedures for filling a vacancy in the membership of the House can be set aside only by special legislation. This occurred in 1943 and 1987, when all by-elections were dispensed with for the remainder of those Parliaments.\textsuperscript{295}

\textsuperscript{291} Electoral Act 1993, s 138.

\textsuperscript{292} Electoral Act 1993, ss 129(4) and 134(3).

\textsuperscript{293} Electoral Act 1993, ss 131 and 136; (1996) 555 NZPD 12542–12562.

\textsuperscript{294} Attorney-General v Jones [2000] QB 66.

\textsuperscript{295} By-elections Postponement Act 1943, s 2(1); Electoral Amendment Act (No 2) 1987, s 2.