

∞

New Zealand – 2020 general election – not an ordinary election, not an ordinary time

Dean R Knight*

New Zealand's general election in October 2020 was, as the Prime Minister put it in her victory speech, 'not ... an ordinary election', just as it was 'not ... an ordinary time'.¹ The election will be remembered as the Covid-19 election: the eventual timing of polling day, logistics for voting, nature of political campaigning and, inevitably, the fate of political parties were all heavily coloured by the pandemic.² And the outcome – the first single-party majority since proportional representation was introduced – and the slightly innovative Cabinet arrangements adopted by government parties added some constitutional intrigue.

The general election was scheduled for 19 September 2020 but ended up being delayed by four weeks. The exclusive power to advise the Governor-General to dissolve Parliament and specify polling day lies with the Prime Minister (as long as they command confidence and subject to the maximum term of Parliament).³ The Prime Minister had originally called a mid-September election, announced at the beginning of the year in accordance with recent convention.⁴ In mid-August, the formal arrangements for the election were about to be implemented. The day before Parliament was set to be dissolved, there was an outbreak of the virus in Auckland and the region was locked down. The Prime Minister advised the Governor-General to delay the dissolution of Parliament and issue of the electoral writ by a few days, given the uncertainty of the outbreak and the irreversible nature of dissolution. Most political parties, including coalition parties, favoured delaying the election for some time. Some speculated about the possibility that opposition parties might peel off one of the coalition parties, seize power and set

* Faculty of Law and New Zealand Centre for Public Law; Victoria University of Wellington (dean.knight@vuw.ac.nz).

¹ 'Ardern receives rapturous applause in victory speech' *Otago Daily Times* (17 October 2020) <www.odt.co.nz>.

² See generally Dean R Knight, 'Stamping out Covid-19 in New Zealand: legal pragmatism and democratic legitimacy' [2021] Public Law _.

³ Cabinet Manual 2017, [2.6]; Constitution Act 1986, s 18 (3 years, in this case, dissolution by 12 October 2020).

⁴ Jacinda Ardern, 'PM announces election date as 19 September' (28 January 2020) <www.beehive.govt.nz>.

an election date most favourable for them.⁵ However, such political shenanigans did not eventuate. Less than a week later, after consulting other political parties and electoral officials, the Prime Minister announced that the election would be delayed until 17 October 2020, with Parliament sitting for an additional three weeks.⁶ The Prime Minister is to be commended for depoliticising the unusual decision to defer the election.

When the general election eventually took place, the regional lockdown and other heightened restrictions had been lifted. However, election logistics still reflected the need for caution during the pandemic. A health order was promulgated providing for contact tracing and physical distancing at polling booths, as well as overriding any travel and gathering restrictions in any other health orders (although none in fact applied on polling day).⁷ The chief electoral officer's existing emergency power to delay polling for short periods was kept in reserve in case of further disruption.⁸

Prime Minister Jacinda Ardern and her Labour party were returned to power.⁹ And, in two referendums held in conjunction with the election, a self-executing poll on euthanasia legislation passed (65.1 per cent in favour) and an advisory poll on the personal use of cannabis failed (48.1 per cent in favour). Despite the pandemic, voter turnout was not adversely affected. Over 82% of the voting population voted – a record high in the last two decades.

Labour significantly increased their support (from 36.9% to 50.0% of the vote). This is the first time since the mixed-member electoral system (MMP) was introduced in 1996 that a single party has won a majority of seats in Parliament. In contrast, the main opposition party, National, fared poorly (down from 44.4% to 25.6%), after polling at 46% in the month when Covid-19 first infiltrated New Zealand.¹⁰ The result has been widely interpreted as a strong endorsement of the government's response to the pandemic.¹¹ Other government parties had mixed

⁵ Dean R Knight, 'Law-making and accountability in responding to Covid-19: the case of New Zealand' (Briefing paper, *Melbourne Forum: Representation in Democracies During Emergencies*, University of Melbourne, September 2020).

⁶ Jacinda Ardern, 'Election to be held on 17 October' (17 August 2020) <www.beehive.govt.nz>.

⁷ Covid-19 Public Health Response (Election and Referendums) Order 2020.

⁸ Electoral Act 1993, s 195A.

⁹ Electoral Commission, '2020 General Election official results' (6 November 2020) <www.elections.nz>.

¹⁰ 'February 13 poll: National and ACT hold the numbers to form a government' *1News* (13 February 2020) <www.tvnz.co.nz>.

¹¹ Richard Shaw and others, 'Jacinda Ardern and Labour return in a landslide – 5 experts on a historic New Zealand election' *The Conversation* (17 October 2020) <www.theconversation.com>.

success: New Zealand First, an existing coalition party, were not returned to Parliament (down from 7.2% to 2.7%, below the 5% party vote threshold for seats in Parliament); the Greens, an existing confidence-and-supply partner, increased their support from (up from 6.3% to 7.9%). On the opposition benches, ACT increased their number of MPs from 1 to 10 (up from 0.5% to 7.6% of the vote) and the Māori party returned to Parliament after a short absence, with two MPs (one electorate and one list). Labour's dominance of Parliament – already realised in majorities on almost all select committees and allocation of the lion's share of oral questions to ministers – will be invigilated with a degree of nervousness, especially because MMP's usual atomisation of Parliament has been one of the most powerful constraints on the executive.

The shape of the government formed after this extraordinary election was curious, with governance arrangements reflecting the unusually high electoral mandate Labour secured. Labour entered into a cooperation agreement with the Greens, even though doing so was unnecessary to command confidence and form government.¹² While the label of 'cooperation agreement' is new, the style is largely familiar – generally reflecting the structure of confidence-and-supply agreements common in recent years.¹³ But there are some notable differences. First, as is typical with support parties, two Green MPs were appointed ministers outside Cabinet.¹⁴ However, unlike previous arrangements, these ministers are not members of Cabinet committees and will only attend for items relevant to their portfolios.¹⁵ Secondly, selective collective responsibility – where ministers from support parties are only bound by unanimity in relation to their portfolios – continues to apply.¹⁶ However, this selective collective responsibility is also overlaid with the ability of the support party to agree-to-disagree on a party-to-party basis – something formerly reserved for formal coalition parties.¹⁷ And, in an interesting innovation, if a Cabinet decision deviates from Greens' policy, the difference may be recorded in Cabinet minutes.¹⁸ As these minutes are routinely disclosed nowadays, this gives the Greens further ability to differentiate themselves from Labour as the lead government party. Thirdly, the Greens'

¹² New Zealand Labour Party and Green Party of Aotearoa New Zealand, 'Cooperation Agreement' (November 2020) <www.labour.org.nz>.

¹³ See generally Matthew Palmer and Dean R Knight, *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, 2021 (forthcoming)) chs 4 and 5.

¹⁴ 'Cooperation Agreement', cl 9.

¹⁵ 'Cooperation Agreement', cl 12; Department of the Prime Minister and Cabinet, 'Cabinet committees' <www.dpmc.govt.nz>.

¹⁶ 'Cooperation Agreement', cls 29 and 31.

¹⁷ 'Cooperation Agreement', cl 32.

¹⁸ 'Cooperation Agreement', cl 30.

obligation on matters of confidence-and-supply is neutral: to 'not oppose', rather than the usual obligation to support.¹⁹ Finally, Labour has sought to brand the administration as a 'Labour government', rather than the usual 'Labour-led government'.²⁰ The nomenclature is a further attempt to signal Labour's dominance and the more limited role for the Greens within government. However, the language shift is an inauthentic attempt at smoke-and-mirrors and should be resisted, especially given the Greens still provide two members of executive government.



¹⁹ 'Cooperation Agreement', cl 3.

²⁰ 'Cooperation Agreement', cl 1; Cabinet Office, 'Labour Government, with support from the Green Party: consultation and operating arrangements' (18 November 2020, CO(20)8).