



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Electoral Amendment Bill

20/09/2019

Submission on the Electoral Amendment Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Electoral Amendment Bill (the Bill), which amends the Electoral Act 1993 (the principal Act). The Law Society has a statutory function, expressed in section 65(e) of the Lawyers and Conveyancers Act 2006, “to assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law”.
2. The right to vote is a fundamental component of New Zealand’s constitutional structure and is affirmed by section 12 of the New Zealand Bill of Rights Act 1990. The Law Society welcomes the improvement in voter engagement that is likely to flow from this Bill, and in particular:
 - a. supports polling day enrolment, and:
 - i. notes that it may encourage voter engagement, especially for former prisoners who may not realise that their names have been removed from the electoral roll;
 - ii. encourages the select committee to recommend educational programmes to get as many people as possible enrolled before polling day, and to recommend that sufficient resources be provided to ensure there are not undue delays at polling places on polling day;
 - b. supports broadening the range of venues for polling places (provided proper security for preliminary counting of votes on site and privacy of voting can be maintained), but asks the committee to consider the potential chilling effect on election publicity near polling places;
 - c. supports the more detailed provisions for managing polling day disruptions, and identifies some further amendments that could helpfully be made to those provisions; and
 - d. supports the discretion to extend voting by hours or days as a result of disruption, but notes that the difficulty for the Chief Electoral Officer in exercising discretion as to when to release preliminary results is likely to mean preliminary results are rarely, if ever, released.
3. The Law Society does not seek to be heard but is happy to discuss its comments with the select committee or officials if that would be of assistance.

Polling Day Enrolment

4. The Law Society supports the intentions of the Bill to increase voter engagement and believes the changes this Bill makes to the enrolment process, as discussed below, are consistent with that purpose.

Re-enrolment of former prisoners

5. The Waitangi Tribunal noted in its recent report *He Aha i Pērā Ai*¹ that automatic removal of sentenced prisoners from the electoral roll is disproportionately prejudicial to Māori and does

¹ *The Māori Prisoners' Voting Report*: 9 August 2019.
https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_151635085/He%20Aha%20i%20Pera%20Ai.pdf

not comply with the Crown's Treaty obligations. The Tribunal discussed the "ripple effect" of not voting (such as wider disengagement) and the "voting habit" among other issues.

6. While it is well known that under current law prisoners cannot vote, neither removal from the roll nor the lack of automatic reinstatement is well known. Prisoners may well believe that although they are not able to vote, their underlying enrolment is not affected.
7. While there are practical obstacles to the re-enrolment of former prisoners, the relevant point for current purposes is that allowing polling day enrolment may assist with the re-engagement of former prisoners with the voting process and wider community engagement.

Voter engagement

8. Clauses 4 – 8 of the Bill introduce procedures for eligible people to register and vote on polling day within New Zealand, rather than being required to register by the day before, as at present. The relevant Regulatory Impact Analysis (RIA) *Enabling Election Day Enrolment* (at pp 2 and 9) indicates that, at present, a significant number of voters do register in the last three days before polling day and that, as a practical matter, such registrations may be checked, and votes allowed or disallowed accordingly, after polling day.
9. The RIA also indicates that 7% of eligible electors are not enrolled and that more than 40,000 voters' electorate votes were not counted in 2017 because they had moved between electorates but not updated their enrolments. The effect for the Bill is that:
 - a. some and possibly many intending voters, who are either unaware of the requirement for pre-registration or who have not updated their registration, will now be able to vote as a result of these amendments; and
 - b. as a practical matter, there is no distinction between verification of eligibility for enrolment of a registration made on polling day and verification of registrations made immediately before polling day.
10. The Law Society notes the concern raised by the Electoral Commission, and in the RIA, over the greater work required at polling places to accommodate registrations on polling day, but that the Commission has advised it can implement election-day enrolment for the 2020 election.
11. For the following reasons, the Law Society is supportive of this change:
 - a. It is important to ensure that as many eligible voters are facilitated to vote via enabling convenient registration (the RIA notes at p 4 that the changes would benefit Māori and Pasifika voters who have the highest number of disallowed votes); and
 - b. There are clear indications that significant numbers of eligible and intending voters are either precluded from voting altogether or, for those voters who have moved between electorates, are precluded from voting for a local member despite having earlier enrolled.
12. The Law Society considers, however, that the committee should make the following recommendations in its report on the Bill:
 - a. noting the discussion in the RIA at pp 16-17, to ensure that additional administrative arrangements, public education, polling day staffing or other resources can and will be put in place to address the concerns raised by the Commission; and

- b. in particular, to maintain and, if possible, extend the encouragement to electors to comply with their legal obligation to enrol before polling day to lessen disruption. It would be unfortunate and undesirable if publicity about the right to enrol on polling day discouraged earlier enrolment.

Location of Polling Places

Terminology

13. Clauses 13 to 16 make amendments to the principal Act which relate to “polling places”. However, the intended extent of the amendments is unclear because the terminology used in the principal Act is not consistent:
 - a. The term “polling place” is not defined in the principal Act, but those locations are appointed under section 155 by the Electoral Commission.
 - b. An “advance voting place” is defined at section 197A(10) of the principal Act in the context of interfering with or influencing advance voters. That definition refers to regulations but does not include the term “polling place”.
 - c. The Electoral Regulations 1996 define in regulation 24A “advance polling place” (for the purposes of scrutineering) by reference to regulation 19(2). Regulation 19(2) relates to special voting, which seems to include advance voting, but refers to an “office” without using the term “polling place”.
14. The Bill should be amended to clarify that the amendments introduced by clauses 13 to 16 are intended to apply to advance voting places.

Interfering with or influencing advance voters

15. The committee should also consider the implications of section 197A of the principal Act, in respect of the new types of locations that are likely to be appointed as polling places under the Bill.
16. Essentially, section 197A prohibits anything intended or likely to influence a voter in the advance polling place or its 10m buffer zone. This could have a chilling effect on freedom of expression and what are at present considered to be normal electioneering activities. For example, if a vacant shop in a mall is used as an advance polling place, some shops or open spaces in that mall may carry political advertising, but some may not be permitted to, depending on how far they are away from the voting place. People going about their ordinary business, as well as those with political motivations, could easily breach section 197A(2) (despite subsections (3) to (7)) merely by walking around the public spaces in the mall wearing or carrying election-related material. There is no mens rea or “intention” element to section 197A offences.

Management of Polling Disruptions

17. Clause 17 replaces the current general power of the Chief Electoral Officer to deal with disruptions on polling day with a more detailed code. Given the importance of clarity in the conduct of elections, particularly on polling day, the greater specificity of the new provisions is clearly desirable.

18. However, the following points in the new provisions may require further consideration:
- a. New section 195(1): It may be helpful to make it clear that the adjournment could be directed in the days before polling day, as well as on polling day if, for example, it is clear before polling day that an earthquake or flood will make an adjournment appropriate in a particular area.
 - b. New section 195(2) provides for the adjournment of voting for "no more than 3 days" initially and then "no more than 7 days each". While the Chief Electoral Officer is required to be satisfied of the necessity of the adjournment, the Bill should make explicit that any adjournment is to last for no longer than the related disruption requires. That may mean an adjournment for a few hours, or a day, followed by further extensions of a day or two.
 - c. New section 195(3) provides for consultation with the Prime Minister and the Leader of the Opposition for subsequent adjournments, but not for the initial adjournment. While it is understandable that an adjournment might be required under urgency, a requirement to consult before or inform as soon as practicable after any initial adjournment would assist transparency.
 - d. New sections 195(3) to (6) use the general terms "natural disaster" and "adverse weather". While these terms are appropriate, the Law Society suggests that one of the matters the Chief Electoral Officer might be required to have regard to is whether a state of emergency has been declared under the Civil Defence Emergency Management Act 2002, in order to give some context as to severity.
 - e. New section 195(6) lists unforeseen or unavoidable disruptions in a manner that is not exclusive. However, it may be usefully broadened to include examples that may relate to the features or utilities at a specific polling place itself, such as a fire alarm, power outage or flood, and which may justify an extension of a few hours. The Law Society suggests that a further sub-paragraph be added:

"(f) a polling place not being able to be occupied for any reason".
 - f. New section 195B sets out matters that the Chief Electoral Officer is required to consider before adjourning voting or otherwise dealing with disruptions. While the point might go without saying, the criteria should include the desirability of allowing every elector a reasonable opportunity to vote.

Disclosure of preliminary count – exercise of discretion

- g. New section 195C(2) confers a discretion on the Chief Electoral Officer to disclose the results of a preliminary count of votes at a polling place, if satisfied that the disclosure will not unduly influence those who have not yet voted.² The test in section 195C(2) may be difficult for the Chief Electoral Officer to apply.
- h. Given that sections 197, 197A and 198 of the principal Act assume electoral material, slogans or emblems near a polling place or broadcast on polling day will unduly influence voters and must be removed, it would be very difficult for the Chief Electoral

² The jurisprudence concerning nations that have different closing times because of time zones (discussed in the NZBORA report of 20 July 2019 on the Bill) is relevant in this context. However, there may be distinctions because New Zealand has list MPs, and a system that allows special votes to be cast outside the relevant electorate.

Officer ever to conclude that disclosure of preliminary counts of votes will not unduly influence those who have not yet voted.

- i. What the Chief Electoral Officer might be asked to do in some situations is conclude that, because of the state of the preliminary counts and the number of votes likely to be cast by those who have not voted, those voters cannot influence the overall outcome. To reduce that pressure, the Law Society considers there should be an express provision that the Chief Electoral Officer must not release preliminary counts on that basis.
- j. There are also practical concerns, including that the Chief Electoral Officer cannot predict with any accuracy how many electors will vote in the extended voting period. By way of example:

An earthquake could cause voting in Wellington Central to be adjourned for some days. However, that would not prevent any number of commuting Hutt Valley, Kapiti Coast, or Wairarapa voters, or indeed other Wellington electorate voters, who had not voted, from casting both special votes for their electorate and list votes when the vote subsequently reopens. This might occur to a greater extent if preliminary results have been released.
- k. In short, the Law Society considers that in the overall context of the Electoral Act, the proposed new section 195C(2) discretion (as currently drafted) will rarely, if ever, be invoked by a Chief Electoral Officer. The most likely outcome will be that preliminary results will not be released until all votes are cast.
- l. If the Chief Electoral Officer did allow an inappropriate consideration to apply, or was generally challenged on the discretion exercised under section 195C(2) or the discretion to extend the voting period, then there may be remedies by judicial review or election petition.



Andrew Logan
Vice-President

20 September 2019