

23 September 2011

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Wellington

ELECTORAL COMMISSION PLANS FOR MANAGING ADJOURNMENT OF POLLING IN AN EMERGENCY

Purpose

1. This paper outlines the measures that the Electoral Commission ("the Commission") proposes to take should an emergency occur in the lead-up to or on polling day.
2. The legislation covering such a situation is of general application and is longstanding, but has never been invoked. While the Commission hopes its planning will not be required, the Christchurch earthquakes remind us of the need for Ministers, Parliament, and the public to understand what the implications of such an event would be for the conduct of the election and referendum and how the Commission would manage it.

Executive summary

3. Under the Electoral Act 1993 ("the Act") where polling is affected by an emergency of any kind, the range of options is:
 - (a) If the area affected is local, the Commission can revoke and amend particular polling places and continue with the conduct of the general election and referendum in the rest of the affected electorate and nationwide;
 - (b) If the event has wider effect, the Commission can adjourn polling in particular polling places, continue with the conduct of the general election and referendum elsewhere in the country and either:
 - (i) publish the preliminary results in the usual way despite voters in the adjourned poll knowing the preliminary results in the general election and referendum when they vote; or
 - (ii) not publish the preliminary results in either the general election or referendum until the adjourned poll can occur.
4. Under MMP, if polling has to be adjourned in even a single polling place, the election of all members of Parliament and, therefore, the formation of Government is delayed for the period of the adjournment. For this reason,

wherever possible the Commission will revoke and amend polling places and make alternative arrangements for voters rather than adjourning polling.

5. The Commission will consult with the Officials Committee for Domestic and External Security Co-Ordination (ODESC) prior to adjourning polling at any polling place. In considering whether to adjourn polling and in what polling places, the Commission will consider four questions based on best available information:
 - is the polling place likely to be safe?
 - is it likely to be safe or practical for voters and electoral staff to attend the polling place?
 - are sufficient staff available to conduct the poll? and
 - can voters attend another polling place?
6. If polling is adjourned in affected polling places, the Commission's view is that preliminary results should still be released on election night (notwithstanding well-established practice that election results should not be released before all polling has concluded). Given the presence of candidate scrutineers and the high level of public, political, and media interest, attempts to embargo preliminary results are likely to be ineffective.
7. Given the constitutional significance of these matters, the Commission proposes on 23 September 2011 to provide you with a copy of this paper for tabling in the House of Representatives in accordance with sections 6(1)(e)(ii) and 6(3) of the Act. Prior to it being tabled, the Commission recommends that you advise your Cabinet colleagues, and then the Leaders of all Parliamentary Parties of the Commission's plans.

Background

The issue of the writ for the general election

8. 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 Parliament expires unless it has already been dissolved. The dissolution or expiry of a Parliament sets in train a series of events leading to the general election beginning with the issue by the Governor-General of a writ to the Commission to make all necessary arrangements for the conduct of the general election. The writ appoints a day by which candidates must be nominated, the day for the poll to be held, and the latest day for the return of the writ.

Power to alter or revoke a polling place

9. The Commission formally appoints polling places for the general election under section 155(5) of the Act by publishing a Gazette notice shortly before Election Day.
10. Section 155 gives the Commission the power to revoke, alter, or add to any polling places that have been appointed. There is no time limit on when the Commission can amend polling places, including on polling day. Given the absence of a time limit, Crown Law considers that section 155 also allows the

Commission to revoke a polling place where polling has been adjourned under section 195. For example, polling may be initially adjourned because the polling place has been damaged but the extent of the damage is unknown. Later, it is clear that the polling place is inaccessible. In that case, the Commission could then revoke it. The Commission can notify any changes by any means considered appropriate.

Power to adjourn polling at a polling place

11. Section 195 of the Act provides:

"Where the polling at any polling place cannot start or has to be suspended whether by reason of riot or open violence, natural disaster, or any other cause, the ... Returning Officer may adjourn the taking of the poll at that polling place to the following day, and if necessary from day to day until the poll can be taken, and shall, if he or she adjourns the taking of the poll, forthwith give public notice of the adjournment in such manner as he or she thinks fit...."

Where the close of the poll at any polling place is adjourned under this section for any number of days, the day on or before which the writ is made returnable shall be postponed by the same number of days".

12. Crown Law has advised that the Commission has no power to adjourn polling nationwide under section 195 of the Act even if the impact of an event is of national significance. Section 195 of the Act requires that adjournment decisions are made on a polling place by polling place basis. The criteria for decision making about an adjournment at any polling place is discussed later at paragraph 25. This means that if, for example, there was an earthquake on the scale of the 22 February 2011 Christchurch earthquake the day before the election, polling elsewhere would have to proceed.

13. An event of this magnitude in one part of the country could have a major effect on the conduct, turnout and perceived legitimacy of the election in other parts of the country as people's focus moves from the election to friends and whanau and the mobilisation of assistance. However, current legislation prioritises the need for polling to proceed in order that members of Parliament can be elected. This appears to reflect the principle that when an election has been called by the Governor-General, polling is paramount and should only be adjourned in the most exceptional circumstances. Section 67 of the Civil Defence Emergency Management Act 2002 allows the Governor-General to summon Parliament to meet if a state of national emergency is declared while Parliament is dissolved or has expired. In that case, Parliament must be summoned to meet within seven days of the last day appointed for the return of the writ for the general election (or if that day has passed, within seven days of the declaration of the state of emergency). Even at the time of a state of national emergency, it is recognised that an election must continue in order for Parliament to be able to be summoned. Section 6(2)(b)(ii) of the Epidemic Preparedness Act 2006 contains a similar provision.

14. This is an area that will always raise difficult constitutional and political issues that go beyond the remit of the Commission. The question of whether the

current legislation is adequate is one that the Justice and Electoral Committee may wish to consider in its Inquiry following the 2011 general election.

Discussion

Implications of adjourning a poll under MMP

15. Section 54 of the Electoral Act provides that members of Parliament cease to be such at the close of polling day (defined in section 3 of the Act as the day appointed in the writ for the polling to take place). Under MMP, because of the single writ and the party vote, if polling has to be adjourned even in a single polling place, the election of all members of Parliament and, therefore, the formation of Government is delayed for the period of the adjournment. However, for the reasons outlined in paragraph 19, it would be unlikely that polling would need to be adjourned if only a small number of polling places were affected.
16. Until polling is complete in every polling place, the Commission cannot return the writ showing all of the successful electorate candidates. If no electorate candidates can be declared elected and there is no final nationwide party vote result, the Commission cannot declare the election of any list members.
17. In the meantime, although a Minister of the Crown or member of the Executive Council has ceased to be a member of Parliament, he or she may continue to act as Minister or member of the Executive Council for 28 days after he or she ceases to be a member of Parliament (section 6(2)(b) of the Constitution Act 1986). In addition, a person who was not a member of Parliament but was a candidate for election, may be appointed a Minister or member of the Executive Council for a period of forty days from the date of appointment, but must vacate office after forty days unless within that time he or she becomes a member of Parliament (section 6(2)(a)).
18. Accordingly, in the event of an adjournment, despite a delay in the return of the writ and declaration of list members, the Executive continues for a defined period.

Decision to revoke a polling place

19. Because of the implications under MMP of adjourning polling, where one or more polling places is affected by an emergency, wherever possible the Commission will utilise the mechanism of revoking and/or amending polling places and making alternative arrangements for voters, rather than adjourning polling in affected polling places.
20. All Returning Officers are required to have a risk management plan in place that identifies potential risks in their electorate, for example, areas that can be prone to flooding. If, for example, one or more polling places were damaged by fire or localised flood, the polling place(s) would be revoked. Voters would be advised of alternative voting arrangements including any new polling places, nearby polling places, and the option to vote in advance at an advance voting facility. Steps would be taken to ensure that any effects on staff and availability of voting papers were managed.

21. If a similar event happened on polling day during the hours of polling, provided satisfactory arrangements could be made quickly enough, similar steps would be taken.
22. Because of the need for immediacy, public notification of changes to polling places would be by local radio or other media operating in the area. Depending on the circumstances, notices would also be put up in the local area around the polling place letting voters know that the polling place is closed and where they can go to vote.

Decision to adjourn polling at a polling place

23. If the scale, nature, and possible consequences of the event are such that it appears to the Commission that it may not be possible to make alternative arrangements for voters, then the Commission will have to consider adjournment at particular polling places.
24. Given the constitutional and political significance of a decision to adjourn polling at any polling place, the Commission would want to make the decision based on best possible advice and information. The appropriate forum for seeking this advice and information is ODESC whose purposes include exercising oversight in respect of matters of crisis management including disasters with serious community consequences or a high level of political interest. The relevant membership for this purpose would include the Department of Prime Minister and Cabinet, Crown Law, the Director of Civil Defence Emergency Management, the Clerk of the Executive Council, the Secretary for Justice, and the Electoral Commission. Our expectation is that other members of ODESC would brief and advise Ministers and Leaders of Parliamentary Parties as required.
25. In considering whether to adjourn polling and in which polling places, the Commission will consider four questions based on best available information:
 - is the polling place likely to be safe?
 - is it likely to be safe or practical for voters and electoral staff to attend the polling place?
 - are sufficient staff available to conduct the poll? and
 - can voters attend another polling place?
26. If the answer to any of the first three questions is no, but voters can attend another polling place (question four), polling would likely proceed with any revocations and amendments necessary. If the answer to any of the first three questions is no, and the answer to question four is also no, polling would need to be adjourned on a polling place by polling place basis. A flow chart illustrating the Electoral Commission's emergency decision making process is attached (**Appendix 1**).

Administrative implications

27. The logistical issues involved in implementing an adjournment across a number of polling places or continuing with polling in the face of an emergency should not be underestimated. For this election we need 19,000 staff to work in 2600 polling places on election day. Their role, as well as being constitutionally important, is complex. Staff must be trained. The training takes place in the evenings over the two and half weeks before election day so that training is as near as possible to election day. Each Returning Officer has a limited number of standby staff who are trained and paid to be available in the event that staff are unavailable.
28. Approximately 60% of polling places are in schools. The rest are a mix of public and privately owned facilities leased for election day. Most election day staff have other jobs. If polling is adjourned at any polling place, it is unlikely to be possible to resume polling until the next available Saturday when polling places and staff are likely to be available.

Whether to release preliminary results

29. If polling is adjourned in affected polling places, consideration needs to be given to whether the Commission should either publish the preliminary results in the usual way or not publish the preliminary results until the adjourned poll can be held.
30. Electoral legislation currently allows an eligible elector to vote at any polling place throughout the country. If adjournment occurs and preliminary results are released, when polling places are re-opened following the adjournment, persons who did not vote on polling day will be able to vote with knowledge of the preliminary election and referendum results even if they are electors of electorates outside the area directly affected by the adjournment.
31. If the vote in the affected electorate is close, persons enrolled in the electorate who did not vote on polling day, could decide that they want to vote based on the preliminary results. Similarly, voters enrolled in other closely fought electorates outside the affected area who did not vote on polling day, might want to cast a special vote in the adjourned polling places once polling resumes.
32. If the preliminary results suggest that:
- the referendum results are close,
 - the party vote is close,
 - a party is close to the 5% threshold,
 - a party has a candidate that is very close to winning an electorate seat that would bring additional list members with him or her based on the share of the party vote, or
 - a party is close to the threshold for obtaining an additional list member,
- when the polling places are re-opened following the adjournment, persons who did not vote on polling day may now want to do so because of their knowledge of the preliminary results. Parties and candidates may have a strong incentive to take advantage of the information to mobilise supporters when polling resumes.

33. Conversely, voters may decide not to vote when polling is resumed because they think that the result is already clear. Both scenarios could affect the actual result and the perceptions of the legitimacy of the result.
34. There is no statutory requirement for the Commission to release preliminary results on election night. However, by convention, the Commission has provided preliminary results on the elections website progressively from 7pm, indicating overall party and electorate results including a preliminary list of successful electorate and list candidates. At this election, the results of the early count of advance referendum results will also be available progressively from 7pm.
35. This is a well-established practice that the public, politicians and media have come to expect.
36. The disadvantage of releasing preliminary results when polling at some polling places has been adjourned is that it runs counter to the well established practice that no results should be released before all voting has concluded (in keeping with the principle that voters' choices should not be influenced by their knowledge of the results).
37. However, attempting to embargo the preliminary results to protect the legitimacy of the poll is likely to be ineffective. Given that candidate scrutineers are entitled to be present during the preliminary counts of polling place and advance votes, parties and candidates would know the results and would be able to act upon them once polling resumed. There would likely be leaks, rumour and speculation about the preliminary results and parties and candidates would be in a privileged position vis a vis the rest of the public and the media. As the Electoral Commission releases preliminary results progressively from 7pm via the election results website and a live media feed, it would be impracticable for the Electoral Commission to withhold preliminary results only if a key result was close. This would not necessarily be known until up to 11:30pm on election night when the Commission would ordinarily aim to have 100% of all preliminary results entered.
38. Withholding preliminary results also raises issues for the timely formation of government. Whilst government formation cannot be completed until the election process is completed, releasing preliminary results would enable preliminary discussions on government formation to commence.
39. Having weighed all those factors, the Commission's view is that on balance, the preliminary results for the rest of the country should still be released on election night.

Next steps

40. In the hopefully unlikely event that polling is affected by an emergency, it is important that Ministers, Parliament, and the wider public understand what the implications would be for the conduct of the election and how the Commission proposes to manage it.

41. On 23 September 2011, the Commission proposes providing you with this paper for tabling in the House of Representatives within 5 working days in accordance with sections 6(1)(e)(ii) and 6(3) of the Act (before the House rises on 6 October 2011).
42. We suggest that prior to it being tabled, you advise your Cabinet colleagues, and then the Leaders of all Parliamentary Parties on the Commission's plans for managing polling in an emergency.

Consultation

43. The Commission has consulted with the Department of Prime Minister and Cabinet, Ministry of Justice, Crown Law, Department of Internal Affairs, and the Office of the Clerk on this paper.

Recommendations

44. It is recommended that you:

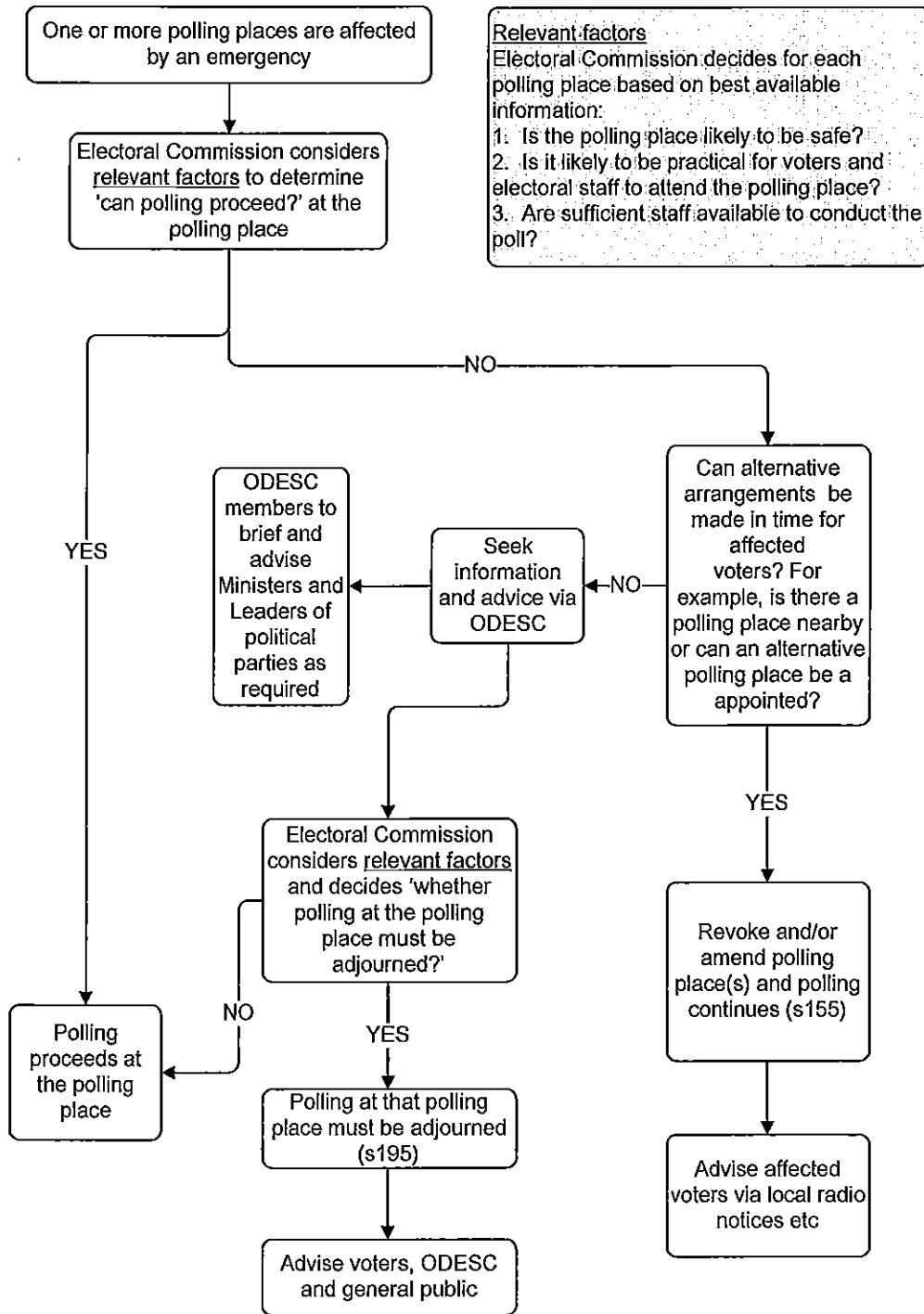
- 1 **note** the contents of this paper;
- 2 **note** that on 23 September 2011 the Commission proposes providing you with this paper for tabling within 5 working days in the House of Representatives in accordance with sections 6(1)(e)(ii) and 6(3) of the Electoral Act 1993; and
- 3 **forward** this paper to your Cabinet colleagues and Leaders of all Parliamentary Parties as soon as possible so that they can see it prior to it being tabled in the House.

Signed for and on behalf of the Electoral Commission



Robert Peden
Chief Electoral Officer

Electoral Commission Emergency Decision Making Process



Source: Electoral Commission 6 September 2011