

Coversheet: Updating the provisions in the Electoral Act 1993 for managing polling disruptions

Advising agencies	Ministry of Justice
Decision sought	The Ministry of Justice has produced this analysis and advice to inform key policy decisions to be taken by Cabinet on amending the Electoral Act 1993 to update provisions for managing polling disruptions.
Proposing Ministers	Minister of Justice

Summary: Problem and Proposed Approach

<p>Problem Definition</p> <p>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</p>
<p>The current provisions in the Electoral Act 1993 (the “Act”) for managing disruptions to elections due to unforeseen or unavoidable events are limited and outdated. The provisions do not provide the Electoral Commission (the “Commission”) with sufficient discretion and flexibility to tailor an appropriate response to a disruption to polling.</p>

<p>Proposed Approach</p> <p>How will Government intervention work to bring about the desired change? How is this the best option?</p>
<p>The proposed approach is to update the current provisions for managing polling disruptions to:</p> <ul style="list-style-type: none"> empower the Commission to respond broadly to a wide range of polling disruptions that either prevent voters from voting or risk the overall administration of the election broaden the definition of the types of events that would require the use of the provisions for managing polling disruptions empower the Commission to utilise or adapt existing voting processes in the Act where there is a polling disruption modernise the existing power for the Commission to adjourn polling due to a disruption on polling day, and restrict the release of the preliminary vote count where a polling disruption delays the close of polling.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

There are no monetised benefits arising from this change.

Non-monetised benefits arise from having mechanisms in place that will ensure that all voters can vote where a polling disruption occurs. This maintains public confidence in the integrity and conduct of electoral processes.

Where do the costs fall?

The Commission already has contingency plans for managing polling disruptions, as part of its standard business continuity planning. The proposals align with the Commission’s existing statutory powers and operational processes, so will have no impact on its current planning costs.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

The Commission already has operational contingencies in place for managing disruptions to polling. The current proposals provide greater flexibility for the Commission in the way it manages any disruptions, but still utilises existing voting processes so there are no expected risks with the proposals.

Due to the unpredictable nature of polling disruptions, the operational impacts cannot be fully known until such a disruption occurs. However, the Commission’s standard business continuity processes, including scenario planning, aim to mitigate the impacts on the election as far as is practicable.

Following each General Election, both the Commission and Justice Committee independently review the conduct of the election. If a polling disruption has occurred, these reviews provide the opportunity to assess whether these provisions allowed the Commission to appropriately manage the impact of the disruption.

Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

The preferred options are compatible with the Government’s ‘Expectations for the design of regulatory systems’. Specifically, they:

- are well-aligned with existing requirements in related or supporting regulatory systems through minimising unintended gaps or overlaps and inconsistent or duplicative requirements, and
- have scope to evolve in response to changing circumstances or new information on the regulatory system’s performance.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?
<p>Constitutional concepts, such as maintaining the integrity of the voting system, are intangible in nature. Their impact on issues such as public confidence is hard to measure, and costs and benefits are hard to estimate. The analysis in this Regulatory Impact Assessment (RIA) is, therefore, primarily qualitative. The key judgments (and assumptions) we have made about the impacts on agencies and individuals are included in relevant sections in the RIA.</p> <p>There have been no polling day disruptions requiring the use of the current provisions in the Act, so there is limited evidence of how these provisions work in practice.</p> <p>To support this analysis, we have considered the recommendations of the Commission, in its reports on the last three General Elections, and the Justice and Electoral Committee, in its inquiries into the 2011 and 2014 General Elections.</p>

Quality Assurance Reviewing Agency:
Ministry of Justice
Quality Assurance Assessment:
The RIA meets the quality assurance criteria.
Reviewer Comments and Recommendations:
The RIA sets out all the necessary information. The analysis is balanced and coherent, with a clear problem definition. There is a good outline of the assumptions and constraints guiding the development of options, and a credible analysis of those options. The analysis is convincing in its conclusions.

Impact Statement: Updating the provisions in the Electoral Act 1993 for managing polling disruptions

Section 1: General information

Purpose
<p>The Ministry has produced this analysis and advice to inform key policy decisions to be taken by Cabinet on amending the Electoral Act 1993 (the “Act”) to update provisions for managing polling disruptions.</p> <p>The Ministry of Justice engaged electoral law expert Professor Andrew Geddis of the University of Otago to advise on issues with the current provisions for managing polling disruptions, and to assist with developing options to address the policy problem.</p> <p>The Ministry of Justice remains solely responsible for the analysis and advice set out in this RIA.</p>
Key Limitations or Constraints on Analysis
<p>We have identified the following limitations and constraints:</p> <p><i>Scope of analysis and range of options considered</i></p> <p>To meet timeframes for progressing changes to the Act ahead of the 2020 General Election, we have limited the scope of this work to focus on the technical issues with the current provisions for managing polling disruptions.</p> <p>We have not considered broader constitutional issues that could arise due to polling disruptions: for example, the effect of a major delay on the formation of Parliament and Government and an extension of the duration of the caretaker Government. These matters could be considered as part of any future review of the Act</p> <p>We have also discounted options that would be administratively complex or would require significant additional analysis to determine feasibility.</p> <p><i>Evidence of the problem and quality of data used for impact analysis</i></p> <p>Since the Act’s enactment in 1993, no polling disruptions have required the use of the current provisions for managing polling disruptions. This means we have limited evidence of how they would work in practice. However, waiting to see whether the current provisions would effectively manage a future disruption is not an ideal approach from a regulatory stewardship perspective. It is better to proactively identify and address existing shortcomings now to ensure adequate systems are in place to respond to future polling disruptions</p>

Key Limitations or Constraints on Analysis cont.

The preference for taking a proactive approach to address this problem is supported by the Commission's¹ and the Justice and Electoral Committee's² recommendations to review the current provisions. The Commission has noted that the current provisions provide only a limited response (eg adjournment of polling) and that the prescribed process for adjournment is administratively cumbersome. The Justice and Electoral Committee has questioned the adequacy of the current provisions in the event of a significant disaster.

Assumptions underpinning impact analysis

While there is a limited evidence base, we have made assumptions about the status quo. In light of the Commission's and Justice and Electoral Committee's recommendations, the key assumption is the current provisions are outdated and no longer adequate and intervention is necessary to ensure these provisions are fit for purpose.

Criteria used to assess options

The proposal's intended outcomes are to ensure that there are mechanisms in place to enable an effective response to emergency situations that arise over the course of an election, and to maintain public confidence in the electoral process where polling disruptions do occur. Due to the intangible nature of these outcomes, our ability to estimate or measure the costs of the preferred options is limited. The analysis in this RIA is, therefore, primarily qualitative. The key judgments we have made about the impacts on agencies and individuals are included in relevant sections of this RIA.

Responsible Manager (signature and date):



Chris Hubscher

Policy Manager, Electoral and Constitutional Policy, Ministry of Justice

Date: 17 July 2019

¹ *Report of the Electoral Commission on the 2011 General Election and Referendum* (April 2012) p 11-12; *Report of the Electoral Commission on the 2014 General Election* (April 2015) p 6; *Report of the Electoral Commission on the 2017 General Election* (April 2018) p 45.

² *Inquiry into the 2011 general election: Report of the Justice and Electoral Committee* (April 2013) p 34-35; *Inquiry into the 2014 general election: Report of the Justice and Electoral Committee* (April 2016) p 30.

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

To maintain a healthy democracy, all eligible voters should be able to participate in elections. This requires having mechanisms and safeguards in place to:

- uphold, protect, and promote the right to vote (as set out in the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights) and protect Māori rights to vote and political representation affirmed by the Treaty of Waitangi (Te Tiriti o Waitangi)
- maintain the integrity of the electoral system, and
- ensure the efficient and secure conduct of electoral processes.

Election day is still conducted using physical polling places and paper ballots

In New Zealand, the general election is conducted at the ballot box. The great majority of voters physically attend a polling place to cast their vote (rather than voting by post or uploading ballot papers online). Most votes are cast on polling day itself, which under the Act must be set out in the Writ for the election³ and must be a Saturday.

Since the 2011 election, the ability to vote in advance of polling day has been available to all voters. This allows voters to attend advance polling places in the two to three weeks prior to polling day.⁴ The number of advance votes is estimated to reach 65 percent in 2020, but the highest volume of votes (ie votes per day) is still expected to be received on polling day.

There is always a risk of an unexpected event disrupting the election

There is always a possibility of a significant event disrupting the election, especially when the election is heavily centred around a specific day and is conducted using largely manual-based processes (eg people and places). An unexpected event that disrupts the ability of voters to cast their vote has the potential to undermine their suffrage rights.

In recent years, New Zealand has experienced several significant natural disasters, such as the Canterbury and Kaikoura earthquakes, which affected a large proportion of the population, as well as local and national infrastructure. A similar type of event on or around polling day could risk the conduct of the election. Other jurisdictions have also experienced man-made disruptions that have risked the integrity of electoral processes, for example, cyber-attacks on electoral systems. New Zealand is not immune to these types of disruptive events.

³ Section 125 of the Electoral Act 1993.

⁴ The Commission determines the period of advance voting; it is not set out in statute. In 2011 and 2014, there were 17 days of advance voting. In 2017 there were 12 days.

The current provisions for managing polling disruptions in the Electoral Act have remained broadly unchanged for the last century

There have been significant changes in the electoral system and technology and communications as well as the types of events that could disrupt polling since the original provisions were put into the electoral legislation.⁵ It is timely to ensure that electoral systems can evolve and adapt to these changes.

If no further action is taken, the Commission will continue to rely on the status quo for managing future polling disruptions. The current provisions will continue to provide a limited response to polling disruptions and so may not adequately protect voting rights against known risks.

2.2 What regulatory system, or systems, are already in place?

The Act is a key part of New Zealand’s constitutional arrangements. It sets out the regulatory framework for New Zealand’s electoral system.

The Act provides that the Commission is responsible for administering the electoral system impartially, efficiently, effectively, and in a way that:

- facilitates participation in parliamentary democracy
- promotes understanding of the electoral system and associated matters, and
- maintains confidence in the administration of the electoral system.⁶

Current provisions for managing polling disruptions

Under section 155 of the Act, the Commission can appoint and amend the list of official polling places at any time (the “designation power”). Where there is a disruption at one polling place, this power enables the Commission to appoint alternative polling places for voting to continue. The designation power can be used during both the advance voting period (before polling day) and on polling day.

The only statutory power in the Act specifically related to polling day disruptions is the power under section 195 to adjourn polling (the “adjournment power”). This can occur due to riot, open violence, natural disaster, or any other cause. This provision requires each Returning Officer (with the Commission’s concurrence) to adjourn polling at each affected polling place on a day-by-day basis until polling can occur.

The Commission has also developed operational contingency plans for managing polling disruptions. This includes the decision-making process it will follow before invoking the designation or adjournment powers. To date, it has not needed to use either the designation or the adjournment power.

⁵ For example, section 159 of the Electoral Act 1927 provided for the adjournment of polling, along very similar lines to the current provision at section 195 of the Electoral Act 1993 and has remained relatively unchanged. The current provisions also pre-date the MMP voting system.

⁶ Section 4C of the Electoral Act 1993.

Interested agencies

Aside from the Commission, other agencies likely to have an interest in provisions for managing polling disruptions include those responsible for managing the wider response to the emergency (eg Civil Defence, Police, or the Ministry of Health).

Overall fitness-for-purpose of system

Under the Act, the Commission must report on the administration of each General Election. This includes recommending any changes to the administration of processes or practices, or to legislation, which are necessary or desirable. Also, by convention, following each General Election, a parliamentary select committee will conduct an inquiry into the administration and conduct of the election.

In their recent post-election reports and inquiries, both the Commission and the Justice and Electoral Committee have questioned the adequacy of the current provisions.

2.3 What is the policy problem or opportunity?

The provisions in the Act for managing polling disruptions are outdated and no longer fit for purpose. If the Commission is not able to appropriately manage polling disruptions, this may risk the safety of voters and staff. It may also undermine the integrity of electoral processes and so call into question the election result, and ultimately the legitimacy of any subsequent Parliament.

Lack of discretion

The current provisions do not provide sufficient discretion for the Commission to tailor a response to the nature of the event. It cannot easily utilise alternative processes (eg extending voting hours) to manage polling disruptions.

Limited to physical disruptions to individual polling places

The current provisions primarily relate to physical disruptions to individual polling places. This does not adequately take into account disruptions that could affect the local area or electorate (eg a flood) or multiple electorates (eg an earthquake or epidemic). The limited nature of the provisions also means they do not address events such as a cyber-attack on the Commission's headquarters or back-office systems.

Managing effect of disruption on release of the preliminary count

The current provisions do not specifically deal with the release of the preliminary count (ie the count of votes cast on election day) where a polling disruption occurs. Releasing the preliminary results from non-affected places provides information that could influence voting in affected places when voting resumes. This would be unfair to other voters who were not privy to information about the vote count when they voted. This could also undermine public confidence in the integrity of electoral processes.

It is also contrary to existing provisions in the Act that place restrictions on the release of information to ensure the integrity of electoral processes and results.⁷

⁷ For example, section 174E of the Electoral Act 1993 requires early votes be counted in secret before the close of polling day; and section 197(1)(d) makes it an offence to “at any time before the close of the poll, conduct in relation to the election a public opinion poll of persons voting before polling day”.

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

Cabinet has authorised the Minister of Justice to take policy decisions on changes to the current provisions for managing polling disruptions [CAB-19-MIN-0129 refers]. Therefore, the scope is limited to this.

2.5 What do stakeholders think?

The Electoral Commission is the key stakeholder affected by these provisions, as it is responsible for running elections. The Ministry of Justice has worked closely with the Commission on the proposed options. The Commission has confirmed that these options are operationally feasible to implement within its existing emergency planning processes.

The Ministry of Justice has also consulted other relevant agencies on the proposed options to address the policy problem. This includes the National Security Policy Directorate in the Department of Prime Minister and Cabinet on the interface between the Act and other civil emergency powers. Also, the Cabinet Office and Crown Law on ensuring options maintain the integrity of constitutional arrangements. The Ministry will continue to engage with these agencies and other relevant government organisations through departmental consultation on proposals for Cabinet consideration.

There will be opportunity for further stakeholder engagement, including the public, through the select committee process for the Electoral Amendment Bill, which is the legislative vehicle for the proposed changes to the Act.

Treaty of Waitangi (Te Tiriti o Waitangi) analysis

Historically, Māori have experienced disparities and unequal treatment under electoral legislation and systems. Therefore, it is important to carefully consider the potential effect of future changes to electoral processes for Māori and to ensure any changes meet Treaty of Waitangi obligations.

The policy problem and proposals to address this problem have the potential to engage Māori rights and interests affirmed by the Treaty. This includes the right, under Article 2, to exercise tino rangatiratanga (eg self-determination), which can be through voting and political representation. Also, the right, under Article 3, to share the same citizenship rights including the right to vote and political representation.

The proposals to address the policy problem are not designed to address Māori electoral participation specifically. Instead, the intent of the proposals is to ensure all affected electors can still vote if there is a disaster or emergency during the election. This include Māori voters. To this extent, the proposals would help support Māori rights under Articles 2 and 3 of the Treaty, and also help the Crown to meet its general obligation to actively protect Māori rights and interests.

2.6 What are the objectives and what criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

Objectives

The objectives of making any regulatory changes are to:

- enable a flexible and pragmatic response to polling disruptions
- maintain the integrity and conduct of electoral processes, and
- support voter enfranchisement (ie electors affected by polling disruptions can still vote).

Criteria

To determine whether the proposed options set out below will achieve the objectives, we have assessed the options against the following criteria:

Practicable and enduring

- Provides sufficient flexibility to adapt to a wide range of unforeseen and unavoidable polling disruptions.
- Strikes an appropriate balance between prescription and flexibility/discretion to accommodate future changes/innovation.

Accountability

- Provides appropriate checks and balances to ensure decision makers are accountable for exercising functions and maintaining the integrity of electoral processes.

Consistency

- Provides a consistent basis for managing polling disruptions within electorates and nationwide.
- Ensures consistency with other electoral processes in the Act and other relevant legislation (eg Civil Defence Emergency Management Act 2002).

Section 3: Options identification

3.1 What options are available to address the problem?

As processes for managing polling disruptions are set out in legislation, non-regulatory changes alone would not be able to resolve current limitations. In developing options to update the current provisions for managing polling day disruptions, we developed a package of measures in response to three sets of questions/issues.⁸

The first set of issues was:

- how to define a polling disruption, and
- what responses should be available to manage polling disruptions (apart from adjournment).

The second set of issues was:

- who should determine when there has been a polling disruption, and when to use the provisions for managing polling disruptions, and
- what level of response should be available to manage polling disruptions.

The third set of issues focused on the existing adjournment power, including:

- if and how to modernise the adjournment power as a response to manage polling disruptions, and
- the effect of extending the close of polling on the release of the preliminary count.

Issue 1: How to define a polling disruption and what responses should be available

How to define a polling disruption

We ruled out creating a detailed list of all potential types of disruption as being unfeasible. We, therefore, developed only one option for determining when the provisions for managing polling disruptions should apply. This option is to provide a non-exhaustive definition that could apply to a variety of circumstances.

Our proposed definition is an '**unforeseen or unavoidable polling disruption**'. This will be broadly defined and include as examples events currently specified in the Act (riot or open violence, natural disaster) and events that are less focused on polling places such as a:

- significant health epidemic in a particular locality or nationwide
- significant risk to the safety of voters or voting officials, or
- cyber-attack or other significant disruption to the Commission.

The Local Electoral Act 2001⁹ and Australia's Commonwealth Electoral Act 1918¹⁰ take a similar approach, providing for a wide range of potential polling disruptions.

⁸ We also looked at how other jurisdictions manage polling disruptions, specifically the United Kingdom, Australia, and Canada. This included whether these jurisdictions have specific legislative provisions guiding the response to polling disruptions. If so, what situations would provisions apply and what the response would look like.

⁹ Section 73 of the Local Electoral Act 2001.

¹⁰ Section 240A (temporary suspension) and section 241 (adjournment of polling) of the Commonwealth Electoral Act 1918.

What responses should be available

Option A: Extending existing voting processes in the event of a polling disruption

This option would empower the Commission, in addition to using the designation or adjournment powers, to use or adapt any existing voting processes in the Act, as may be appropriate. For example, the Commission could:

- extend voting hours beyond 7pm on polling day (but only up to midnight)
- extend existing special voting processes such as electronic download and upload of voting papers (currently only available for overseas voters), or
- bring mobile voting teams directly to voters affected by an unforeseeable or unavoidable disruption, as it currently does for voters in hospital.

These alternative voting processes could be adopted in the event of a polling disruption that occurs on polling day. The Commission would be able to use these processes during the advance voting period but only where the disruption is reasonably expected to extend to polling day. This is because where a disruption occurs during the advance voting period but does not extend to polling day, there may still be time and opportunities to use ordinary voting processes. Therefore, use of alternative voting processes may be unnecessary.

In deciding whether, and which alternative voting processes are appropriate to use the Commission would be expected to adopt the least disruptive measure available to address the polling disruption, in consideration of the need to ensure the:

- safety of voters and electoral officials
- election process remains free from corrupt or illegal practices, and
- election process is concluded in a timely and expeditious manner.

Option B: Specific responses developed for each type of disruption

This option would have involved creating a detailed set of responses for each type of disruption (eg for a natural disaster versus a cyber-attack). This could include developing voting processes not currently in the Act, such as online voting. This option was not developed further because it could not feasibly have been implemented in time for the 2020 election.

Issue 2: Who decides whether there is a polling disruption and what level of response to use

Option A: Single centralised decision maker (the Electoral Commission) empowered with a broad response to wide range of polling disruptions

This option would centralise decision making with the Commission. Under the current provisions, the Commission must concur to any adjournment of polling. Therefore, in practice, decision-making is largely centralised already. In making its decision, the Commission would need to work closely with Returning Officers in each electorate. Where appropriate, it would also need to consult with and consider the advice of any relevant authorities about the scale and expected duration of the disruption (eg Civil Defence, Police, or the Ministry of Health).

The Commission would be able to use any of the provisions available for managing polling disruptions where there is an unforeseen or unavoidable disruption to polling that may:

- prevent voters from voting, or
- risk the administration of the election overall.

Option B: Tiered decision-making and responses depending on scale of polling disruption

This option would adopt a tiered level of response depending on the extent of an unforeseen or unavoidable disruption to polling. For example:

Tier	Scale of disruption	Decision-maker	Responses available
Tier 1: Polling place disruption	Affects less than five percent of polling places in an electorate	Returning Officer (with concurrence of the Commission)	Limited range of alternative voting processes available Initial adjournment power available at affected polling places only
Tier 2: Electorate disruption	Affects more than five percent of polling places in an electorate	The Commission (after consulting with relevant authorities)	Full range of alternative voting processes available Adjournment power available in all polling places in affected electorate
Tier 3: National disruption	Affects more than five percent of polling places across all electorates	Governor-General on advice of the Commission.	Full range of alternative voting process available Adjournment power available in all polling places in affected electorates

Issue 3: The adjournment power

Modernising the adjournment power

The adjournment power is administratively burdensome, and reflects a time when communication was less immediate. Currently, the decision to adjourn must be made polling place-by-polling place on a day-to-day basis. We have considered options to simplify and streamline this process.

Option A: Electoral Commission responsible for adjournment

- Initial adjournment: if there is a polling disruption, the Commission can adjourn polling at any polling place for up to a maximum of three days from polling day.
- Subsequent adjournment: if the scale of the polling disruption requires a subsequent adjournment, the Commission can adjourn for incremental periods of up to seven days each.

Before each subsequent adjournment the Commission will have a statutory obligation to consult with and consider the advice of other relevant authorities responding to the wider effects of the disruption. This might include, for example, Civil Defence, Police, or the Ministry of Health (depending on the nature of the disruption).

This option provides effectively the same outcome that can already be achieved under the existing provision; however, it is simpler to administer over more than one polling place or for a longer period of adjournment. The addition of a requirement to consult with other relevant agencies mitigates the Commission acting unilaterally and adjourning polling unnecessarily. It also gives effect to the current operational practice.

Option B: Electoral Commission responsible for initial adjournment and either the Prime Minister or the Governor-General responsible for subsequent adjournments

- Initial adjournment: if there is a polling disruption, the Commission can adjourn polling up to a maximum of three days from polling day. In making its decision, the Commission has a statutory obligation to consult with and consider the advice of any relevant authorities.
- Subsequent adjournment: if there is a polling disruption that requires a subsequent adjournment after three days, only the incumbent Prime Minister or the Governor-General has the power to continue adjournment (eg through a declaration or Order-in-Council). The Governor-General could make the decision on the advice of either the Chief Electoral Officer and/or the Prime Minister.

This option provides an external check on the Commission's powers to delay the election beyond three days. Discussion with the Cabinet Office and constitutional law experts identified risks to existing constitutional norms, and inconsistency with the Act. For example, the Governor-General acts on the advice of Ministers of the Crown; advice cannot be tendered by a statutory officer, such as the Chief Electoral Officer, directly. In an election period, there is a risk if the Governor-General, in being asked to exercise an adjournment power on the advice of an incumbent Prime Minister, could be seen to be influencing the conduct of the general election. Mitigations such as requiring that the Prime Minister consult with the Leader of the Opposition or the leaders of all registered parties that contested the party vote before making any decision to adjourn, or before tendering advice to the Governor General were not considered strong enough to overcome the risk of partisan influence.

Furthermore, during election period, there is no Parliament in place to examine any decisions that a Minister may make. Without this oversight, there is the risk and perception that power may be used inappropriately. It would also be inconsistent with the Commission's independence; the Act does not permit Ministers to direct the Commission on how it performs its functions and duties.

Option C: Electoral Commission responsible for adjournment with requirement to consult with the Prime Minister and the Leader of the Opposition

Instead of involving the Governor-General or members of the Executive as decision-makers (Option B), this option would only require the Commission to consult with the Prime Minister and Leader of the Opposition before each subsequent adjournment. This option broadly aligns with the principles of the 'caretaker convention', as set out in the Cabinet Manual.

The purpose of such consultation would be for the Commission to gain a full picture of the impact of a continued adjournment on the election.

This option raises similar constitutional implications as Option B. Involving members of the Executive or Parliament in a decision to adjourn the election may create a perception of partisan influence in electoral processes. It may also risk the Commission's statutory independence in running elections. We also note that the Commission's decision to adjourn polling should be primarily concerned with the safety of voters and electoral staff. It is unclear how consultation with members of the Executive or Parliament will assist with this assessment.

Managing the effect of a delay in the close of polls on the release of the preliminary vote count

Ordinarily, there is a strong public expectation that the preliminary count¹¹ will be released on election night. The integrity of electoral processes and the legitimacy of the result may be questioned if this does not occur, especially in electorates not affected by a polling disruption. However, if polling has not been completed in some electorates due to an adjournment (or to a decision to extend the close of polls beyond 7pm) then there is a risk that releasing some preliminary vote counts might be considered as influencing those voters who have yet to vote. We considered three options for managing the release of the preliminary count to maintain the conduct and integrity of electoral processes and outcomes.

Option A: Release preliminary vote count for unaffected polling places

Where a polling disruption delays the close of polling, the preliminary vote count can be completed in unaffected polling places and released before polling is completed in affected polling places. This is the Commission's current default position (the status quo).

Option B: Providing that the Electoral Commission may delay the release of preliminary vote count until close of polling at all polling places

Under this option, in the event of a delay or adjournment to the close of polls, the results of the preliminary count would not be released from any electorate until polling has been completed at all polling places, unless the Electoral Commission consider that the release of the results is unlikely to unduly influence voters. It is expected that in most cases where a disruption impacts on multiple polling places across an electorate, the incomplete results would be withheld, to preserve fairness and integrity. However, the discretion provides the Commission with some flexibility and recognises that if the disruption is only to a small number of polling places this may not be necessary.

It would be an offence and a corrupt practice for anyone to wilfully disclose information about the result of the preliminary vote count (except to the Commission) before the close of polling at all polling places, with the intent of influencing voters.

¹¹ The preliminary vote count is the initial count of ordinary votes taken in polling places in the advance voting period and on polling day. Although not statutorily required, by long-standing convention the Commission releases the preliminary counts as they are received from each Returning Officer throughout the night of polling day.

Option C: No preliminary vote count

Where a polling disruption delays the close of polling, there would be no preliminary vote count. Instead, there would only be the official count.

3.3 What other options have been ruled out of scope, or not considered, and why?

We have discounted options that would be administratively complex and would require additional analysis and consideration to determine feasibility.

Section 4: Impact Analysis

Table 1 – How to define a polling disruption and what responses should be available

Key:

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

		Definition of polling disruption	What responses should be available	
	No action Status Quo	Broad definition: 'unforeseen or unavoidable polling disruption'	Option A – Extending existing voting processes	Option B – Specific responses for each type of disruption
Practicable and enduring	0	++ Better accommodates future developments and wider range of disruptive events.	+ Greater efficiency.	- Could create operational complexity due to need to respond based on type of disruption.
Accountability	0	0 Provides certainty about the types of events that qualify.	+ Centralised decision-making provides more oversight and transparency.	- Could create operational complexity due to tiered decision-making and response.
Consistency	0	+ More consistent with the overall approach of the Act. + Consistent with approach of legislation for managing polling disruptions in other jurisdictions and domestic emergency legislation.	++ Aligns with other powers and practices in the Act.	- May result in inconsistent approaches to polling disruptions.
Overall assessment	0	+	+	-

Table 2 – Who decides/level of response

	No action/ Status Quo	Option A – Single centralised decision maker (the Electoral Commission) empowered with a broad response to wide range of polling disruptions	Option B – Tiered decision-making and tiered responses depending on scale of polling disruption
Practicable and enduring	0	++ Provides widest flexibility to determine an appropriate response to a polling disruption.	<ul style="list-style-type: none"> - Creates operational complexity and lack of flexibility to tailor an appropriate response. - Requires a decision on the basis of a somewhat arbitrary number of affected polling places.
Accountability	0	+ Centralised decision-making provides more oversight and transparency.	<ul style="list-style-type: none"> - Could create operational complexity due to tiered decision-making and response. - Involvement of Ministers or Governor-General against constitutional norms.
Consistency	0	<ul style="list-style-type: none"> + More consistent with the overall approach of the Act. + More consistent with approach of other emergency legislation. 	<ul style="list-style-type: none"> - Prescription is not consistent with approach of the Act. - May limit ability to manage polling disruptions which may mean some voters are unable to vote.
Overall assessment	0	+	-

Table 3 – Modernising the adjournment power

	No action/ Status Quo	Option A – Electoral Commission responsible for adjournments of any length	Option B – Electoral Commission responsible for initial adjournment and Governor-General or Prime Minister for longer adjournments	Option C – Electoral Commission responsible for adjournments, following consultation with the Prime Minister and Leader of the Opposition
Practicable and enduring	0	++ Provides greater flexibility to set an appropriate adjournment period.	++ Provides greater flexibility to set an appropriate adjournment period. - May complicate process, especially where a quick decision is needed.	++ Provides greater flexibility to set an appropriate adjournment period. - Consultation may slow process. + Consultation may assist decision-making by providing Commission with information about the impact of the adjournment on the election.
Accountability	0	+ Provides a check on the use of the adjournment power through requirement to consult with other agencies responding to emergency. + Sets out in statute matters which the Commission must have regard to in adjourning the election.	++ Strong check on extended use of the adjournment power - - Involvement of Ministers or Governor-General against constitutional norms. - Interferes with Commission's statutory independence.	++ Provides some political oversight of the extended use of the adjournment power. - Could be seen as interference with Commission's statutory independence.
Consistency	0	+ Statutory requirement to consult with relevant authorities will ensure Commission's response consistent with broader response to emergency.	+ Statutory requirement to consult with relevant authorities will ensure Commission's response consistent with broader response to emergency. - - Inconsistent with Commission's statutory independence under the Act.	+ Statutory requirement to consult with relevant authorities will ensure Commission's response consistent with broader response to emergency. - May be perceived as inconsistent with Commission's statutory independence under the Act.
Overall assessment	0	+	- -	-

Table 4 – Managing the effect of a polling disruption on the preliminary vote count

	No action/ Status Quo	Option A – Release preliminary count for unaffected polling places (effective status quo)	Option B – Ability to postpone release of preliminary count until completion of polling everywhere	Option C – No preliminary count
Practicable and enduring	0	- Limited flexibility.	+ Gives Commission flexibility to withhold if necessary.	- Could create significant delays in official count as no pre-sorting of votes.
Accountability	0	- Once released, no sufficient controls in place to prevent voters affected by polling disruption from obtaining information.	++ Ensures integrity of electoral processes. + Restrictions on individuals that are privy to information about preliminary vote count	- Security risks in transporting uncounted ballot papers to a central location for official counting.
Consistency	0	- Inconsistent with other provisions that prevent release of information that may influence voters who have yet to vote.	+ Consistent with approach in the Act with the count of early votes and other information that may influence voters who have yet to vote.	- Inconsistent with existing practice/voter expectations.
Overall assessment	0	-	+	-

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

We have favoured maximising flexibility over prescription, while still ensuring sufficient checks and balances. We have also preferred approaches that align, as far as possible, with the Commission's existing statutory powers and operational processes.

We think the combination of the following options will best achieve this, and meet the objectives noted above under section 2.6:

How to define a polling disruption and what responses should be available

Broad definition: 'unforeseen or unavoidable polling disruption'

Having a broader definition of the types of events that would constitute a polling disruption avoids over-prescription or limiting the response to just physical disruptions to individual polling places. It would also recognise future developments.

Option A – Extending existing voting processes

This option will provide greater flexibility to respond to polling disruptions other than adjourning polling especially when compared with the status quo and alternative option. This approach has the benefit of being simpler to implement where there is a polling disruption as it utilises the most appropriate existing voting processes rather than prescribing a new set of special emergency voting processes. This is consistent with the Act's overall approach to the Commission's role in conducting elections.

Who decides and level of response

Option A – Single centralised decision-maker (the Electoral Commission) empowered with a broad response to wide range of polling disruptions

This option provides the widest flexibility for the Commission to determine an appropriate response to a polling disruption. It is also more consistent with the overall approach of the Act to empower the Commission to manage technical aspects of voting processes in a principled manner without over-prescription.

Having a centralised decision-maker will provide greater oversight. In particular, where there is a disruption that affects multiple electorates, the Commission will be the best placed to make what will likely be a quick and informed decision about the most appropriate response.

Modernising the adjournment power

Option A – Electoral Commission responsible for adjournments or any length

This option provides greater flexibility to set an appropriate adjournment period (compared with having to adjourn on a day-by-day basis like the status quo).

In practice, the Commission is expected to exercise the adjournment power very cautiously and only in extraordinary circumstances. It is appropriate that the Commission continues to have sole responsibility for invoking the adjournment power. Requiring the involvement of members of the Executive or Parliament seems to add little by way of constitutional safeguards and may instead have unintended consequences.

This includes significant implications for constitutional arrangements, public perceptions of impartiality and the Commission's statutory independence in the conduct of elections.

Therefore, we think this option is more appropriate. Any check on the Commission's use of the adjournment power is more appropriately provided through setting out in statute:

- matters which the Commission must have regard to in adjourning the election, and
- requiring the Commission to consult with other agencies responding to emergency to ensure consistency in the type/approach of response.

Managing the effect of a polling disruption on the preliminary vote count

Option B – Ability to delay release of preliminary count until completion of polling everywhere

This option presents less risk than the alternatives. This includes risks associated with releasing information that is likely to influence voting in places affected by polling disruptions. Option B does the most to prevent this possibility, including through the creation of a specific offence. This will help to ensure the integrity of electoral processes and results. This option would also avoid some of the risks that would arise from the alternative option of delaying the count of votes until the official count, which would create logistical and security issues with transporting uncounted ballot papers.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment: <i>nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks</i>	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>	Evidence certainty (High, medium or low)
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Additional costs of proposed approach, compared to taking no action

Electoral Commission	Proposed approach aligns with Commission's existing statutory powers and operational processes; therefore, there are no additional costs expected from implementing these proposals. It has not been possible to determine whether the changes would affect the potential costs of the operational response to a polling disruption, as these costs are, by nature, uncertain and dependent on the type and scale of any disruption.	Low	Medium
Other agencies responding to emergencies/ disruptive events	Proposed approach does not alter or amend existing processes for managing any emergency response to wider effects of disruptive event.	Low	Medium
Total Monetised Cost	Minimal; proposed legislative changes expected to have minor effect on affected parties.	Low	Medium
Non-monetised costs	Minimal; minor effect on affected parties.	Low	Medium

Affected parties (identify)	Comment: <i>nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks</i>	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>	Evidence certainty (High, medium or low)
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Expected benefits of proposed approach, compared to taking no action			
Electoral Commission	Proposed approach will provide the Commission with greater flexibility to respond to polling disruptions and allow it to adjust its responses according to the disruption.	High	Medium
General public (voters)	Proposed approach will ensure that voters affected by polling disruptions can still vote free from any undue influence.	High	Medium
Parliament	Maintaining integrity of electoral processes may increase public confidence in constitutional arrangements and institutions.	High	Medium
Total Monetised Benefit	Few specific monetised benefits as intended outcomes are mostly intangible and cannot be measured.	-	Medium
Non-monetised benefits	May result in some non-monetised benefits, specifically increase in public confidence	High	Medium

5.3 What other impacts is this approach likely to have?

No additional impacts.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The preferred options are compatible with the Government's 'Expectations for the design of regulatory systems'. Specifically, they:

- are well-aligned with existing requirements in related or supporting regulatory systems through minimising unintended gaps or overlaps and inconsistent or duplicative requirements, and
- have scope to evolve in response to changing circumstances or new information on the regulatory system's performance.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The proposal will be progressed through the Electoral Amendment Bill in 2019. This Bill should be passed in early 2020 prior to the 2020 General Election. This will enable new powers and processes for managing polling disruptions to be in place in the event of a disruption that may occur either during the advance voting period or polling day for the 2020 General Election.

The Commission will be responsible for implementing and the ongoing administration of provisions for managing polling disruptions.

6.2 What are the implementation risks?

The Commission already has operational contingencies in place, so it is expected the implementation of the proposal will have minimal operational implications.

Section 7: Monitoring, evaluation and review

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

Effects will be dependent on the occurrence of a disruptive event that requires the use of the provisions for managing polling disruptions. The use of the provisions would only apply during the election period, so any monitoring would be limited to this timeframe.

7.2 When and how will the new arrangements be reviewed?

There are regular reviews of aspects of the electoral system. Following each General Election, both the Commission and the Justice Committee complete a review and inquiry of the conduct of that election respectively. As noted above, the problem that this proposal seeks to address was raised as part of previous reviews. Therefore, if the new provisions are used in future (eg a polling disruption occurs during the 2020 General Election or a future election), any General Election review could cover this. The review may assess the effect of a polling disruption and whether the new arrangements helped address it well.

Stakeholders, including the general public, will have an opportunity to participate in any Inquiry through the select committee process.